



**Seaways Kenya Limited v Commissioner of Customs and Border Control (Tax Appeal E166 of 2025) [2025] KETAT 261 (KLR) (12 September 2025) (Judgment)**

Neutral citation: [2025] KETAT 261 (KLR)

**REPUBLIC OF KENYA  
IN THE TAX APPEAL TRIBUNAL  
TAX APPEAL E166 OF 2025  
CA MUGA, CHAIR, T VIKIRU, B GITARI, DK RONO & B MIJUNGU, MEMBERS  
SEPTEMBER 12, 2025**

**BETWEEN**

**SEAWAYS KENYA LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF CUSTOMS AND BORDER CONTROL .... RESPONDENT**

**JUDGMENT**

**Background**

1. The Appellant is a company incorporated in Kenya under the *Companies Act*, CAP 486 of the Laws of Kenya whose principal activity is clearing and forwarding.
2. The Respondent is a principal officer appointed under Section 13 of the *Kenya Revenue Authority Act*, CAP 469 of Kenya's Laws. Under Section 5 (1) of the Act, the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all tax revenue. Further, under Section 5(2) of the Act with respect to the performance of its functions under subsection (1), the Authority is mandated to administer and enforce all provisions of the written laws as set out in Part 1 and 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
3. In September 2014, the Appellant cleared a 2001 BMW X5 motor vehicle Chassis No. WBFAF52070LM41363 on transit to Kampala, Uganda, under Entry No. T812 2014MSA4991269.
4. The vehicle was released from Mombasa Port under a transit bond (CB8) pursuant to the East African Community Customs Management Regulations (EACCMR), 2010. The transit bond was executed to ensure that the vehicle would be exported to Uganda within the stipulated period, as required by law.



5. According to the Appellant, while the vehicle was being transported by road from Mombasa to Kampala, it was stolen along the Mombasa Road and despite the Appellant's efforts, the vehicle was not recovered.
6. The Respondent subsequently issued demand letters for the payment of duty, interest, and penalties, citing the Appellant's failure to account for the transit bond.
7. On 29<sup>th</sup> January 2025, the Appellant wrote to the Respondent seeking to have the bond cancelled on account that it could not recover the stolen car despite all efforts being made.
8. On the 3<sup>rd</sup> of February 2025, the Respondent replied indicating that the Appellant had the obligation of ensuring that the vehicle was exported to Uganda and that the theft did not absolve the Appellant of its responsibilities under the transit bond.
9. On the 4<sup>th</sup> of February 2025, the Appellant made another request to the Respondent to reconsider its position and cancel the bond. The Respondent on the 6<sup>th</sup> of February 2025, replied reaffirming its earlier position that the bond remained outstanding and enforceable.
10. Dissatisfied with the Respondent's decision, the Appellant filed the instant appeal vide a Notice of Appeal dated and filed on 5<sup>th</sup> February 2025.

### **The Appeal**

11. The Appellant lodged its memorandum of appeal dated 18<sup>th</sup> February, 2025 and filed on 19<sup>th</sup> February, 2025 wherein it raised the following grounds of appeal:
  - i. That the Respondent erred in law and fact by demanding payment of duty, interest and penalties despite the Appellant efforts of acting in a timely manner by reporting the said incident as soon as possible to the Embakasi Police Station and to KRA Rapid Response Team. That the Appellant further provided for transport at its own cost, for the armed Police Officers, the tracking company staff and the Respondent officer from Rapid Response team.
  - ii. That the Respondent erred in law and fact by demanding payment of duty, interest and penalties for a vehicle that was stolen on transit to Uganda, a criminal incident completely beyond the Appellant's control.
  - iii. That the Respondent was negligent in their responsibilities and duties by releasing the car on transit from Mombasa port whose tracking device was incorrectly pegged to the wrong Entry No 2014MSA4991296 as per the tracking report from the tracking company, Automated Logistics instead of the correct Entry No T812 2014MSA4991269, thus contributing to the difficulty in recovering the stolen car.
  - iv. That due to the Respondent's negligence above, the Respondent Transit Monitoring Unit (TMU) was not able to get a corridor alert immediately the car was diverted from its designated route causing delays in the recovery process, an error that the Appellant should not be punished for.
  - v. That the Respondent erred in Law and facts by not employing and engaging competent tracking company, Automated Logistics Ltd.
  - vi. That the Respondent failed to investigate further on the circumstances surrounding the theft of the car and whether the Tracking Company Automated Logistics Ltd fulfilled their



contractual obligation but instead assumed the car was consumed locally without any factual basis or proof.

- vii. That the Respondent have not disputed the fact that the Car on Transit was stolen, neither have they alleged that the Appellant were negligent, responsible or involved in any way with the theft of the car to warrant them pay duty, interest and penalties and this is therefore against the principle of Natural justice of ascribing fault without blame.
- viii. That the Respondent misinterpreted and misapplied Regulations 104(22) and (23) of the East Africa Community Customs Management Act, 2004 (hereinafter “EACCMA), failing to distinguish between diverted goods, untraceable good and stolen goods.
- ix. That the Respondent’s actions are in violation of Section 135(3) of the EACCMA, which bars the collection of short-levied duty after five years have lapsed-. Enforcement Notice of 18<sup>th</sup> September 2024.
- x. That the Respondent violated Article 47 of the Constitution that provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. That the Respondent must exercise its statutory powers in a manner that does not violate the Appellant’s right to a fair administrative action and that the process of doing so should be in accordance with the law.
- xi. That the Respondent acted unlawfully by suspending and refusing to renew the Appellant clearing and forwarding licence until they appealed to the Tax Appeal Tribunal where instructions were given by email without the Respondent responding to Appellant letter officially.

### **Appellant’s Case**

12. The Appellant’s case was premised on its statement of facts dated 18<sup>th</sup> February 2025 and filed on 19<sup>th</sup> February 2025 together with the documents attached thereto.
13. The Appellant averred that it cleared a car on transit to Kampala Uganda, a BMW X5 Chassis No WBAFAS2070LM41363 in September 2014 for its client, Richard Erasmus Byaruhanga at Mombasa Port under Entry No T812 2014MSA4991269.
14. The Appellant averred that it fulfilled all the requirements as a clearing and forwarding agent and was in full compliance with the transit bond CB8 requirements as expected and that the transit car was therefore released from Mombasa Port to be transported by road from Mombasa to Kampala, Uganda.
15. The Appellant averred that along Mombasa Road, whilst the car was being driven by road to Kampala Uganda it was stolen at gunpoint from the Appellant’s driver whose belongings were also stolen. The Appellant stated that it immediately reported the incident Embakasi Police Station as well as the Respondent’s Rapid Response Team officer a Mr. Hudson Makhanu, who came to the site immediately.
16. The Appellant stated that together with the Respondent’s officer Mr. Hudson Makhanu, were armed Police officers who participated in the search operation with the aid of the tracking company, MS Automated Logistics Services (hereinafter “the Tracking Company”). The Appellant asserted that the team searched for the stolen car in vain.
17. The Appellant averred that the Tracking Company used substandard equipment that was unable to pin point the precise location of the stolen car.



18. The Appellant contended that the Respondent who had the responsibility of tallying and ensuring that the correct entry was pegged either knowingly or by error failed.
19. The Appellant stated that the tracking device was pegged to the wrong or incorrect entry No. 2014MSA49991296 instead of the correct Entry No 2014MSA4991269 and that the error occurred due to negligence, lack of responsibility and a weakness in the Respondent's system.
20. The Appellant averred that the Respondent failed to acknowledge the fact that it violated Section 14 of the Act which provides that any person employed by the Respondent is personally liable for their wrongful acts or omissions and as such should equally be held liable for the negligence which contributed to the difficulties in recovering the stolen car.
21. The Appellant stated that there was a similar incident regarding stolen BMW vehicles in Nairobi which happened around the same time as the Appellant's imported vehicle was stolen. The Appellant cited an excerpt of the following incident referred to in a KTN news feature dated 5<sup>th</sup> September, 2014 where a stolen BMW belonging to presidential escort was later found in Uganda and returned to Kenya:

“The stolen police BMW that was attached to the presidential escort fleet has been returned to Kenya. The vehicle escorted under tight security now sits at the criminal investigations department at the Nairobi area police station. The vehicle was recovered in Uganda. Flying squad boss Munga Nyale says they had no choice but negotiate for the release of the vehicle... four suspects have already been apprehended and will be arraigned in court on Monday over the theft of the presidential escort vehicle...Nyale says the Kenyans are allegedly running a car theft syndicate with their Ugandan counterparts...nonetheless.”

22. The Appellant averred that its intent and action before the transit car was stolen was to fully comply with the transit bond requirements as mandated of it in the CB8 and that whereas the vehicle may not have crossed into Uganda as planned, every effort had initially been made by the Appellant to fulfil the transit requirements within the stipulated timelines and were it not for the unforeseen circumstances that were totally beyond its control, the Appellant would have fulfilled its obligation.
23. The Appellant contended that the Respondent had not disputed that the car was stolen and that the Respondent's officer was informed and attended the site with the Appellant on the fateful day.
24. The Appellant averred that the Respondent without evidence or even alleging that the Appellant was involved in the theft of the stolen car, insisted that the Appellant is liable for the payments of duty, interest and penalties, in violation of the principles of natural justice of ascribing blame without fault, which is unfair, unjust and unlawful. The Appellant further averred that it should not be held accountable and liable for the actions of the criminals who stole the car and the Respondent's negligence.
25. The Appellant posited that it was unfair for it to be made liable to pay taxes for a stolen car, when the Respondent was fully aware that the car was stolen. The Appellant reiterated that the criminal act was totally beyond its control. The Appellant relied on the case of Kenya Revenue Authority v. Spectre International Limited [2013] eKLR, where the court stated the following:

“It is trite law that persons charged with statutory powers and duty ought to exercise the same reasonably and fairly and that the discretionary (sic) ought [not] to be used whimsically (sic), unreasonably arbitrarily or against the tenets of natural justice. If the discretion is used arbitrarily or unreasonably, the court may step in to remedy the situation. The respondent



has not shown any ground or reason why it formed the opinion that the ex-parte applicant diverted the goods. ...”.

26. The Appellant averred that the Respondent’s failure to do a proper investigation to ascertain the circumstances under which the transit car was stolen, was the Respondent’s fault since the Respondent’s officer failed in his or her responsibility to tally and recognise that the tracking device was pegged to a wrong entry.
27. The Appellant contended that the Respondent was wrong to insist that the Appellant was liable to pay the taxes, interest and penalty after ten years from the date of the incident or of the entry or transaction as this was in violation of the Section 135 (3) of EACCMA.
28. The Appellant averred that it had a good track record having been in the clearing and forwarding industry for over 30 years without any incident of this nature.
29. The Appellant relied on Section 109 of EACCMA, which provides as follows:

“(1) Where the conditions of any bond have not been complied with the Commissioner may by notice in writing require the person who has given security under it to pay to him or her the amount of the security within fourteen days of the notice; and on failure to comply with the notice, the Commissioner may enforce payment of the security as though it were duty due and unpaid. (2) Nothing in this section shall, unless the Commissioner otherwise allows, discharge the person who has given security under section 108 from the obligations entered by him or her under this Act or under any other law.”
30. The Appellant also relied on the conditions of the Transit Bond CB8 including the above law, read together with EACCMR 2010, Regulation 104 (19) which provides as follows:

“Notwithstanding anything to the contrary contained in these Regulations, where the Commissioner is satisfied that the non-production of satisfactory proof of exportation in respect of a part of the goods is due to circumstances beyond the control of the owner, the Commissioner may in his or her discretion refund to the owner as much of the deposit as he or she deems to be appropriate to that part of the goods in respect of which the proof has been produced, or release the owner from the obligations of any bond in so far as it concerned that part”
31. The Appellant contended that there is a clear distinction between goods that have been diverted from the designated route, goods that cannot be traced from goods that have been stolen and proceeded to outline its views on the differences as follows:
  - i. Diverted goods refers to goods that have been intentionally rerouted or redirected from their intended route or destination through illegal means by either the agent or the owner.
  - ii. Untraced goods are goods whose location is unknown or uncertain and one is not sure whether such goods were lost or stolen because there is no evidence or information about the whereabouts of such goods or what exactly happened to the said goods.
  - iii. Stolen goods on the other hand are goods that have been taken unlawfully without the consent of the owner through theft which is usually a criminal act and more often than not, there is evidence.



32. The Appellant averred that the Respondent misinterpreted the above regulation which should not be applicable in this case since the Appellant had evidence to prove that the transit car was stolen under circumstances that were totally beyond its control and the Respondent's officer who was at the site could attest to the same.
33. The Appellant relied on the holding of the Court in the case Senior Assistant Commissioner (Enforcement Port Operations) & 3 others [2018] eKLR, wherein the Court in referring to Regulation 104 (22) and (23) [supra] stated as follows:
 

“The above clause is in relation to a person who diverts goods. My understanding of this is that a person can only be found to have committed a criminal offence if only the court determines so. In the absence of any conviction a person cannot be held liable, the 3rd respondent has not shown anywhere that the applicant was involved in the diversion and theft of the transit goods, .... and the respondents have not shown if at all the applicant contributed in any way.”
34. The Appellant also averred that the Respondent violated Section 135(3) of EACCMA for both Entry No. 2014MSA4991269 and No. 2019MSA7115743 by raising demand letters referenced KRA/CFS/Transit/Audit/DEM/22/591 and C&BC/DMU/CFS-MSA/1547/2023 dated 21<sup>st</sup> November 2022 and 4<sup>th</sup> May 2023 respectively.
35. The Appellant averred further that the Respondent's Simba System erroneously failed to pick up the processing fee of Kshs. 10,000.00 in entry No. 2019MSA7115743 for a local duty-free car for its client Joseph Maina Muchiri which was done on the 5<sup>th</sup> of January 2019 and that after almost 4 years from the date of the transaction the Respondent sent the Appellant the first demand letter and another one after 4 years, to pay the short-levied taxes of Kshs. 11,300.00 being processing fees, penalty and interest.
36. The Appellant averred that while it was waiting to be cleared by the Respondent for renewal of its license it was informed that it had an uncleared debt of Kshs. 11,300.00 being processing fees penalty and interest which had to be paid before clearance.
37. The Appellant averred that upon getting the applicable law and referring to the demand letter, way before the Respondent raised the payment slip No 1020250000162963, the Appellant protested to the payment of the above tax as it was unlawful for the Appellant to be asked to pay short levied taxes contrary to Section 135 (3) of EACCMA when the five-year window had already lapsed.
38. The Appellant stated that it was its customer Joseph Maina Muchiri, who was supposed to pay for the short levy tax but he was unresponsive to the Appellant's communication and that the Appellant had no other way of reaching him.
39. The Appellant averred that the Respondent ignored its protest on the short-levied taxes insisting that the five-year period starts from the date of the first demand letter and that the period goes on indefinitely until the short-levied taxes are paid, a position that is contrary to the law. The Appellant submitted that it paid the Kshs. 15,300.00 under duress on the 17<sup>th</sup> of February 2025.
40. The Appellant stated that it had the expectation that the Respondent who has statutory powers ought to exercise the same reasonably and with fairness as provided for in Article 47 of the Constitution of Kenya, 2010 (hereinafter “the Constitution”).
41. The Appellant stated that as a clearing and forward agent it is liable and mandated to remit taxes on behalf of its clients based on what the Respondent has charged or invoiced and not on figures of its own



making and that it is not the responsibility of the Appellant as the Agent by law to check or confirm whether the Respondent system has an error or not.

42. The Appellant finally stated that when the Respondent fails in its duties and responsibilities of ensuring that its systems are functioning well, it should not assign the blame to third parties such as the Appellant or the agents.

### **Appellant's Prayers.**

43. The Appellant prayed for the following reliefs:
- a. That the Court compels the Respondent under Regulation 104 (19) of the EACCMR to release the Appellant from the bond obligation
  - b. That this Court compel the Respondent to waive all the duty, interest, and penalties levied to the Appellant in relation to the stolen vehicle of Kshs. 1,074,553.00 or any amount that may be levied further as tax, interest and penalty on the stolen car.
  - c. That this Court compels the Respondent to refund to the Appellant processing fees including interest and penalties amounting to Kshs. 15,300.00 paid to them under duress.
  - d. That the Respondent bears the all the costs.

### **Respondent's Case**

44. The Respondent's case was premised on its statement of facts dated and filed on 21<sup>st</sup> March 2025 together with the documents attached thereto;
45. The Respondent averred that a transit bond is a legal instrument designed to ensure that goods cleared for transit are exported to their intended destination within the stipulated period
46. The Respondent asserted that the Appellant, as the clearing agent, assumed responsibility for ensuring that the vehicle would be exported to Uganda and that proof of exportation would be provided to the Respondent. The Respondent further asserted that the theft of the vehicle, while unfortunate, does not automatically discharge the Appellant from its obligations under the bond.
47. It was the Respondent's position that the Appellant's action of reporting the theft to the Embakasi Police Station and informing the Respondent's Rapid Response Team does not absolve it of its legal obligations under the transit bond (CB8) and the relevant provisions of EACCMA and the EACCMR, 2010
48. The Respondent placed reliance on Regulation 104(23) of the EACCMR which provides as follows:
- “(1) Where goods in transit cannot be traced, the person referred to under sub regulation (22) shall pay to the proper officer the penalty to bond in addition to the fine.”.
49. The Respondent averred that this provision makes it clear that if goods in transit cannot be traced, the responsible party has the obligation to pay the bond penalty and that theft of the vehicle falls under the category of goods that "cannot be traced," and therefore, the Appellant is legally required to settle the bond penalty



50. The Respondent further relied on the provisions of Section 109 of the EACCMA, which reinforces the Respondent's position in providing as follows:
- “(i) Where the conditions of any bond have not been complied with, the Commissioner may by notice in writing require the person who has given security under it to pay to him or her the amount of the security within fourteen days of the notice; and on failure to comply with the notice, the Commissioner may enforce payment of the security as though it were duty due and unpaid.
  - (ii) Nothing in this section shall, unless the Commissioner otherwise allows, discharge the person who has given.”
51. The Respondent posited that this section empowers it to demand payment of the bond amount if the conditions of the bond are not met and that in this case, the Appellant failed to provide proof of exportation, which is a condition of the transit bond. The Respondent stated that the theft of the vehicle does not negate this obligation unless the Respondent explicitly allows for a discharge, which has not been granted in this instance.
52. The Respondent maintained that the Appellant's obligation to account for the transit bond remains enforceable under the law and that timely reporting of the theft, while commendable, does not relieve the Appellant of its legal responsibilities as the law is clear that the failure to trace goods in transit results in the obligation to pay the bond penalty.
53. The Respondent asserted that its demand for payment was therefore lawful and in accordance with the provisions of the EACCMA and EACCMR.
54. The Respondent averred that the Appellant did not provide sufficient evidence to substantiate the claim that the tracking device was pegged to the wrong entry and that the pegging of the tracking device was done by vendors nominated by the Appellant. The Respondent also stated that it was not involved in this process and that therefore, the Appellant cannot shift the blame to the Respondent for any negligence.
55. The Respondent stated that its duty is to ensure compliance with the transit bond conditions and not to investigate the theft but to enforce the bond conditions as provided for under Section 109 of the EACCMA and that since the Appellant failed to provide proof of exportation, a requirement under the bond, the demand for payment of the bond was justified.
56. On the Appellant's averment that the Respondent misinterpreted and misapplied Regulations 104(22) and (23) of the EACCMR, by failing to distinguish between diverted, untraceable, and stolen goods, the Respondent maintained that this distinction is irrelevant in the present case, as the core issue was the Appellant's failure to ensure the exportation of the goods as required under the transit bond CB8. The Respondent further stated that the law is clear that the Appellant's obligation to account for the transit bond remains enforceable, regardless of whether the goods were stolen, diverted, or untraceable.
57. The Respondent averred that the Appellant, as the clearing agent, assumed responsibility for ensuring that the vehicle would be exported to Uganda and that proof of exportation would be provided to the Respondent and that the theft of the vehicle, while a criminal act, does not alter the fact that the goods were not exported as required under the bond.
58. The Respondent relied on Regulation 104(23) of the EACCMR which explicitly states that if goods in transit cannot be traced, the responsible party must pay the bond penalty. That the theft of the



vehicle falls under the category of goods that "cannot be traced," as the vehicle was taken unlawfully and its whereabouts remain unknown and that therefore, the Appellant's obligation to settle the bond penalty is triggered under this provision, regardless of whether the goods were stolen, diverted, or simply untraceable.

59. The Respondent maintained that it did not contravene Section 135(3) of the EACCMA, by demanding payment of duty, interest, and penalties after the lapse of five years from the date of the incident and further that the Appellant's claim was based on a misinterpretation of the law as Section 135(3) of EACCMA applies specifically to short-levied duties and erroneous refunds, and not to transit bond obligations. The Respondent further averred that the demand for payment in this case was based on the Appellant's failure to account for the transit goods, which is governed by the provisions of Section 109 of the EACCMA and not by Section 135(3) of EACCMA.
60. The Respondent averred that it acted within its statutory powers as provided for under Section 145(1) and (3) of the EACCMA in refusing to renew the Appellant's license and that the Appellant's failure to account for the transit bond constitutes a breach of customs laws, which justifies the suspension and refusal to renew the license.

### **Respondent's Prayers**

61. The Respondent prayed to the Tribunal for the following Orders:
  - a. That the Appellant's appeal be dismissed
  - b. That the Respondent's decision issued on the 6<sup>th</sup> of February 2025 be upheld.

### **Parties Submissions**

62. On 9<sup>th</sup> June 2025, the Tribunal directed the parties to file written submissions by 30<sup>th</sup> of June 2025. Both parties failed to comply with the directions, however the Respondent filed its submissions dated 30<sup>th</sup> June 2025 on 7<sup>th</sup> July 2025. At the hearing on 23<sup>rd</sup> July 2025, the Tribunal adopted the Respondent's submissions albeit filed late and extended time for the Appellant to file its submissions by close of business on 23<sup>rd</sup> July 2025. In spite of being afforded additional time to file its submissions, the Appellant failed to comply with the Tribunal's directions and filed its submissions out of time on 4<sup>th</sup> August, 2025. After the matter had been heard the Appellant sought, by way of an application, for its submissions, filed out of time to be adopted, the Tribunal did not grant leave hence the submissions do not form part of the Appellant's record of appeal.
63. In its submissions the Respondent identified the following issues for determination:
  - i. Whether the Respondent erred in demanding payment of duty, interest, and penalties despite the Appellant's timely reporting of the theft of the transit vehicle.
  - ii. Whether the Respondent was negligent in releasing the transit vehicle with an incorrectly pegged tracking device, thereby contributing to the failure to recover the stolen vehicle.
  - iii. Whether the Respondent failed to conduct a proper investigation into the circumstances of the theft and wrongly assumed that the vehicle was consumed locally without proof.
  - iv. Whether the Respondent misinterpreted and misapplied Regulations 104(22) and (23) of EACCMR, by failing to distinguish between diverted, untraceable, and stolen goods.
  - v. Whether the Respondent violated Section 135(3) of the EACCMA by demanding payment after five years had lapsed from the date of the incident.



- vi. Whether the Respondent violated Article 47 of the Constitution by suspending and refusing to renew the Appellant's Clearing and Forwarding License in a manner that was procedurally unfair, unreasonable, or unlawful.
  - vii. Whether the Appellant is entitled to relief under Regulation 104(19) of EACCMR, which allows the Commissioner to waive bond obligations where non-compliance is due to circumstances beyond the Appellant's control.
64. The Tribunal notes that the Respondent had submitted extensively on the identified issues in its statement of facts, therefore the Tribunal does not wish to re-hash the same. The only issue the Respondent had not submitted on was whether the Appellant is entitled to relief under Regulation 104(19) of EACCMR, which allows the Respondent to waive bond obligations where non-compliance is due to circumstances beyond the Appellant's control.
65. The Respondent submitted that a careful reading of the following provisions of Regulation 104(19), together with applicable law and precedent, reveals that the Appellant does not qualify for such discretionary relief:
- “Notwithstanding anything to the contrary contained in these Regulations, where the Commissioner is satisfied that the non-production of satisfactory proof of exportation in respect of a part of the goods is due to circumstances beyond the control of the owner, the Commissioner may in his or her discretion refund to the owner as much of the deposit as he or she deems to be appropriate to that part of the goods in respect of which the proof has been produced, or release the owner from the obligations of any bond in so far as it concerns that part.”
66. It was the Respondent's submission that while this provision indeed allows its discretion to waive bond obligations in exceptional circumstances, the power is discretionary and not mandatory and that the term “may,” indicates that the Respondent does not have the obligation of granting the relief merely because the Appellant claims that the theft was beyond its control. The Respondent submitted that the test is whether the Commissioner is “satisfied” that the circumstances justify the relief.
67. The Respondent submitted that in the present case, it was not so satisfied as the facts surrounding the alleged theft were not straightforward for the following three reasons:
- a. That the tracking device had been incorrectly pegged to a different entry, making it impossible to verify the location and movement of the vehicle.
  - b. The failure to monitor the vehicle's actual route contributed to the lack of proof of export.
  - c. Furthermore, there was no conclusive evidence demonstrating that the vehicle exited the country or that it was not consumed locally.
68. The Respondent maintained that it was thus justified in treating the vehicle as unaccounted for under Regulation 104(23) of EACCMR, which mandates enforcement of the bond in cases where goods in transit cannot be traced.
69. It was the Respondent's submission that a bond is a strict liability instrument whose enforcement is not contingent upon proving wrongdoing or negligence and that the condition is the production of proof that the goods exited the customs territory as declared, the principle is key because the existence of a theft, even if proven, does not by itself satisfy the requirement under Regulation 104(19) EACCMR unless the Respondent is persuaded that the theft genuinely made it impossible to produce proof of



export. That in the absence of compelling, verifiable evidence supporting the Appellant's claims, the Commissioner was entitled to reject the waiver requested.

70. The Respondent posited that its actions including the enforcement of the bond, suspension of the Appellant's license, and rejection of requests for bond waiver were all within the confines of the law and grounded in reasonable administrative discretion and that the Appellant failed to demonstrate any breach of duty, legal misinterpretation, or procedural unfairness on the part of the Respondent.

### **Issues for Determination**

71. The Tribunal has considered the parties pleadings, documentation and the Respondent's submissions and is of the view that this Appeal raises the following issue for determination;

Whether the Respondent exercised its legal mandate in refusing to cancel the Appellant's Transit Bond

### **Analysis and Findings**

72. Having established the issue for determination, the Tribunal will proceed to analyse it as hereinunder:

Whether the Respondent exercised its legal mandate in refusing to cancel the Appellant's Transit Bond

73. The Tribunal observed that dispute at hand emanates from the Respondent's refusal to cancel the impugned transit bond T812 2014MSA4991269. On 25<sup>th</sup> January 2025, the Appellant made an application for cancellation of the transit bond for the reason that the vehicle that was in transit to Uganda, a 2001 BMW X5 motor vehicle Chassis No. WBAFA52070LM41363 was stolen at gunpoint and that recovery efforts were futile.
74. The Tribunal notes that the Respondent in a rejoinder on 3<sup>rd</sup> and 4<sup>th</sup> February 2025 declined the request for the cancellation of the transit bond and reiterated that the bond remained outstanding and enforceable as the bond conditions had not been met. The Tribunal has also observed that in its notice of appeal dated and filed 5<sup>th</sup> February 2025, the Appellant makes reference to an electronic mail dated 4<sup>th</sup> February 2025 against which it has appealed. The view of the Tribunal is that the decision of the Respondent was issued on 3<sup>rd</sup> February 2025 and forwarded to the Appellant vide an electronic mail on 4<sup>th</sup> February 2025.
75. The Tribunal noted from the Appellant's pleadings, that it had cleared a 2001 BMW X5 motor vehicle Chassis No. WBAFA52070LM41363 on transit to Kampala, Uganda, under Entry No. T812 2014MSA4991269. The vehicle was released from Mombasa Port under a transit bond CB8 pursuant to the provisions of the EACCMR, 2010. The transit bond was executed to ensure that the vehicle would be exported to Uganda within the stipulated period, as required by law.
76. The Tribunal noted that it was the Appellant's averment that the vehicle was stolen along Mombasa Road at gunpoint and that the Appellant informed the Respondent's Transit Monitoring unit, the Tracking Company and the police. The Appellant also averred that the team attended the crime scene and made joint attempts to trace the vehicle in vain. The Appellant attached a police abstract, a vehicle tracking report and the import documents as proof that the theft had occurred and was reported to relevant authorities.
77. The Tribunal observed that the Appellant laid blame on the Respondent for engaging an incompetent tracking company resulting in the tracking device being pegged to the wrong or incorrect entry No. 2014MSA4991296 instead of the correct Entry No 2014MSA4991269 thereby hampering tracking



and recovery efforts. It was the Appellant's further averment that the Respondent failed to pursue investigations to ascertain whether the vehicle exited the Kenyan territory.

78. The Tribunal noted that the Respondent in its response was insistent on the fact that the Appellant had failed to discharge the conditions of the bond by failing to demonstrate that the transit goods had left the country and that hence the bond remained in force and was enforceable.
79. The Tribunal also noted that the Respondent took the position that the burden to prove that the transit goods had left the country lay with the Appellant and that the Respondent was not responsible for investigations to trace the vehicle. The Respondent posited that the Appellant ought to have obtained an insurance cover for the transit goods so as to mitigate the attendant risks.
80. The Tribunal noted the Respondent's assertion that where bonds had not been cancelled, Section 15 and 16 of Regulation 104 of the EACCMR deemed such goods as having been imported for home use as provided for under Section 130(1) of EACCMA. The Tribunal observed that the Appellant's prayer was for the Tribunal to compel the Respondent to release the transit bond and waive duty, penalties and interest resulting therefrom.
81. The Tribunal noted that from the party's pleadings, that it was not in dispute whether the theft incident reported along Mombasa Road occurred since there is indeed a police report and a tracking report to that effect. What was in contention was whose responsibility it was to ensure the vehicle was properly tagged and in the event of theft, to track the vehicle and how the transit bond should be treated in accordance with the law if the vehicle (transit goods) remained untraceable as is the case herein.
82. The question of whose responsibility it was to tag and trace the vehicle and whether the said administrative duty was executed prudently and in accordance with the law is not within the ambit of this Tribunal, the Appellant's recourse in that regard does not lie with the Tribunal. The Tribunal will only address itself to the question of whether the Respondent's decision not to cancel the transit bond was founded in law
83. The administration of transit bonds in Kenya is governed by EACCMA and more specifically the following provisions of Section 109 of EACCMA:
- “(a) Where the conditions of any bond have not been complied with the Commissioner may by notice in writing require the person who has given security under it to pay to him or her the amount of the security within fourteen (14) days of the notice and on failure to comply with the notice, the Commissioner may enforce payment of the security as though it were duty due and unpaid.
  - (b) Nothing in this section shall, unless the Commissioner otherwise allows, discharge the person who has given security under section 108 from the obligations entered into by him or her under this Act or under any other law.”
84. Further, Regulation 104(19) of the EACCMR is as follows with regard to release from obligations of any bond:
- “(19) Notwithstanding anything to the contrary contained in these Regulations, where the Commissioner is satisfied that the non-production of satisfactory proof of exportation in respect of a part of the goods is due to circumstances beyond the control of the owner, the Commissioner may in his or her discretion refund to the owner as much of the deposit as he or she deems to



be appropriate to that part of the goods in respect of which the proof has been produced, or release the owner from the obligations of any bond in so far as it concerned that part.”

85. With regard to goods that cannot be traced, Regulation 104 (23) of the EACCMR is as follows:

“(23) Where goods in transit cannot be traced, the person referred to under Sub-regulation (22) shall pay to the proper officer the penalty to the bond, in addition to the fine.”

86. Based on the foregoing provisions of EACCMA and EACCMR, the Tribunal is of the view that the release of customs bonds in any other way apart from fulfilment of the conditions precedent is the Respondent’s sole mandate. Sections 109(2) of EACCMA and Regulation 104 (19) of EACCMR provide that a taxpayer ought to satisfy the Respondent of the circumstances beyond his/its/her control for consideration of release from bond obligations. The Tribunal observed that the Respondent in its response to application for bond cancellation on 3<sup>rd</sup> February, 2025 cited the conditions of the transit bond CB8 and emphasised that the same had not been met. Further in its submissions the Respondent averred that it had not been satisfied by the Appellant’s reasons for seeking release from the bond obligations.

87. The Tribunal wishes to reiterate the holding of the High Court in *Ola Energy Kenya Limited v Commissioner for Investigations and Enforcement (Income Tax Appeal E031 of 2021) [2022] KEHC 16006 (KLR)* wherein it was held as follows:

“It has already been established that the appellant failed to satisfactorily prove to the Commissioner that the export was done. The bond clearly empowered the Commissioner to request for the certificate of landing in South Sudan. When such request was made, the appellant failed to honor the terms of the bond. The bond was also clear that only the fulfilment of the condition to export the goods and provision of satisfactory proof of export would discharge the bond. That the bond would remain in force in the event of non-fulfilment of this condition.

Having failed to fulfil the conditions of the bond, the question of discharge of bond upon expiry of three years cannot arise. The bond continues to remain in force until the conditions for discharge are met. In any case, the dispute arose before the expiry of three years, thus the bond was still in force.”

88. In view of the foregoing the Tribunal finds and holds that the Respondent acted well within its legal mandate and that accordingly its refusal to cancel the Appellant’s transit bond was proper in law.

### **Final Decision**

89. The upshot of the foregoing is that the Appeal herein lacks merit and the Tribunal accordingly proceeds to make the following Orders:

- a. The Appeal be and is hereby dismissed.
- b. The Respondent’s Decision dated 3<sup>rd</sup> February 2025 is hereby upheld.
- c. Each party to bear its own costs.

90. It is so Ordered.



**DATED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**CHRISTINE A. MUGA - CHAIRPERSON**

**DR. TIMOTHY B. VIKIRU - MEMBER**

**BERNADETTE GITARI - MEMBER**

**DOMINIC K. RONO - MEMBER**

**BILLY MIJUNGU - MEMBER**

