IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 24 OF 2018

BETWEEN

KENYA REVENUE AUTHORITY.......................... 1ST APPELLANT

COMMISSIONER OF CUSTOMS SERVICES.....2ND APPELLANT

JULIUS MUSYOKI..3RD APPELLANT

AND

DARASA INVESTMENTS LIMITED.........................RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Mombasa

(Ogola, J) dated 22nd February, 2018

inHC. Misc. Civil Application No. 67 of 2017)

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JUDGMENT OF THE COURT

[1] Initially, the scope of judicial review and the remedies which could issue thereunder were set out in the **Law Reform Act** and **Order 53** of the **Civil Procedure Rules.** The ground(s) upon which such review could be exercised by the High Court was where the administrative decision/action in question was deemed as being *ultra vires* and/or against the rules of natural justice. Similarly, the judicial review remedies which the High Court could issue were restricted to orders of *certiorari, mandamus* and prohibition. As Diplock J. had predicted in **Council for Civil Service Union** vs. **Minister for Civil Service** [1995] AC 374 there have been developments m judicial review. In his own words, he expressed:-

> **"Judicial review has ... developed to a stage where ... one can classify under three heads the grounds upon which administrative action is a subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further developments on a case by case basis may not in the course of time add further grounds. I have in mind particular the possible adoption in the future of the principle of proportionality."[Emphasis added]**

[2] Echoing those developments in the Kenyan legal system, Peter Kaluma in **Judicial Review, Law and Practice, 2nd Edition at page 69** states that:-

> **"Thus judicial review is no longer a strict administrative law remedy as was the case in the past. Judicial review is currently an administrative law remedy and a constitutional fundamental. The right to fair administrative action, the right to written reasons for adverse administrative action and the right to judicial review of administrative action are now enshrined in the Constitution as fundamental rights and freedoms to be enjoyed by every person subjected to administrative action."**

See **Article 47** of the **Constitution and Section 7(2)** of the **Fair Administrative Action Act.** Likewise, the remedies which could issue have since expanded from the traditional remedies to declarations, damages and injunctions as set out under **Section 11** of the **Fair Administrative Action Act.**

[3] Nonetheless, judicial review orders are still discretionary m nature and whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in **Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others** [2014] eKLR. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.

[4] With the foregoing in mind, the brief background information underpinning this appeal has its origin to Gazette Notice No 4536 dated 12rh May, 2017, wherein the Cabinet Secretary of the National Treasury under **Section 114 (2)** of the **East African Community Customs Management Act 2004 (EACCMA),** gave notice of a general exemption of duty on sugar imported between 12th May, 2017 and 31st August, 2017. The reason for the exemption was the drought signaled in a Presidential declaration through executive order No. 1 of 2017.

[5] Pursuant to the said waiver, **Darasa Investments Limited** (the respondent) claimed that it imported some 40,000 tonnes of brown sugar from Brazil, which was loaded in a vessel known as Anangel Sun on 15th July, 2017 destined for arrival at a Port in Mombasa, Kenya on or about 28th August, 2017 (within the exemption period). However, as per the respondent, bad weather conditions on the high seas coupled with the fact that Anangel Sun could not berth at the Mombasa Port due to its sheer size, the projected date of arrival was not met. This state of affairs compelled the Anangel Sun to proceed to its next destination at Jebel Ali Port in Dubai where the sugar consignment was offloaded and transhipped.

[6] Meanwhile, the respondent wrote to the Cabinet Secretary of the Ministry of Agriculture, livestock and Fisheries, seeking extension of the import exemption under the Gazette Notice No. 4536. It appears that the respondent was not alone; about 13 other companies who had opted to take advantage of the exemption had also not managed to get their sugar consignments into the country within the exemption period for one reason or another. In turn, the Cabinet Secretary of the Ministry of Agriculture, livestock and Fisheries, wrote to his counterpart at the Ministry of National Treasury recommending the extension in question. The Cabinet Secretary for National Treasury acceded to the request on condition that only the consignments which were shipped before the expiry date in the Gazette Notice 4536 would benefit from the extension. Towards that end, the said Cabinet Secretary vide Gazette Notice No. 9802 dated 41 October, 2017 amended the first notice in the following manner:-

> **"It is notified for the general information of the public that the Gazette Notice No. 4536 of 2017, is amended by-**
>
> > **i) In item (a), by deleting the word 'imported' and substituting thereof the words '<u>loaded into a</u> <u>vessel destined to a port in Kenya.</u>'**[Emphasis added]

[7] Thereafter, the respondent's consignment was transhipped from Dubai to Mombasa aboard a vessel known as 'MV Iron Lady'. From the record the consignment arrived at Mombasa between 28th October, 2017 and 30th October, 2017. All the same, the respondent's agent tried to clear the consignment of imported sugar, under the above duty exemption status but after some back and forth engagement and written correspondence, the appellants declined to clear the consignment. The appellants claimed that the consignment did not meet the conditions of the Gazette Notices because of the inconsistencies relating to the date of loading, place of inspection, certificate of origin and change of ownership.

[8] The matter therefore became a dispute that fell before **Ogola, J.** that was filed in court by the respondent by way of judicial review application. The respondent applied amongst other orders, for the decision made by the appellants, which was communicated to it vide a letter dated 22nd November, 2017, to be quashed. In the said letter, the Commissioner Customs & Border Control declined to exempt the respondent's consignment from payment of duty as provided under Gazette Notice No 4536 and as subsequently amended by Gazette Notice No 9801. The Commissioner also demanded payment of Kshs.2, 548,542,325 as duty on the sugar consignment before the same could be cleared.

[9] The key issues which fell for determination before the learned Judge were *inter alia;* whether the respondent's consignment of imported sugar was loaded in a vessel destined to a Port in Kenya between the 12th May, 2017 and the 31st August, 2017; whether the respondent was entitled to duty exemption; whether the appellant's decision to deny the respondent's duty exemption was unreasonable, unfair and highhanded and whether the respondent should have invoked the alternative remedy provided for under **Sections 229{1) & (2)** as well as **230** of the **EACCMA** as read with **Sections 2 & 12** of the **Tax Appeals Act, 2013.**

[10] After hearing the matter and by a ruling dated 22nd February, 2018 the subject matter of this appeal, the learned Judge issued orders in favour of the respondent in the following terms:-

> **a) An order of certiorari to remove into this Honourable court and quash in its entirety the decision by the respondents, communicated vide the letter dated 22nd November, 2017, to levy duty/tax of Kshs. 2,548,542, 325 on sugar imported under Entry 2017 MSA 66845998, BL BSS802017 for the alleged failure by the applicant to meet the provisions of the gazette notice No. 4536 dated 12th May, 2017 as amended by gazette notice No. 9802 dated 4th October, 2017 respectively.**
>
> **b) An order of prohibition directed towards the respondent restricting /prohibiting the respondents, its agents, officers and any person acting under that office from levying or demanding any duty/ taxes over and above Kshs. 422,106,560 already paid as import declaration fees, maritime fee levy in regard to sugar imported under entry 2017 MSA 6684598, BL; BRSS802017 pursuant to the provisions of the gazette notice No. 9802 dated 4th October, 2017 respectively.**
>
> **c) An order of Mandamus ordering and compelling the respondents to immediately process, clear and release on duty free basis, the applicant's entire sugar consignment or 40,000 MT of Brazilian brown sugar imported under Entry 2017 MSA. 6684598, BL BR SS802017 as contemplated. by the provisions of the gazette notice No 4536 dated 12th May, 2017 as amended by gazette notice No. 9802 dated 4th October, 2017 respectively.**

d) The costs of the application shall be for the Ex Parte applicant.

[11] Aggrieved by the aforesaid orders, the appellants appealed against the entire ruling, raising 7 grounds of appeal which we paraphrase as; the learned Judge was faulted for, finding the court had jurisdiction to entertain the proceedings despite the fact that the respondent had not exhausted the available alternative remedies; sitting on appeal of the appellants decision; finding the appellants had not given reasons for their decision in the letter dated 22nd November, 2017; shifting the burden of proof to the appellants; finding the respondent was subjected to discrimination; finding the appellants decision was unreasonable and finally, for finding that the respondent was entitled to exemption of duty on account of legitimate expectation.

[12] During the hearing of the appeal, and with leave of the Court, both parties filed written submissions which we will consider along the oral highlights.

[13] M/s Otachi and Ontweka teaming up for the appellants made some oral highlights of their written submissions and elaborated on the grounds of appeal. First on jurisdiction, they pointed out that the issue was raised in the affidavit of Rosemary Mureithi, who deposed that the court's judicial review jurisdiction was unlawfully invoked because the respondent had not exhausted alternative statutory remedies. It was in their view wrong for the learned Judge to posit that the issue of jurisdiction was raised during submissions and as a mere afterthought. According to counsel, although it is prudent that an objection on jurisdiction should be raised at the earliest opportunity, the same could be raised at any stage of the proceedings and even on appeal owing to its significance in any matter before a court. Citing the case of **Kenya Ports Authority** vs. **Modern Holdings [E.A] Ltd.** 2017 eKLR they added that jurisdiction could neither be conferred by consent nor acquiesced by the parties.

[14**]** On the issue of alternative remedies, counsel for the appellants submitted that the Judge misapprehended the scope of the Tax Appeals Tribunal 's jurisdiction as being limited to disputes over quantum of tax payable. It was urged that the Tax Appeal Tribunal was not precluded by law from considering disputes relating to liability to pay tax.

[15] Counsel went on to cite a retinue of authorities; **Kenya Revenue Authority** vs. **Keroche Industries Ltd. -** Civil Appeal No 2 of 2008 (unreported), **Grain Bulk Handlers Ltd.** vs. **Kenya Revenue Authorities** [2018] eKLR and **Cortec Mining Kenva Limited** vs. **Cabinet Secretary Ministry of Mining** [2017] eKLR. The ratio *decidendi* which runs through those cases is that where Parliament has provided statutory mechanism for resolving disputes, parties must exhaust the available mechanisms for resolving disputes before invoking judicial review, which should be sought as a last resort in exceptional circumstances where facts are not disputed and it is only a question of exercise of administrative malaise's by a public body or office.

[16] Further, **Section 9** of the **Fair Administrative Action Act, 2015** which operationalized **Article 47** of the **Constitution,** is clear on that position. It stipulates that a court exercising its judicial review jurisdiction, can only entertain a matter where the alternative remedies have not been exhausted in exceptional circumstances. Counsel contended that the respondent's case did not fall under such an exception. Moreover, even assuming it qualified as an exceptional case, the respondent was required to make a formal application to be exempted from exhausting the alternative remedies which it did not.

[17] The learned Judge was faulted for substituting his own decision for that of the 2nd appellant. Elaborating further, it was submitted that issues of tax are squarely within the mandate of the appellants, the court therefore could not review the errors, if any, arising therefrom as though it was sitting on appeal of the decision of the 2nd appellant. By setting out to determine the date of loading of the cargo through evaluating evidence in letters dated 12th January 2018 and 29th January, 2018, which were authored when there was live litigation, the learned Judge delved into factual and evidential aspects which were irrelevant considerations in judicial review. Nonetheless, the disputed issues were never resolved and the appellants were denied an opportunity to execute their mandate through court orders.

[18] Besides, the learned Judge disregarded very material inconsistencies in the documents presented by the respondent, for example a pre-export verification certificate produced by the respondent showed the Brazilian brown sugar was produced in August, 2017 and September, 2017. Thus, there was a serious inconsistency as the respondent stated that the sugar was loaded on 15th July, 2017; also the ownership of the consignment was indicated as Ms Safina Engineering Ltd. in Kampala according to the letter of credit issued by Diamond Trust Bank; there was also another Bill of Lading issued in Dubai on the 17th October, 2017 wherein the exporter of the consignment is indicated as Multi Commerce FZC on behalf of M/S Lumira General Trading Co L.L.C of Sharjah UAE for the same consignment of 40000 tonnes. Initially, the sugar consignment which was on board Anangel Sun did not show the respondent as the consignee but was being exported on behalf of Sabina Engineering Co Ltd. of Kampala Uganda. Even if the sugar was loaded in Dubai, the question still remained whether this was done within the period of exemption; these were legitimate questions that were asked by the appellants because they had a duty to clear the consignment in accordance with Gazette Notices. All in all, the respondent had not established that it had shipped the consignment in issue within the prescribed time frame hence was liable to pay duty for the same.

[19] As far as the appellants were concerned, the letter dated 22nd November, 2017 clearly set out the reasons for the imposition of duty on the respondent's consignment. The reasons included inconsistencies relating to the date of loading, date and place of inspection, certificate of origin and change of ownership. In that regard counsel emphasized that although the letter did not elaborate much on the inconsistencies, there were previous correspondence which should be read with the aforesaid letter to demonstrate the respondent was given a hearing before the aforesaid letter was dispatched. Those inconsistencies removed the consignment from the ambit of the Gazette Notices.

[20] The appellants took issue with what they deemed as the learned Judge's finding to the effect that the Gazette Notices gave rise to legitimate expectationthat the respondent's consignment would be cleared duty free without proof that conditions for such waiver were met. In addition, there was no evidence or basis to substantiate the learned Judge's finding that the appellants had discriminated the respondent as the documentation in respect of the other 13 importers did not have the same inconsistencies as those by the respondent. It is on those grounds that we were urged to allow the appeal.

[21] The appeal was strenuously opposed by Mr. Ngatia teaming up with Mr Mosota for the respondent. Mr. Ngatia stated that although judicial review is founded on **Article 47** of the **Constitution** and the **Fair Administrative Action Act** which codified the common law and

public law principles thereto, review of administrative action is to be undertaken by a court. In support of that line of argument, he referred to **Article 47(3)(a)** of the **Constitution** which stipulates that: -

> **"Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-**
>
> > **a) provide for the review of administrative action <u>by a</u> <u>court or, if appropriate, an independent and</u> <u>impartial tribunal;</u>..."**[Emphasis added]

[22] It is only the High Court under the **Law Reform Act** that has jurisdiction to issue orders of *certiorari,* prohibition and *mandamus;* the complaint by the respondent could only be litigated in the High Court as the alternative tribunal, that is, the Tax Appeals Tribunal has no power to adjudicate a public law dispute. In any event, the Tax Appeal Tribunal established under **Section 12** of the **Tax Appeal Act** only deals with issues of quantum of tax payable.

[23] Counsel referred us to the case of **<u>Municipal Council of Mombasa vs. Republic & another</u>** [2002] eKLR where it was stated that judicial review is concerned with the decision making process, not with merits of the decision itself; the court would concern itself with issues as to whether the decision makers had jurisdiction, whether persons affected by the decision were heard before it was made and whether in making the decision the maker took into account relevant matters or did take into account irrelevant matters. In the instant case, the appellants were faulted for denying the respondent a hearing and for taking irrelevant matters into consideration and thereby arriving at an erroneous decision that affected the respondent adversely.

[24] In the alternative, Mr. Ngatia while making reference to persuasive High Court decisions in the case of; **<u>Republic vs. Senior Magistrate Mombasa Ex Parte HL & Another</u>** [2016] eKLR and **<u>Republic vs. Commiss ioner of</u> <u>Customs Services Ex Parte Unilever Kenya Ltd. -</u>**High Court Misc. Application No. 181 of 2011, argued that the existence of an alternative remedy by itself is not a ground for declining a judicial review relief, especially where the administrator's decision was ultra vires.

[25] We understood counsel's argument also to be that the appellants having not only taken part in the proceedings but also enjoyed stay of execution issued thereunder could not object to the jurisdiction of the High Court at the stage they did. The appellants' raised issues of the existence of alternative remedies on the threshold of the hearing which was scheduled 14th February, 2018 vide an affidavit of Rosemary Murithi which was filed in the High Court on 30th January, 2018. Counsel cited the case of **The Owners of the Motor Vehicle "Lillian S" <u>vs. Caltex Oil Kenya Ltd</u>** [1989] KLR 1, and emphasized that an objection to jurisdiction should be raised at the earliest opportunity since jurisdiction is a condition precedent to the whole case as set out and mandated by statute or the **Constitution**. He particularly, relied on the following sentiments of Nyarangi J (as he then was):-

> **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.Jurisdiction is everything.Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"**

[26) Like, the appellants, Mr. Ngatia submitted that following the amendment of the initial Gazette Notice, all an importer was required to establish in order to benefit from exemption of duty, is that the sugar consignment was loaded into a vessel destined to a port in Kenya within the period between l1th May, 2017 and 31st August, 2017. According to counsel, the commercial invoice indicated the date of shipment from Brazil as 15th July, 2017 and sugar was to be loaded in a vessel, Anangel Sun for offloading in Mombasa. The Bill of Lading also showed the sugar consignment was loaded at the port of Santos, Brazil and the port of discharge was Mombasa sea Port; the sugar was loaded into the vessel and set sail on 27th July, 2017.

[27] In the respondent's view the appellants were wrong to deny it clearance on the grounds that the documents presented had inconsistencies regarding date of loading, date and place of inspection, certificate of origin and change of ownership. By doing so, the appellants exhibited unreasonableness by engaging on irrelevant considerations when the only issue was whether the consignment of sugar was loaded into a vessel within the prescribed period. Be that as it may, despite the respondent giving an explanation for the so called inconsistencies, the appellants merely contended that the issues were not satisfactorily addressed without giving the respondent a fair hearing.

[28] Taking into account the evidence on record, the respondent had discharged its evidential burden by showing the cargo was loaded in Brazil within the exemption period. As such, it was up to the appellants to disprove the same which they did not. This was submitted on behalf of the respondent.

[29] The respondent maintained that the learned Judge had at no point substituted his factual findings with that of the appellants. All the learned Judge did was to consider whether the action in issue was lawful, reasonable and procedurally fair as delineated under **Article 47(1)** of the **Constitution.** He went on to submit that the appellants should have given reasons as to why they found the respondent 's explanation unsatisfactory. Last but not least, counsel claimed that out of the 14 companies which had sought extension of the exemption of duty, only the respondent 's consignment was not cleared duty free. This evidenced discrimination on the part of the appellants. In conclusion, Mr. Ngatia urged us to dismiss the appeal.

[30] We have considered the record of appeal, both written and oral submissions and authorities cited. In our respectful view, this appeal herein turns on the following issues:-

> **a) Did the learned Judge have jurisdiction to entertain the judicial review proceedings? and if so,**

b) Was the appellants' decision contained in the letter dated 22nd November, 2017 amenable to judicial review as sought by the respondent?

c) Did the learned Judge properly exercise his discretion in issuing the orders he did?

[31] Jurisdiction is what clothes a court with the authority to entertain a matter before it and issue appropriate orders. A court either has jurisdiction or doesn't. It cannot be inferred or presumed. This Court in **Adero & Another vs. Ulinzi Sacco Society Limited** [2002] 1 KLR 577, sufficiently summarised the law on jurisdiction as follows;

"1....

2. The jurisdiction either exists or does not ab initio ...

3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal."

See also **Kenya Ports Authority vs. Modern Holdings [E.A] Limited** [2017] eKLR. Based on the foregoing, we find that the learned Judge erred in holding that the appellants had consented and/or acquiesced to the court's jurisdiction by participating in the judicial review proceedings.

[32) The appellants' objection to the High Court's jurisdiction was grounded on the allegation that the respondent had not exhausted the alternative remedies provided under the **EACCMA** and **Tax Appeals Act**. On one hand, **Section 229 (1)** of the **EACCMA** provides that:-

"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 that decision or omission."

On the other hand, **Section 12** of the **Tax Appeals Act** provides:-

"A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax Jaw may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal..." [Emphasis added]

[33] In light of the foregoing provisions, we respectfully disagree with the respondent's position that alternative remedies thereunder specifically relate to quantum or assessment of tax payable. The wording used thereunder is clear that any decision which is made by the Commissioner or any other officer under the respective Acts is subject to review by the Commissioner under **Section 229** of the **EACCMA** and appeal to the Tax Appeals Tribunal.

[34] It is trite that where the **Constitution** or statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with the **Constitution** or statute. In **Secretary, County Public Service Board & another vs. Hulbhai Gedi Abdille** [2017] eKLR this Court expressed itself as follows:-

"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

What then is the consequence, if any, of the respondent’s failure to invoke the alternative remedies?

[35] As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this Court in **Cortec Mining Kenya Limited vs. Cabinet Secretary Ministrv of Mining & 9 others** [2017] eKLR and **Kenya Revenue Authority & 5 others vs. Keroche Industries Limited** -Civil Appeal No. 2 of2008. Perhaps, that is the reason why the legislator under **Section 9(4)** of the **Fair Administrative Action Act** stipulated that:-

"**Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedv if the court considers such exemption to be in the interest of justice."[Emphasis added}**

Our reading of the above provision reveals that contrary to the appellants contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.

[36] Did the respondent 's case fall within the exception? The principles which a court should consider in determining whether a case falls within the exception are settled. This Court in **Republic vs. National Environmental Management Authority**- Civil Appeal No. 84 of2010,_set out the said principles as follows:

"...in determining whether an exception should be made and judicial review granted, it was necessary for the court to

look carefuiJy at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ..."

[37] We find that the issue in dispute was the appropriateness or otherwise of the process or mode adopted by the appellants in arriving at the administrative decision as contained in the letter dated 22nd November, 2017. In other words, the respondent sought the review of the decision which it deemed as being unreasonable, unlawful and irrational. To us, the dispute rightly fell within the scope of judicial review which is concerned with the decision making process rather than the merit consideration of the decision in issue. As respondent was alleging arbitrariness on the part of the appellants, on the face of it, it would seem the High Court could not have declined to hear the matter, but once you excavate further as it happened in the course of the hearing; that the refusal by the appellants to clear the sugar was due to failure on the part of the respondent to produce evidence to show that the subject sugar was exempt from duty, that is when matters begin to look like perhaps the judicial review forum was not the most efficacious in the circumstances. This is because judicial review does not avail parties' court room processes to thrash out disputed matters. We shall revert to this issue later in paragraph 40 of this judgment.

[38] The next issue for consideration is whether the appellants' decision was amenable to judicial *review?* As we have set out above, judicial review is concerned with the decision making process and not the merits of the decision in respect of which the application for judicial review is made. This was aptly stated by this Court in **Commissioner of Lands vs Kunste Hotel Ltd** [1997] eKLR. As such, what the learned Judge was called upon to do was to examine the process adopted by the appellants in declining to exempt the respondent's consignment.

[39] Following the amendment of the initial Gazette Notice, the learned Judge observed, and correctly so, that the respondent was required to establish that the consignment was loaded onto a vessel destined to a port in Kenya within the exemption period. In our view, this was to be done through the requisite shipping documents submitted by the respondent to the appellants. ·

[40] From the record, it is clear that the appellants did examine the shipping documents which were handed in by the respondent to determine that very issue.

the consignee is given as Darasa Investment Ltd. of P.O Box 6883-00622 of Nairobi Kenya. Initially the sugar consignment which was onboard M/V Anangel Sun did not show Darasa Investments as the consignee ...

We would appreciate your speedy clarification on the date of loading, date and place of inspection, certificate of origin, change of ownership of the goods to enable determination as to whether the subject sugar consignment meets the terms of the gazette notice."

[41] The respondent responded to the queries through a letter dated 21st November, 2017. We set out the pertinent extract of the said letter:-

"We ... wish to clarify the issues raised in the said letter as follows:

1) Date of Lading

The sugar was loaded by Bill of Lading number BRSS802017 on 15th of July, 2017. The consignee was Diamond Trust Bank Limited based on a letter of credit issued to Darasa Investments Limited...

2) Date and Place of inspection

The consignment was transhipped via Jebel Ali in Dubai as the vessel did not discharge in Kenya. It is not in doubt that the sugar originated from Brazil and the inspection was done in Dubai solely to meet the PVOC requirements...

3) Certificate of origin

The certificate of origin from United Arab Emirates is not significant as United Arab Emirates is not known as a sugar producing country. The coo only becomes relevant if we were · being conferred· preferential tax rates like COMESA.

4) Change of ownership

The sugar has been under ownership of Darasa Investments Limited right form the port of loading as stated in item No. 1..."

[42] Albeit the explanation tendered, the 2nd appellant was not satisfied that the inconsistencies had been adequately addressed. The 2nd appellant communicated as much to the respondent by a letter dated 22nd November, 2017 which is the subject of the judicial review proceedings.

[43] Whether or not the decision taken by the appellants in the said letter was wrong or right was not an issue that fell for consideration by the learned Judge. Similarly, we as the appellate court cannot delve into the same. Of concern, is whether the procedure adopted was in conformity with the rules of natural justice and fair administrative action as envisioned under **Section 4(3)** of the **Fair Administrative**

Action Act. Our understanding of the issue is that the respondent's contention that it was not given an opportunity to be heard holds no water. It is common ground that such an opportunity was given to the respondent when it was asked to clarify the issues herein above stated.

[44] We also find that the 2nd appellant's letter dated 22nd November, 2017 did set out the reasons for the decision thereunder. It read in part:

> **"We have reviewed your submission in respect of the above entry against the provisions of the Gazette Notice No. 9802 dated 4.10.2017 and have noted several inconsistencies relating to the date of loading, date and place of inspection, certificate of origin, change of ownership. These issues have not been satisfactorily addressed.**
>
> **In light of the foregoing, you are hereby notified that the subject sugar consignment does not meet the provisions of the said Gazette Notice."**

We are guided by the sentiments of Githinji J.A in **Judicial Service Commission** **vs. Mbalu Mutava & Another** [2015] eKLR thus,

> **"The duty to give reasons and the nature and extent of the reasons envisaged by Article 47(2) is dependent on the character and limits of the administrative discretion conferred on the administrator by the Constitution or law and its application to the facts of the case."**

[45] Did the appellants take into account irrelevant considerations in determining whether the respondent's consignment was subject of the exemption? The need to take into account relevant considerations and ignore irrelevant facts in the decision making has close nexus with the need to act reasonably. This much was appreciated by Lord Greene MR in **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation** [1948] 1 KB 223 thus,

> **"For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant . to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.**

[46] By scrutinizing the requisite shipping documents the appellant cannot be said to have taken into account irrelevant matters. These documents were essential in establishing whether the consignment had been shipped within the requisite time frame. One of such requisite documents is a Bill of Lading. Apart from acting as a title to the goods specified thereunder, a Bill of Lading also acts as a receipt of the goods by the carrier, that is, acknowledgment that the goods in question have been received by the owner of the ship or his agent. See **Schmitthof's Export on trade, the law and practice of international trade, 11th Edition at para 15-019.** Consequently, the date on such a Bill of Lading is prima facie evidence of the date the goods were loaded onto a vessel. This position is fortified by **Halsbury's Laws of England, Volume 7 (2015) paragraph 317, The Saudi Crown [19861 1 Lloyd's Rep 261 and J Aron & Co One)** vs. **Comptoir Wegimont** [1921] 3 KB 435.

[47] In this case, it is not in dispute that there were two sets of Bills of Lading issued on15th July, 2017 in Brazil and 17th October, 2017 in Dubai respectively.

This raised questions as to when the sugar consignment was loaded onto a vessel destined for Mombasa port. Was it on 15th July, 2017 or 17th October, 2017? This was further confounded by the Certificate of Conformity issued in Dubai on 19th October, 2017 which indicated the date of production of the sugar in question as August and September, 2017. As matters stood, the date upon which the sugar consignment was loaded was uncertain. This is also discernible from a pertinent paragraph of the impugned Ruling where the Judge appreciated there were disputed facts in regard to the date when the sugar was loaded into a vessel destined for a port in Kenya as per the Gazette Notice. This is what the Judge said in his own words;-

> **"Both parties seem to dispute the period within which the sugar was loaded onto a vessel destined to a port in Kenya. This is a significant issue in determining whether or not the consignment met the provisions of the Gazette Notice No. 4536 published on 12th May, 2017 as amended by Gazette Notice No. 9802 published on 4th October, 2017. However, this court does not have expansive liberty to entertain this issue as it goes beyond the realm of Judicial Review proceedings. To delve deeply into this issue would be tantamount to addressing the merits and demerits of the decision made on 22nd November, 2017..."**

[48] As the Judge readily accepted matters were disputed, and the decision being challenged was fundamentally to do with the date of loading of sugar for a port in Kenya, we find the Judge erred by proceeding to issue judicial review orders on disputed facts as the underlying dispute of whether the consignment of sugar was loaded between 12th May to 31st August as per the Gazette Notices remained unresolved. We appreciate that under **Section 107(1)** of the **Evidence Act,** whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In the absence of such proof, such in this case, rendered the respondent's claim that it had shipped the consignment within the exemption period moot. See also **Halsbury's Laws of England Volume 12 (2015) para 702.**

[49] We are also of the view that it has now become a settled principle that judicial review remedies are not available in matters where facts are disputed. See the case of **Funzi Island Development Ltd & 2 Others vs County Council of Kwale & 2 Others** [2014] e KLR succinctly stated that- .

> **"It is true that generally speaking, judicial review procedure is not well suited for resolving disputes on material fact."**

Karanja, JA in the aforementioned case also expressed that-

> **"lt is common ground that the subject matter herein is property worth a substantial amount of money. There were also serious and weighty arguments, for instance, whether the property in question was Trust Land or not; whether it was forest land or not; whether it formed part of Funzi Island or it formed part of the foreshore which could not be set aside for allocation..**
>
> **In my view, a matter such as this ought to have been fully heard as a civil claim where all the parties would have had an opportunity to bring all their legal ammunition in support of their claim. That way, issues of fraud as envisaged under the Registration of Titles Act (RTA), and other disputed facts would have been fuiJy canvassed and conclusive determinations made on the same"**

[50] To the extent that the learned Judge despite cautioning himself delved deep into the evidence to consider letters dated 12th January, 2018 and 29th January, 2018 which were authored way after the decision contained in the letter dated 22nd November, 2017 was made and during the litigation, we find that he acted beyond the scope of his jurisdiction. With tremendous respect, he substituted the court's own opinion of the matter with that of the 2nd appellant or the administrator for that matter. It is the 2nd appellant's mandate to clear goods according to the law, and unless it was established there was a breach of the Jaw, impropriety or unreasonableness, the court cannot substitute its own opinion with that of the mandate holder.

[51] Even assuming that the said letters established that Anangel Sun left the port in Brazil in July, 2017 and was within the Kenya waters, they still did not address the inconsistencies with regard to when the respondent's consignment was loaded in a vessel destined for a port in Kenya according to the two Gazette Notices. We hasten to add that in our view, those disputed facts were a good candidate for a normal court room trial where parties can conduct discovery, examination and cross examination of witnesses.

[52] As the 2nd appellant found that the respondent had not established that the consignment had been shipped within the exemption period the issue of legitimate expectation could not arise. In the text book by; **POLLARD, PARPWORTH AND HUGHES** writing at page 583 in the 4th edition of **CONSTITUTIONAL AND ADMINISTRATEIVE LAW: TEXT WITH MATERIAL** the learned authors posited as thus: -

> **"Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act *in* a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not,without an overriding reason in the public interest, resale from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment".**

Also In 4th Edition, Vol. 1 (1) at page 151, paragraph 81 of **HALSBURY'S LAWS OF ENGLAND,** legitimate expectation is outlined as follows: -

> **"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice".**

The promise made to the general public was that they had to import sugar and provide proof that the consignment of sugar was loaded in a vessel for a port in Kenya within the dates of 12th May, to 31st August, 2017. In the event that the 2nd appellant found the respondent did not provide clear evidence of the time of loading, it follows there was no legitimate expectation.

[53] Finally, there was no evidence that the appellants subjected the respondent to differential treatment or discrimination by allowing the consignment of sugar belonging to the other 13 companies who were subject to the amended Gazette Notice to be cleared duty free without complying with the condition attendant thereto. This is for the simple reason that there was no evidence to show that the documents presented by the other 13 importers had the same inconsistencies as those presented by the respondent.

[54] **Based** on the foregoing, we find that the learned Judge erred in holding that the appellants' decision was unreasonable, unlawful and procedurally deficient. Accordingly, the appeal herein has merit and is hereby allowed. We hereby set aside the orders issued by the learned Judge in the ruling dated 22nd February, 2018 and substitute the same with an order dismissing the respondent's application.

[55] Owing to the nature of this matter where members of public were invited to import sugar to respond to a national drought, we direct each party to bear its own costs both in the High Court and in this appeal.

Dated and delivered at Mombasa this 11th day of April, 2018

ALNASHIR VISRAM

..

JUDGE OF APPEAL

W.KARANJA

....

JUDGE OF APPEAL

M. K. KOOME

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR