Case Number:	Civil Appeal 263 of 2004
Date Delivered:	08 Dec 2006
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Riaga Samuel Cornelius Omolo, Philip Nyamu Waki, Erastus Mwaniki Githinji
Citation:	Aberdare Freight Services Ltd v Kenya Revenue Authority [2006] eKLR
Advocates:	Mr Ngatia for the Appellant Mr Ontweka for the Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	MISC APPLICATION NO. 946 OF 2004
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	Mr Mogaka for the Krish Commodities
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 263 of 2004

ABERDARE FREIGHT SERVICES LTD……..APPELLANT

AND

KENYA REVENUE AUTHORITY……RESPONDENT

(Being an appeal from the judgment and order of the High Court of Kenya at Nairobi (Nyamu, J.) dated 9th November 2004

in

MISC APPLICATION NO. 946 OF 2004)

****

REASONS FOR JUDGMENT OF THE COURT

On the 9th of June, 2005 we delivered our judgment in this appeal dismissing it and reserved our reasons to be given on notice. It is self -evident that the reasons have unusually taken sometime coming and the parties are entitled to an apology. The appeal was not without its peculiar complexity. It cannot also be gainsaid that this Court has been labouring under a heavy workload at half its judicial capacity for reasons beyond its control. Hopefully the situation will be ameliorated sooner than later. We now give the reasons for our judgment.

"The Sugar wars"**……...**

The appeal before us emanates from one of the battlefronts in what this Court aptly christened ***"the sugar wars"*** of that period, in **Kenya Sugar Board vs Transouth Conveyors Ltd,** Civil Appl. NAI 101/05 (ur). The main combatants in the war are Sugar Importers, Kenya Revenue Authority, Kenya Sugar Board, Ministry of Agriculture and the Ministry of Finance, while the pawns in the whole saga are the sugar consumers and the fledgling sugar milling industry in the country. The general information available is that the country's annual net sugar consumption is 600,000 metric tonnes, while local sugar production is only 400,000 tonnes, leaving a net national deficit of 200,000 tonnes. Some of that deficit may be imported duty-free, hence the scramble for quick profit.

In the matter before us, **M/s Aberdare Freight Services Ltd** (hereinafter "Aberdare") is pitted against the **Kenya Revenue Authority** (KRA) over some 124x20 feet containers or 62,000 bags of sugar imported into the country in April 2004 which were allegedly impounded or seized by KRA on account of non-payment of customs and excise duty.

Background……

In the year 2001, Parliament enacted the **Sugar Act** (No 10 of 2001) (hereinafter "the Act") for the development, regulation and promotion of the sugar industry. The Act set up the **Kenya Sugar Board** (hereinafter "the Sugar Board") for implementation of those objects, and to generally co-ordinate the activities of individuals and organisations within the sugar industry; to facilitate equitable access to the benefits and resources of the industry by all interested parties, and to participate in the formulation and implementation of overall policies, plans, programs of work for the development of the industry. The Minister for the time being responsible for matters relating to Agriculture was vested with powers to make regulations, in consultation with the Sugar Board, for regulation and control of production, manufacturing, marketing, importation or exportation of sugar and for licencing and charging fees for all activities related to the Board's mandate. Those regulations were duly made under ***Section 33*** of the Act in **L/N NO. 39 of 2003** dated 15th April, 2003 and are referred to as "**The Sugar (Imports, Exports and By-Products) Regulations 2003** (hereinafter "the regulations").

Section 27 of the Act provides safeguard measures as follows:

(1) "Subject to such regional and international trade agreements to which Kenya is a party, all sugar imports into the country shall be subject to the prevailing import duties, taxes and other tariffs and such imports shall be controlled by the Board.

(2) The Government shall introduce other safeguard measures as may be necessary to protect the industry from unfair trade practices."

One regional agreement referred to in that section which is relevant in this matter is the treaty establishing the Common Market for Eastern and Southern Africa ("the **COMESA treaty**") to which Kenya is a signatory. Under that treaty, member countries agreed, amongst other things, to reduce and ultimately eliminate by the year 2000, customs duties on or in connection with the importation of goods which are eligible for Common Market tariff treatment subject only to a safeguard clause under Article 61. Members also agreed under Article 55 to prohibit all practices that negate the objective of free and liberalised trade. Pursuant to those provisions, the Minister for Finance invoked the **Customs and Excise Act** (Cap 472) on 1st March 2004 and published mutual tariff concessions for **COMESA** limiting the importation of white refined sugar for industrial use to 111,000 metric tonnes, and 89,000 metric tonnes for raw and mill white sugar, every year up to the year 2008 with effect from the date of the notice. That was in ***Legal Notice No. 12/04***. So that, when such sugar was imported from listed **COMESA** countries there would be no duty payable or only minimal duty.

The Legal Notice however said nothing about the manner of importation of such sugar as that was in the province of the Sugar Board. In the absence of any regulating machinery, the importation for the annual quota 2003/2004 was carried out on the basis of first come first served. But on 19th March, 2004, through Gazette Notice **NO.2127/04,** the Sugar Board introduced a tender system for monthly importation of specified quantities up to 89,000 metric tonnes of raw and mill white sugar between March, - June 2004. The objective was to avoid monopolistic tendencies and high-handedness on the part of some sugar importers, avoid flooding of the local sugar market, prevent artificial sugar shortages by unscrupulous traders and generally to protect the local sugar industry. Henceforth only importers registered with the Sugar Board were eligible to tender. In the implementation of those measures however, the sugar wars intensified and a multiplicity of suits were filed in Courts.

As regards Aberdare, who had been registered as importers between August 2003 and June 2004, the Sugar Board revoked their certificate of registration on 1st April 2004. That meant that when the Sugar Board subsequently published **Gazette Notice No. 3431 of 2004** on 7th May 2004 listing some 18 importers who had been authorised to import various quantities of sugar between March–August 2004,

Aberdare was not in the list. But Aberdare had moved to Court to challenge the revocation of their registration certificate in **HCCC 456/04**, and temporary *ex parte* orders were issued on 8th April, 2004 staying the revocation. They also challenged the ***Gazette Notice No. 2127/04*** in **HCCC 495/04** and obtained *ex parte* orders for stay in the same month. It is not clear what became of those cases after issuance of the temporary *ex parte* orders.

Upon the publication of ***Legal Notice No. 12/04***, on 1st March 2004, and notwithstanding the subsequent publication of the regulations on 19th March, 2004, and the Gazette notice made on 7th May 2004, Aberdare had gone ahead and negotiated the importation of various quantities of raw sugar from Swaziland and Egypt which countries are in the **COMESA** region. The sugar import from Egypt was zero-rated for duty while that from Swaziland was reduced by 90% and so only 10% duty was payable. Even before the sugar imports arrived in the country from both destinations, Aberdare had collected and completed the KRA Customs & Excise Import entry form (C 63) between 4th March, 2004 and 30th April, 2004 indicating when the various consignments were expected to arrive in the country. They paid the expected import duties; sugar development levies, V.A.T and IDF Fees for the consignments. The payments were accepted by KRA. The imported sugar subsequently arrived in the country in various batches and was stored in customs freight (CFS) stations designated by Aberdare. Those were **Mitchell Colts (K) Ltd, Freight Fowarders** and **J.B. Maina (Kipevu)**.

Owing to conflicting and confusing information from the Sugar Board and other players who implement various statutes in the industry, as well as sugar importers who obtained orders after filing various suits in court, KRA was reluctant to release the imported sugar. According to the documents in KRA's possession, the monthly importation quota of 22,250 metric tons of raw sugar importable between March and June 2004, had been exhausted. Any further sugar importations would therefore attract duties and other taxes in accordance with the law. But KRA did not issue Aberdare with any document explaining why the imported sugar was not being released. They would have issued customs documents under the ***Customs and Excise Act*** (Cap 472, Laws of Kenya) if there was any reason for forfeiture, seizure, condemnation, or such like transgressions, but none was issued. So, Aberdare went to court and filed ***H.C.Misc. Application No. 646/04 (646/04)*** on 27th May, 2004 and sought judicial review orders of prohibition, mandamus and certiorari which were granted on 10th June, 2004 as follows: -

"1. THAT an order of prohibition be and is hereby issued prohibiting the Respondent, its servants and/or agents from obstructing the applicants from taking delivery of the applicant's sugar consignment when the applicants have paid all charges and taxes and taken part of the consignment.

2. THAT an order of prohibition be and is hereby issued prohibiting the Respondent, its officers, agents, servants, officers, body or authority appointed for that purposes from continuing to withhold/retain/impound the Applicant's sugar after the same has been cleared.

3. THAT an order of certiorari be and is hereby issued to remove to the High court for the purposes of being quashed the decision hereunder:

(i) ***The decision by the Respondent, its agents, servants, officers, body of authority appointed for that purpose, made on or about May 2004 purporting to restrain the Applicants from accessing and or removing their sugar consignment from the Customs Freight Stations, namely, Mitchel Cotts (K) Limited, Freight Fowarders and J.B. Maina (Kipevu).***

4. THAT an order of Mandamus be and is hereby issued compelling the Respondents to release the Applicant's duly processed sugar consignment from the Customs Frieght Stations,

namely, Mitchell Cotts (K) Limited, Freight Forwarders and J.B. Maina (Kipevu).

5. THAT the Applicants undertake that if sugar is released immediately no demand or action will be taken against the Respondent arising out of any delay in the release of the sugar.

6. THAT there be no order as to costs."

According to KRA that order, which was granted without resistance, was fully complied with. But not Aberdare. They returned to court on 27th July, 2004, after grant of leave, and filed a fresh notice of motion in ***Misc. Civil. Appl. No. 946/04 (946/04)*** seeking further judicial review orders. That is the application that gave rise to the appeal before us.

The pleadings……..

The orders sought by Aberdare in the application dated 27th July, 2004 were as follows:

"a) An order of mandamus to compel the Respondent to release a consignment consisting of 124 x 20 freight containers of sugar belonging to the Applicant and currently detained by the Respondent at the port of Mombasa.

b) An order of prohibition to prohibit the Respondent, its servants and/or agents from obstructing the Applicant or its agents and servants from taking delivery of the applicant's sugar consignment aforestated.

c) An order committing the commissioner General of the Respondent to jail for contempt of court.

d) Costs of and incidental to this application be provided for."

The grounds upon which the application was made were, *inter alia, that*:

"(i) The decision by the Respondent to detain the applicant's sugar cargo after this Honourable Court ordered that such sugar consignment be released to the Applicant amounts to contempt of court and is an abuse of the Respondent's powers.

(ii) The decision by the Respondent to detain the Applicant's sugar consignment or cargo is illegal and contrary to the Customs and Excise Act (Cap 472) of the Laws of Kenya; the Free Trade Area Comesa Rules and the Comesa Treaty to which the Republic of Kenya is a party.

(iii) The Applicant has paid all lawful levies, taxes and charges in respect of the sugar consignment and the Respondent's refusal to release the consignment to the applicant is therefore unlawful, capricious, oppressive, malicious and an abuse of the Respondent's statutory power and authority.

(iv) The Respondent is acting in excess of its powers by continuing to detain the Applicant's sugar consignment contrary to a court order recorded in High court Miscellaneous Application Number 646 of 2004 and inspite of the fact that the applicant has paid all taxes, levies and/or duties required by law. The Respondent accepted all the entry documents, levies, VAT and cleared the said consignment under the Comesa tariff rate."

In his affidavit verifying the facts relied on, the General Manager of Aberdare, Mr. Abdulrehman Hemed Mohamed, deposed in part on 21st July, 2004, as follows: -

"2. THAT on 27th May, 2004, the applicant and another corporate body known as Mat International Limited commenced Judicial Review Proceedings against the Respondent herein in Miscellaneous civil Application Number 646 of 2004. True copies of the pleadings in the said suit are annexed hereto and marked "AHM-1".

3. THAT the substantive motion in the aforesaid suit was heard by this Honourable Court and determined on 10th June, 2004. A true copy of the order issued by the court is annexed hereto and marked "AHM-2".

4. THAT in partial compliance with such order, the Respondent released to the Applicant all the Applicant's sugar cargo that it had withheld and detained at customs freight stations namely Mitechl Cotts (K) Limited, Frieght Forwarders and J.B. Maina but has refused to release a consignment of 124 x 20 containers currently held at the port of Mombasa and which were cleared long before the judgment delivered in Misc. No. 646 of 2004. The Respondent has adamantly refused to release the said consignment inspite of a demand letter from the Applicant's advocates. A true copy of a letter dated 6th July, 2004 sent to the Respondent by the Applicant is annexed hereto and marked "AHM-3"

5. THAT I am advised by the Applicant's advocate, Mr. Fred Ngatia, which advise I verily believe to be true and correct, that the Respondent's said detention of the Applicant's sugar cargo is in contempt of court and unlawful for the following reasons: -

i. The Applicant has paid all requisite charges and processed all clearance documents required by the Respondents. True copies of all relevant receipts and clearance documents are annexed hereto in a bundle marked "AHM-4".

ii. The Court order issued by this Honourable Court clearly prohibited the Respondent and its servants or agents from obstructing the Applicant from taking delivery of its sugar consignment provided all lawful charges and taxes had been paid and the Applicant had taken part of the consignment. The Applicant has already taken the consignment that was detained at the aforesaid customs freight stations.

iii. The Respondent has not advanced any reasonable or lawful grounds for detaining the sugar consignment.

iv. The Respondent has no power or authority to continue detaining the Applicant's sugar consignment in violation of the court order issued on 10th June, 2004.

v. The decision by the Respondent to continue withholding or detaining the Applicant's sugar cargo is illegal and contrary to the Customs and Excise Act (Cap. 472) of the Laws of Kenya.

vi. The continued detention of the Applicant's sugar consignment in contravention of the law and a valid court order is unjust, unfair, capricious, oppressive and a violation of the Applicant's constitutional rights.

vii. The Respondent has not advanced any reasonable grounds for detaining the sugar

consignment in contravention of a valid court order."

In response, KRA, through the Commissioner of Customs and Excise, Mr. Francis Thuranira swore thus: -

"3. THAT I have read and understood the Application dated 27th July, 2004 together with the Statement and the Verifying Affidavit of ABDULREHEMAN HEMED MOHAMED dated 21st July, 2004 where it is alleged that I have refused to release sugar of 124 x 20 feet containers covered by Import Entry No.5091 of 30th april, 2004 and reply as follows:

4. THAT the Ex-parte Applicant prepared Import entry No. 5091 of 30th April, 2004 and paid the relevant taxes and sugar levy on the same as per the annexed copies of the Entry and receipts marked 'FM1'.

5. THAT after some time the Ex-parte Applicant and M/S. MAT INTERNATIONAL LIMITED filed a case being Nairobi H.C. Misc. Civil Application No. 646 of 2004 wherein they sought an order compelling me to release the consignments covered by various entries including Import entry No. 5091 of 2004 aforesaid.

6. THAT the consignment of sugar was said to be lying at the Container Freight Stations (CFS) namely J.B. Maina, Kipevu and Mitchell Colts Limited respectively.

7. THAT the Respondent did not have any objection to the release of the sugar as the same was not under detention or seizure as alleged by the Ex-parte Applicants and I filed a Replying Affidavit to that effect. Annexed hereto and marked 'FM2' is a copy of the said Affidavit.

8. THAT on 10th June, 2004, the Court made its order in a judgment delivered on the same day releasing the sugar.

9. THAT it emerged that the sugar covered by Import entry No. 5091 of 30th April, 2004 had not landed at the CFS as pleaded by the Ex-parte applicants in the Application.

10. THAT the sugar arrived on 2nd June, 2004 which is more than the seven days allowed to perfect an Entry under the Customs procedures. Annexed herewith are Photostat copies of the Rotation Register and Blue Book marked "FM 3"

11. THAT this is a case of misrepresentation on the part of the Ex-parte Applicant which led myself and the Court to act upon that information. This culminated to my issuing a Press Release that the Sugar quota under COMESA preferential tariff rates had been exhausted due to the quantity covered by the entry aforementioned.

12. THAT the Applicant's Application is made in bad faith, without full disclosure of material facts and the same is intended to further mislead the Court on the aforestated misrepresentations.

13. THAT the sugar arrived after I had stopped other importers from processing documents of COMESA related sugar and some of them have filed cases alleging that there was collusion between the Respondent and the Applicant to exclude them from importing sugar from COMESA at duty free rate.

14. THAT due to the above stated reasons, the Ex-parte Applicant's Sugar cannot be released without payment of full duties.

15. THAT in so doing, the Ex-parte Applicant has to prepare Customs entries indicating that full duties are now collectable together with other relevant taxes and levies."

In a subsequent affidavit sworn by Mr. Mohamed on 7th October, 2004, he admitted, as contended by Mr. Thuranira, that the import entry No. 5091 was prepared on 30th April, 2004 and the relevant taxes due thereon were paid. He further admitted that the orders issued in H.C. Misc. App. No. 646/04 covered the consignment referred to in that entry. His only denial was that the consignment was stored in the three freight stations where the rest of the consignment was, that is to say, Mitchell Cotts, Frieght Forwarders and J.B. Maina (Kipevu). In fact the sugar consignment arrived in the country on 2nd June, 2004 after the filing of the Misc. Application No. 646/04. The Sugar Board also joined the fray on 14th October, 2004 when their legal officer, Yufnalis Okulo, swore a lengthy affidavit opposing the application. After highlighting the functions of the Board under the Act, he continued: -

"5. THAT further, Section 27(1) of the Act places the absolute control of Sugar Imports into Kenya in the hands of the Board and as such the Board as a bona fide interest in the determination of this case.

6. THAT the Board also has the power and competence to undertake the tasks under the Regulations in issue by virtue of both S. 6 of the Sugar Act which gives the Board powers necessary for the proper performance of its functions under the Act, and S.5(1) of the State CorporationS Act (Cap 446) which gives every State Corporation powers necessary or expedient for the performance of its functions.

7. THAT I am aware that in exercise of powers under S. 33 of the Sugar Act and in consultation with the Board the Minister for Agriculture and Livestock Development published the Sugar (Imports, Exports and By Product) regulations 2003 through legal Notice 39 of 2003.

8. THAT pursuant to the said regulations and in an effort to bring Order and Equity to the Sugar Sector the Minister for Agriculture and Livestock and the Board duly invited tenders for desiring Importers of Sugar. Having carefully seized the Applications received, the Board allocated specific quantities to be imported during specific periods. All these was duly advertised and gazetted by the Board with the approval of the minister.

9. THAT the primary reason for introducing the tendering system is to avoid monopolistic tendencies on the part of some sugar importers, to avoid flooding of the local sugar market, to prevent artificial sugar shortages by unscrupulous traders and to generally protect the local sugar industry.

10. THAT by various consultative meetings of the stakeholders, it was resolved that the importation of duty free sugar from the COMESA region shall be spread as to allow for the protection of the local industry and for the reasons mentioned above.

11. THAT the Gazette Notice No. 2127 is consistent with the Regulations contained in Legal Notice No. 39 of 2003. These regulations provide a system by which the Government through the Sugar Board can monitor and promote the development of the Sugar Industry.

12. THAT I am also aware that the Hon. Minister for Finance duly published a Gazette Notice

confirming the respective sugar allocation which would be imported under the COMESA treaty as 111,000 metric tones of White Refined Sugar per annum and 89 (sic) tones of Raw and Mill White Sugar per annum.

13. THAT in the understanding of the Board, only importers duly registered as such with the Board and duly allocated quantities in accordance with the Gazette Notice can import the respective quantities during the specified periods under the COMESA Treaty and in accordance with the legal Notice Number 12 of 2004 by the Minister for Finance.

14. THAT in exercise of these powers, the Board published Gazette No. 3431 of 2004 which provided for the monthly quantities to be imported under the COMESA preferred tariffs, the registered Importers, and their allotments.

15. THAT the Board can independently confirm that the Exparte Applicant herein Aberdare Freight Services Limited had successfully applied for registration as an importer but the said registration was cancelled by the Board and communication of the cancellation expediently done on the Respondent on the 1st of April, 2004.

16. THAT the Applicant herein was not listed in gazette Notice No. 3431 published on the 7th of May, 2004, considering that its registration certificate had been cancelled for engaging in practices that are harmful to the sugar industry.

17. THAT subsequent upon the publication, the Gazetted importers did proceed to import the allocated quotas and due to the confusion created by the Applicants who purported to import sugar without getting an allocation as has been the practice since the year 2003.

18. THAT the Board was surprised to learn that the Exparte Applicant had purported to import sugar and the preferred tariffs without an allocation and when the Respondent notified the Board that the Applicant had prepared Import Entry No. 5091 of 30th April, 2004, the Board immediately sought to ascertain the facts surrounding this clearance. I can confirm that our investigations indicated that there was no sugar at the port of Mombasa awaiting clearance.

19. THAT it was even more surprising to learn that the Applicant and the Respondent had consented to the release sugar held at the Port of Mombasa in Misc. Application No 646 of 2004, without notifying or inviting the Board to the hearing of the Application as an interested party. This was worsened by the fact that the Respondent was aware that Gazette Notice No. 3431 had been published providing the list of importers with their respective allocations and that the Applicant herein was not one of them.

20. THAT it is clear from the aforegoing that the Applicant schemed by way of misrepresentation and abusing the process of the court to circumvent the regulatory framework put in place by the Sugar Act and the Regulations made thereunder to circumvent the Board's regulatory role.

21. THAT as a result of the purported clearance, the importers duly allocated with amounts to import by the Board have instituted numerous suits against Kenya Sugar Board and the Respondent herein demanding that their quota should be allowed in under the preferred tariffs. This cannot be done without cancelling the allocations made to the Applicant herein by disallowing the Application filed herein.

22. THAT if the Honourable Court grants the Orders sought, this is likely to throw the sugar industry into further confusion and disarray and will amount to usurpation for the role of the Kenya Sugar Board and therefore rendering it irrelevant.

23. THAT the process of allocation of amounts to be imported is done in an equitable manner considering the various companies that tender to supply the sugar. This mechanism allows the Board to maintain a level of statistics and control over the duty free sugar importation.

24. THAT the Regulations and actions of the Board are among various measures the Government is taking in a bid to revive the Sugar industry in Kenya which the applicants appear not to find favour with.

25. THAT in view of the clear role of the Kenya Sugar Board to regulate, monitor and general control the sugar industry; and appreciating the role of the Kenya Revenue Authority to collect revenue on behalf of the Government of Kenya, it is only logical that only those allocated amounts to import under the preferred COMESA tariffs should be allowed to import duty free.

26. THAT in any case, the Board duly allocated all the quotas for mill while sugar and all importers including the Applicants would have to pay the regular duty.

27. THAT I am advised by our Advocate on record, Mr. Otiende Amollo, which advise I verily to be true that the entire application is misconceived and bad in law for the reasons that:

i) The Application is res judicata as the matters raised by the Applicant are substantively the same matters raised in Misc. Application No. 646 of 2004 and clearly addressed by the Honourable Court.

ii) The Applicant purports to institute contempt of court proceedings by way of a Judicial Review, Application and without providing the legal basis of the Application, the same is fatally defective.

iii) To the extent that the Application is grounded on a court order issued in Misc. Application No. 646 of 2004, the same is otherwise an abuse of the court process.

iv) The Application is fatally defective in form and cannot found a basis for granting the Orders prayed for.

v) To the extent that the Applicant has blatantly misrepresented the facts and the law to this Honourable Court, the Applicant is not entitled to the reliefs sought.

vi) The Application is a grave abuse of the process of the court as it appears that the Applicants consciously and deliberately misled the Honourable Court to issuing Orders to secure them an allotment of sugar to be imported by themselves in a well calculated scheme to unlawfully secure an allotment of tax free sugar importation and surpass the regulatory framework put in place by the Board."

In response to the matters deponed to above, an affidavit in reply was sworn by a Manager of Aberdare, Mr. Ismail Jillo Dajissa, reminding the Sugar Board that Aberdare had challenged the various Legal Notices and Regulations issued by the Board and the matters were before the Court for determination after interim orders were issued. Mr. Dajissa concluded as follows: -

"7. THAT Kenya Sugar Board intends to nominate the persons who should import sugar so that the Board can dispense favours to its cronies. The Board has absolutely no powers under the Comesa Treaty to decide the persons who ought to import sugar. In addition such inherent pervasive powers are subject to abuse in that:

a) The persons to be nominated have no capacity to engage in the trade. In the recent past, unknown entities were allocated quotas to import maize in preference to commodity traders. The preferred companies have been unable to import maize despite waiver of import duty. As a consequence an acute shortage of maize now exits.

b) The Minister of Finance allowed Kenyans to import sugar upto a maximum ceiling. The Board has no residual power to impose the persons who ought to import sugar."

Finally, in closing the pleadings, another interested party M/S. Krish Commodities Ltd, also a sugar importer, joined the fray and filed an affidavit of its Director, Ashok Shah. The company had been allocated an importation quota of 5000 metric tons which could not be imported duty-free on account of the over-importation of sugar by Aberdare and other importers who had exhausted the allotted quota. They opposed the application on the ground, *inter alia*, that it was an abuse of court process since similar or substantially the same orders were sought and finally determined in Misc. Appl. No. 646/04. Mr. Shah also stated: -

"6. THAT from the Replying Affidavit of Francis Thuranira on record sworn on 14th September, 2004 and filed on 27th September, 2004, it is clear that the respondent's decision to the effect that the Comesa Sugar quota of 89,000 metric tons of brown (raw) sugar is exhausted was erroneous as it is said to have been based on misrepresentations by the applicant and hence the applicant should not be allowed to reap/benefit unfairly to the detriment of other sugar importers more particularly, my company."

The matter fell for consideration before Nyamu J. on the basis of those pleadings and the submissions of counsel on the law applicable.

The superior court's findings …….

The learned superior court Judge analysed, and we must say admirably so, the documentary evidence placed before him, together with the submissions of counsel. In the end, he framed ten issues which fell for determination as follows: -

*"**1. What law applies to the consignment and has the sugar been detained"***

2 What is the effect of the payment of duties and taxes in advance in April"

3 What is the applicable law concerning the rate of duty"

4 Does the advance payment preclude the Respondent from raising 100% duty as opposed to zero rating"

5 Has the advance payment created a vested right which the Respondent cannot take away"

6 Is there a misrepresentation on the part of the applicant and what is the effect if any on the rate of duty payable and the Respondent's right to raise additional duties and taxes"

7 Are these proceedings an abuse of the court process and should they be struck out and (sic) on this ground alone.

8 Is the 1st interested party (Kenya Sugar Board) entitled to regulate the quota in law"

9 Has the Comesa Treaty been violated"

10 What remains to be done if any and by whom in respect of the consignment""

In answering the first issue, which was crucial, the learned Judge found as a fact that the customs entry form No. 5091 was completed on 28th April, 2004. The importer made representations that the consignment would arrive on 8th May, 2004 and would be stored at Mitchell Cotts customs freight station. It was partly on the basis of that information that KRA informed the whole world, especially sugar importers, on 26th May, 2004 that the quota allotment for that period was exhausted. But there was no sugar, as described in the form, either at Mitchel Cotts or in the country, until 2nd June, 2004, although it had been zero-rated for duty at the point of payment on 30th April, 2004. The information was not disclosed by Aberdare until 28th June, 2004.

As for the law applicable, the learned Judge examined ***sections 27*** and ***124*** of the ***Customs and Excise Act*** and found them applicable. The two sections as far as they are relevant state: -

"27(1) Save as otherwise provided in this Act, the whole of the cargo of ……. a vessel which is unloaded or to be unloaded shall be entered by the owner between such period after the commencement of discharge as may be prescribed or such further period as may be allowed by the proper officer …….

(2) Where an entry is delivered to the proper officer, the owner shall furnish full particulars supported by documentary evidence of the goods referred in the entry.

(3) Entries for goods to be unloaded may be delivered to the proper officer for checking before arrival at the port of discharge ……. of the vessel in which the goods are imported and in that case the Commissioner may permit goods to be entered before the arrival of the …… vessel." (emphasis added).

Section 124:

"(1) Subject to Section 74 and subsection (3) of this section, import duty or dumping duty shall be paid at the rate in force at the time when the goods liable to duty are entered for home use. (emphasis added).

(2) ……..

(3) Where in accordance with S.27(3) goods are entered before the arrival at the port of discharge of ……. the vessel in which the goods are imported, the duty upon the goods shall be paid at the rate in force at the time of arrival of the …….vessel at the port or place of discharge." (emphasis added).

It therefore followed, according to the learned Judge, that on application of those provisions, full duty was payable for the consignment in issue.

The learned Judge also examined the provisions of the ***Sugar Act (No. 10/01)*** in relation to the powers given to the Sugar Board for the control of imports in order to safeguard the national interest, as against the objectives set in various Articles of the ***Comesa Treaty*** and found there was no conflict between the two or any contravention of the treaty by the local legislation. What the Act did was simply to provide for equity and fairness in importation and licencing instead of exposing importers to a free for all situation where only the fittest would survive or where monopolistic tendencies would be encouraged.

Finally the Judge found on the first issue that KRA was statutorily empowered under ***Rule 1*** of ***Part B***, ***8th Schedule*** of the ***Customs and Excise Act*** to detain goods until other laws, for example, the ***Sugar Act*** and regulations thereunder, are complied with. He found as a fact however that KRA had not detained the consignment of sugar in issue.

The other issues were answered as follows: -

Issue No. 2:

The effect of payment of duty on 30th April, 2004 did not preclude KRA from demanding the duty applicable on the date of arrival on 2nd June, 2004.

Issue No. 3:

The applicable law governing the rate of duty is section 124 (3) of the Act.

Issue No. 4:

KRA was not precluded from levying full duty because of the advance payment made.

Issue No. 5:

The advance payment of duty did not create a vested right since there is statutory entitlement to further payment of duty.

***Issue No. 6*:**

There were clear factual and legal misrepresentations by Aberdare. Leave to seek judicial review orders was granted on the grounds that the orders issued on 10th June, 2004 in Misc. 646/04 had been flouted and the notice of motion filed thereafter repeated those grounds. The application was however presented and argued on the ground that the consignment in issue was a new shipment not covered in the earlier order. The prayer for committal of KRA Commissioner to civil jail was even abandoned as it was incapable of pursuit in the fresh application. It was also a misrepresentation that the imported sugar was located at Mitchell Cotts, and that it would be in the country on 8th May, 2004 when in fact it arrived out of time on 2nd June, 2004. The import entry was not perfected to reflect the situation on the ground and therefore the consignment had not been detained since duty had not been paid.

Issue No. 7:

The proceedings were an abuse of court process since the grounds relied on in Misc. 646/04 are relitigated in Misc. 946/04. The admission that the consignment in the latter case was a new shipment bordered on intellectual dishonesty.

***Issue No. 8*:**

The Sugar Board was entitled to regulate importation of sugar in the country under the Act.

***Issue No. 9*:**

The Comesa Treaty was not violated. The articulation of national interest in the allocation of quotas and the safeguards aimed at protecting the local industry and the endeavour to achieve equity in allocation are not inconsistent with the Treaty.

***Issue No. 10*:**

Duty imposed under the ***Customs and Excise Act*** should be paid before release of the goods.

In concluding his judgment, the learned Judge examined the role of Aberdare in the whole saga which he found wanting; the *locus standi* of the interested parties in the application which he found proper; the exercise of powers and statutory duties by the Sugar Board and KRA, which he found fair and reasonable; possible estoppel or enforceable rights arising from advance payments made in respect of the sugar importation, which he found not tenable against KRA or any other statutory body; legitimate expectation by Aberdare that the sugar will be released without further demand for duty, which he found did not arise since there was no full and candid disclosure about the consignment by Aberdare and the expectation would in any event be contrary to statute; and finally, the discretion exercisable by the court in judicial review matters which he was unable to exercise in favour of Aberdare since they contributed largely to the confusion in having duty free quota equitably and fairly managed by the relevant authorities. Mandamus did not lie since there was no public duty or statutory power which KRA had failed to exercise. Prohibition was also not available since there was no unlawful act to be prohibited.

The application was dismissed.

The appeal ……..

Aberdare was aggrieved by those findings and so came before this court and filed a memorandum of appeal containing 9 grounds which were argued globally by learned counsel for them, Mr. Frederick Ngatia. The grounds were these: -

**"*1. The learned trial Judge erred in law and in fact in not appreciating sufficiently or at all that the consignment of sugar was exempt from customs duty pursuant to the authorization made by the Finance Minister. Hence, the trial Judge was in error to consider that the rate of duty which existed on 30th April, 2004 had changed by 2nd June, 2004 when the consignment of sugar arrived at the port of Mombasa.*

2. The learned trial judge erred in law and in fact in not appreciating sufficiently or at all that the Respondent took into account the Appellant's consignment of sugar while computing whether the quota had been exhausted. Hence, the consignment of sugar was within the allowable quota.

3. The learned trial Judge erred in law and in fact in not appreciating sufficiently or at all that whether Kenya Sugar Board was entitled in law to nominate and/or appoint the persons to import sugar and also decide the quantity that such persons would import were issues raised in another pending suit.

Consequently, it was in error and prejudicial for the learned trial Judge to do the following;

a) Adjudicate the validity of the actions taken by Kenya Sugar Board notwithstanding that the suit was not before him.

b) Declare that the actions taken by Kenya Sugar Board are lawful and in accord with the Comesa Treaty.

4. The learned trial Judge erred in law and in fact in holding that the consignment of sugar arrived "hopelessly out of time" and "reasons for delay were unknown" when no such evidence was presented before him.

5. The learned trial Judge erred in law and in fact in failing to appreciate that the principle of law stated in High Court Misc. 646/2004 applied to the suit before him and further erred in holding that the consignment of sugar was pleaded and/or the subject of proceedings in High Court Misc. 646/2004.

6. The learned trial Judge erred in law and in fact in holding that the consignment of sugar was dutiable at 100% customs duty while it was common ground that the consignment was part of the Comesa duty free sugar quota.

7. The learned trial Judge erred in law and in fact in holding that the suit was an abuse of process notwithstanding that the Appellant's substantial consignment of sugar continues to be held at the port of Mombasa and the Respondent had no legal right to detain the sugar.

8. The learned trial Judge erred in law and in fact in using the Appellant's evidence for the purpose of criticism and further erred in displaying a bias against the Appellant; a willingness to make unwarranted accusations against the Appellant and embracing the cause of Kenya Sugar Board and other competitors wholly.

9. The learned Judge erred in law and in fact in not appreciating sufficiently or at all that Mitchel Cotts was the preferred destination for the consignment of the sugar upon arrival in Kenya and not the physical location where the cargo was situate."

Mr. Ngatia's submissions on the matter may be summarized: -

· The sugar pleaded in Misc. Civil Appl. No. 646/04 as having been in three freight stations: Mitchell Cotts, Frieght Forwarders and JB Maina, was different from the sugar consignment in Misc. Civil Appl. 946/04. The payments to KRA for sugar in the former suit were settled between 4th March, and 27th April, 2004 while those in the latter suit, entry No. 5091 dated 28th April, 2004, were made on 30th April, 2004. The sugar in both cases was imported pursuant to Legal Notice No. 12/04 published by the Minister for Finance on 1st March, 2004. It was erroneous therefore for the superior court to hold that the two cases involved the same sugar importation.

· There was no legal requirement that the entry No. 5091 made on 28th April, 2004 indicating that sugar would arrive on 8th May, 2004 at Mitchell Cotts Freight station be amended to conform with the information on the ground as at 2nd June, 2006 that there was no sugar in the country as at 8th of May, 2004 and that it was at Mombasa Port uncleared.

· Although the appellant had abandoned the prayer for contempt of court, it was proper for the court in

the earlier suit, 646/04, to issue an order of prohibition which covered not only the consignments already in the country but also future ones including entry No. 5091.

· It was erroneous to hold that the Comesa quota had been exhausted as at 26th May, 2004 when KRA issued its press statement, without considering that the consignment in entry No. 5091 was included in the tally.

· It was erroneous for the superior court to make findings on the fairness or suitability of the allocation of sugar quotas and issuance of licences made by the Sugar Board pursuant to Gazette Notice No. 2127 published on 19th March, 2004. Those were issues raised by Aberdare in other suits it filed against the Sugar Board which were pending determination after issuance of interim orders of stay. The decision made on the issue was not part of the pleadings.

· There was no basis for the finding that KRA was not detaining the sugar consignment. That is because section 26 of the ***Customs and Excise Act*** provides for unloading of goods and gives the responsibility for their removal to the proper officer in KRA. The officer did not authorise removal of the sugar consignment.

· Section 27(3) of the Act allows the Commissioner of Customs to permit advance entry of goods and in this case entry No. 5091 was approved on 30th April, 2004 when payment was accepted. It was therefore erroneous for the superior court to hold that a different rate of duty would apply as at 2nd June, 2004 when the goods were landed. The time of entry referred to in section 124 (3), in this case 30th April, was the operative date for assessment of duty which was zero rated.

· The superior court erred in considering Articles 45, 49 and 61 of the COMESA Treaty and finding that the system adopted by the Sugar Board in allocating quotas and tendering for Sugar Imports was in no conflict with the treaty. Article 55 of the Treaty prohibits practices in the member countries that negate the objective of free and liberalised trade, and the activities of the sugar board were therefore inimical to the treaty objective.

· There were discretionary powers granted to the Commissioner of Customs under Sections 26 and 27 of the Act and it is envisaged that those powers would be used fairly. The acceptance of advance payment by KRA and the subsequent refusal to release the goods when there was an explanation for delay, was an unfair exercise of discretion. It would result in erosion of profit margin, and was a breach of contract or representation. In sum, it was an abuse of power against which judicial review would lie as was held in **Reg v I.R.C. Ex. P. Preston** (H.L) [1985] AC 835 and **Congreve v Home Office** [1976] I Q B 629.

· There was no misrepresentation made by Aberdare, either on the date of arrival of the goods, or the designated freight station or that the sugar consignment was a fresh shipment. It was unnecessary therefore to make a finding that there was misrepresentation and to require that the entries in form 5091 be amended or that the application ought to have been amended under **Order 53 rule 4** of the Civil Procedure Rules.

· It was erroneous for the superior court to hold that Krish Commodities had the *locus standi* in the litigation as an interested party. They could not have any interest in a matter between KRA and Aberdare for payment of extra tax as was held in **Inland Revenue Commissioners v National Federation of Self Employed [1981] 2 All ER 93**. They had also not shown that they had imported any grain of sugar. The same applies to other parties who were brought in and allowed participation in the application. It was not an inquisition.

Submissions made by learned counsel for KRA, Mr. Ontweka may similarly be summarised:

· A Plain reading of the chamber summonses, statutory statements and verifying affidavits in both Misc. 646/04 filed on 27th May, 2004 and in Misc. 946/04 filed on 21st July, 2004, together with the notices of motion subsequently filed in both matters, reveals that the entry No. 5091 was part and parcel of the litigation in both suits. It would have been unnecessary to plead contempt of court in the latter suit if the orders in the former suit were irrelevant.

· There was no disclosure by Aberdare until 28th June, 2004 that the consignment of sugar which they represented on 28th April, 2004 would arrive on 8th May, 2004, had not in fact arrived on that date but on 2nd June, 2004. When the perfection of entry of the goods was not made within 7 days of the arrival of the goods, the law had to take its course and KRA was obliged to follow the law in seeking payment of duty at the rate prevailing when the goods arrived. Sections 27 and 124 of the **Customs and Excise Act** were complied with.

· KRA in reliance of information at hand and pursuant to the Legal Notice No. 12/04 published by the Minister for Finance, issued a press statement declaring that the sugar quota was exhausted as at 26th May, 2004. Dates of arrival of each consignment were therefore important.

· There was no undue criticism of the appellants by the superior court because their role was clear that they wanted to confuse KRA and other Sugar players in order to bring in a lot of uncontrolled sugar before expiry of the quota allowed by the law.

· The Minister for Finance in publishing L/N 12/04 was invoking section 118 of the Customs and Excise Act while the Minister for Agriculture, in consultation with the Sugar Board, invoked the Sugar Act which came into effect on 1st April, 2002 to regulate the sugar industry. It was the duty of KRA to monitor compliance and to collect revenue due to the exchequer under sections 27, 124 and 127 of the Act.

· There was a lawful and proper exercise of discretion by KRA in allowing advance entry of the goods, but there was no discretion in collection of duty in accordance with the Act.

The final submissions came from learned counsel for the Krish Commodities, Mr. Mogaka since there was no appearance for the Sugar Board, while another interested party, Mumias Sugar, expressed no interest in participating in the appeal. Mr. Mogaka was emphatic that: -

· As registered importers of sugar who had been allotted an importation quota of 5,000 metric tons by the Sugar Board, Krish Commodities had the *locus standi* as an affected party to participate in the litigation. Their allotment would be adversely affected if the entry No. 5019 was accepted duty free.

· Misc. App. 946/04 was commenced on the basis that there was a breach of the court order issued in Misc. 646/04. It was however argued on the basis that entry No. 5019 had nothing to do with the previous suit. The superior court was therefore right in making a finding that the departure in pleadings was not acceptable and was contrary to ***Order 53 rule 4 Civil Procedure Rules***, and also a departure from the very reason for granting leave to seek judicial review orders.

· There were material non-disclosures in the affidavit supporting the application filed on 27th May, 2004 in stating that all the sugar was already in three specified customs freight stations (CFS) or that the applicant was suffering demurrage or storage charges and yet the sugar in entry No. 5091 had not, to the knowledge of Aberdare, arrived in the country and no mention of the fact of non-arrival was made in the affidavit.

· There was an abuse of court process when a party relitigates the same issues. There was a remedy in the previous suit where contempt of court proceedings could have been pursued.

· The issues decided by the court on the duties of the Sugar Board under the Sugar Act and the interplay between the Act and the Comesa treaty were not irrelevant. They arose from pleadings and therefore ought to have been decided on.

· The Customs entry form C63 does not cater for suppositions or expected dates or preferred destinations. It seeks definite and accurate information on the various items contained in the form and it requires that the importer/exporter should sign a declaration as to the truthfulness and completeness of the form .and it requires that the importer/exporter should sign it as a declaration as to the truthfulness and completeness of the firm.

· There was no misdirection on the discretion exercisable by the court in judicial review matters.

Our findings …….

We carefully and anxiously considered all the above matters before we came to the conclusion that the appeal was not meritorious. The starting point was the extent to which an appellate court may interfere with the exercise of discretion by the court of first instance. The principles have been set out in many decisions of this Court but we take it from **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A 898**, at pg. 908 where Madan J.A stated: -

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

It is common ground that all remedies available upon judicial review are discretionary. We must be satisfied therefore that the discretion exercised by the superior court in this matter was a serious departure from the principles stated above.

The superior court made a finding that there were factual and legal misrepresentations or non-disclosures made in the application and that there was an unfair use of the court process which bordered on intellectual dishonesty. On both counts the court was of the view that a party who conducts himself thus was not entitled to favourable exercise of the court's discretion.

The failure to make full and candid disclosure of facts in any *ex parte* application is of course the worst torpedo a party can use in its own cause. As was stated in **"The MV Lilian S" [1989] KLR 1** at pg. 38 citing with approval **"The Andria" (Vasso) [1984] 1 QB 477**:

"It is axiomatic that in ex parte proceedings there should be full and frank disclosure to the Court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the ex parte application, even though the facts were such that, with full disclosure, an order would have been justified; see *Reg v. Kensington Income tax Commissioners*, *Ex parte Princess Edmond de Polignac* **(1971) I KB 486. Examples of this principle**

are to be found in the case of ex parte injunctions, ex parte orders made for service of proceedings out of the jurisdiction under Order 11 of the Rules of the Supreme Court. In our judgment, exactly the same applies in the case of an ex parte application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the Court"

There is no doubt that the same principle would apply in ex parte applications for leave to seek judicial review orders under ***Order 53*** of the ***Civil Procedure Rules***. Considering similar provisions in **O'Reilly v Mackman (HL) [1983] 2 A.C. 237** at pg. 280, Lord Diplock stated: -

"First, leave to apply for the order was required. The application for leave which was ex parte……..hadtobesupportedbyastatementsettingout,interalia,thegroundsonwhich the relief was sought and by affidavits verifying the facts relied on: So that a knowingly false statement of fact would amount to the criminal offence of perjury. Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit. This was an important safeguard, which is preserved in the new Order 53 of 1977."

The application before the superior court was argued there, as it was before us, on the basis that the sugar consignment contained in customs entry form No. 5091 was a new shipment completely detached from the sugar imports involved in Misc. Appl. No. 646/04. Mr. Ngatia made that clear in the opening statements of the appeal. The facts of the matter do not however bear him out and clearly there is simultaneous approbation and reprobation in the appellant's case.

The affidavit in support of the chamber summons seeking leave and the affidavit verifying the statutory statement in the notice of motion plainly made reference to the entry No. 5091 which was the consignment of sugar in 124 x 20 containers. The appellants' general manager, Abdulrehaman Hemed Mohamed, indeed admitted on oath as contended by KRA, that the consignment was part of the litigation in Misc. 646/04. He deponed on 7th October, 2004:

"3. That it is true as stated in paragraph 5 of the said affidavit that my company filed a case in Nairobi HCCC Misc. Appl. No. 646/04 seeking an order for release of consignment of sugar including Import Entry No. 5091 of 2004."

The applicant's advocate, Mr. Macharia, who appeared in the *ex parte* application for leave before Makhandia Ag. J. (as he then was) on 21st July, 2004 stated: -

"These proceedings have been made necessary by two factors.

1. It is the contention of the applicant that the order of this court is being breached. The respondent has wilfully refused to comply with the order although several demands have been made to the respondent in any event was party to the order of the court requiring it to release the sugar to the applicant upon certain terms being complied with by the applicant. The applicant has complied with all the conditions imposed by paying all the necessary levies, duties, taxes and or charges. There is evidence on record of payment.

2. The continued detention of the consignment is not only violation of court order but is contrary to the Customs and Excise Act, Cap 472, Free Trade Area Comesa Rules and the Comesa treaty to which the Kenya Government is a party to.

It is upon these grounds that we seek the prayers sought in the application dated 21st July, 2004."

Leave was granted on that basis, and the notice of motion filed subsequently on 27th July, 2004 could only have been argued on the basis of the prayers for which leave was granted, unless amendment was sought under ***Order 53 rule 4(2)*** of the ***Civil Procedure Rules***. No amendment was sought or granted under that rule or at all. So that, what the appellant sought to do was merely to enforce the orders issued in Misc. 646/04 by filing a fresh application. That is why they included a prayer for committal of the Commissioner-General of KRA to prison for contempt of court. As was correctly held by the superior court, however, they could not do that as it would be in abuse of the court process. The judge relied on a passage in the ***English White Book Service 2003***, ***Vol. 1*** at page 80, which defined abuse of court process as: -

"Using the process for a purpose or in a way significantly different from its ordinary and proper use (Attorney General vs. Barker) The Times March 7, 2000 per Lord Bingham of Cornhill, Lord Chief Justice. It is an abuse to bring vexatious proceedings i.e two or more set of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make him fight the same battle more than once with the attendant multiplication of costs, time and stress. In this context, it is immaterial whether the proceedings are brought concurrently or serially."

In the same treatise it is stated:

"As a general rule a party should not be allowed to litigate issues which have already been decided by a court of competent jurisdiction."

We think those are appropriate definitions and principles which are applicable in this matter.

We also think the entry No. 5091 told a lie about itself and the appellants did not make any effort to disclose the correct information although it was within their knowledge. We allude to the information given in the entry form 5091 that the goods were in the country on 8th May, 2004 and were at Mitchell Cotts freight station. As the information was given in advance on 28th April, 2004 and was accepted by KRA when payment for the consignment was accepted on 30th April, 2004, there may not have been a conscious intention to misrepresent those facts at the time. But the appellants swore an affidavit on 27th May, 2004 with the intention to obtain, and did obtain, court orders binding KRA in respect of the consignment in entry No. 5091. They were aware at the time that the consignment had not arrived in the country on 8th May, 2004 and that it was not yet at the Mitchell Cotts freight station where it was supposed to be. These were matters peculiarly within the knowledge of the appellants. The facts were material because the failure to disclose them led to a misleading press statement being issued by KRA that all duty-free sugar quota for the period was exhausted. They were also material because the law required the levy of custom duties at the rate prevailing at the time of arrival of the goods. ***Section 27(3)*** (supra), of the ***Customs & Excise Act*** which allows KRA to accept advance entry is subject to section ***124(3)*** (supra). ***Regulations 24*** in ***Part III*** of the ***Customs and Excise Regulations***, which covers importation, provides for amendments thus: -

"Where cargo reported for discharge at a port or place in Kenya is found to be in excess or short of the report or <u>where it is found necessary to make amendment in relation to the destination ownership or stations of such cargo, the master or his agent may make application to the proper officer for permission to amend the report</u>." (emphasis added).

No amendment was sought in respect of the consignment in issue although the information on the ground at arrival was different from the one given in entry form 5091. We think, with respect, that the conduct of the appellant in this matter was insidious and was distinguishable from the television licence owners' case in **Congreve v Home Office [1976] 1 Q.B. 629.** The non-disclosure of facts in that case was of no consequence since an application for a television licence is not a proposal for a contract *uberrimae fidei* whereunder there is a duty to disclose all material facts. The non-disclosure complained of in this matter was in affidavits which, as we have seen above, required to satisfy the requirement of *uberrima fides*.

On the basis of those two issues which the learned Judge found sufficient to deny the appellant favourable treatment, and we think he was right in so finding, this appeal was for rejection.

Having so found we need not elongate this judgement, which is already fairly long, with detailed analysis of the other grounds of appeal. Suffice it to say that we find no serious misdirection of fact, law or principle to entitle us to fault the decision of the learned Judge.

What remains is the order for costs. We are satisfied that the parties who appeared before us properly did so pursuant to ***Rule 76(1)*** of the rules of this Court. Mumias Sugar opted out of the appeal and therefore no orders for or against it shall be made. The same goes for the Kenya Sugar Board which made no appearance at the hearing. The costs of the appeal shall however be paid to the respondent, Kenya Revenue Authority, and Krish Commodities, an affected party.

These are our reasons for the Judgment dated 9th June, 2005.

Dated and delivered at Nairobi this 8th day of December, 2006.

R.S.C. OMOLO

……

JUDGE OF APPEAL

E.M. GITHINJI

……

JUDGE OF APPEAL

P.N. WAKI

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR