Tetra Pak Limited v Kenya Revenue Authority & another (Petition 443 of 2012)
[2023] KEHC 2815 (KLR) (Constitutional and Human Rights) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2815 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 443 OF 2012

HI ONG'UDI, J

MARCH 31, 2023

BETWEEN

TETRA PAK LIMITED ..... PETITIONER

AND

KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

HELLMAN WORLDWIDE LOGISTICS ..... 2ND RESPONDENT

JUDGMENT

1. The amended petition dated 10th December 2019 was filed under Articles 20, 22, 23, 35, 40, 47 and 48 of *the Constitution* for the alleged contravention of these rights and freedoms in relation to the *Value Added Tax Act*, the *Customs and Excise Act* and the East Africa Community Customs Management Act. Accordingly the petitioner seeks the following orders:

    i. A declaration that the failure by the 1st respondent to process and pay the VAT refunds due to the petitioner is an infringement of its constitutional right to property and administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    ii. An order for judicial review by way of mandamus to compel the 1st respondent to process and pay the petitioner the value added tax refunds of KShs.110,064,398 immediately.

    iii. A declaration that there is no legal basis for the 1st respondent to apply the directive of the National Treasury of April 2017 retrospectively.

iv. A declaration that the petitioner has no legal responsibility or obligation to ensure that VAT withheld by third parties on its account are actually remitted to the 1st respondent.

v. An order for such compensation as the Court may order against the 1st respondent including but not limited to a sum equal to interest at commercial rates (13.5%) on the VAT refunds of Ksh. 368,823,833 from the dates that the petitioner submitted its claims to the various dates on which the refunds were actually paid by the 1st respondent.

vi. A declaration that the Agency Notices dated 26th September 2012 are unconstitutional and in contravention of Article 40 of *the Constitution* to the extent that the same were issued arbitrarily and without regard to the due process of law and without consideration of the evidence of payments produced by the petitioner's agent.

vii. An order for judicial review by way of an order of certiorari to remove to this court and quash the decision by the 1st respondent to make the demand contained in the letters dated 12th September 2012 and 21st September 2012 requiring Tetra Pak Limited (the petitioner) to pay taxes in the sum of Kshs.82, 885,855 due from it and the interest and penalties claimed thereon.

viii. An order for judicial review by way of an order of Certiorari to remove to this court and quash the decision by the 1st respondent to make demand and the demand contained in the Agency Notices issued to Citibank NA, Commercial Bank of Africa and Kenya Commercial Bank (referred to in the notice as Kenya Commercial of Kenya Limited) on 26th September 2012 requiring them to pay to the 1st respondent the sum of Kshs 82,885,855/- being taxes allegedly due from the petitioner.

ix. An order for judicial review by way of prohibition to prohibit the 1st respondent from commencing, instituting or proceeding with any other enforcement actions against the petitioner or its directors and/or officers in relation to and/or on account of the disputed value added tax in the sums of Kshs. 82,885,855 and the interest and penalties claimed thereon.

x. A declaration that it is unreasonable, unfair and an abuse of power on the part of the 1st respondent to demand import VAT from the petitioner while the petitioner had already paid the taxes.

xi. A declaration that the 1st respondent failed to effectively carry out its mandate as provided for under the KRA Act and EACCMA, by legally clearing and releasing imported goods to the petitioner only to subsequently claim that taxes were yet to be paid.

xii. A declaration that the petitioner is not liable for import VAT of Kshs. 82,885,855/as demanded by the 1st respondent.

xiii. An injunction to restrain the 1st respondent from taking any enforcement action relating to the demand contained in the Agency Notices issued to Citibank NA, Commercial Bank of Africa and Kenya Commercial Bank

(referred to in the notice as Kenya Commercial of Bank of Kenya Limited) on 26th September 2012 requiring them to pay the 1st respondent the sum of Kshs 82,885,855/- being taxes allegedly due from Tetra Pak Limited. For the avoidance of doubt the 1st respondent and the Commissioner of Investigation & Enforcement be stopped from taking any steps to collect any money from the aforesaid banks on account of the disputed taxes.

xiv. An injunction to restrain the 1st respondent from taking any enforcement action relating to the demand contained in the letters dated 21st September 2012 or any other amount arising from the alleged unpaid value added tax on imports or value added refunded in error pending the reconciliation of all payments made by or on behalf of the petitioner with respect to Import VAT. For the avoidance of doubt the 1st respondent and the Commissioner of Investigation & Enforcement be stopped from taking any steps to collect any money on account of the disputed taxes.

xv. An order that if any sums have been paid to the 1st respondent as a result of the impugned agency notices issued on 26th September 2012, such sums be refunded to the petitioner.

xvi. An order for costs of this application.

The Petitioner's case

2. The petition was supported by the supporting affidavit dated 28th September 2012, a supplementary affidavit dated 12th October 2012, a further affidavit dated 30th April 2013, a further supplementary affidavit dated 10th December 2019 and the affidavit dated 11th December 2019 in support of the amended petition. All the affidavits were based on the sworn averments of Daniel Njenga, the petitioner's Finance Director. The petitioner's case is in view of that summarized below.

3. The petitioner is a company that deals with processing and packaging solutions for food and beverages within Kenya and other East Africa Countries. It is also part of Tetra Laval Group, a multinational company in Switzerland. The petitioner in rendering its services in the instant case retained the services of the 2nd respondent as its clearing and forwarding agent who paid all its taxes on its behalf.

4. At the time of filing the instant petition, it was deposed that the petitioner had paid taxes in excess of Ksh.3.5 billion. It was deposed that the 1st respondent sought to audit the petitioner for the period of October 2011 to February 2012. The audit was concluded on 21st February 2012.

5. In the 1st respondent's letter dated 13th July 2012, the petitioner was informed that it had not paid VAT of Ksh.47,177,019/= on imported goods during the period of January 2008 to December 2009. Further that the petitioner owed Ksh.12,122,339/= which was erroneously refunded as a VAT refund. This amount also comprised of interest computed at Ksh.35,798,834.89/=. The genesis of this suit was thus, the 1st respondent's demand of taxes totaling Ksh.95, 008,194/= from the petitioner vide its letter dated 21st September 2012.

6. He averred that this demand was unreasonable since at the time, the 1st respondent owed the petitioner a sum total of Ksh.422,219,015/= for the period January 2009 and September 2012. He further deposed that the prescribed taxes for the mentioned period had been duly paid by their agent, the 2nd respondent as seen from the adduced evidence.

7. He averred that the 1st respondent's official, A.K. Salim on 25th September 2012 informed the petitioner that agency notices would be issued to its banks, if the amount was not paid. This was actualized on 26th September 2012 when the agency notices were issued to Citibank NA, Commercial Bank of Africa and Kenya Commercial Bank. The procedure utilized in issuing the notices was faulted for being unprocedural.

8. When this suit was filed the petitioner was granted a Court Order dated 15th October 2012 .The Order restrained the 1st respondent from taking any enforcement actions against the petitioner in relation to the disputed amount of Ksh.95,008,194/= pending determination of the petition.

9. The petitioner and the 1st respondent, soon after initiated negotiations with a view to settling the matter out of Court. As a result of these negotiations it was deposed that the 1st respondent vacated the Ksh.12,122,339/= being VAT refunds paid in error out of the Ksh.95,008,194/=. Referring to the petitioner's initial claim of VAT refunds amounting to Ksh.368, 823, 833/= in the petition, he averred that the 1st respondent had since made a VAT refund payment of Ksh. 204,396,652/=.

10. He deposed that the 1st respondent later conducted a verification exercise on the outstanding VAT refund claim. Vide a letter dated 20th February 2018 the petitioner was informed that the amounts due to it was Ksh.110, 064,398/=. In order to receive the refund, the 1st respondent advised the petitioner to re-introduce this amount as input tax in the subsequent VAT 3 return.

11. The petitioner deposed that vide an email dated 15th October 2018 the 1st respondent informed it that the VAT refund could not be paid in full due to a directive issued by the National Treasury that refunds be apportioned based on the proportion of export sales out of total sales since April 2017. He contended that this was despite the VAT refund claim being made prior to the issuance of this directive.

12. He averred that owing to the case made out, the petitioner sought compensation for the loss of opportunity to invest the funds due from the 1st respondent which would have earned an interest of 13.5% per annum in a fixed deposit totaling Ksh.177, 474, 626. Considering this facts, he averred that the petitioner was entitled to the reliefs sought.

The 1st Respondent's case

13. The 1st respondent's case and response was articulated in the affidavits. The first affidavit dated 21st November 2012 was sworn by Edward Karanja, the 1st respondent's Senior Assistant Commissioner. A further supplementary affidavit dated 16th July 2015 sworn by Margaret Masaku, the Ag. Chief Manager in Charge of Taxpayer Services. Finally in response to the amended petition, a replying affidavit dated 4th February 2020 sworn by Violet Sabwa a Manager in the Accounts Management and Refunds Division. The 1st respondent as well relied on a further affidavit dated 17th March 2021 also sworn by Violet Sabwa.

14. It was deposed that the 1st respondent picked on the petitioner, to determine its VAT compliance levels since it was in a perpetual credit position since 2011. He noted that the credit is given to a registered person like the petitioner, to allow the person to claim a refund of the input tax from the 1st respondent. He deposed that this was done through an audit of the petitioner's records as it imports raw materials and produces goods for the local and export market. Further, a compliance check of its import schedules for the period of January 2008 to August 2011 was done with a view to ascertain that it had remitted all the import VAT.

15. He averred that the audit report showed that the petitioner had complied for the years 2010 and 2011. They however found anomalies in the years 2008 and 2009. Essentially, it was noted that the import

VAT made by the petitioner and cleared by the 2nd respondent amounting to Ksh.47,177,019/= with an interest of Ksh.35,708,834/89 had not been remitted to the Customs Services Department. In addition the petitioner owed Ksh.12,222,239/= being an erroneous payment of a VAT refund that it had applied for. He further deposed that the payment deposit slips with reference to this payment adduced as evidence in Daniel Njenga's supplementary affidavit were not genuine. Likewise, that the petitioner's imported goods had been released using import documents that belonged to other merchants.

16. He averred that the East African Community Customs Management Act, 2004 obligates the owner of goods imported into the country to declare the same to the customs officer through the online platform called the Simba system. As such, the 1st respondent is dependent on an importer's declaration of its import VAT for its imported goods. Owing to this, it was only after the audit that the 1st respondent discovered the anomalies. Moreover, the 1st respondent held a VAT audit closing meeting on 21st February 2012 at the petitioner's offices where the petitioner's Finance Director, Tasneem Gaffar, and other officials, Daniel Njenga and Sammy Ngonde were in attendance.

17. It was deposed that subsequently, the 1st respondent issued a demand notice dated 12th September 2012 for the VAT arrears. Another meeting was held with the petitioner on 20th September 2012 on the issue. Successively the 1st respondent issued the demand dated 21st September 2012 seeking for the tax arrears to be paid. It was noted that the petitioner failed to honour this demand. This in turn caused the 1st respondent to issue agency notices to the petitioner's banks on 26th September 2012. He noted however that these notices were withdrawn on 4th October 2012.

18. On the petitioner's claim for its VAT refund, he deposed that the 1st respondent at the time was processing its 5 VAT Refund claims valued at Ksh.368,823,833/= and that the delay had been occasioned by the VAT compliance audit check. In light of this, he noted that the 1st respondent had complied with the VAT Act in handling the petitioner's case.

19. Following the petitioner's and the 1st respondent's negotiation meetings it was noted that some of the issues had been resolved whereas others remained outstanding. In particular, the 1st respondent abandoned payment of the Ksh.12,122,339/= while the Ksh.47,177,020/= was recovered from the petitioner's VAT claim of Ksh.79,498,384/=. The penalties and interest accrued on the principal tax arrears was still outstanding. In the same way it was observed that the 1st respondent had since paid part of the VAT refund claim.

20. In response to the amended petition it was stated that the parties had been negotiating out of Court since 2016 which gains were being negated by the amended petition. It was deposed that a letter of authority had been issued to the petitioner to re-introduce the refund amounts of Ksh.110,064,398/= as a credit in the monthly VAT returns. This would then facilitate a cash refund or offset against any liability. It was noted that contrary to the petitioner's allegations the 1st respondent had not refused to pay the amounts as claimed but that the delay had been occasioned by a lack of response from the petitioner on authorization to reintroduce the facility for cash refund or set off and new system challenges.

21. It was further averred that the matters raised and introduced in the amended petition were not constitutional in nature and hence the proper forum was the Tax Appeals Tribunal which confirms or invalidates the process of refunds. Further that the petitioner's claim on the VAT refund of Ksh.368,823,833/= in the amended petition was inflated and outrageous with the intent of undue enrichment. Additionally that the parties had negotiated out of Court and determined that the only outstanding amount was Ksh.110,064,398/= from the initial claim of Ksh.422,219,015/33.

22. It was deposed equally that prayer 6 in the amended petition ought not to be granted as the agency notices were withdrawn on 4th October 2012. Also that prayer 7 – 14 had been overtaken by events in view of the out of Court settlement exercise. To this end, the 1st respondent urged this Court to dismiss the amended petition.

The 2nd Respondent's case

23. The 2nd respondent was served with the amended petition through a newspaper advert dated 19th February 2022 and an email correspondence dated 21st February 2022.However, this party did not enter appearance or make any response.

The Petitioner's submissions

24. The petitioner through the firm of Hamilton Harrison and Matthews Advocates filed written submissions and a list of authorities dated 12th August 2022. Counsel identified the issues for consideration as follows:

    i. Whether the 1st respondent's refusal to process the petitioner's VAT refund amount of Ksh.110,064,398/= violates the petitioner's right to fair administrative action.

    ii. Whether the 1st respondent was right in insisting that the petitioner submits a fresh VAT refund claim for the period 2009 to 2012 and further requiring the petitioner to apportion its claim by relying on a directive issued by the National Treasury in April 2017.

    iii. Whether the 1st respondent's demand of Ksh.82,885,855/= comprising a principal tax of Ksh.47,177,019/= and interest of Ksh.35,708,834/89 on account of alleged non-payment of import is justified.

    iv. Whether the 1st respondent acted lawfully by offsetting the principal tax demanded of Ksh.47,177,019/= and a separate VAT demand of Ksh.4,077,978/= against the petitioner's VAT refund claim without obtaining the petitioner's consent contrary to the then provisions of Section 25 of the *Kenya Revenue Authority Act*.

25. On the first issue, Counsel submitted that the 1st respondent had admitted to the VAT refund being Ksh.110,064,398/= yet had refused to process the amount in essence violating the petitioner's right to fair administrative action under Article 47 of *the Constitution*. In support reliance was placed on the case of Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes(Large Taxpayers) (2014) eKLR where it was held that as long as the claim is lodged within the prescribed time and proper documentation is submitted and verified the 1st respondent has a duty to pay the claim.

26. Counsel argued that the petitioner's refund claim had been outstanding for over 13 years which amounts to unreasonable delay as held in the case of Republic v Kenya Revenue Authority ex parte L.A.B International Kenya Limited HC Misc.No.82 of 2010. Similar reliance was placed on the case of Kenya Data Networks Limited V Kenya Revenue Authority Nairobi Petition No.87 of 2012.

27. On the second issue counsel submitted that the repealed VAT Act did not provide for summation of two separate refund claim applications with respect to the same amount and period. Furthermore that the 1st respondent owing to a directive issued by the National Treasury in April 2017 had informed

the petitioner that it would not pay out the full VAT refund of Ksh.110,064,398/=. Counsel opposed this notion as the directive has no legal basis. This is since it cannot apply retrospectively for the VAT refund claims lodged between 2009 and 2012.

28. In support of this point, Counsel relied on the Supreme Court decision of Samuel Kamau Macharia and another v Kenya Commercial Bank LTD and 2 others (2012) eKLR which settled the issue of retrospective application of law. The Court held that the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective and retrospective effect is not given to them unless by express words or by necessary implication as this was the intention of the legislature.

29. Turning to the third issue, he submitted that importers are required to only use clearing agents such as the 2nd respondent who are approved by the 1st respondent. These agents are mandated to clear the goods and pay the applicable taxes. As such only the 1st respondent and these clearing agents have access and control of the system where these payments are made. Counsel submitted that the letter dated 21st September 2012 demanded payment of these taxes from the petitioner yet the petitioner had paid them through the 2nd respondent who cleared the goods and obtained receipts. In support he cited the case of Republic V Commissioner General, Kenya Revenue Authority Ex parte BOC Kenya Limited (2014) eKLR where it was observed that according to the *Customs and Excise Act* and EACCMA, the respondent is in full control of licensing of customs clearing and forwarding agents and hence the statutes do not allow for entry of goods without all requisite duties having been paid. In view of this, Counsel submitted that the 1st respondent unlawfully demanded for these taxes hence necessitating the reliefs under prayer 7, 8, 9, 10, 11 and 12 in the amended petition.

30. On the last issue, it was submitted that the offsetting of the demanded Ksh.47,177,019/= was carried out without the petitioner's consent and was contrary to the law. According to Section 25 of the *Kenya Revenue Authority Act* which has since been deleted, the 1st respondent could only do this after receiving a written request from the taxpayer which the petitioner did not issue. Further that the action contravened the Court Orders issued on 2nd October 2012 which restrained the 1st respondent from taking any actions on the demand until the petition was heard and determined.

The 1st Respondent's submissions

31. Counsel, Diana A. Almadi on behalf of the 1st respondent filed written submissions dated 30th January 2023 where she identified the only issue for determination to be as follows:

> Whether the 1st respondent violated the petitioner's right under Article 47 of *the Constitution*, in processing the VAT tax refund claim.

32. Counsel in this regard opposed the petitioner's assertion that the 1st respondent had refused to pay the VAT refund claim. This is because the 1st respondent had not neglected to pay neither withdrawn its authority to allow the petitioner, claim the refunds through its monthly VAT returns. Considering this, it was argued that the right had not been violated.

33. She submitted that the delay in refunding the petitioner had been caused by a change in legislation, the National Treasury Directive, 2017 that changed the manner in which the petitioner should apply for the refund which requires the petitioner to submit a fresh VAT refund claim to stream line the process. Counsel contended that this was the due process and the 1st respondent could not be faulted for following the law. As such, she submitted that the petitioner's failure to adhere to this requirement had delayed the process of issuance of the VAT refund.

34. In support Counsel relied on the case of Ericsson Kenya Limited v Attorney General and 3 others (2014) eKLR where it was held that whether the respondents acted in accordance with Article 47 of *the Constitution* is a question of fact which calls for an examination of the circumstances under which the petitioner's refund claims were dealt with. As such she argues the Court is not concerned with the entitled amount but whether the process afforded was one that complied with the dictates of Article 47 of *the Constitution*. As such Counsel submitted that the petition lacks merit.

Analysis and determination

35. The matter at hand as espoused in the parties' pleadings and submissions revolves around two key issues. The issues are the 1st respondent's demand for import VAT tax totaling Ksh.82,885,855/= vide its letter dated 21st September 2012 and the petitioner's owed VAT refund of Ksh.110,064,398/=. Essentially the petitioner's case is that these two issues have violated its right to property and right to a fair administrative action under Article 40 and 47 of Constitution respectively. From the foregoing account, it is my considered view that the issues that arise for determination are as follows:

    i. Whether this Court has jurisdiction to entertain the matters raised in the amended petition.

    ii. Whether the petitioner's constitutional rights under Articles 40 and 47 of *the Constitution* were violated.

    iii. Whether the petitioner is entitled to the reliefs sought.

Whether this Court has jurisdiction to entertain the matters raised in the amended petition

36. It was the 1st respondent's contention in its replying affidavit dated 17th March 2021 in response to the amended petition that the petition had introduced new matters which are not constitutional in nature but factual and tax dispute related. Violet Sabwa, the deponent argued that these issues would be canvassed properly at the Tax Appeals Tribunal which is the forum that validates or invalidates the process of confirming refunds.

37. It is settled that where a statute has provided a remedy to a party, the Court must exercise restraint, giving the relevant bodies an opportunity to first deal with the dispute as provided in the relevant statute. The Court of Appeal speaking to this issue in the case of Mutanga Tea & Coffee Company Ltd v Shikara Limited & another [2015] eKLR held that:

> " This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by *the Constitution*. In granting the order, the Court made the often-quoted statement that:
>
> "[W]here there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."
>
> (See also Kones V. Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others (2008) 3 Klr (er) 296).
>
> It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force

to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective."

38. The *Tax Appeals Tribunal Act*, 2013 which establishes the Tax Appeals Tribunal provides the jurisdiction of the Tribunal to be as follows under Section 12:

> A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal, provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

39. For context, a tax decision is defined under Section 3 of the *Tax Procedures Act*, 2015 as follows:

a. an assessment;

b. a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;

c. a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under section15, section 17 and section 18

d. a decision on an application by a self-assessment taxpayer under section 31(2);

e. a refund decision;

f. a decision under Section 48 requiring repayment of a refund; or

g. a demand for a penalty.

40. The mandate of the Commissioner as provided for under Section 4 of the *Tax Procedures Act*, 2015 is as follows:

1. The Commissioner shall be responsible for—

    a. the control and collection of taxes;

    b. accounting for collected taxes; and

    c. subject to the direction and control of the Cabinet Secretary, for the general administration of tax laws.

2. The Commissioner shall appoint such authorised officers as may be necessary for the administration of a tax law.

3. An authorised officer shall enforce, and ensure due compliance with, the provisions of the tax law, and shall make all due inquiries in relation thereto.

4. An authorised officer shall produce on demand such documents approved by the Commissioner establishing the officer's identity.

41. It follows under Section 51 of the Tax Procedure Act, 2015 that where a party is aggrieved by a tax decision the following procedure should be followed:

1. A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

2. A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

42. Where the party is not satisfied with the verdict of the Commissioner on its objection of the tax decision Section 51(12) makes known as follows:

> A person who is dissatisfied with the decision of the Commissioner under subsection (11) may appeal to the Tribunal within thirty days after being notified of the decision.

43. It is apparent from a perusal of the law that the exclusive jurisdiction to make tax decisions in relation to the existing tax laws is the 1st respondent's Commissioner. Moreover, the preamble of the Tax Procedure Act, 2015 makes known that the law provides for the procedural rules for the administration of tax laws in Kenya. There is therefore a robust dispute resolution mechanism in dealing with decisions made under tax laws including the VAT Act which is the subject of this suit. Principally, where issues revolve around tax decisions the Court is called upon to exercise restraint until the available procedure is exhausted. With this in mind, it is prudent to interrogate the 1st respondent's averments against this background.

44. The contended new issue as spelt out in the grounds of the amended petition under Paragraph 52 is as follows:

> The 1st respondent's refusal to process the VAT refund applications despite confirming that the VAT is due and payable while at the same time pursuing the petitioner for alleged unpaid taxes is unconscionable and is a violation of the petitioner's rights to property. This is particularly so given the fact that the 1st respondent's requirement that the petitioner makes a fresh VAT refund application has no legal basis.

45. It is my considered opinion that the context of this ground falls within the meaning of a tax decision made within the confines of a tax law that is the *Value Added Tax Act*. It is appreciated that the administration of the tax system and regime in Kenya is solely the mandate of the 1st respondent as led by the Commissioner. Unmistakably, a Court cannot prescribe the manner in which these tax laws should be adopted or construed. It follows therefore that where a person or organization is found in breach of such laws or dissatisfied with their application, they ought to yield to the prescribed procedure as long as it is not in violation of constitutional principles.

46. Suffice to say, this Court in determination of such matters is not called to make a decision for the 1st respondent or question the rationality of the decision. It's core mandate is to examine whether indeed the decision making process was in conformity with the principles of *the Constitution* and the law. Irrefutably the grounds raised by the petitioner in relation to tax decisions, negates this Court's authority to make a finding on them. No evidence has been adduced that the petitioner addressed these

issues by submitting them before the Tribunal to warrant invoking this Court's jurisdiction under Section 53 of the Tax Procedure Act, 2015.

Whether the Petitioner's constitutional rights under Articles 40 and 47 of *the Constitution* were violated

47. As discussed above, the 1st respondent is the central body for the assessment of revenue, administration and collection of taxes. This Court as such cannot interfere with this mandate or purport to prescribe a manner in which the 1st respondent ought to perform its mandate. That said, this Court is mandated to inquire whether the process adopted by the 1st respondent in making its decisions was in line with the law so as not to infringe on the petitioner's rights.

48. The petitioner in this matter was aggrieved by the decision of the 1st respondent to demand import VAT tax and the lack of payment of their owed VAT refund by the 1st respondent. In this regard, the petitioner faulted the 1st respondent's action of deducting the demanded import VAT tax from the VAT refund, the procedure of issuing agency notices and the National Treasury's directive on claim of the pending VAT refunds.

49. It is not in dispute that the 1st respondent made a demand of the import VAT and that there was a VAT refund claim by the petitioner. The dispute as such is whether the 1st respondent's reasons for taking out the decisions were in line with the threshold set under Article 47 of *the Constitution* which in turn affected Article 40 of *the Constitution*.

50. The question is whether the respondents acted in accordance with the dictates of Article 47 of *the Constitution* in making their decisions. Article 47 of *the Constitution* provides as follows:

> 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

51. The Court in the case of Tata Chemicals Magadi Limited (supra) referring to Article 47 of *the Constitution* held that:

> " The purpose of Article 47 is to uplift the standards of administrative action by providing constitutional standards (see Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 [2012]eKLR). The national values and principles of governance articulated in Article 10 among then good governance, integrity, transparency and accountability must be infused in administrative action. In regard to processing of VAT refund claims, Ojwang' J., (as he then was) in the case of Republic v Kenya Revenue Authority ex-parte L.A.B International Kenya Limited (Supra) observed that, "In practical terms, Government has a public duty to effect change to any unprogressive arrangements, such as those that may characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of *the Constitution*; and in this regard, ordinary statutory arrangements cannot qualify the constitutional provisions."

52. Likewise the Court in the case of Ericsson Kenya Limited (supra) opined as follows:

> "49. Whether the respondents acted in accordance with Article 47 of *the Constitution* is a question of fact which calls for an examination of the circumstances under which the petitioner's refund claims were dealt with. The Court is not concerned with whether the petitioner is entitled to the amount but whether the process afforded was one that complied with the dictates of Article 47 of *the Constitution*....The Commissioner, when processing the claim, is not merely a conveyor belt performing a perfunctory exercise. He is required to examine and verify the claim and where irregularities, fraud or other deficiencies are discovered draw the petitioner's attention to them. The Commissioner is also entitled to call for further information, if necessary, to satisfy himself that the claim meets the legal threshold for payment. Ultimately, the Commissioner is entitled to reject a VAT refund claim by giving written reasons which would entitle the taxpayer to appeal or challenge the decision."

53. A perusal of the pleadings by the parties reveals an exchange of correspondences throughout. Following a VAT compliance check by the 1st respondent the petitioner was informed of the unpaid import VAT which was due. The petitioner asserted that it had paid the demanded amount through the 2nd respondent whilst attaching documentation to that effect. This was opposed by the 1st respondent who in response to the claim vide its letter indicated that the invoices and receipts relied on were from other parties.

54. It is appreciated that the 1st respondent by virtue of the *Value Added Tax Act* Cap.476 (repealed) which the petitioner relied on, is granted the power under Section 3 to collect, control and account for taxes owed. In view of this, it was incumbent on the petitioner to ascertain that the assessed amounts were in error to sustain its claim. It is noted that, despite the 1st respondent's call in their correspondence to the petitioner to furnish the necessary documentation for its claim against the demand for the import tax, the same was not supplied.

55. The petitioner instead sought to rely on the assertion that the taxes owed were paid through the 2nd respondent who it sought to enjoin in the suit. This assertion was not verified as the 2nd respondent did not file any responses. As it stands, the 1st respondent is lawfully required to claim taxes due and unless a party proves that the same were paid or submitted, the 1st respondent's action is deemed lawful. Considering this, the 1st respondent's demand of income VAT totaling Kshs.82,885,855/= is believed to be lawful unless the petitioner buttresses the demand by adducing fulfilment and discharge of this duty through the requisite documentation.

56. Furthermore, the petitioner challenged the issuances of the agency notices and stated that the procedure used was unlawful. A reading of the VAT Act (repealed) discloses the following as regards issuance of agency notices. Section 19(1) provides that:

> Where any sum by way of tax is due and payable by a taxable person, the Commissioner may, by notice in writing, require—
>
> a. any person from whom any money is due or accruing or may become due to a taxable person; or
>
> b. any person who holds or may subsequently hold money for or on account of the taxable person; or

c. any person who holds or may subsequently hold money on account of some other person for payment to the taxable person; or

d. any person having authority from some other person to pay money to the taxable person, to pay to the Commissioner that money or so much thereof as is sufficient to pay the tax so due and payable.

57. My interpretation of the above Section is that, the 1st respondent may issue a notice to any person or even entity of the Tax payer's creditor with reference to the tax owed. This was done through the letters dated 26th September 2012 to the petitioner's banks. In light of the conclusion that the demand for the income VAT was lawful, issuance of the agency notices was within the law as the tax sums were due and owing to the 1st respondent. The petitioner challenged the procedure of issuing the notices however it did not demonstrate how issuance of these letters was contrary to the law prescribed under Section 19 of the Act.

58. On the second contention of the VAT refund claim, the petitioner asserted that the 1st respondent had refused and delayed to make this payment to them. It also took issue with the 1st respondent's action of offsetting the due income VAT from its VAT refund claim. Similarly, that the National Treasury's directive requiring fresh applications for the VAT refund claim was not applicable to its claim. It was acknowledged by both parties that following their out of Court settlement, the petitioner had so far received Ksh.204,396,652/=. Moreover, that after a verification exercise on the outstanding VAT refund claim by the 1st respondent, the petitioner was informed that the amount due to it for the VAT refund was Ksh.110,064,398/=.

59. The primary reason given by the 1st respondent for not issuing the remaining VAT refund was a procedural issue that requires the petitioner to make an application by re-introducing the Ksh.110,064,398/= as input tax in the subsequent VAT 3 Return Form. This instruction and authorization was contained in the 1st respondent's letter to the petitioner dated 20th February 2018. It was emphasized in the 1st respondent's further affidavits that the 1st respondent had not refused to pay the petitioner as claimed. The petitioner in its submissions did not furnish evidence of having complied with this instruction hence its claim of delay and refusal to pay by the 1st respondent was unsatisfactory and premature. Equally, it was not shown how making a fresh application to receive the owed VAT refund was contrary to the law or mandate of the 1st respondent.

60. The VAT Act(repealed) under Section 24 provided for refunds as follows:

Refund of tax

Where—

a. taxable goods have been manufactured in or imported into Kenya and tax has been paid in respect of those goods and, before being used, those goods have been subsequently exported under customs control; or

b. any tax has been paid in error; or

c. in the opinion of the Minister, it is in the public interest to do so, the Commissioner shall, except as otherwise provided by the regulations, refund the tax which has been paid in respect of those goods:

Provided that no refund shall be made under paragraph (b) of this section unless the claim in respect thereof is lodged within twelve months from the date the tax became due and payable under section 13.

61. On the issue of offsetting existing tax obligations in relation to a VAT refund claim, the petitioner sought to rely on Section 25 of the Kenya Revenue Act which has since been deleted by virtue of the *Tax Procedures Act* No. 29 of 2015. This Act allows for the 1st respondent to offset the owed tax amounts from any refund owed. With regard to an offset against a refund claim, the Act under Section 47(5) the Act provides as follows:

> Where the application is for a refund of tax under subsection (1)(b), the Commissioner shall apply the overpayment in the following order—
>
> a. in payment of any other tax owing by the taxpayer under the specific tax law;
>
> b. in payment of a tax owing by the taxpayer under any other tax law; and
>
> c. any remainder shall be refunded to the taxpayer.

1. Following the examination of the circumstances of this case it is my considered view that the 1st respondent did not violate the petitioner's right to fair administrative action and its property. I say so because from the evidence adduced the 1st respondent engaged the petitioner through various meetings, correspondences and out of Court settlement with reference to the dispute at hand in conformity with the law. Article 47 of *the Constitution* demands that an administrative action be expeditious, efficient, lawful, reasonable and procedurally fair which in my view was applied in the circumstance of this case. This was a case of money issues in relation to payment, refunds of taxes and ought not to have been filed here disguised as a constitutional violation.

2. From the foregoing, I am inclined to reject the petitioner's assertions that the 1st respondent violated its right under Article 40 and 47 of *the Constitution*. I find no merit in the petition dated 10th December 2019 which I hereby dismiss with costs.

62 Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 31ST DAY OF MARCH, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT