Uzuri Foods Limited v Commissioner of Customs and Border Control (Income Tax Appeal E107 of 2024) [2025] KEHC 7931 (KLR) (Commercial and Tax) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7931 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E107 OF 2024

AB MWAMUYE, J

MAY 29, 2025

BETWEEN

UZURI FOODS LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... RESPONDENT

(Being an Appeal from the Judgment of the Tax Appeals Tribunal at Nairobi delivered on 22nd March, 2024 in TAT No. E001 of 2023)

JUDGMENT

INTRODUCTION AND BACKGROUND

1. The Appellant, Uzuri Foods Limited, is a limited liability company duly incorporated in Kenya, and carrying out the business of manufacturing. The Respondent is a principal officer appointed under Section 13 of the Kenya Revenue Authority, a public body, duly established under the *Kenya Revenue Authority Act*, CAP 469, of the Laws of Kenya whose primary mandate is the assessment, collection and accounting of all revenue on behalf of the Government.

2. This appeal arises from the judgment of the Tax Appeals Tribunal (TAT) in Tax Appeals Tribunal case No. E001 of 2023, delivered on 22nd March, 2024. The TAT dismissed the Appellant's Appeal on the ground that the refund application was improper.

3. The facts leading to this dispute are that the Appellant purchased Estonian and Lithuanian milling wheat in bulk from Holbud Ltd sometime in May, 2010. The customs value of the consignment was Kes. 21,902,016.44 and the import duty assessed at 25% was 5,475,504.00.

4. On 12th July, 2010, the Appellant paid Kes. 5,968,297.00 inclusive of Import Declaration Fees (IDF) of Kes. 492,793.00. The second consignment was for customs value of Kes. 50,587,386.90 where import

duty was assessed at the rate of 25% amounting to Kes. 12,646,847.00 and the Appellant paid Kes. 13,780,060.00 inclusive of IDF of Kes. 1,138,213.00.

5. The Respondent vide a letter dated 30th July, 2010 issued a demand for payment of under-declared revenue for the two consignments amounting to Kes. 7,243,948.00 and indicated that that the Legal Notice No. EAC/8/2009 staying the applied rate of 25% for the period of one year had lapsed on 3oth June,2010 and the rate automatically reverted to 35%.

6. On 30th August, 2010, the Appellant paid additional import duty of Kes. 7,243,948.00 but later on in October 2010realized that as per Legal Notice No. EAC/12/2010 dated June 2010 had approved a remission of import duty on wheat grain from 35% to 10% for a period of one year with effect from 1st July 2010. The Appellant thus applied for a refund of duty on 25th October 2010 for an amount of Kes. 18,117,358.67.

7. The Appellant made a follow-up of its application vide letter dated 1st August 2014 where vide a letter dated 10th September, 2014 the Respondent advised the Appellant to lodge its claim through the Region where the goods were cleared. The Appellant sent another reminder on 28th September, 2021 after which the Respondent issued a decision rejecting the Appellant's claim vide its letter dated 12th October,2021 stating that the request dis not conform to the provisions of Section 144 of EACCMA. The Appellant applied for a review of the decision vide an application dated 12th November, 2021 where the Respondent affirmed its decision rejecting the Applicant's application.

8. Aggrieved by the decision, the Applicant filed its notice of Appeal dated 5th January, 2023 and the Respondent raised a Preliminary Objection opposing the appeal stating that it is fatally defective since the Memorandum of Appeal dated 19th January 2023 against the Respondent's decision dated 12th October 2021 was filed outside the mandatory provisions of Section 13 (b) of the TAT which provides that a Notice of Appeal shall be submitted to the Tribunal within 30 days upon receipt of the decision of the Commissioner.

9. The Tribunal made reference to Section 230 of the East African Community Customs Management (EACCMA) which provides that a person intending to lodge and appeal under the Section shall lodge the appeal within forty -five days after being served with the decision and held that the review decision was dated 9th December, 2022 and the Appellant's Memorandum of appeal was dated 19th January,2023 which is forty days after being served with the Respondent's decision hence within the timelines prescribed under Section 230(2) of EACCMA dismissing the preliminary objection and upholding the appeal.

10. In analyzing whether the Appellant's application for refund was proper, the TAT held under EACCMA, there are protocols to be observed, a set of rules to be followed and procedures that need to be carried out in order for a tax payer to claim its rights. One such procedure is that the Appellant had an obligation to complete form C39 and it did so within the statutory timeline that was set which is 12 months. However, the Appellant's staff or agent who was responsible to see the execution and completion of the said Form C39 do not appear do not appear to have carried out the duties that were assigned to them as the Form was improperly completed as the proper officer(s) of the Respondent did not execute the document as required, in the spaces confirming that they have checked and found the application to be correct.

11. Due to the above explanation, the Tribunal held that although the Appellant filled its part on Form C39, it was unable to prove that the same was presented to the Respondent on 25th October 2010 or at least a few days after that thus finding that the application was not acknowledged by the Respondent as statutorily required and proceeded to dismiss the Appeal.

12. Aggrieved by the TAT's decision, the Appellant has lodged this appeal, citing five (5) grounds set out in the Memorandum of Appeal dated 15th May 2024 which are as follows:i. That the Tribunal erred and misdirected themselves in law in relying on provisions of Section 56(1) of the *Tax Procedures Act*, 2015 in its decision whereas the EACCMMA is not a tax law as defined under the provisions of the *Tax Procedures Act*, 2015.ii. That the Tribunal erred and misdirected themselves in law in failing to properly consider the provisions of Section 229 (4) of the EACCMA, 2004 and concluding that the Respondent's Review Decision dated 9th December 2022 was issued within the statutory timeframe and therefore not deemed to have been allowed by operation of Section 229 (5) of EACCMA.iii. That the Tribunal erred and misdirected themselves in law in their interpretation of Section 144 (3) of the EACCMA, 2004 and Regulation 148 of the EACCMA Regulations, 2010 and finding that the Appellant's Refund Application was not acknowledged by the Respondent as required by law.iv. That the Tribunal erred in law in their interpretation of Section 144(3) of the EACCMA in imposing extra- legal conditions that would entitle the Appellant to be refunded the duty being, statutory timeframe of twelve (12) months to make the refund claim and requirement of execution of Form 39 by the Respondent's proper officer within the statutory period.v. That the Tribunal fell into error and misdirected itself in failing to appreciate that the actions of the Respondent of rejecting the Appellant's claim was in breach of the Appellant's right to property and a violation of the Appellant's right to fair administrative action guaranteed under Article 47 of *the Constitution* and in particular the Appellant's legitimate expectation.

13. The Appellant prays that this Court allows the appeal, sets aside the Judgment of the Tax Appeals Tribunal dated 22nd March 2024, together with the Respondent's Review Decision dated 9th December 2022.

14. The Appellant also prays for a declaration that the Appellant is entitled to a refund of taxes and an order of costs of the appeal herein and the appeal before the Tax Appeals Tribunal be awarded to the Appellant.

15. The Appeal was canvassed by way of written submissions. In compliance, both parties filed and served their submissions.

THE APPELLANT'S SUBMISSIONS.

16. The Appellant, through its counsel filed its written submissions dated 12th October, 2024. The Appellant's counsel submitted on behalf of the Appellant that it is not in dispute that the Appellant's refund claim was made under Section 144 (3) of EACCMA which provides for refund of any import duty paid on goods in respect of which an order remitting such duty has been made under the Act. They contend that Section 144 (3) of EACCMA does not impose any statutory timeframe on making the claim for refund as alleged by the Tribunal, therefore, the Tribunal erred by alleging that that the refund application was to be made within the statutory period of twelve (12) months as only applications made under Section 144(1) are required to be made within the statutory timeframe.

17. According to the Appellant, the application for refund was made under Section 144(3) of the EACCMA which does not impose any statutory timeframe and the Tribunal was therefore misguided in imposing a timeframe or condition to be met by the Appellant in order for it to be entitled to its refund. Additionally, the tribunal cannot purport to impose a time limitation where the statute has not expressly provided for such time limitation and the wordings must receive strict construction. Reliance was placed on the case of Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others [2019] where the court held that when it comes to tax legislation, the language imposing the tax must receive a strict construction.

18. The Appellant further submitted that the alleged statutory requirement to have Form C39 executed by a proper officer for refund claim to be proper is not pegged on any law as Section 144 (3) does not impose such a condition as it is coached in mandatory terms and provides that the Commissioner shall refund any import duty paid on goods in respect of which an order remitting such an order has been made under this Act. The Appellant submitted that on the law of refunds EACCA and EACCMR do not impose any requirement for the alleged Form C39 to be executed and acknowledged by the Respondent.

19. They further argued that the Respondent vide a letter dated 12th May 2023, unequivocally acknowledged that there was an erroneous demand from the Respondent to the Appellant for undeclared revenue on imported wheat at the time and proceeded to advise the Appellant to seek a refund of the overpaid amount being the sum of Kes. 18,117,358.60 and based on the Respondent's unequivocal admission, the Tribunal should not have entertained any explanations as to why the Respondent should not refund the Appellant. Reliance was placed on the case of Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others [2021] eKLR

20. The Appellant stated that its claim for a refund was deemed to have been allowed by the operation of the law under Section 229 (5) of the EACCMA on 12th December 2021 upon the lapse of 30 days provided for the Respondent to make a decision on the application for review made on 12th November 2021. They argued that the decision issued on 9th December 2022 cannot be considered to be a valid decision under Section229 of the EACCMA since it was made 4 months after the date of when the Respondent provided further information.

21. The Appellant stated that it had legitimate expectation that it would enjoy the remission granted on the consignments and that in accordance with Section 144(3) of EACCMA, the Respondent would issue a refund in respect of the duty paid over and above the 10% provided in Legal Notice No. EAC/12/2010. The Appellant cited the cases of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR and the case of Commissioner of Domestic Taxes vs Mennonite Board of East Africa T/A Rosslyn Academy (High Court Income Tax Appeal No. E047 of 2020) in support. They urged this Honourable Court to allow the appeal with costs.

RESPONDENT'S SUBMISSIONS.

22. The Respondent filed its written submissions dated 30th September, 2024. In its written submissions, the Respondent maintains that the Appellant alleged that they lodged the application for refund in October 2010 yet was unable to demonstrate the authenticity of the refund application letter dated 25th October 2010and other documents attached including Form C39 which were only signed by the appellant and did not bear any stamp of the proper officer receiving/ acknowledging and approving the same. The Respondent submitted that the Appellant made the application for refund on 1st August 2014, four years later which was way out of stipulated period for refund applications. In support of this, they relied on the case of Cape Brandy Syndicate vs Inand Revenue Commissioner [1921] 1 KB 64 they equally relied on the case of Law Society of Kenya v Kenya Revenue Authority & Another (2017) eKLR , *Niazons (K) Ltd. Vs China Road & Bridge Corporation (K) Civil Appeal No. 187 of 1999*, Kenya National Commission on Human Rights [2014] eKLR and finally the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] Eklr.

23. The Respondent further argued that whereas the Tribunal referred to Section 56(1) of the TPA, application under the said provision was not fatal and did not in any way affect the decision arrived at by the Tribunal as it simply referred the burden of proof to the Appellant. They further submitted that Section 56 (1) of the TPA alongside Section 30 of the Tax Appeal Tribunal Act (TATA) and Section

107 of the *Evidence Act* have the same implication of burden of proof and even if this court expunges Section 56(10 of the TPA, the other provisions will carry the same weight.

24. The Appellants, to the Respondent, seem to be selectively cherry picking what it deems fit to have been a review application and review decision and the Respondent issued a decision rejecting the same on 12th October 2021 which is within the stipulated 30 days. Further the alleged application for review of August 2022 from the Appellant was not Application for review but a letter imploring the Respondent to change their earlier position, which the Respondent had maintained all long.

25. The Respondent further submits that having issued its decision rejecting the Application for refund om 12th October 2021 it became functus on the issue and any other letter were mere communications in compliance with Fair Administrative Actions which required the Respondent to all the correspondences from the Appellant hence Section 229(4) was not applicable. The Respondent contends that the Appellant's Objection and Appeal before the Tribunal were out of time because the tribunal issued its decision on 12th October 2021 and it is the Appellant who engaged the Respondent in unending communication with an aim of imploring the Respondent to change its earlier position. They further averred that there cannot be legitimate expectation against clear provision of law.

26. Consequently, the Respondent asks this Court to uphold the TAT's decision and dismiss the Appellant's appeal with costs.

ANALYSIS AND ISSUES FOR DETERMINATION.

27. Having carefully considered the Memorandum of Appeal, the Record of Appeal, the parties' submissions, and the authorities cited, this Court finds that the following broad issues arise for determination:

I. Whether the Appellant's claim for a refund is deemed to have been allowed by operation of the Law under Section 229(5) of EACCMA

II. Whether the TAT properly dismissed the Appellant's appeal as invalid under section 144(3) of the EACCMA.

III. Whether the TAT violated the Appellant's right to Fair Administrative Action and Right to own property under Article 40 and 47 of *the Constitution*,

I. Whether the Appellant's claim for a refund is deemed to have been allowed by operation of the Law under Section 229(5) of EACCMA

28. Section 229 of the EACCMA provides as follows:

"

"(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs shall within thirty days of the date of the decision or omission lodge an application for review of the decision or omission.

(2)The Application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged...

(3)...

(4)The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may

require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

(5)Where the Commissioner has not communicated his or her decision on the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made the a decision to allow the application."

29. In the present case, it is not in dispute that the Appellant lodged is refund claim on 10th October, 2010. The Respondent did not respond to the said application. On 1st August 2014, the Appellant sent a reminder to Respondents regarding the refund claim and on 10th September 2014, the Respondent issued a letter to the Appellant directing it to comply with Section 144 of EACCMA. The Appellant sent a further reminder on 28th September 2021 and on 12th October 2021, the Respondent issued a refund decision rejecting the Appellant's claim for the refund.

30. It is also not in dispute that the Appellant lodged its application for review on 12th November, 2021. The Respondent therefore ought to have issued its review on or before 12th December 2021 or in the event it required additional information, it ought to request for it within the 30 days.

31. After going through the documents submitted by the parties, I have noted that the Respondents did not put in any response and did not issue any decision on the review application as requested by the Appellant. The Respondent in its Statement of facts indicates that they informed the Appellant that the Application did not meet the requirements under Section 144, vide a letter dated 9th December 2021, 1year subsequent to the Appellant's application for review.

32. The Respondent did not provide any evidence that there existed any correspondence between it and the Appellant subsequent to the application for review on 12th November, 2021 and prior to its letter dated 9th December 2021. Consequently, the Respondent wrote to the Appellant 1 year later which was 11 months past the statutory required time to put in a decision.

33. Section 229 (5) of the EACCMA provides that where a Commissioner has not communicated his or her decision to the person lodging the application for review within thirty (30) days, the Commissioner shall be deemed to have made a decision to allow the application.

34. In emphasizing the strict application of statutory timelines this Honourable Court in the case of Equity Group Holdings Limited vs. Commissioner of Domestic Taxes (2021) eKLR held as follows:

> "A statutory edict is not procedural technicality. Its law which must be complied with. Parliament in its wisdom expressly and in mandatory terms provided..."

35. The compliance with the statutory timelines in the issuance of a review decision is to that extent a fundamental and substantive statutory obligation on the part of the Respondent that cannot be whimsically termed as a mere procedural technicality. This was more aptly captured by the Court of Appeal in the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 others (2013) eKLR where Justice Kiage stated as follows:

> "I am not the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and

eve-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

36. There is no evidence from the Respondent that there was any engagement with the Appellant within the year it took to render a decision on the application for review of refund lodged by the Appellant on 12th November 2021 since such evidence would have otherwise had the effect of enlarging the time within which the Respondent would have ordinarily been enjoined to issue the review decision.

37. The consequences of the default on the part of the Respondent to timeously issue a review decision within the mandatory statutory timelines were well settled in the case Republic vs Commissioner of Customs Services ex-parte Uniliver Kenya Limited (2012) where the court stated as follows:

> " ...my understanding of the above quoted section is that once a taxpayer lodges an application for review, the Commissioner of Customs who is the Respondent in this case has 30 days within which to make and communicate a decision within 30 days, then the respondent "shall e deemed to have made a decision to have allowed the application." the law is so clear that it can only be interpreted in one way."

38. Accordingly, I find that the Appellants Application for review dated 12th November, 2021 was allowed by operation of the law.

II. Whether the TAT Properly Dismissed the Appellant's Appeal as Invalid under Section 144 (3) of the East African Community Customs Management Act (EACCMA)

39. Section 144 of the East African Community Customs Management Act (EACCMA) provides as follows:

> " 144.
>
> (1) Subject to any regulations, the Commissioner shall refund any Customs duty paid on the importation of the goods –

a. of any import duty, or part thereof which has been paid in respect of goods which have been damaged or pillaged during the voyage or damaged or destroyed while subject to Customs control;b. of any import or export duty which has been paid in error;2. Refund of import or export duty or part thereof, shall not be granted under subsection (1) unless the person claiming such refund presents such claim within a period of twelve (12) months from the date of payment of the duty3. The Commissioner shall refund any import duty paid on goods in respect of which an order remitting such duty has been made under this Act.

40. It is not in dispute that that at the time of entering the consignment on 12th July 2010 and 14th July 2010 there existed a Legal Notice No EAC/12/2010 dated 29th June 2010 where the EAC Council of ministers had approved import duty remission of wheat grain from 35% to 10% a fact which is acknowledged by the Respondent. However, vide its letter dated 30th July 2010, the Respondent subjected the Appellant's consignment to import duty at the rate of 35% as opposed to 10% in total disregard with the Legal Notice No. EAC/12/2010.

41. In its submissions to the TAT, the Respondent acknowledged the error and submitted that it is not in contention that the taxes may have been paid in error as there was a new legal notice in place No. EAC/12/2010 which is the notice deducting import duty remission of wheat grain from 35% to 10% thereby acknowledging that the Appellant was entitled to a refund of the excess amount paid.

42. I agree with the Tribunal sentiments that it is clear that the refund was owed and that the Appellant was not responsible for the Respondent's inability to adjust the system to reflect and/or to apply the remission rates as amended by the various Legal Notices. It is therefore not in doubt and is acknowledged by the Respondent that the Appellant was entitled to a refund of Kes. 18,117,358.67.

43. In the case of Republic v Commissioner of Domestic Taxes Large Tax Payer's Office Ex-parte Barclays Bank of Kenya LTD [2012] eKLR Majanja J (as he then was) held as follows:

> " The approach to this case is that stated in the oft cited case of Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64 as applied in T.M. Bell v Commissioner of Income Tax [1960] EALR 224 where Roland J. stated,"...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to tax, Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used...if a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might appear to be." As this case concerns the interpretation of the *Income Tax Act*, I am also guided by the dictum of Lord Simonds in Russel v Scott [1948] 2 ALL ER 5 where he stated, "My Lords, there is a maxim of income tax law, which though sometimes it may be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him" adopted in Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (unreported) [2009] eKLR per Nyamu JA (See also Jafferali Alibhai v Commissioner of Income Tax [1961] EA 610, Kanjee Narajee v Income Tax Commissioner [1964] EA 257)
>
> Any tax imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of statute. In Adamson v Attorney General (1933) AC 257 at p 275 it was held that, "The section is one that imposes a tax upon the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect-if it be in view of the Crown a defect can only be remedied by legislation."

44. Similarly in the case of Vestey vs. Inland Revenue Commissioners [1979] 3All ER at 984 it was held that:

> " Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated to in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined."

45. In tax cases therefore the Court is not entitled to attempt a discovery at the intention of the Legislature but must restrict itself to the clear words of the statute. Whereas the Court appreciates the need to

collect taxes, in carrying out their statutory obligations the tax authorities must adhere to the law. As was held in the case of Keroche Industries Limited vs Kenya Revenue Authority & 5 others :

> " it is no good answer for the taxman to proclaim that Kshs. 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due...
>
> Applying the same reasoning, the matter before this court, it does not matter that the Respondents say and think they are owed over a billion Kenya shillings- what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law and the integrity of the rule of law."

46. In the present case the bone of contention is regards whether the Tax Appeal Tribunal erred by applying timelines of 12 months as limitation on claim of refund. Section 144 (1) (b) provides that the Commissioner shall refund any customs duty paid on importation of goods of any import or export duty which has been paid in error. Section 144 (2) provides further that the refund of import or export duty of subsection (1) shall not be granted unless the person claiming the refund presents such a claim within a period of 12 months. However, Section 144 (3) of the EACCMA provides that the Commissioner shall refund any import duty paid on goods in respect of which an order remitting such duty has been made under the Act.

47. Notably, section 144(3) does not outline specific timelines to be adhered to with regards to an order made under the Act. Having found that the Appellant's Application for review dated 12th November, 2021 was allowed by operation of the law, the tribunal erred in finding that the application for refund ought to have been made within twelve months in accordance to Section 144 (2) as opposed to Section 144 (3) of the EACCMA.

48. I am guided by the above judicial precedents that Section 144(3) is clear and unambiguous that the Commissioner shall refund any import duty paid on goods in respect to an order made under the Act. The Application for review by the Appellant dated 12th November, 2021 having been allowed by operation of the law, allows the Appellant to make claim for a refund at any time and it did so in August 2014 which is acknowledged by the Respondent.

49. Consequently, I find that the Tax Appeal Tribunal erred in finding that the that the Appellant's refund application was improper and set aside the decision having found that the TAT improperly dismissed the Appellant's Appeal after relying on Section 144(2) as opposed to Section 144(3) of the EACCMA.

III. Whether the TAT violated the Appellant's right to Fair Administrative Action and Right to own property under Article 40 and 47 of *the Constitution*

50. Article 47 (1) and (2) of *the Constitution* provides as follows: -

> "
>
> "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2)If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

51. In the case of Judicial Service Commission vs Mbalu Mutava & Another (2015) eKLR regarding the violation of Article 47 of *the Constitution* on Right to fair administrative action, the court observed that the term procedurally fair used under Article 47(1) by proper construction imports and subsumes to a certain degree, the common law including rules of natural justice which means that common law is complementary to right to administrative actions.

52. Similarly in the case of Dry Associates Limited v Capital Markets Authority and Another (Nairobi Petition No. 328 of 2011) (Unreported) the court noted that:

> " Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by *the Constitution*.

53. The Appellants claim that by a letter dated 9th December, 2021 it was notified that its application for review of refund claim on import duty of Kes. 18, 117,358.67 was declined because there was absence of more evidence to support the claim.

54. The Appellant herein being dissatisfied with the Respondent's decision dated 9th November 2021, appealed to the Tax Appeals Tribunal against the whole decision.

55. The Tax Appeal Tribunal after considering and analyzing the case together with attached documents and submissions from both the Appellant and the Respondent rendered its decision on 22nd March 2024.

56. Disgruntled, the Appellant instituted this suit. The Appellants contend that the Tax Appeal Tribunal acted unlawfully and unreasonably by denying the Appellant a refund that it is entitled to pursuant to legal Notice EAC/12/2010.

57. Fair administrative action requires public authorities to act transparently, reasonably and in accordance with the law-making decision affecting people's lives.

58. I find that the Appellant has not demonstrated any breach of Article 47 of *the Constitution* by the Tax Appeal Tribunal since the decision by the TAT for dismissing the appeal was disclosed to it and the Appellant has in no way demonstrated that the decision was discriminatory. I find that the Tax Appeal Tribunal followed due process in making their decision as no evidence has been tendered to prove otherwise.

59. The Appellant equally contends that the Tax Appeals Tribunal violated its right to property since it denied the Appellant a refund of import duty which it is entitled to amounting to breach of the Appellant's right to property envisaged under Article 40 of *the Constitution*.

60. I am persuaded that the Respondent in refusing to refund the taxes paid by the Appellants violated the Appellant's right to property under Article 40 of *the Constitution*. However, the Appellant did not provide sufficient evidence to demonstrate how the Tax Appeal Tribunal curtailed this right. It is the Respondent's action that unlawfully took away property in liquidated, monetary amount that rightfully belong to the Appellant and not the decision of the TAT. I therefore find that the Tax Appeals Tribunal did not in any way violate the Appellant's rights under Article 40 and 47 of *the Constitution*.

61. With regards to the issue of legitimate expectation, the Appellant stated that it had legitimate expectation that it was would enjoy the remission granted on the consignments and that in accordance with Section 144(3) of EACCMA, the Respondent would issue a refund in respect of duty paid over and above the 10% provided in Legal Notice. No. EAC/12/2010.

62. With respect to legitimate expectation, the Supreme Court of Kenya in the case of Communications Commission of Kenya & 5 others v Royal Media Services & 5 others SC Petition Nos. 14, 14A, 14B & 14C of 2014, stated as follows: -

> " Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."

63. Further, in *Republic v Kenya Revenue Authority ex parte Shake Distributors Limited HCMISC Civil Application No. 359 of 2012*, it was held:

> " In view of the above, the claim for legitimate expectation will be established where a public body has made a clear representation or proposition which has been relied on by the other party in fulfilment of a certain the respondent has relied on with respect to receiving or obtaining a certain right. The question before the court whether the appellant by refunding part of the money created a legitimate expectation that the balance would be paid off."

64. The Respondent acted contrary to legitimate expectation as it confirmed that it is not in contention that taxes may have been paid in error as there was a new Legal Notice EAC/12/2010 in place. The Respondent indicated that there is a law in place governing the refund process. The Appellant has outlined how it followed the refund process but to date has not received any amount from the Respondents. The respondents have in no way disputed the validity of the claim for refund.

65. As a public body the Respondent is required to act in good faith and in line with the percepts of fair administration. The Respondent delayed in several instances to communicate the discrepancies and to what extent it contended that the claim was unverifiable. It simply cancelled the entire tax refund. The Respondent therefore had no justifiable and reasonable reason for cause for delay in the circumstances.

66. Consequently, for the reasons set out above I find that the Tax Appeal Tribunal's decision striking out the appeal for invalidity cannot stand. The appropriate remedy is to set it aside and allow this appeal for refund.

67. In light of the above analysis, this court therefore makes the following orders:

    a. The appeal is hereby allowed.

    b. The Judgment of the Tax Appeals Tribunal in Tax Appeal No. E001 of 2023, delivered on 22nd March 2024, is set aside in its entirety.

    c. The Appellant is granted a refund of tax in the amount of Kes. 18,117,358.67

    d. Costs of this appeal are awarded to the Appellant**.**

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29th DAY OF MAY 2025.

BAHATI MWAMUYE

JUDGE