



Case Number:	Petition 6 of 2019
Date Delivered:	17 Jun 2020
Case Class:	Civil
Court:	High Court at Chuka
Case Action:	Judgment
Judge:	Robert Kipkoech Limo
Citation:	John Mbaabu & another v Kenya Revenue Authority [2020] eKLR
Advocates:	-
Case Summary:	<p><b>Regulations 32 and 33 of Excisable Goods Management System Regulations, 2017, which allowed the seizure of a person's vehicle without being given a chance to be heard are unconstitutional for infringing on the right to be heard</b></p> <p><b>John Mbaabu &amp; another v Kenya Revenue Authority [2020] eKLR</b></p> <p><b>Petition No. 6 of 2019</b></p> <p><b>High Court at Chuka</b></p> <p><b>RK Limo, J</b></p> <p><b>June 17, 2020</b></p> <p><b>Reported by Kakai Toili</b></p> <p><b><i>Constitutional Law – constitutionality of statutes – constitutionality of regulations 32 and 33 of Excisable Goods Management System</i></b></p>

*Regulations, 2017 - whether regulations 32 and 33 of Excisable Goods Management System Regulations, 2017, which allowed the seizure of a person's vehicle without being given a chance to be heard were unconstitutional for infringing on the right to be heard – Constitution of Kenya, 2010, articles 25, 47 and 50; Fair Administration Action Act, 2015, section 3 ; Excisable Goods Management System Regulations, 2017, regulations 32 and 33.*

**Tax Law** – Kenya Revenue Authority – Commissioner General – powers of the Commissioner General – seizure of goods for failure to pay excise tax - whether the power of the Commissioner General of Kenya Revenue Authority to seize any goods for which excise duty had not been paid applied to the vessels ferrying the goods – Tax Procedure Act, 2015, section 44; Excise Duty Act, 2015, section 2; Excise Duty (Excisable Goods Management System) Regulations, 2017, regulation 32.

#### **Brief facts**

The petitioners claimed that their vehicles were seized by the respondent in June 2019. The plaintiffs claimed that despite repeated demands for the release of the detained motor vehicles, the respondent had ignored, refused and/or neglected to release the motor vehicles and that as a result of the seizures, they had suffered and continued to suffer loss of use of the vehicles. The plaintiffs claimed that at the time of the seizure of the motor vehicles, the offices/agents of the respondent failed to serve them with any notice and that no reason had been given by the respondent for the seizures and detention of the motor vehicles.

The petitioners submitted that the seizure and detention of their motor vehicles was an infringement and violation of their right to acquire and own property. They further contended that their rights for a fair trial were infringed stating that they had a right to be informed of any charge against them with sufficient detail to answer. The petitioners prayed for among others orders that; a

declaration be issued that their constitutional rights of having their property not arbitrary seized had been violated and infringed by the respondent; and a declaration that the petitioners' constitutional right to acquire and own property had been infringed and or violated by the respondents.

### **Issues**

- i. Whether the power of the Commissioner General of Kenya Revenue Authority to seize any goods for which excise duty had not been paid applied to the vessels ferrying the goods.
- ii. Whether regulations 32 and 33 of Excisable Goods Management System Regulations, 2017, which allowed the seizure of a person's vehicle without being given a chance to be heard were unconstitutional for infringing on the right to be heard.

### **Relevant provisions of the law**

#### **Excise Duty (Excisable Goods Management System) Regulations 2017**

#### **Regulation 32**

*The commissioner shall seize excise stamps, equipment, vehicles or goods where—*

- a. *excise stamps-*
  - i. *have been counterfeited*
  - ii. *which were subject to the returned to the commissioner, were not returned; or*
  - iii. *have been found in the possession of persons other than those to whom were supplied.*
- b. *The vehicles is used in the storage, concealment or transportation of excisable goods that have not met the requirements of these regulations;*

**Held**

1. Under sections 44 of the Tax Procedure Act, 2015, the Commissioner General of the Kenya Revenue Authority (Commissioner) was allowed and mandated by law to seize any goods for which excise duty had not been paid. The respondent had an obligation to the seizure of excisable goods (liquor) transported by the petitioners. The owner of the goods had not gone to the respondent's premise to claim the goods or dispute the tax obligations to the tax collector. Section 44 however applied only to excisable goods not the vessels ferrying the goods.
2. Section 2 of Excise Duty Act, 2015, gave what constituted excisable goods and the list provided under the First Schedule of that Act included alcoholic drinks. From regulation 32 of Excise Duty (Excisable Goods Management System) Regulations 2017, the respondent had some legal backing to justify the seizures of the petitioner's motor vehicle.
3. The notices of seizure exhibited by the respondent were directed at Hakim Agencies and the notices were also in respect to seized goods which were assorted alcoholic drinks and not the motor vehicles. Section 44 of the Tax Procedures Act did not relate to vehicles or vessels used to ferry the excisable goods. Section 44(5) dealt with the question of service of the seizure notice and gave the Commissioner the leeway of not effecting service if after reasonable inquiries it was unable to locate the owner of the goods for purposes of service.
4. The notices of seizure were regularly issued and duly served on the persons who had custody and or control of goods immediately before the seizure on June 11, 2019 and June 18, 2019 respectively. The respondent could not be faulted in so far as the excisable goods or uncustomed goods were concerned. However, in regard to seizures of the petitioners'

vehicles, there was no notice served and section 44 of the Tax Procedures Act was silent on notices to the owners of seized motor vehicles. There was no legal requirement obligating the respondent to issue notice to the owner of a motor vehicles(s) seized under regulations 32 of Excise Duty (Excisable Goods Management System) Regulations 2017.

5. Whereas regulation 30 of Excise Duty (Excisable Goods Management System-EGMS) Regulations created various offences in relation to uncustomed goods, the respondent had not preferred any charges against anyone in regard to seizure of the petitioners' lorries. They had cast any aspersions on the culpability of the petitioners or their drivers in relation to breaking/breaching any law.
6. The respondents had not provided the crucial link or means (if at all) between the petitioners and seized unexcisable goods which could have in the very least showed their responsibility under section 15 of Excise Duty Act, 2015. The seizure of the motor vehicles was done without any notice to the petitioners who were the registered owners of the seized motor vehicles. The respondent averred that the lorry and pick up seized were branded Hakim Agencies but they had not annexed any evidence to demonstrate that.
7. The petitioners' ownership of the seized motor vehicles had been demonstrated by the exhibits of copies of logbooks which were *prima facie* proof of ownership. The respondent had not contested the issue of ownership of the seized motor vehicles or demonstrated any link to the required standard in law between the uncustomed goods and the petitioners other than the fact that they were found transporting the same. The respondent however had not preferred any charges against them or anyone for commission of any offence in regard to ferrying or conveying of uncustomed goods.
8. Seizing and selling of someone's legitimate property at the whims of a commissioner without giving the owner(s)

a chance to be heard was arbitrary and ran afoul the constitution of an open and democratic society such as Kenya because:

- a. One of the fundamental rights and freedoms under article 25(c) of Constitution was a right to a fair trial and one of the tenets of fair trial under article 50 of the Constitution was a right to be heard and it included a right to be informed of any charge with sufficient detail to answer to it.
  - b. One of the cardinal rules of natural justice was a right to be heard. That meant that a person should not be penalized by decisions affecting their rights unless they had been given a prior notice and a fair opportunity to be heard. That tenet was entrenched under article 47 of the Constitution which dealt with fair administrative action.
9. The petitioners' motor vehicles were seized and they were not given a chance to be heard courtesy of regulations 32 and 33 of Excisable Goods Management System Regulations, 2017, that did not provide for a chance to be heard. Any provisions of law that allowed or gave power to an entity, a State officer or any public officer to take adverse action or steps without according the concerned/affected person a chance/opportunity to be heard was draconian and unconstitutional. Such a provision flew in the face of the tenets of natural justice which were entrenched in the Constitution.
10. A right to a fair trial under article 25 of the Constitution could not be limited by the impugned regulations 32 and 33 of Excisable Goods Management System Regulations and to the extent that the provisions breached the right to be heard, it was inconsistent with articles 25, 47 and 50 of the Constitution and to that extent the provisions were a nullity and void.
11. The respondent's action in seizing the motor vehicles could not pass the test of

reasonableness or procedural fairness because it was arbitrary, unfair and extreme in whatever angle one views the same for someone's property to be seized and told that the same would be disposed at the pleasure of the Commissioner or to put it aptly "in the manner that the commissioner may consider fit."

12. The respondent's defence of statutory authority did not absolve the respondent from blame because of the provisions of section 3 of the Fair Administration Action Act which applied to all State and none State agencies including the respondent. It could not avoid the clear dictate of the law and its action in the seizure of the petitioners' motor vehicles was a violation of the cited constitutional rights of the petitioners.
13. The dispute raised had nothing to do with tax obligation by the Respondents in respect to transportation of goods. Section 44 of Tax Procedures Act did not apply to transporters. Furthermore, section 15 of Excise Duty Act, 2015, which dealt with activities requiring a licence did not include transportation of excisable goods. That *lacuna* in law needed to be addressed through legislative interventions before the respondent contemplated future actions.
14. The respondent had failed to demonstrate that the petitioners had any tax obligation in respect of the goods they were found carrying and having failed to do so it could not hide under the existence of an alternative dispute resolution mechanism under section 51 of the Tax Procedures Act which did not apply to the respondent's dispute.
15. The court was well placed to entertain and determine the instant matter and there was no basis in law to refer the constitutional question raised to any other forum. The mandate of the court as provided under article 165 of the Constitution was well spelt out and it included the jurisdiction to determine the instant matter. The petitioners given the circumstances really had no other avenue to seek redress other than the instant court.

	<p>16. There was no wrong without a remedy and one of the remedies to address the petitioners' losses was an award of damages. The petitioners had suffered loss because their motor vehicles had been detained for almost a year thereby depriving them of use and income from the motor vehicles. Proof of loss was imperative and a party could not just plug a figure from the air and claim it.</p> <p><i>Petition allowed; costs of the petition to go to the petitioners to be agreed or taxed.</i></p> <p><b>Orders:</b></p> <p>i. <i>A declaration was made that the petitioners' rights under article 25, 31(b), 47 and 50 of the Constitution were violated by the respondent by the seizure of their motor vehicles.</i></p> <p>ii. <i>A declaration was made that regulations 32(b) and 33 of Excise Duty (Excisable Goods Management System) Regulations, 2017, to the extent that it provided no chance to the affected person to be heard, was unconstitutional and a violation of Constitution. They were also inconsistent with Fair Administrative Actions Act, 2015.</i></p> <p>iii. <i>The 1<sup>st</sup> petitioner was awarded damages of Kshs.2 million only for the detention of his motor vehicle while the 2<sup>nd</sup> petitioner was awarded Ksh. 800,000 for detention of his motor vehicle.</i></p> <p>iv. <i>The detained motor vehicles to be released to the owners (petitioners) unless lawfully held.</i></p>
Court Division:	Civil
History Magistrates:	-
County:	Tharaka Nithi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition ordered
History County:	-
Representation By Advocates:	-



Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**PETITION NO. 6 OF 2019**

**IN THE MATTER OF ARTICLES 10, 23, 31(b), 40(3), 73, 165 AND 258(1)**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION AND INFRINGEMENT OF THE RIGHTS AND FUNDAMENTAL RIGHTS AND FREEDOMS ARTICLE 31(B) AND 40(3) OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**JOHN MBAABU.....1<sup>ST</sup> PETITIONER**

**JOHN MUTEMBEI MURATHI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**J U D G E M E N T**

1. **JOHN MBAABU** and **JOHN MUTEMBEI MURATHI**, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners respectively have sued Kenya Revenue Authority the Respondent herein for what they termed as an illegal detention of their lorry Registration No. KCG 482 T and a pick up Registration No. KBL 804 Y which they claim were seized on 11<sup>th</sup> June 2019 and 18<sup>th</sup> June 2019 respectively. They claim that attempts to have the seized lorry released have been futile.

2. The Petitioners have come to this court for the following reliefs namely:-

*i) A declaration that the Petitioners constitutional rights of having their property not arbitrary seized a guaranteed under Article 31(b) of the Constitution has been violated and infringed by the Respondent.*

*ii) A declaration that the Petitioners constitutional right to acquire and own property of any description and in any part of Kenya as guaranteed by Article 40(3) of the Constitution has been infringed and or violated by the Respondents.*

*iii) A declaration that the seizure by the Respondent of the Petitioners motor vehicles without their consent and without giving any notice to that effect is contrary to Section 44(1) of the Tax Procedures Act 2015 and Constitution of Kenya 2010.*

*iv) Reinstitution of the Petitioners motor vehicles and prohibitory order to the Respondent from seizing and/or detaining without following the due process of the law.*

*v) General damages for illegal seizure and detention of the motor vehicles.*

*vi) Costs and interests of this petition.*

**The Petitioners' case**

3. The 1st Petitioner claims that he is the owner of that lorry Registration No. KCG 482T and states that the said lorry was seized on 11<sup>th</sup> June 2019 at Kaanwa Market in Tharaka Nithi County and detained at the offices of the Respondent within Embu Town.
4. The 2<sup>nd</sup> Petitioner claims that he is the owner of that pick up Registration No. KBL 804Y Toyota Hilux and that the same was seized by the Respondent on 18<sup>th</sup> June 2019 at Kaanwa Market and detained at Embu at the offices of the Respondents.
5. The Respondents claim that despite repeated demands for the release of the said detained motor vehicles, the Respondent has ignored, refused and/or neglected to release the said motor vehicles and that as a result of the seizures, the Respondents have suffered and continue to suffer loss of use of the said vehicles and are afraid of further losses due to pilferage.
6. The Respondents aver that at the time of the seizure of the said motor vehicles, the offices/agents of the Respondent failed to serve them with any notice and that no reason has been given by the Respondent for the seizures and detention of the motor vehicles contrary to **Section 4** of the **Tax Procedure Act**.
7. They insist that the seizure and detention of their motor vehicles is an infringement and violation of their right to acquire and own property of any description in Kenya guaranteed under **Article 40(3)** of the **Constitution of Kenya 2010**. They further claim that their rights under **Article 31(b)** of **Constitution of Kenya** have been violated by the Respondent due to its arbitrary acts of seizing and detaining the motor vehicles and that they have suffered losses and continue to suffer as a result of Respondent's action.
8. In their written submissions through the learned counsel Ms A.G. Riungu & Co. Advocate, the Petitioners have reiterated their factual claims against the Respondent adding that the seizure of the motor vehicles was done without requisite notices under **Section 44 (4)** of the **Tax procedure Act No. 29 of 2015**. They submit that the Respondent's action violated their rights under **Article 35 (1) (a) and (b)** of the **Constitution of Kenya 2010**.
9. They have further contend that their rights for a fair trial under **Article 50 (a) (b)** of the **Constitution of Kenya** were infringed stating that they have a right to be informed of any charge against them with sufficient detail to answer.
10. The Petitioners allege that the Respondent's action was committed pursuant to **Sections 44 and 60 of Tax procedure Act 2015** which provisions in their view is inconsistent with **Article 31(b)** of the **Constitution of Kenya 2010** They further contend that the provisions of **Sections 44(1) and (2) and 60 (1- 3) Tax Procedure Act** restrict the provisions of **Article 30 (b)** and do not comply with **Article 24 of Constitution of Kenya 2010**.
11. The Petitioners have relied on the decision of **Robert K. Ayisi -vs- Kenya Revenue Authority & Another [2018] eKLR** to buttress the position.
12. They urge this court to find that there has been violations of rights to dignity and the loss of their motor vehicle and award them Kshs. 10 million .
13. They further contend that the Respondent has not stated which drivers were given notices and that the vehicles seized did not belong to Hakim Agencies. They aver that they are not parties to taxation issues involving Hakim Agencies and that they were merely hired to ferry goods from Hakim. They insist that their vehicles were not branded Hakim Agencies and no one has been charged with ferrying uncustomed goods.

#### **The Respondent's Case:**

14. The Respondent has opposed this petition through a Replying Affidavit sworn by one David Omugo who works at the Respondent's domestic Taxes Department in Embu.
15. The Respondent pleads that it has responsibilities and mandate under the Excise Duty Act to regulate importation and manufacture of excisable goods and to ensure that the excise duty is paid on excisable goods.
16. It avers that under **Section 15** of the **Excise Duty Act**, all importers, Manufacturers, distributes and dealers in excisable goods

are required to be licensed and that ethanol, natural spirits and alcoholic beverages are excisable goods as per the First Schedule of the Excise Duty Act.

17. The Respondent further avers that it is part of a multi-agency task force that was created for the purpose of curbing illicit trade and the Respondent has mandate to ensure there is public health and safety to check harmful products that do not comply with the law.

18. The Respondent claims that in line with task force activities, the Respondent together with DCI received intelligent report on 11<sup>th</sup> June 2019 that a motor vehicle Registration No. KCG 482T was at Chuka town distributing illicit brew. It claims that an ambush was laid leading to impounding of the truck which was found to be carrying alcoholic products without excise stamps and the truck was taken to KRA Embu office where it was detained. The Respondent further claims that the driver of the lorry was issued with a seizure notice which he signed at the back.

19. The Respondent further claims that on 18<sup>th</sup> June 2019 another motor vehicle Registration No. KBL 804 Y was seized and taken to KRA office for inspection of the cargo and that upon inspection it was found to be ferrying alcoholic drinks that did not have excise stamps. It contends that the driver of the said motor vehicle was also issued with seizure notice which he signed. It has exhibited the signed notices to demonstrate the same.

20. The Respondent avers that the motor vehicles having been seized transporting goods for which excise stamps had not been affixed, stand to be forfeited as they can only be dealt with as provided under the **Excise Duty Act 2015** and the Regulations and Tax Procedure Acts, 2015.

21. The Respondent claims that the Petitioners have not approached the commissioner as provided under **Regulations 33**. In its view there is no provision in law allowing the release of seized motor vehicles adding that neither the alleged owner of the goods, Hakim agencies nor petitioners have directly approached the Respondent to claim the motor vehicle or the seized goods to enable the Respondent exercise its discretion in disposing the motor vehicles.

22. The Respondent further claims that this petition is premature in the sense that the petitioners have not exhausted the legal mechanisms under **Regulation 33** and that neither the petitioner nor Hakim agencies hold licences under **Section 17 of Excise Duty Act** to deal in excisable goods.

23. The Respondent avers that right to property cannot be raised when it comes to tax administration as taxation itself is constitutional. It further contends that remedies sought cannot be granted as the respondents have not complied with the law and regulations in place.

24. In its written submissions through Ms G.O Ochieng Advocate, the Respondent has reiterated its contention that that the petitioners did not exhaust administrative remedies which include first engaging the Commissioner and thereafter Tax Appeals Tribunal if aggrieved as provided under Tax Procedure Act. The Respondent has submitted that this court should remit this matter to the Respondent or Tax Appeals Tribunal. It has supported their contention by relying on the following cases; (i) **Speaker of the National Assembly v Karume (1992) KLR 21**, (ii) **Geoffrey Kabiru and 2 others vs Samuel Munga Henry and 1756 others (2015) eKLR** and **Mui Coal Basin Local Community (2105) eKLR**. In those cases the courts stated that where there is an established alternative dispute resolution process/mechanism, the same should be exhausted before the courts are approached. They also refer to **Section 9(2) of the Fair Administrative Action Act** which states that the court shall not review an administrative action unless the mechanisms for appeal or review and other remedies available under written law are first exhausted. It submits that the applicant should be directed to first exhaust the said remedies.

25. It is the Respondent's case that the Petitioners have not demonstrate exceptional circumstances to necessitate filing of this petition.

26. The Respondent states that the goods and vehicles in issue were seized for conveying goods for which excise duty had not been paid contrary to Regulation 32(b) and no one has ever come to claim the vehicles in issue as to initiate the procedure under Regulation 33. They further state that the seizure notices were issued to the drivers and the fact that the content of the seizure notices only mentions the content of the vehicle and not the vehicle itself doesn't make the seizure unconstitutional. They also submit that there is seizure under **Section 44** of the TPA, which is not the relevant seizure herein as the seizure done was pursuant to

EGMS regulations.

It submits that the court in **Crywan Enterprises Ltd v KRA (2013) eKLR** when faced with a similar issues found that the provisions for seizure under EAMCCA were not unconstitutional when viewed against **Article 40(2)** of the CoK. It has relied on the case of **George Selelo and another v Commissioner General, KRA and 4 others with Pevans EA Ltd (t/a Sportpesa) and 3 others (2019) eKLR** where it was stated that taxation is constitutional and enforcement of the same cannot be unconstitutional as far as the right to property is concerned. It further relies on the case of **Okiya Omtata v AG and KRA [2020]** where **Korir J** *inter alia* stated that the right to privacy can be limited and limitation is done with the aim of protecting public interest against individuals who wish to act for self-gain.

27. On the claim for damages, the respondent submits that it is not contested that the vehicles were transporting excisable goods for which excise duty had not been paid. It also submits that alternative laid down legal procedures to release the vehicles were not engaged and that it has not been shown how constitutional rights of the petitioners have been infringed. The respondent therefore states that no wrongdoing or *ultra vires* action has been shown to warrant the respondent to pay any damages to the petitioners. It relies on the case of **Nyaga v HFCK Civil Appeal 134 of 1987** where the CoA stated that where a party has a statutory right to action, the court will not prevent it unless it has no basis to be exercised or if it is exercised in an oppressive manner. It also refers to the case of **Allen v Gulf Oil Refinery (1981) AC 1001** where the House of Lords said that administrative bodies can become liable to pay damages if they act maliciously or negligently but cannot be liable for damages when they perform their lawfully mandated actions. It further contends that under the doctrine of *Damnum sine injuria*, there can be loss without infringement of right. The Respondent submits that in any case, no damages have been proven and on this point it relies on the case of **KTDA vs Sundowner Lodge Ltd Civil Appeal No 120 of 2017** where the CoA stated that damages should be quantified and justified by way of evidence. It also submits that the petitioners did not attempt to mitigate their losses by approaching the respondent's office and they rely on the case of **African Highlands Produce Limited v Kisorio KLR (2001) 172** where the CoA held that a plaintiff must take reasonable steps to mitigate losses and cannot claim amounts lost as a result of his own negligence. Lastly they rely on the case of **Eric Omuodo Ounga v KCB Civil suit 42 A of 2015** in which the court stated that losses flowing from anticipated deals with third parties are speculative and failure of the same could not be attributed to the Respondent. Therefore, according to the respondent herein, the petitioners do not qualify to be awarded any damages and let alone a very speculative figure like Kshs. 10,000,000/= . It submits the Petitioners have not suffered any damage and that the figure claimed on damages lacks basis and is untenable.

28. The Respondent has further submitted that the seized motor vehicles have the label of the manufacturer of the goods seized, (Hakim Distributors) and that from the time the motor vehicles were seized no one has come forward to claim them. It insists that **Regulations 33** provide that goods seized in such circumstances shall be disposed as the commissioner shall decide. It further faults the Petitioners for ignoring the provisions of **Section 51** of Tax Procedures Act which provides for dispute Resolution Mechanism. It avers that the petitioners neither initiated nor exhausted that process. It denies the accusation levelled against it that it denied the petitioners the right to be heard arguing that the petitioners rushed to court without reason and that they cannot claim any infringement of a right when they are committing an offence.

### **Analysis and Determination**

29. This court has gone through this petition and the response made. A number of undisputed facts have emerged just as contested facts have also

30. The undisputed facts are that the 1<sup>st</sup> Petitioner's motor vehicle RegistrationNo.KCG 482 T and 2<sup>nd</sup> Petitioners motor vehicle Registration No. KBL 804 Y were detained by the Respondent on 11<sup>th</sup> June 2019 and 18<sup>th</sup> June 2019 respectively. Both vehicles were ferrying uncustomed goods namely liquor which are classified in law as excisable goods.

31. There is no denial by both Petitioners that their motor vehicle were indeed found carrying the said goods which is said to be manufactured by Hakim Agencies who are not parties to this petition.

32. The contested issues which are up for determination are;

i) Whether the seizures of the said motor vehicle were done lawfully.

- ii) Whether the petitioners as owners were notified about seizure.
- iii) Whether the seizures of the motor vehicle contravened constitutional rights of the Petitioners.
- iv) Whether this court is well seized of this matter.
- v) Whether the Petitioners are entitled to damages and if so how much **whether the seizures of the Petitioners' motor vehicles were done lawfully.**

33. Whereas the Petitioners claim that the seizures of their motor vehicle was arbitrary and unlawful, the Respondent contends the opposite. It has cited **Section 44 of Tax Procedure Act 2015** and **Regulations 30, 32 and 33 of Excise Duty (Excise Goods Management System), 2017** to defend its actions.

34. **Sections 44 of Tax Procedure Act, 2015** provides as follows:-

***"44. Seizure and forfeiture of goods***

***(1) This section shall apply to—***

***(a) any goods in respect of which the Commissioner or authorised officer reasonably believes that the value added tax or excise duty payable in respect of the supply, removal, or import of the goods has not been or will not be paid; or***

***b) goods for which excise duty has not been paid, unless the owner of the goods has made arrangements that have satisfied the Commissioner for the payment of the excise duty, which may include the giving of a security;***

***(c) excisable goods subject to excise control that have been moved, altered, or in any way interfered with, except with the permission of the Commissioner;***

***(d) excisable goods in respect of which, any person, in any matter relating to excise, makes or produces a declaration, certificate, application or other document, answer, statement or representation, that is false or incorrect in any particular; or***

***(e) excisable goods in respect of which a refund of excise duty has been unlawfully obtained.***

***(2) The Commissioner or an authorized officer may seize any goods to which this section applies."***

The above provisions shows that the commissioner is allowed and mandated by law to seize any goods for which excise duty has not been paid. As I have observed above there is no dispute that the Respondent had an obligation to seize of excisable goods (liquor) transported by the Petitioners. As a matter of fact the owner of the goods as the Respondent reports has not gone to the Respondent's premise to claim the goods or dispute the tax obligations to the tax collector. The provision of **Section 44** however applies only to excisable goods not the vessels ferrying the goods.

35. The provision of **Section 2 of Excise Duty Act, 2015** gives what constitutes "***Excisable goods***" and the list provided under the First Schedule of the said Act includes alcoholic drinks. The big question is did the law allow the Respondent seize the Petitioners motor vehicles" The Respondent has submitted that the law allows the Respondent to do so and it is apparent that it has a point because under **Regulation 32** of Excise Duty (Excisable Goods Management System) Regulations 2017, provides as follows:-

***"The commissioner shall seize excise stamps, equipment, vehicles or goods where -***

***(a) excise stamps-***

***(i) have been counterfeited***

(ii) *which were subject to the returned to the commissioner, were not returned; or*

(iii) *have been found in the possession of persons other than those to whom were supplied.*

***(b) The vehicles is used in the storage, concealment or transportation of excisable goods that have not met the requirements of these regulations....." (emphasis added)***

It is there clear from the above regulations that the Respondent has some legal backing to justify the seizures of the Petitioners motor vehicle. However this petition has not just challenged the legality of the Respondent's action but the constitutionality of that action which in my considered view is the elephant in the room in this petition. Before I look at this issue which is germane to the determination of this petition I will consider the question of service of notice of seizures of the Petitioners' motor vehicles

**(ii) Whether the Petitioners as owners of motor vehicles were notified.**

36. The Petitioners have complained that the seizures of their motor vehicles contravened **Section 44 (4) of Tax Procedure Act, 2015** because they were not served with requisite notices of seizures or detention of their vehicles. The Respondents has denied this and stated that the Respective drivers of the motor vehicles were duly served and has exhibited prove of service. I have looked at notices of seizure exhibited by the Respondent and it is clear that the notices are directed at Hakim Agencies and the notices are also in respect to seized goods which are assorted alcoholic drinks and not the motor vehicles. Furthermore, as I have noted above the provisions of **Section 44** applies to excisable goods and not the vessels used to ferry the same. The Section provides;

*" (1) This Section shall apply to;*

*(a) any goods in respect of which the commissioner or authorized officer reasonably believes that the value added tax or excise duty payable in respect of the supply, removal, or import of the goods has not been or will not be paid; or*

*(b) goods for which excise duty has not been paid unless the owner of the goods has made arrangements that have satisfied the commissioner for the payment of the excise duty, which may include the giving of a security;*

*(c) excisable goods subject to excise control that have been moved, altered, or in any way interfered with except with the permission of the commissioner*

*(d) excisable goods in respect of which any person, in any matter relating to excise, makes or produces a declaration, certificate, application or other documents, answer, statement or representation that is false or incorrect in any particular or*

*(e) excisable goods in respect of which a refund of excise duty has been lawfully obtained....."*

37. It is apparently clear from the above provision that the section does not relate to vehicles or vessels used to ferry the excisable goods. In fact **Subsection (4)** of the same provision is express. It states;

*"Subject to subsection (5) when goods have been seized under this section, the commissioner or authorised officer shall, as soon as practicable after the seizure and having regard to the conditions of the goods, serve the owner of goods or the person who had custody or control of the goods immediately before their seizure, a notice in writing-*

*(a) Identifying the goods*

*(b) stating that the goods have been seized under his section and the reason for seizure;*

*(c) Setting out the terms for the release or disposal of the goods and*

*(d) Stating that the goods may be forfeited to the commissioner if they are not claimed in accordance with subsection (7)."*

Subsection (5) deals with the question of service of the seizure notice and gives the commissioner the leeway of not effecting service if after reasonable inquiries it is unable to locate the owner of the goods for purposes of service.

38. The reading of the above provisions gives a clear context and the basis upon which the Respondent herein served the Petitioner's drivers with the notices that it has exhibited in its Replying Affidavit sworn by David Omogo on 4<sup>th</sup> November 2019.

39. This court finds that the said notices were regularly issued and duly served on the persons who had custody and or control of goods immediately before the seizure on 11<sup>th</sup> June 2019 and 18<sup>th</sup> June 2019 respectively. The Respondent cannot be faulted in so far as the excisable goods or uncustomed goods are concern. However in regard to seizures of the Petitioners' vehicles, it is abundantly clear that there was no notice served and **Section 44** is silent on notices the owners of seized motor vehicles. There is no legal requirement obligating the Respondent to issue notice to the owner of a motor vehicles(s) seized under Regulations 32 of Excise Duty (Excisable Goods Management System) Regulations 2017. This brings out what I have observed above as the elephant in the room which is the next issue for determination.

**(iii) Whether the seizures of Petitioners' motor vehicles contravened their constitutional rights.**

40. The Petitioners have faulted the Respondent's action of seizing their motor vehicles terming the action arbitrary and unconstitutional. The Respondent has justified its action arguing that there was nothing unconstitutional about seizure of motor vehicles found conveying unexcisable or uncustomed goods. The Respondent has even gone ahead to urge me not to consider the merits of the seizure because the same in its view can be dealt with under **Section 50 of Tax Procedure Act 2015**.

41. I have carefully considered the issue raised by the Petitioners regarding the seizures of the motor vehicles and the issue, in my view, is a fundamental constitutional issue. The Petitioners allege that they have no tax obligations to the goods they were carrying and that their business was simply transportation as they were simply hired to ferry the goods. They further claim that have no connection to the owner of the goods. Hakim Agencies are not parties to this petition and the Respondent states on oath that no one has gone forward to claim the seized goods.

42. As I have observed, above there is no dispute that the Petitioners' drivers were found ferrying unexcisable or uncustomed goods and the main question is by doing so did they commit any offence under the law" There is no denying that whereas Regulation 30 of Excise Duty (Excisable Goods Management System- EGMS) Regulations creates various offences in relation to uncustomed goods, the Respondent did not and have not preferred any charges against anyone in regard to seizure of the petitioners' lorries. They have cast any aspersions on the culpability of the Petitioners or their drivers in relation to breaking/breaching any law.

43. The Respondents has also not provided the crucial link or means (if at all) between the petitioners and seized unexcisable goods which could have in the very least show their responsibility under **Section 15 of Excise Duty Act 2015**.

44. There is no dispute that the seizure of the motor vehicles was done without any notice to the Petitioners who are the registered owners of the seized motor vehicles. The Respondent avers that the lorry and pick up seized are branded Hakim Agencies but they have not annexed any evidence to demonstrate that and nothing could have been easier for them because the seized motor vehicles are in their yard in Embu. They could simply take photos of the branded motor vehicles if that was the case and show the photographs to this court because the petitioners had pointed out that they are not Hakim Agencies. Besides this and more significantly is that the Petitioners' ownership of the seized motor vehicles have been demonstrated by the exhibits of copies of logbooks which are *prima facie* prove of ownership. The Respondent has not contested the issue of ownership of the seized motor vehicles or demonstrated any link to the required standard in law between the uncustomed goods and the petitioners other than the fact that they were found transporting the same. The Respondent however has not preferred any charges against them or anyone for commission of any offence in regard to ferrying or conveying of uncustomed goods.

45. Secondly and more importantly the petitioners have challenged the constitutionality of the Respondent's action of seizing the motor vehicles without giving them a chance to be heard which I find valid and legitimate. I have looked at **Regulation 32 and 33** of the **Excisable Goods Management System (EGMS)** and the question posed is can someone's legitimate property be just seized and sold at the whims of a commissioner without giving the owner(s) a chance to be heard" In my considered view such powers are arbitrary and runs afool the constitution of an open and democratic society such as Kenya. I say so for two main reasons;

i) One of the fundamental rights and freedoms under Article 25(c) of Constitution of Kenya 2010 is a right to a fair trial and one of



the tenets of fair trial under **Article 50** is a right to be heard and as the Petitioners have rightly put it this includes a right to be informed of any charge with sufficient detail to answer to it.

ii) Secondly it goes without saying that one of the cardinal rules of natural justice is to right to be heard. This means that a person should not be penalized by decisions affecting their rights unless they have been given a prior notice and a fair opportunity to be heard. This tenet is entrenched under **Article 47** which deals with fair administrative action and it states;

*"Every person has a right to administrative action that is expeditious, efficient lawful, reasonable and procedurally fair....."* further provides that parliament shall enact legislation to give effect to the above rights. In this instance, Kenya's parliament pursuant to this constitutional provision enacted.

The Fair Administrative Act, 2015. **Section 4(1)** thereof provides;

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

*(2) Every person has the right to be given written reasons for any administrative action that is taken against him.*

*(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—*

*(a) prior and adequate notice of the nature and reasons for the proposed administrative action;*

*(b) an opportunity to be heard and to make representations in that regard;*

*(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*

*(d) a statement of reasons pursuant to [section 6](#);*

*(e) notice of the right to legal representation, where applicable;*

*(f) notice of the right to cross-examine or where applicable; or*

*(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

46. The Petitioners motor vehicles were seized and it is clear that they were not given a chance to be heard courtesy of **Regulations 32 and 33 of Excisable Goods Management System Regulations 2017** that apparently does not provide for a chance to be heard. This court finds that any provisions of law that allows or gives power to an entity, a State officer or any public officer to take adverse action or steps without according the concerned/affected person a chance/opportunity to be heard is draconian and unconstitutional. Such a provision flies in the face of the tenets natural justice which are entrenched in the **Constitution of Kenya 2010**.

47. This court further finds that a right to a fair trial under **Article 25** cannot be limited by the impugned **Regulations 32 and 33 of Excisable Goods Management System** and to the extent that the said provisions breaches the right to be heard, it is inconsistent with **Articles 25, 47 and 50** of the **Constitution of Kenya 2010** and to that extent the provisions are a nullity and void.

48. The Respondent's action in seizing the said motor vehicles also cannot pass the test of reasonableness or procedural fairness because how can someone's property be seized and told that the same shall be disposed at the pleasure of the commissioner or to put it aptly *"in the manner that the commissioner may consider fit."* That certainly is arbitrary, unfair and extreme in whatever angle one views the same. The Respondent's defence of statutory authority in my view does not absolve the Respondent from blame because of the provisions of **Section 3** of the **Fair Administration Action** which applies to all state and none state agencies including the Respondent. It cannot avoid the clear dictate of the law and its action in the seizure of Petitioners motor vehicles is a violation of the cited constitutional rights of the Petitioners. The Respondent has cited that their action is based on **Regulations 32 and 33 of Excisable Goods Management System** but as observed above those regulations are clearly inconsistent with the

**Constitution of Kenya 2010** for denying aggrieved parties an opportunity to be heard.

**(iii) whether this court is well seized of this matter.**

49. The Respondent has contended that no one denied the Respondent a right to be heard and that they prematurely rushed to this court before exhausting the Alternative Dispute Resolution Mechanism provided under **Section 51 of Tax Procedure Act, 2015** and that this court should refer this matter to Tax Tribunal. This court has considered this contention which though valid is inapplicable to the Petitioners concerns because in the first place the dispute raised has nothing to do with tax obligation by the Respondents in respect to transportation of goods. **Section 44 of Tax Procedures Act** does not apply to transporters. Furthermore **Section 15 of Excise Duty Act 2015** which deals with activities requiring a licence does not include transportation of excisable goods. That laguna in law needs to be addressed through legislative interventions before the Respondent contemplate future actions.

50. The Respondent has failed to demonstrate that the Petitioners had any tax obligation in respect of the goods they were found carrying and having failed to do so it cannot in my view hide under the existence of an Alternative Dispute Resolution Mechanism under **Section 51** which as I have found out above does not apply to the Respondents' dispute. This court therefore is well placed to entertain and determine this matter and I find no basis in law to refer the constitutional question raised to any other forum. The mandate of this court as provided under **Article 165** of the constitutional is well spelt out and it includes the jurisdiction to determine this matter. The Petitioners given the circumstances really had no other avenue to seek redness other than this court.

**(iv) Whether the Petitioners are entitled to damage and if so how much.**

51. This court has already found that the constitutional right of the Petitioners were violated. They were wronged by the Respondent's arbitrary action of seizing their motor vehicles instead of just seizing the uncustomed goods. There is obviously no wrong without a remedy and one of the remedies to address the petitioners losses is award of damages. There is no dispute that they have suffered loss because their motor vehicles have now been detained for almost a year thereby depriving them of use and income the motor vehicles. I agree with the Respondent that prove of loss is imperative and that a party cannot just plug a figure from the air and claim it. The Petitioners herein have claimed 10 million but have not given the basis of the same. That notwithstanding this court shall exercise its inherent discretion and award the 1<sup>st</sup> Petitioner Kshs.2 million (two million) because his motor vehicle is a lorry while the 2<sup>nd</sup> Petitioner is awarded damages of Kshs.800,000/- (Eight hundred Thousand only).

In sum of the aforesaid reasons this court enters judgment against the Respondent as follows:-

- i) A declaration is hereby made that the Petitioner's rights under **Article 25, 31(b), 47 and 50** were violated by the Respondent by the seizure of their motor vehicle Registration No. KCG 482T and KBL 804Y respectively
- ii) A declaration is hereby made that **Regulations 32(b) and 33** of Excise Duty (Excisable Goods Management System) Regulations 2017 to the extent that it provides no chance to the affected person to be heard is unconstitutional and a violation of Constitution of Kenya 2010. They are also inconsistent with Fair Administrative Actions Act 2015.
- iii) The 1<sup>st</sup> Petitioner is hereby awarded damages of **Kshs.2 million** only for the detention of his motor vehicle Registration KCG 482T while the 2<sup>nd</sup> Petitioner is awarded **Ksh. 800,000/-** (eight hundred thousand) for detention of his motor vehicle Registration KBL 804Y.
- iv) The detained motor vehicles Registration No. KCG 482 T and KBL 804Y shall be released to the owners (Petitioners) forthwith unless lawfully held.
- v) The costs of this petition shall go to the Petitioners to be agreed or taxed.

**Dated, signed and delivered at Chuka this 17<sup>th</sup> day of June 2020.**

**R.K. LIMO**

**JUDGE**


**17/6/2020**

Judgment signed, dated and delivered via zoom in presence of Ochieng for Respondent and Riungu for Petitioners.

**R.K. LIMO**

**JUDGE**

**17/6/2020**

 While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)