**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**(JUDICIAL REVIEW & CONSTITUTIONAL DIVISION)**

**MISCELLANEOUS APPLICATION NO.123 OF 2014**

**IN THE MATTER OF THE LAW REFORM ACT AND THE CIVIL PROCEDURE ACT**

**AND**

**IN THE MATTER OF AN APPLICATION BY IMPERIAL BANK LIMITED FOR ORDERS**

**OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE EAST AFRICA COMMUNITY CUSTOMS MANAGEMENT ACT, 2004**

**AND**

**IN THE MATTER OF CUSTOMS AND EXCISE ACT, CHAPTER 472, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COMMISSIONER OF CUSTOMS SERVICES.....RESPONDENT**

***EX PARTE:*** **IMPERIAL BANK LIMITED**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 7th April, 2014, the *ex parte* applicant herein, **Imperial Bank Limited,** seeks the following orders:

**1. ORDER OF PROHIBITION directed at the Respondent, whether acting by himself or through any of his agents, employees or officers prohibiting him from acting in any manner whatsoever upon his decisions embodied in the letters dated 13th March 2014 and 25th March 2014 and ostensibly issued under the provisions of sections 109 and Section 131 respectively of the East Africa Community Customs Management Act prior to full compliance with the provisions of the East Africa Community Customs Management Act as to the resolution of disputes as to enforceability of the secured bonds.**

**2. An ORDER OF CERTIORARI to remove into the High Court and quash the said decision of the Respondent embodied in the letters dated 13th March 2014 and 25th March 2014.**

**3. An ORDER OF MANDAMUS directed at Respondent compelling him to comply with all the enforcement provisions of the East Africa Community Customs Management Act prior to the issuance of an agency notice under Section 131 of the Act and in particular the in pursuance of sections 109(1) and 229 (1) of the East Africa Community Customs Management Act.**

**4. An ORDER OF PROHIBITION directed at the Respondent prohibiting him from issuing any further agency notices, demands for payment and instituting recovery mechanisms against the *Ex parte* Applicant prior to the compliance with the relevant provisions of the East Africa Community Customs Management Act and in particular in pursuance to sections 109(1) and 229 (1) of the East Africa Community Customs Management Act.**

**5. THAT costs of this application be borne by the Respondent.**

**Ex Parte Applicant's Case**

2. The application was supported by an affidavit sworn by **Mary Wanjiru**, the ex parte applicant's Legal Officer on 7th April, 2014.

3. According to the deponent, on 7th October 2005 the *ex Parte* Applicant jointly with **Metro Petroleum Limited** executed a transit bond in the sum of Kshs. 100,000,000/- for petroleum products on transit from various countries via Mombasa to various countries. The parties thereof were to be bound to the Commissioner of Customs and Excise for the said amount from the date thereof up to and including 31st December 2005.

4. It was deposed that Subsequently, on 22nd June 2006 the *ex Parte* Applicant jointly with **Metro Petroleum Limited** executed another transit bond in the sum of Kshs. 50,000,000/- for petroleum products on transit from various countries via Mombasa to various countries. The parties thereof were to be bound to the Commissioner of Customs and Excise for the said amount date thereof up to and including 30th June 2006.

5. According to the deponent as far as the *ex Parte* Applicant was concerned, those security bonds expired on the dates appearing on the face of the security bonds and from the date of expiry of the 2nd transit bond on the 30th June 2006, the *ex Parte* Applicant did not formally hear from the Respondent or any other party in this matter until the 4th of March 2014 when it received a letter dated 6th of February 2014 from the Respondent appointing it as an agent under section 131 of the ***East Africa Community Customs Management Act, 2004*** (hereinafter referred to as EACCMA) on account of **Metro Petroleum**

**Limited** for Kshs.86,424,702 vide a letter dated 6th February 2014. To this letter, the ex parte applicant responded vide a letter dated 6th March 2014 confirming to the Respondent that it was not holding any funds on behalf of the **Metro Petroleum Limited** and forwarded to the Respondent a statement of account No. 0101159019 held with the *ex Parte* Applicant.

6. Despite that by a letter dated 13th March 2014, the Respondent issued the *ex Parte* Applicant with a demand for Kshs 86,424,702 purportedly in accordance with the provisions of Section 109 of EACCMA. Notably, the said notice indicated a period of 7 days contrary to the provisions of Section 109(1) of EACCMA which provides for a Notice period of 14 days. This letter was received by the *ex Parte* Applicant on or about the 18th of March 2014, around two days before the lapse of the 7 day period indicated in the demand letter an on receipt thereof the *ex Parte* applicant immediately sought legal advice on the demand letter in view of the strong objections it had on the demand.

7. Notwithstanding that the Respondent, vide a letter dated 25th March 2014, and without due consideration of the law and procedure, proceeded to appoint the Central Bank of Kenya as the sole agent for purposes of paying the amount of Kshs 86,424,702 being enforcement of security bond guaranteed by the *ex Parte* Applicant.

8. By a letter dated 25th March 2014 the *ex Parte* Applicant informed Central Bank of Kenya of its dispute over both the amount demanded and the issuance of the agency notice, and the *ex Parte* Applicant is justifiably apprehensive that the monies held with the Central Bank of Kenya on its behalf will be released to the Respondent if the prayers sought herewith are not granted, and which will render the proceedings herein nugatory.

9. According to the deponent, the aforesaid decision of the Respondent made on the 13th March 2014 to enforce the secured bonds is tainted with **illegality** to the extent that the said notice was improperly issued contrary to the provisions of Section 109(1) of EACCMA which requires a notice period of 14 days; the transit bonds subject matter of the agency notice are both expired, not enforceable in law and therefore cannot form a legal basis for making a tax demand against the *ex Parte* Applicant; the Respondent did not pursue the principal importer nor did it make any attempts to forfeit the goods imported prior to pursuing the *ex Parte* Applicant contrary to the provisions of regulation 96 (11) of the ***Customs and Excise Regulations*** (hereinafter referred to as the Regulations). The *ex Parte* Applicant had a legitimate expectation that the avenues provided by the law to recover these sums would be exhausted prior to a claim being made to the bond issuer; the sum demanded is disputed in terms of computation as the *ex Parte* Applicant is not aware how the computation was arrived at; the *ex Parte* Applicant disputes the enforceability of the transit bonds aforesaid; the issuance of the notice is in breach of the constitutional right to fair administrative action, as enshrined under Article 47 of the Constitution, since the said issuance of the notice technically disentitles the *ex Parte* Applicant from the statutory laid down process as set out in Section 229 of EACCMA of challenging any demand or assessment by the Commissioner. Similarly, it is the Ex Parte Applicant's contention that by issuing the agency notice, there was **procedural impropriety** as the enabling statute clearly spells out the process to be followed upon a tax demand being issued to a party. The issuance of the agency notice is an attempt to disentitle the *ex Parte* Applicant to that process of challenge, is tainted with procedural impropriety and denotes bad faith and mala fides on the part of the Respondent; and that the action by the Respondent is also in breach of the *ex Parte* Applicant's right for equal treatment under the law and equal protection and benefit of the law as enshrined in Article 27(1) of the Constitution.

10. It was contended that the decision of the Respondent made on 25th March 2014 to appoint Central Bank of Kenya as an agent for purposes for collection of the sum demanded is **unreasonable** and **manifestly unjust** as it seeks to enforce the secured bonds guaranteed by the *ex Parte* Applicant which

is subject of a dispute and in respect of which the *ex Parte* Applicant has been deprived its statutory right to an opportunity to be heard on appeal channels availed under EACCMA, by an act of the Respondent.

11. It was further averred that the decision of the Respondent to issue the agent appointment notice on 25th March 2014 is contrary to rules of natural justice to the extent: that the said decision in effect permits the Respondent to completely deprive the *ex Parte* Applicant an opportunity to apply for a review of the decision to the Respondent and/or be heard on its appeal to the Tax Appeal Tribunal; and the decision permits the Respondent to sit as judge and executioner in his own cause.

12. It was further deposed that the decision of the Respondent to issue the agent appointment notice on 25th March 2014 is tainted with apparent bad faith and malice to the extent that the demand made on 13th March 2014 was made with total disregard of the required statutory period of 14 days; the demand of 13th March 2014 was received by the *ex Parte* Applicant on or about the 18th of March 2014, around two days before the lapse of the 7 day period indicated in the demand letter; and that the Respondent proceeded to nonetheless callously apply drastic enforcement mechanisms to the grave detriment of the *ex Parte* Applicant which shall include forceful enforcement of the security bonds guaranteed by the *ex Parte* Applicant for the sum of Kshs.86,424,702;

13. According to the deponent, it is in the interest of justice that the orders sought herein be granted.

14. In a rejoinder the deponent to the verifying affidavit swore a supplementary affidavit on 10th June 2014 in which she deposed that he was a stranger to contents of the letters purportedly issued by the Respondent dated 7th October 2013 and 23rd January 2014as attached to the Respondent's Replying Affidavit since the said letters, to his knowledge, were not received by the *ex parte* Applicant.

15. He reiterated that the notice dated 13th March 2014 to enforce the secured bonds was improperly issued contrary to the provisions of Section 109(1) of the Act which requires a notice period of 14 days and that the *ex parte* Applicant was not in receipt of any prior notices, purportedly issued, enforcing the transit bonds dated 7th October 2005 and 22nd June 2006, herein hence the *ex Parte* Applicant did not have sufficient time to exercise its statutory right to an opportunity to be heard on the appeal channels afforded under the EACCMA.

16. According to him, whereas the Respondent is responsible for collection of and accounting for customs revenue under the EACCMA, the Respondent failed to legally and procedurally observe the said obligation in the present case. In his view, the *ex parte* Applicant is directly affected by the Respondent's decision to issue an agency notice under Section 131 vide the letter dated 25th March 2014 to Central Bank of Kenya and disputes both the enforceability of the transit bonds and the terms of computation of the amount of Kshs. 86,424,702/-, of which the latter is unknown to the *Ex parte* Applicant.

17. He asserted that the Regulations (under the ***Customs and Excise Act***, Chapter 472, Laws of Kenya, hereinafter referred to as the Act) is applicable legislation and is recognised as such under EACCM and that the bonds were issued pursuant to Rule 96(4) of the Regulations, and which position is undisputed. He was however, neither aware of the meetings held between the *ex parte* Applicant and the Respondent, as alluded to by the Respondent, nor any other correspondences thereof other than those mentioned and attached to the Verifying Affidavit sworn on 7th April 2014, herein.

18. To him, by duly executing the transit bonds herein the Respondent was bound by the terms thereof and accordingly is estopped from enforcing them beyond the validity periods stipulated thereto on the respective transit bonds hence it is in the interest of justice that the orders sought herein be granted.

19. It was submitted that as the transit bonds expired on 31st December, 2005 and 30th June, 2006 respectively, the same are unenforceable and cannot form a legal basis for making tax demand against the applicant. In support of the submission the applicant relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**.

20. It was submitted that having executed the bonds, the Respondent was bound by the terms thereof and is therefore estopped from enforcing them beyond the validity periods stipulated thereto.

21. It was submitted that the ex parte applicant had a legitimate expectation that the avenues provided by the law to recover the sums in question would be exhausted prior to a claim being made to the bond issuer.

22. It was further submitted that the sum demanded was also disputed as the applicant was unaware of the manner in which it was computed.

23. According to the applicant the notice issued was in breach of the applicant's right to fair administrative action enshrined in Article 47 of the Constitution since it had the effect of disentitling the applicant of the statutory laid down process under section 229 of EACCMA by challenging the demand and the assessment by the Commissioner.

24. It was further submitted that the letter dated 13th March 2014 was only received two days before the lapse of the 7 days mentioned hence the notice was unprocedural and was in breach of the *ex parte* applicant's right to equal treatment under the law and equal protection and benefit of the law.

25. Citing several authorities, it was submitted that the Respondent's decision was unreasonable, in breach of the rules of natural justice and made in bad faith.

**Respondent's Case**

26. In response to the application, the Respondent filed a replying affidavit sworn by **Alfred N. Kathonde**, an officer appointed under and in accordance with section 13 of the ***Kenya Revenue Authority Act***, Cap 469 of the Laws of Kenya under which EACCMA is administered on 22nd May, 2014.

27. According to the deponent, he was serving in the rank of Supervisor within the Dept Management Section of Customs Services Department of the Respondent, charged with among other duties the realization of security bonds which have not been liquidated after the transaction for which they were executed are preformed or not performed.

28. He deposed that the e*x parte* Applicant was for all intents and purposes as guarantor to **M/s Metro Petroleum Limited** vide two security bonds Nos. GBNSB 6888/05 with a BIF value of 100 Million and GBNSB 4450/06 with BIF value of Kshs 50 Million thereby binding themselves to the Commissioner of customs Services to the amount guaranteed. However when the principal to the Bonds, **Metro Petroleum Limited** failed to comply with the conditions of the bonds through accounting for transactions amounting to Kshs 86,424,702, the Respondent by its letter dated 7th October 2013 to the Applicant, unequivocally gave them a fourteen (14) day notice of the Respondent's intention to proceed with enforcement of the outstanding taxes but the said letter elicited no response. By a further letter dated 23rd January 2014, the Respondent wrote to the *ex parte* Applicant intimating to them the Respondent's intention to enforce the outstanding bond of Kshs 86,424,702 which letter equally did not elicit any response.

29. It was further deposed that by the Respondent's letter dated 6th February 2014 to the *ex parte* Applicant, copied to **Metro Petroleum Limited**, the Respondent intimated its intention to enforce the outstanding bond of Kshs 86,242,702 which letter elicited a response vide a letter dated 6th March 2014 informing the Respondent herein that the account was overdrawn. To the said response the Respondent reverted vide a letter dated 13th March 2014 and subsequently opted to enforce against the guarantors as provided under Section 109 of EACCMA vide our letter dated 25th March 2014 to the *ex parte* Applicant's bankers (Central Bank of Kenya) in accordance with Section 131 of the EACCMA.

30. The deponent therefore denied that the notice issued on 13th March 2014 was improperly issued for want of a fourteen day notice as the said notice clearly made reference to previous notices dating back from 7th October 2013 and culminating in the said notice all seeking to enforce the outstanding bonds. Despite being accorded sufficient time to rebut to the various demand letters, the *ex parte* Applicant failed to account for the unretired bonds and as a result, the Respondent invoked Section 131 of EACCMA and issued notices for the recovery of Kshs 86, 424,702 for the unretired bonds.

31. The deponent was therefore of the view that the Ex parte Applicant was accorded more than sufficient opportunity to be heard but elected to sleep on its rights. To him, there is nothing in Section 131 of EACCMA that prevents the commissioner form requiring immediate payment of taxes from an agent appointed there under on account of a taxpayer who has defaulted. It was his view that the 30 day period referred to under Section 131 applies to the agent i.e. Central Bank and since it did not complain, the *ex parte* Applicant hereon cannot be allowed to argue the Central Bank's case hence nothing stops the commissioner from requiring immediate payment of taxes and nothing stopped applicant from lodging an application for review since the Agency Notice was directed at Central Bank of Kenya and was duly issued under Section 131 of EACCMA. Since Central Bank of Kenya who was the proper party to complaint, has not complained, the Ex parte Applicant cannot be heard on the issue of procedural impropriety and or legitimate expectation.

32. It was averred that on the issue of legitimate expectation under regulation 96(11) of the Regulations (which in any event is not the applicable legislation) does not issue in view of the fact that the provision of the applicable statute (EACCMA 2004) provides for the commissioner override those of the subsidiary legislation.

33. It was therefore asserted that the Respondent's actions cannot be termed as being unreasonable, manifestly unjust, contrary to the rules of natural justice, and tainted by malice and bad faith since prior to the issuance of the Agency Notice, there were a series of meetings and correspondence between the parties regarding the enforcement of the transit bonds.

34. The Respondent's position was that pursuant to the provisions of Section 107 of EACCMA, transit bond could only be discharged after due performance of the conditions thereof or after all obligations and liabilities have been dealt with to the satisfaction of the Commissioner. Further, the endorsement of the validity was not a prescribed content of a security bond as set out in the law and the same cannot be used to deny the Respondent the statutory duty to collect government revenue that is legally due. It was therefore deposed that allegation that the agency notices are expired, not enforceable in law and therefore cannot form a legal basis for making a tax demand is misguided as no bond or security, general or particular, on which either a principal or surety specifies a definite date of expiry or period of validity is to be accepted. To the deponent, the transit bonds have neither been discharged nor have the conditions, obligations and liabilities been dealt with to the satisfaction of the commissioner.

35. On the issue of failure to pursue the principal debtor, it was deposed that nothing stops the commissioner from pursuing the *ex parte* Applicant because under the provisions of Section 108 of

EACCMA, a surety or a party for all purposes of any bond shall be deemed to be the principal debtor and thus the Respondent was in order to pursue the Applicant for the un discharged bond as it did herein.

36. It was contended that on the issue of legitimate expectation under regulation 96(11) of the Regulations (which in any event is not the applicable legislation) does not arise as the provision of the applicable statute EACCMA clearly provide for the same, and that regulation being a subsidiary legislation, it cannot override those of the main statute. However without prejudice, the *ex parte* Applicant is not entitled to the orders sought as this application is founded on a fundamental misapprehension of the jurisdiction of this honourable court in proceeding brought by way of judicial review, in that the *ex parte* Applicant has not demonstrated with precision how its right has been violated especially in view of the provisions of the various of the EACCMA; this application fails to meet the minimum threshold for grant of the orders sought in light of the foregoing; and the Respondents have demonstrated that they have executed their mandate within the boundaries of the law and have not violated the *ex parte* Applicant's right to fair administrative action and that their actions were lawful, procedural and in accordance with the various laws administered by the Respondent.

37. It was further deposed in a further affidavit sworn on 23rd June, 2014 that the Respondents letter dated 23rd January 2013 was delivered to the Applicant 6th February 2014 while that dated 7th October 2013 was delivered on 23rd October 2013 by EMS Worldwide Courier as evidenced by delivery notes dated 6th February 2014 and the Respondent's Delivery Note confirming service of our letters dated 23rd January 2013 respectively:

| Bond No | Principal Name | Guarantor | Year | Station | Entry No | Bond Amount Kshs |
|---|---|---|---|---|---|---|
| GBNSB4450/06 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2006 | MSA | 510719 | 2,798,769 |
| GBNSB4450/06 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 752216 | 5,324,121 |
| GBNSB4450/06 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 752230 | 5,324,121 |
| GBNSB4450/0 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 856506 | 5,835,949 |

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|---|---|---|---|---|---|---|
| 6 | | | | | | |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 752253 | 5,989,628 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 752682 | 5,324,121 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 570930 | 5,553,087 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 571120 | 2,487,277 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 671658 | 2,459,979 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 679251 | 1,800,039 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 687526 | 6,643,816 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 723946 | 1,348,602 |
| | METRO | | | | | |

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|---|---|---|---|---|---|---|
| GBNSB6888/05 | PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 735477 | 5,989,628 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 752267 | 5,324,121 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 752686 | 5,324,121 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 752708 | 5,324,121 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 752770 | 4,658,613 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 777036 | 1,362,934 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 777065 | 1,817,245 |
| GBNSB6888/07 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 777074 | 908,623 |
| | METRO PETROLEUM LTD | IMPERIAL BANK LTD | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| GBNSB6888/05 | | | 2007 | MSA | 777084 | 908,623 |

| | | | | | | |
|---|---|---|---|---|---|---|
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 777094 | 2,725,875 |
| GBNSB6888/05 | METRO PETROLEUM LTD | IMPERIAL BANK LTD | 2007 | MSA | 857347 | 5,189,292 |
| **TOTAL** | | | | | | **86,424,702** |

38. According to the deponent, he was informed by his colleague one **Joseph Muchoki** that on 4th March 2014 he did have a meeting with one **Mary Wanjiru** who confirmed receipt of the earlier Agency Notices but could not remember when and whether the matter had been taken to court.

39. He was therefore of the view that in light of the foregoing, the *ex parte* Applicant's application is without merit and therefore untenable.

40. It was submitted based on section 109 of the Act that the Respondent's decision to enforce the secured bonds is neither tainted with illegality nor impropriety.

41. It was submitted that the validity of the transit bonds cannot be faulted because it was endorsed that they will expire on 31st December, 2005 and 30th June 2006, since validity was not a prescribed content of the security bond as set out in the law. In support of this submission the Respondent relied on section 108(1) of the EAMCCA and contended that there can be no estoppel against statute.

42. It was submitted that the Respondent's decision to enforce the secured bonds is not tainted with illegality to the extent that the statutory provisions under section 163 of the Act as read with section 109 of EAMCCA override those of the subsidiary legislation. It was contended that the said provisions mandate the Commissioner to pursue the person who has given security to pay the amount due and there is no requirement that the Respondent pursues the principal importer prior to pursuing the ex parte applicant.

43. It was submitted that legitimate expectation cannot be used to prop an illegality, the only question being whether the security bonds were discharged which according to the Respondent was not. . In the Respondent's view, since the principle of subrogation applies, the applicant has a remedy against **Metro Petroleum** upon satisfying the guaranteed bond. On the issue whether the computation of the taxes was forwarded to the applicant, it was submitted that there is no such requirement.

44. Since the Commissioner was exercising powers conferred upon him by section 131 of the EAMCCA, it was submitted that its actions were not unreasonable and in support of this submission, the Respondent relied on **Republic vs. Commissioner of Income Tax ex parte Charter House Bank Limited [2012] KLR**.

45. While admitting that it would be irrational for the Respondent to demand tax from the Applicant if it had indeed discharged its obligations in respect of the security bonds in question, it was submitted that the applicant did not furnish any proof of such discharge and reliance was placed on **Republic vs. Kenya Revenue Authority ex parte Premier Food Industries [201] KLR**.

46. According to the Respondent the evidence of meetings held and correspondences exchanged between the parties clearly dislodge the allegations of bad faith and malice.

**Determinations**

47. I have considered the applicant's case, the Respondent's opposition thereto, the submissions and authorities cited.

48. The grounds upon which the Court grants judicial review orders are now fairly well settled though the known grounds have been recognised not to be exhaustive.

49. The purpose of judicial review proceedings as opposed to the normal civil proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected rather than the merits of the decision in question. It is therefore concerned not with private rights or the merits of the decision being challenged but with the decision making process and its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

50. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

51. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

52. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

**"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

53. However, as was appreciated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

**"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis**.....**The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."**

54. The applicant's case is that as the security bond, the subject of these proceedings were time bound and as their time had lapsed, the applicant could not be called upon to satisfy the same. The Respondent appreciates that if the security bond in question were discharged, it would be irrational on the part of the Respondent to insist on the applicant meeting the obligations under the said bonds.

55. What is the law relating to performance bonds" In **Kenindia Assurance Company Limited vs. First National Finance Bank Limited Civil Appeal No. 328 of 2002** the Court of Appeal expressed itself as

follows:

**“The Court’s view of the matter is that upon giving notice of default, the respondent had discharged its obligations under the guarantee and the burden then shifted to the appellant to rebut the rebuttable presumption raised by the notice that liability had attached unless payment is made before a formal demand is made. Notice is to enable the guarantor to approach the principle debtor to ascertain the truth and to urge it to pay. The position would have been different had no fixed period been fixed within which liability would attach in which case the respondent would then have been placed in the unenviable position of exhausting even the avenue of litigation and appointment of a receiver. But as the matter stands, the performance bond had a life of only 12 months and it was executed in 1997. It cannot have been contemplated that the respondent would first sue or appoint a receiver, and when those failed then make a formal demand. It would be faced with the answer that the demand had been made too late....All these leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank, which gives a performance guarantee, must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice.....As to the fulfilment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken at its face value unless the contractor can establish that the beneficiary’s stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor. In absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement..... The performance bond in the instant case is in the nature of a covenant by the appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a third party and in such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and that there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security.....Performance bonds fulfil a most important role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go to far away countries for damages, or go through a long arbitration. He can get damages at once, which are due to him for breach of contract. The bond is given so that, on notice of default being given, the buyer can have his money in hand to meet his claim for damages for the seller’s non-performance of the contract. The courts must see that these performance bonds are honoured. The courts always recognise that the bonds affected the ‘tempo’ of the parties’ obligations but not their substantive rights.....In the instant case the appellant’s obligation was to pay upon demand which the obligation was established when it was served with a notice of default and upon a demand of payment being made. Liability to pay in the circumstances is not and cannot be an issue. There is no question outstanding to go for trial or which will require the examination of witnesses…….On the question of interest it was within the respondent’s right to demand it provided the overall liability did not exceed what was covenanted. Besides it was a matter in the discretion of the court.”**

56. What in effect the Court was saying was that where a bond is time bound and a condition precedent for the satisfaction of the bond has arisen, the surety must honour its obligations under the bond and the creditor is not under an obligation either to pursue the debtor or resort to other alternatives before calling upon the surety to pay. In those circumstances the surety steps into the shoes of the debtor and settles the debtor’s liability in accordance with the terms of the bond.

57. Similarly in **Transafrica Assurance Co. Ltd vs. Cimbria (EA) Ltd [2002] 2 EA 627 (CAU), i**t was held:

**"A performance bond has many similarities to a letter of credit and it has long been established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of credit are satisfied. Any dispute between a buyer and seller must be settled between themselves and the bank must honour the credit……..A bank or institution giving a performance bond is therefore bound to honour it in accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the buyer and the seller arising from the contract in respect of which the bond was given. It is only excused where there is fraud of which it has notice."**

58. In the same vein in **Kamro Agrovet Limited vs. Ceva Sante Animale & Others Kisumu HCCC NO. 45 of 2008**, the Court held:

**"A performance guarantee was similar to a confirmed letter of credit. Where, therefore a bank had given performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the underlying contract had been established and the banks had notice of the fraud. As to the fulfilment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken on its face value unless the contractor can establish the beneficiary's stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor – In absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement."**

59. Therefore the general rule is that a surety that has issued a performance bond may become liable under the bond when the principal fails to fully and correctly perform the underlying contract between the principal and the obligee/owner ("owner"). Typically, a surety's obligations under a performance bond are triggered when the owner declares the principal to be in default or terminates the principal's contract for default. After receiving notice of its principal's default, the surety generally is entitled to a reasonable period in which to investigate the circumstances surrounding the propriety of the default and to choose a course of action in performing its bond obligations. Of course, if the surety believes that the obligee has acted improperly, it may elect to deny liability and not perform under the performance bond or else it may choose to perform under a reservation of rights.

60. From the above discourse, the rules relating to a performance bond must be distinguished from the general rules of contract or insurance. In issuing a Bond, the Bank's obligations are to the owner and not the obligee though it is the obligee who would be liable to pay the Bank the consideration for the issuance of the Bond. The Bank however, has nothing to do with the validity of the agreement between the obligee and the owner. Accordingly, it is my view that the issue of insurable interest is inapplicable. Based on the same reasoning whereas in normal insurance contracts the claimant is obliged to prove loss, it is my considered view that in purely performance bond contracts, as long as default is proved, the Bank surety is obliged to pay the sum for which the bond was issued unless the surety proves that it is entitled to pay less. In other words the onus of proving that the surety is not liable to the full amount of the Bond rests on the surety. This was the position in **Corporate Insurance Co. Ltd vs. Nyali Beach Hotel [1995-1998] 1 EA 7 at 16 and 17** where **Pall, JA** expressed himself as follows:

**"The risk taken is generally known to the surety and the circumstances generally point to the view that as between the creditor and surety it was contemplated and intended that the surety**

**should take upon himself to ascertain exactly what risk he was taking upon himself. Ordinary contracts of guarantee are not amongst those requiring *uberima fides* on the part of the creditor towards the surety by the creditor of the facts known to him affecting the risk undertaken by the surety will not vitiate the contract."**

61. In the instant case two bonds were executed jointly by **Metro Petroleum Ltd** and the ex parte applicant herein. The first bond was dated 7th October, 2005 for the sum of Kshs 100,000,000.00 and it was expressly stated that the bond was "valid up to and including the 31st December, 2005". The second bond was dated 22nd June, 2006 for the sum of Kshs50,000,000.00 and was expressly stated to be "valid up to and including the 30th June, 2006". It is not contended that there were any other bonds.

62. The *ex parte* applicant's case is that it was not until after the expiry dates that the Respondent called upon the ex parte applicant on a 7 days' notice which was received 2 days to its expiry to satisfy the obligations under the said bonds. The said notice according to the ex parte applicant was made vide a letter dated 6th February, 2014. According to the Respondent, on the other hand the notification had been made way back on 7th October, 2013. Either way, the said notifications were made way past the validity period of the bonds in question. That the bonds were executed by the Respondent is not in question.

63. It is clear that barring anything else, the validity period of the bonds in question ceased to exist after 26th June, 2006 and no action could be taken based on the strength of the said bonds after that date.

64. The Respondent has however contended that the validity was not a prescribed content of the security bond as set out in the law and has relied on section 108(1) of EACCMA which provides:

***"Without prejudice to any rights of a surety to any bond given under this Act against the person for whom he or she is surety, a surety shall, for all purposes of any bond, be deemed to be the principal debtor and accordingly the surety shall not be discharged, nor his or her liability affected, by the giving of time for payment, or by the omission to enforce the bond for any breach of any conditions thereof, or by any other act or omission which would not have discharged the bond if he or she had been the principal debtor."***

65. A fortiori if the act or mission in question would have discharged the principal debtor the section is clear that the surety would similarly be discharged. In other words the extension of the indulgence to the principal debtor or the omission by the Respondent to enforce its rights against the said debtor does not *ipso facto* discharge the surety unless such action or omission discharges the principal debtor. In this case both the liability of the principal debtor and that of the surety under the bond were time bound and lapsed on 26th June, 2006 when the bonds became invalid. Whereas the Respondent could enforce its rights as against the principal debtor under any other legal regime it is clear that its rights under the bonds lapsed with the invalidity of the bonds. Accordingly it is my finding that section 108(1) of EACCMA is of no assistance to the Respondent in this case.

66. The other provision relied upon by the Respondent is section 163(1) of the Act. It is however clear from that section that the provision applies to situations "where the conditions of a bond have not been complied with". In this case however, one of the conditions of the bonds was that its validity extended up to and including 26th June 2006.

67. The Respondent has also sought to rely on section 109 of EACCMA. That section however applies to a "person who has given security under section 108 from the obligations entered into by him or her". In my view one's obligations extend to and include the period for which such obligations are to be

performed and where a specifically agreed period within which the obligation attaches lapses, one cannot in all fairness be held to be still under the obligations attaching to the bond.

68. To expect a person who has expressly limited its liability to a certain period of time to be held liable way after the said period would in my view not only be unreasonable and irrational but would go against that person's legitimate expectation that his or her liability would only apply to the said period.

69. An issue was raised as to whether the notice period complied with the law. It was contended by the applicant that the Respondent ought to have given a period of at least 14 days. However section 163 of the Act uses the phrase "within fourteen days' of notice" instead of "after fourteen days' notice". Whereas I agree that the notice ought to be reasonable, it is not true that the Respondent was obliged to give a fourteen days' notice. In any case, there is conflicting evidence whether there were in fact earlier notices and whether such notices were properly served on the applicant. Such conflict of factual issues cannot properly be resolved in these proceedings.

70. It was also contended that the ex parte applicant was not furnished with the figures in question before the impugned action was taken. However no legal provision was cited before me which would have enjoined the Respondent to do so.

71. I have considered the application, it is my view and I so hold that since the legal validity of the subject bonds expired at the latest on 26th June, 2006, the ex parte applicant's liability thereunder also disappeared and the Respondent had no justification in falling back on the said bonds to hold the ex parte applicant liable.

72. As was held in **Republic vs. Kenya National Examinations Council *ex parte* Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996**:

**"the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment."**

15. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240:**

**"…….legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for**

**the reasons set out in this judgment including failure to satisfy the principle of legality. In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the *quantum* of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power…….. Statutory power must be exercised fairly."**

73. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** it was held:

**"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."**

74. It is my view and I so hold that the Respondent having by its conduct in executing bonds whose lifespans were limited led the ex parte applicant to believe that after the expiry of the said bonds the ex parte applicant would not be called upon to meet liability thereunder.

75. In light of my findings hereinabove, the inescapable conclusion I come to is that the Notice of Motion dated 7th April, 2014 is merited. However on the prayers that ought to be granted, as was held in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA. No. 1747 of 2004 [2006] 1 EA 47,** once a quashing order is given the decision making body has to act in accordance with the law and the Court cannot make the decision for the challenged body. The Court held that since the purpose of certiorari is to bring up and quash the impugned orders, if that is done, there would be no necessity for an order of prohibition since there is nolonger any threat present of an illegal action. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

**Order**

76. Consequently the orders which commend themselves to me and which I hereby grant are as follows:

**a. ORDER OF PROHIBITION directed at the Respondent, by himself or through any of his agents, employees or officers prohibiting them from acting in any manner whatsoever upon the decisions embodied in the letters dated 13th March 2014 and 25th March 2014 ostensibly issued under the provisions of sections 109 and Section 131 respectively of the East Africa Community Customs Management Act.**

**b. An ORDER OF CERTIORARI removing into this Court the decision of the Respondent**

**embodied in the letters dated 13th March 2014 and 25th March 2014 which decisions are hereby quashed.**

**c. Taking into account the fact that there is no allegation that the Respondent received the amount covered by the bonds in question, each party will bear own costs.**

**Dated at Nairobi this 20th day of January, 2015**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Miss Cherono for the ex parte applicant***

***Miss Mburugu for Mr Chaballa for the Respondent***

***Cc Patricia***