REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL, JUDICIAL REVIEW & HUMAN RIGHTS DIVISION

PETITION NO.494 OF 2014

THE TAX JUSTICE NETWORK- AFRICA.....PETITIONER

-VERSUS-

CABINET SECRETARY FOR NATIONAL TREASURY.....1ST RESPONDENT

THE KENYA REVENUE AUTHORITY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The petition herein was filed on 3rd October 2014 by Tax Justice Network Africa, hereafter *"THAN-A"* which is not for profit organization seeking the following orders:

> a. A declaration that the failure, refusal and or neglect of the Respondents to subject the Kenya Mauritius Double taxation Avoidance Agreement to Ratification pursuant to the Treaty making and Ratification Act 2012 Contravened Article 10 (a) (c) and (d) and 201 of the Constitution of Kenya.
>
> b. An order pursuant to the above declaration directing the Cabinet secretary for finance immediately withdraw legal notice 59 of 2014 and commence the process of Ratification in conformity with the provisions of the Treaty making Ratification in conformity with the provisions of the Treaty making Ratification Act 2012 and report back to the Honourable Court within such period as the Honourable Court shall direct.
>
> c. Costs of this petition with interest at Court rates.

2. The Petition relates to the Constitutionality of the Kenya Mauritius double Taxation Avoidance Agreement done at port Luis in the Republic of Mauritius on 11th May 2012 which was meant to place the competitiveness of Kenyan companies at par with that of other African countries having tax treaties with Mauritius e.g Botswana, Lesotho, Madagascar, Mozambique, Namibia, Rwanda, Senegal, Seychelles, Swaziland, South Africa, Tunisia, Uganda and Zimbabwe and others out of Africa like India.

The other objectives was to streamline tax effectiveness it being said that Mauritius is an emerging economy and due to its strategic location it had a central role to play in facilitating trade and investment in the region.

3. The Petition sets out the contravening Articles of the agreement as follows:

> *a. Article 11's provision relating to interest limits source withholding tax to 10% whereas Kenyan domestic rate currently stands at 15% and thereby adversely affecting the 2nd Respondents tax base and thereby undermining the principle of sustainable development.*
>
> *b. Article 12's provision relating to royalties limits source withholding tax to 10 % whereas the Kenyan domestic rate is 20% significantly reducing opportunity for 2nd Respondent to raise revenue for sustainable economic growth and development.*
>
> *c. Article 20 reserves all taxation of "other income" not dealt with in specific Articles to the resident State effectively reducing the*

withholding tax to 0% on services, management fees, insurance commission etc whereas Kenyan domestic withholding tax rate currently stands at 20%resultinfg in the potential loss of tax revenue from "other revenue" and therefore breaching the principle of good governance, integrity, transparency and accountability.

d. the agreement is further, and by way of example, neither UN nor OECD compliant and does not address the issue of selling shares in companies thus reserving under Article 134 therefore all taxation of capital gains from selling shares in companies to Mauritius where the effective capital gains tax is 0% and thereby negatively impacting on the 2nd Respondents available tax revenue necessary for sustainable development and thereby contravening the national valves principle of transparency and accountability.

e. Under the agreement foreign investors in Kenya can buy Kenyan companies through Mauritius holding companies and Kenya cannot tax any of the gains when they sell these business again and this opens avenues for abuse and is contrary to the national values and principle of governance relating to integrity, transparency and accountability.

f. Likewise and for the same reasons as stipulated in E-above, domestic Kenyan investors can dodge Kenyan tax by round tripping their investments illicitly through a Mauritius shell Company.

g. Kenyan Companies can also easily avoid Kenyan taxes in dividends paid to foreign investors through devices like share buy backs thereby denying the government development revenue.

h. The provision is very similar to the capital Gains Tax Article in the India Mauritius Treaty which has proved very controversial costing India an estimated & 600 million a year in revenues as a result of tax avoidance and illicit round-tripping by Indian business people resulting in the Government of India signaling intention to renegotiate its agreement with Mauritius.

i. Article 22 of the Agreement allows tax sparing which enables Mauritius based entitles tax credits for Kenyan tax which would have been paid if not an economic – development – related tax incentive.

j. Article 24 dealing with disputes does not require mandatory arbitration.

k. Whereas under the UN OECD models, again by way of example, termination restrictions are left open, Article 29 of the Agreement restricts termination until after 5 years.

l. It contravenes Article 114 (2) of the Constitution as it enables waving a tax, fee or a charge imposed by the National Government and Article 201 which sets out the principle of Public Finance participation in financial matters."

2nd Respondents Reply

4. The 2nd Respondent through its manager in the large tax payers office filed a Replying Affidavit on 26th January 2015 seeking that the petition be dismissed with costs on the following grounds:

a) As tax expert the agreement does not breach or contravene Articles 10 and 20 of the Constitution.

b) It is inappropriate to compare interest rate applicable to a non-resident person with that of a resident as in many instances, withholding tax on resident person is not final tax. Whereas the withholding tax rate on the non-resident person may appear low, the resultant tax may be more that that paid by the resident.

c) An average rate of 100% is good deal given competitive for investment such as Uganda has also 10% while South Africa is exempt from tax interest payable to non-resident thus if Kenya negotiated a higher rate of withholding tax it would lose investments.

d) The 10% rate in the Kenya – Mauritius DTA is comparable with those for other Countries with Mauritius e.g Uganda 10%, Swaziland 7.5%, Madagascar, Mozambique, Namibia, Zambia 5%, Tunisia 2.5%, Senegal, Seychelles, S.A are exempt, Botswana 12.5% and Zimbabwe 15%.

e) The only countries in Africa with a different version of Article 21 are Rwanda and Zambia all the rest have similar to that of Kenya.

f) There is no requirement that a DTA must exhibit a pure form of OECD or U.N. models. This DTA similar to that of many Countries is a hybrid of both OECD and UN models and thus is not a contravention of any law.

g) For the 32 years Kenya has not been taxing capital gains on disposal of shares yet it is still struggling to attract investment. The advantages accruing to a non-resident pursuant to a DTA are meant to attract foreign investment thus creating employment.

h) Once a tax advantage has been passed to the taxpayer it is not in the interest of Kenya to ensure that the advantage has been taxed in the other tax jurisdiction tax incentives have the ability to stimulate foreign investment.

i) It is not a requirement under international law that a DTA must contain an arbitration clause. Intestate arbitration and adjudication have both been rather rare in practice, so as to avoid the unpredictability of the outcome given the vagueness of international law.

j) Paragraph 4 and 5 provides that the contracting States have the liberty to determine when the DTA shall be terminated and the minimum period the DTA must remain in force before termination. The Kenya – Mauritius DTA gives 5 years.

k) He avers that the 2nd Respondents action in regard to this matter were within the law and its mandate.

l) That without prejudice to the forgoing, the Petitioner is not entitled to the Orders sought as this Petition is founded on a fundamental misapprehension of the jurisdiction of this Honourable Court in proceedings brought under Article 10 of the Constitution.

1st and 3rd Respondents Reply

5. The 1st and 3rd Respondents filed their Reply on 6th November 2015 through the Principal Secretary to the National Treasury and averred as follows:

a) That the Kenya – Mauritius DTA was negotiated in strict adherence with the law and the main aim for these agreements is to attract investment, thus conferring incentives upon the investors.

b) It is incumbent on the negotiating parties analyze the domestic rates and agree on a compromise that will lead to achieve its objective and the sum would be defeated in the event that it confers similar or higher rates compared to the rates that are in statute books of the 2 Countries.

c) That the taxing of services and management fees which the Petitioner is alleging is 0% was cleverly crafted and inserted under Articles 5 (3) (b) of the agreement while insurance Commissions are dealt with under Article 5 (7)

d) Article 5 (permanent establishment) enables Kenya to tax services, management fees and insurance commissions since a permanent establishment is established to existent will be as provided in article 7[business profits]which tax shall be so much as is attributable to that permanent establishment

e) At the time the two countries were negotiating the Agreement the capital gains tax was not in the statute books.

f) The DTA stipulates that the resolution of disputes arising from any difficulties or doubts arising as to the interpretation or application of this agreement shall be through mutual agreement.

g) Article 25 of the UN model on DTA establishes a mutual agreement procedure [MAP] administered by the competent authorities and that parties can go to arbitration if they so wish.

h) The 1st respondent submitted a government memorandum annexed and marked as KT1for approval to gazette the DTA

i) Section 3[4] of the Treaty making and Ratification Act bilateral agreements that are important and may be necessary for the government in matters relating to government business or relating to technical administrative or Executive matters are not subject to Ratification as opposed to the bilateral treaties stipulated in section 3[2]of the said act.

From the above the thus pray for the petition to be dismissed.

Petitioner's Supplementary Affidavit

6. The petitioner filed a supplementary affidavit on 30th March 2016 which annexed an opinion by a tax expert from the London School of Economics by the name Mr. Martin Hearson in review of the 1st and 3rd Respondents reply together with articles from other tax experts on agreements with Mauritius.

Submissions

7. The petitioner filed its submissions on 1/12/2015 highlighting the issues to be determined as :-

a) Does the Court have power to invalidate the DTA and the legal notice?

b) Is the DTA a Treaty within the meaning of the Constitution, the Treaty Act and the applicable international law?

c) Is the DTA unconstitutional and the legal notice invalid because the DTA was enacted without due regard to the requirements of the principle of rule of law and in this regard because it failed to comply with the requirements of the law in that:

- It was required to be approved by the Cabinet and the parliament but was not

- It was passed in a manner that was not transparent and accountable and accountable and was never subjected to public participation.

d) Is the DTA unconstitutional because it contravenes the principles of public finance and effectively results in unreasonable loss of income for the country?

8. They submit that article 2 (4) and 165 (3) (d) (i) & (ii) give this Court power to invalidate any law ,act and emission that is inconsistent with the Constitution and cite:

The ***Institute of Social Accountability & Another v. National assembly and others*** petition 71 of 2013-Where the Court invalidated the Constituency development Fund Act. The ***Council of governors & others v. Speaker of the senate & others*** petition 381 of 2014 where the High Court invalidated the County Development Boards for Pet. 341 of 2011 this Court struck down a provision of section 45 (3) of the Employment Act 2007 because it was inconsistent with the Constitution esp. Articles 28, 4 (1), 47, 48 and 50 (1). ***Johnson Muthama v. Minister for Justice and Constitutional Affairs & Anor.*** Petition 198 of 2011 Consolidated with Petition 166 of 2011 and 172 of 2011 this Court declared sections 22 (1) (b) and section 24 (1) (b) of the Elections Act 2011 which barred persons not holding post-secondary school qualification from being nominated as candidates for elective office and to parliament as unconstitutional. ***Minister of Health & others v. Treatment Action Campaign & others*** [2002] 5 LRC 216, 248 at paragraph 99.

> *"The primary duty of Courts is the Constitution and the law, which they must apply imperatively and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote and fulfil the rights in the bill of rights. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its Constitutional obligations. If it should be held in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes intrusion into the domain of the Executive that is an intrusion mandated by the Constitution itself".*

> ***Jayne mati & Anor v .AG & Anor Nairobi Petition 108 of 2011*** – "in the matter the interim independent Electoral Commission [Supra at paragraph 54] the Supreme Court Stated, *"the effect of the Constitution detailed provision for the rule of law in processes of governance, is the legality of Executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and these organs must play mutually contravening roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation."*

9. They State that it is critical that the Court can invalidate an action or a law when either its purpose or effects are unconstitutional. This Court captured that principle in ***The institute of Social Accountability & Anor. v The National Assembly & 4 Others*** Pet 71 of 2013 [the CDF case where it was noted, "Third when determining whether a statute is Constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (See ***Muranga bar Operators and Anor v. Minister of State for provincial Administration and internal security and others*** Nairobi Pet. No 3 of 2011 e KLR, *Samuel G. Momanyo v. AG & Ano* (Supra).

The Canadian Supreme Court in ***R V. Big MDrug Mart Ltd*** [1985] I.S.C.R 295 Stated.

> *"Both purpose and effect are relevant in determining Constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. Purpose and effect respectively, in the sense of the legislations object and its ultimate impact are clearly linked, if not indivisible intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."*

They thus submit that this Court therefore has the powers to invalidate the DTA and the legal notice if it finds in content or form, they offend the Constitution. In determining whether the DTA is unconstitutional, this Court must interrogate not just whether the purpose of the DTA and legal Notice are unconstitutional but also whether it affects (including possible loss of public revenue through tax avoidance waivers) is unconstitutional.

(b) Is the DTA a Treaty within the meaning of the Constitution, the Treaty Act and the applicable international law.

10. The Treaty making and Ratification Act (No 45 of 2012) came in force on 14th December 2012 and it is "An Act of parliament to give effect to the provisions of Article 2 (6) of the Constitution and to provide the procedure for making and Ratification of Treaties and connected purposes".

Article 2(6) of the Constitution provides;

> *"Any Treaty or convention ratified by Kenya shall form part of law of Kenya under this Constitution".*

Section 3 of the Treaty Act defines the scope and limit of its application as 3 (1) this Act applies to Treaties which are concluded by Kenya after the commencement of this Act.

(2) This Act shall apply to-

> (a) ***Multilateral Treaties***
>
> ***(b) Bilateral Treaties which deal with –***
>
> > *i. The security of Kenya, its sovereignty, independence, unity or territorial integrity;*

ii. The rights and duties of citizens of Kenya;

iii. The status of Kenya under international law and the maintenance or support of such status;

iv. The relationship between Kenya and any international organization or similar body and

v. The environment and natural resources

(4) Notwithstanding subsection (2) (b), the Government may enter into bilateral agreements-

(a) Necessary for matters relating to government business; or

(b) Relating to technical, administrative or Executive matters.

Section 2 defines a Treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whether its particular designation and includes a convention".

A bilateral Treaty is defined to mean "an agreement concluded between Kenya and any other State or between Kenya and an international organization".

11. It is their submission that the word Treaty has been used interchangeably with the phrase *"international agreement"*, the schedule of the legal Notice is clear that the DTA is a bilateral agreement. OECD recognizes that tax agreement (or what it generally refers to a tax conventions) are international Treaties falling within the Vienna Convention on the law of Treaties. They further submit that the Treaty Act is an agreement that deals with the *"rights and duties of citizens"* within the meaning of Article 3 (2) (b) (11) of the Treaty Act because taxes directly and indirectly affect the rights and duties of citizens.

They State that the 1st and 3rd Respondent notion that the DTA is not an international agreement (Treaty) as per Treaty Act is erroneous and they were under duty to ensure that the development and enactment of the DTA complied with all the processes, procedures and requirement necessary for entering into a Treaty under the Treaty Act.

(c) Is the DTA unconstitutional as it was not approved by parliament and there was no public participation

12. They submit that the Supreme Court and the Court of Appeal have severally stated that when the Constitution or a law requires that a certain process be followed, for the law or act resulting there-from to be Constitutional in ***The Speaker of the senate v. speaker of the National Assembly Advisory*** No. 2 of 2014 the Supreme Court at Paragraph 82 Stated;

> *"Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both houses of parliament are bound to follow the procedure. If parliament violates the procedural requirements of the Supreme law of the land, it is for the Court of laws, not least the Supreme Court to assert the authority and supremacy of the Constitution".*

The above was reproduced by this Court in ***Council of Governors & 6 Ors v. The Senate Petition No. 413 of 2014*** and further Stated it had "power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165 (3) of the Constitution, [it] has the duty and obligation to intervene in actions of other arms of Government and State organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation.

13. The Petitioner submits that the Minister acted beyond his powers and in violation of set out procedure in the Treaty Act in developing the DTA, as he failed to involve the parliament and the Cabinet. Article 94 (5) of the Constitution provides that no person or body, other than parliament, has the power to make provision having the force of law in Kenya except under authority conferred by the Constitution or by legislation and in their view this legislation is the Treaty making and Ratification Act 2012, and that the Minister failed to comply with Section 5 and 7 that the Treaty be "considered and approved by the Cabinet".

The Minister also breached the requirement of section 8 which requires that before any Treaty can be ratified, parliament must approve the Ratification following a thorough interrogation based on factors outlined in that section.

14. The Minister in the legal Notice cites his authority being derived from section 41 of the Income Tax Act that provides:

> *41(1)the Minister may from time to time by notice declare that arrangement, specified in the Notice and being arrangement that have been made with the government of any country with a view of affording relief from double taxation in relation to income tax and other taxes of a similar character imposed by the laws of the country, shall, notwithstanding anything to the contrary in this Act or in any other written law, have effect in relation to income tax, and that Notice shall, subject to the provisions of this section, have effect according to its tenor".*

They submit that the Minister relied on or only on section 41 of the Income Tax Act instead of being guided by the Treaty Act and the Statutory Instrument Act 2013. They also State that even if he was guided by section 41 of the Income Tax Act the same should have been read together with Article 7 of the sixth schedule of the Constitution further he did not consider Article 2 (6), 10, 94(5) and (6), 210 (1) and 2 of the Constitution. They submit that the legal notice that is law or intended to be law was enacted without any transparency and thus in violation of Article 10 and 210 of the Constitution. The legal Notice should have complied with the requirement of the consultation and

public participation pursuant to part (ii), a regulatory impact Statement pursuant to part (iii) and placing before parliament pursuant to part (iv) of the Statutory Instruments Act 2013.

(d) Is the DTA unconstitutional due to breach of public finance.

15. The Petition cites the Canadian case of Big M. Drug Mart where it was held that *"a law whose purpose is not unconstitutional can STILL be unconstitutional because its effects are unconstitutional."*

The above finding should apply to this petition as it also violates provisions of the Article 201 of the Constitution.

The Petitioner submits that the petition in the FACTS section has shown the deleterious effect of the DTA hindering Kenya from collecting certain revenue hence the violation to Article 201 of the Constitution; and that the Respondent have not provided credible evidence to the contrary.

They further submit that it is plausible and reasonable to draw the inference that, the loss of revenue, primarily from corporations, will result in the State imposing higher and additional taxes on its citizens in order to meet its financial obligation contrary of the Constitutional principle that tax burden must be shared fairly.

They thus urge the Court to issue a declaration that the DTA and its corresponding Legal Notice No. 59 of 2014 are unconstitutional and invalid hence allow the petition as prayed.

The 1st and 3rd Respondents Submissions

16. The 1st and 3rd Respondents filed two sets of submissions they being on 16th December 2015 and 13th April 2016 which they answer the following questions:

a) Whether the agreement is subject to Ratification by Parliament and whether it was lawfully made

b) Whether the agreement is prejudicial to the Kenyan economy

c) Whether the Orders sought can be granted

d) Whether the process of enactment was lawful

e) What is the import of the said document

f) Does the agreement violate the Constitution of Kenya

Whether the agreement is subject to Ratification by Parliament and whether was lawfully made.

17. It is their Submission that the applicable Law is the Treaty making and Ratification Act No. 45 of 2012, which States as follows:

Section 2 defines Ratification as the *"International Act by which the State signifies its consent to be bound by a Treaty and includes acceptance, approval and accession where the Treaty so provides:"*

Article 2 (1) (b) defines Ratification, Acceptance, approval and accession to mean in each case the International Act so named whereby a State establishes on the International plane its consent to be bound by a Treaty.

Section 3 (2) of the Act States that it is applicable to:

(a) Multilateral Treaties

(b) Bilateral Treaties which deal with:

i) …..

ii) ……

Section 3 (4) provides:

Notwithstanding subsection 2 (b), the Government may enter into bilateral agreements:

(a) Necessary for matters relating to Government business; or

(b) Relating to Technical, Administrative or Executive matters.

Thus section 3 (4) is an exception to section 3 (2) supporting the 3rd Respondents advisory that section 3 (4) exempts certain bilateral agreements from the Ratification process. Provisions of section 3 (2) (b) and section 3 (4) differentiates between bilateral Treaties and bilateral agreements respectively. Bilateral agreements are ordinary contracts that are effectual upon signing by the State's representatives while bilateral Treaties go inforce after Ratification.

18. Section 4 of the Treaty Act provides: *"subject to the provisions of this Act, the National Executive shall be responsible for initiating the Treaty making process, negotiating and ratifying Treaties."*

Thus meaning the Cabinet being part of the Executive, the agreement was ratified as per the Cabinet Memorandum of 15th August 2013 approved it on 10th October 2013 and the decision communicated to the Ps Treasury and the A.G. This is in further compliance of section 5 (4) of the Treaty Act that provides:

> *"The Cabinet shall consider and approve or disapprove a proposal for Treaty making presented in accordance with subsection (30 within a reasonable time."*

Thus this proves that the agreement was properly ratified by Cabinet and does not need Parliamentary approval, hence on this ground the petition fails.

The allegation of violation of Article to the 1st and 3rd Respondent submits that Article 1 (1) of the Constitution delegates Sovereign Power to Parliament, Judiciary and the Executive (which includes Cabinet) further Article 129 (1) provides that Executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution.

b) Whether the agreement is Prejudicial to the Kenyan Economy

19. The 1st and 3rd Respondents submit that reason behind the Agreements rate of Withholding Tax Act 10% is to attract investors and it is a negotiated rate between the two Countries which was made in good faith in the interest of Kenyans earning Revenue from Foreign Investors

They submit that the taxing of services and management fees which the Petitioner is alleging is 0% was cleverly crafted and inserted under Article 5 (3) (b) while the Insurance Commissions is dealt with under Article 5 (7).

They also State that capital gains tax was scrapped in Kenya with a view of attracting Foreign and local investment and was only introduced back in 2014 with the Finance Act. The argument that capital gains is 0% is not true as this is a bilateral agreement and assuming that it is only Mauritius Investors who will come to Kenya and not the other way round is analyzing the issue with bias.

20. They state that tax sparing is where a County grants tax incentives to encourage Foreign Investment for a Country to an investor that is a resident of another Country with which a tax Treaty has been concluded and the other Country gives a credit against it's own tax for the tax which the Company would have paid if the tax had not been "spared" under the provisions of the tax incentives as this is the core and essence of DTA's.

21. The UN model provides two versions of Article 25 where one has a provision on Arbitration which is pursuant of the OECD model on DTA while the other doesn't. Article 25 of the UN model on DTA's also provides for *"mutual agreement procedure"* (MAP) to deal with the interpretation and application of the Treaty paragraph 14 of the UN commentary provides for a *"Voluntary"* arbitration and it is for parties to agree.

22. It is their Submission that the guiding models for DTA's is the UN and OECD models that provide for termination after 5 years so as to allow investors time to adjust and also oversee the implementation of the agreement. This is the same as what is provided in this DTA and thus this claim should be regarded as leaving timeline open would be impracticable.

(c) Can the Orders sought issue?

23. It is submission that if the Petitioner has demonstrated how prejudicial the Treaty is, then the prayer for Ratification should not issue but the prayer should have been for nullification. It is also good to note that until Mauritius ratifies and gazettes the DTA, the agreement is binding but not enforceable. They thus submit that since the agreement at hand is not subject to the Ratification process by Parliament, thus the petition entirely collapses.

(d) Whether the process of enactment was lawful

24. The 1st and 3rd Respondent submits that at this point it is upon the Court to interpret the provisions of section 3 (2) (b) as well as section 3 (4) to determine whether the DTA is subject to the Ratification process provided by part II of the Treaty making and Ratification Act, thus determining whether the process was within the Law.

They cite ***Magor Mellons Rural District Council vs. Newsport Corporation*** (1952) AC 189 where Lord Simmonds said, *"The duty of the Court is to interpret the words that the Legislature has used, those words may be ambiguous, but even if they are, the power and the duty of the Court is to travel outside them on voyage of discovery are strictly restricted."*

> ***Grey v. Pearson 6 HCL 106***: *"We are to take the whole statute together and construe it altogether, giving words their ordinary signification unless when so applied they produce an inconsistency…..so as to justify the Court in placing on them some other*

signification, which, though less proper, is one which the Court thinks the words will bear."

They thus urge the Court to find that the DTA is a bilateral agreement contemplated under section 3 (4) of the Act whose ordinary meaning is bilateral agreements are necessary documents for Government business but need not go through Ratification process which is a preserve of Treaties under section 3 (2). It would have been easier to leave out section 3 (4) if Parliament intended for all Treaties to pass through it. Further the Court should consider the deliberate use of the word agreement and not Treaty in the impugned DTA.

DILEEP MANIBHAI PATEL & 3 OTHERS V MUNICIPAL COUNCIL OF NAKURU & ANOTHER [2014] EKLR

> *"Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-absence of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."*

The above finding was borrowed by Emukule J. from the case of ***Pastoli vs. Kabale district local Government Council and others*** [2008] 2 EA 300

The DTA was not an arbitrary decision made as from the Cabinet Memorandum produced by the 1st and 3rd Respondents it is clear that the treasury, foreign affairs, KRA, Kenya Investment Authority and State law offices were involved during the process, the two States reviewed all Articles before which the Cabinet Secretary signed the same.

(e) What is the Import of the said document

25. The 1st and 3rd Respondent submit that the opinions filed by the Petitioner from alleged tax experts are inconsequential and advice of tax experts in the office of the 2nd Respondent is applicable.

The Court should take a purposive approach to ascertain the intention of why the DTA was drafted. In the ***DILEEP case Emucule J. quoted Ditcher v. Denison Limoore Pc.*** 325 at 357 stating:

> *"it is good general rule in jurisprudence that one who reads a legal document whether public or private should not be prompt to ascribe – should not, without necessity or some sound reason impute to its language tautology or superfluity and should rather at the outset be inclined to suppose every word intended to have some effect or to be of some use."*

In ***Olum Another v. Attorney General*** [2002] 2 E.A 508 the Court of Appeal in Uganda Stated;

> "In order to determine the Constitutionality of a statute the Court had to consider the purpose and effect of the impugned statute or section thereof. If the purpose was not to infringe a right guaranteed under the Constitution, the Court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed on a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional."

(f) Whether the agreement breached any Constitutional provisions

26. The 1st and 2nd Respondents do submit that the agreement did not breach Articles 10, 94 (5) and (6) and 201. It is upon the Petitioner to prove how their rights have been violated as set out in the case of ***Anarita Karimi Njeru V.A.G***. As to whether there was public participation what is to be considered is as set out in the case of ***Moses Munyendo & 908 Others*** VAG Nairobi HC Petition No. 16 of 2013 Lenaola J at Paragraph 18 Stated:

"The National Assembly and Public Institutions have a broad measure of discretion in how they achieve the object of public participation. How it is affected will vary form case but it must be clear that a reasonable level of participation has been afforded to the public." Sachs J observed in ***Minister of Health and Ano. No. v New Clicks South Africa (pty) Ltd and others*** 2006 (2) SA 311 (CC) at para. 630 that:

> *"The forms of facilitating an appropriate degree of participation in the law – making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and t have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."*

> *"As concerns the pre-parliamentary or consultative stage, the permanent secretary has given Organizations consulted include the following; Kenya National Federation of Cooperatives, National Cotton Growers Association.……..*

The organizations consulted are, in my view broadly representative of agricultural interests in the Country. This evidence is not controverted by the Petitioners. Furthermore I do not think that it is necessary for every person or professional be invited to every forum in order to satisfy the terms of Article 10."

Article 201 provides for the principles of Public Finance including openness, and accountability and public participation in financial matters. They submit that they have demonstrated that the DTA was a participatory, inclusive and open process and economically viable. Thus the petition should be dismissed with costs.

2nd Respondents Submissions

27. The 2nd Respondent filed its Submissions on 1st February 2016 where they State that the Petitioner has failed to show how the 2nd Respondent failed, neglected and/or refused to perform its duties subject to section 5 of the Kenya Revenue Act cap 469.

The principles in dealing with Constitutional Petitions are set out in the case of ***Anarita Karimi Njeri v. The Republic*** [1976 – 1980] KLR 1272 which require a Petitioner to:

> *i) Specifically set out the provisions in the Constitution that have been allegedly violated;*
>
> *ii) Provide particulars of such violations;*
>
> *iii) Provide particulars in which the Respondent has purportedly infringed their rights.*

In revisiting the above principles Lenaola, J. in ***Stephen Nyarangi Onsoma & Ano. V. George Magoha & 7 Others*** [2014] eKLR Stated:

> *"…..This Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation to Constitutional Rights have presented their cases. As a basic minimum a Petitioner is required to cite the provisions of the Constitution which have allegedly been violated and the remedy which he seeks, for the violation. In demonstrating the manner in which they have been violated, a Petitioner should present before the Court evidence of the factual basis upon which the Court can make a determination whether or not there has been a violation."*

In ***Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others*** [2013] eKLR the Court Stated:

> *"We cannot emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims."*

28. The 2nd Respondent submits that the 1969 Convention on the Law of Treaties (the 1969 Vienna Convention) and the 1986 Vienna convention on the Law of Treaties between States and International Organizations or between International Organizations (the 1986 Vienna Convention) provides the yardstick on how to deal with Treaties and conventions. They further submit that once a Treaty becomes part of its laws, a State party is obligated to perform the Treaty regardless of conflicts with it's internal laws, as provided by Article 27 of the 1986 of Vienna Convention which Kenya has ratified it provides that:

> *1. A State party to a Treaty may not invoke provisions of its internal law as justification for its failure to perform the Treaty.*
>
> *2. An International Organization Party to a Treaty may not invoke the rules of the Organization as a justification for its failure to perform the Treaty.*
>
> *3. The rules contained in the proceeding paragraphs are without prejudice to Article 46.*

Article 46 provides that:

> *1. A State may not invoke the fact that its consent to be bound by a Treaty has been expressed in violation of its internal law regarding competence to conclude Treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.*

An International Organization may not invoke the fact that its consent to be bound by a Treaty has been expressed in violation of the rules of the Organization regarding competence to conclude Treaties, as invalidating its consent unless the violation was manifest and concerned a rule of fundamental importance. A violation is manifest if it would be objectively evident to any State or any International Organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of International Organizations and in good faith.

They submit that the Petitioner's Submission under Articles 2 (4) and 165 (3) (1) and (11) as the basis for questioning the Constitutionality of legal Notice No. 51 published in the Kenya Gazette of 23rd May 2014 and by extension the DTA is untenable and therefore without merit.

IS DTA WITHIN THE TREATYY ACT

29. The 2nd Respondent submits that the DTA is a bilateral agreement falling within the provisions of section 3 (4) of the Treaty making and Ratification Act 2012 and is therefore not subject to part III of the Act which relates to Ratification.

IS THE DTA UNCONSTITUTIONAL AND THE LEGAL NOTICE INVALID FOR WANT OF THE REQUIREMENTS OF APPROVAL BY PARLIAMENT AND PUBLIC PARTICIPATION

30. The 2nd Respondent submits that Article 10 of the Constitution binds all State organs, State officers, public officers and all persons in the discharge of public functions. The Constitution however does not provide for how public participation is to be undertaken and thus the

process is left to those encompassed under the Article to see how to undertake.

The 2nd Respondent further submits that it is neither its role nor within its mandate to conduct public participation and that there may be need for legislation to generally guide this process.

31. On the issue of failing to involve the Cabinet and parliament they submit that the burden of proof is upon the Petitioner as provided by section 107 of the evidence Act which the Petitioner has not discharged.

32. They conclude by submitting that the Petitioner is not entitled to the orders as this petition is founded on a fundamental misapprehension not the mandate of the 2nd Respondent with regard to this proceedings and jurisdiction of this Honourable Court in proceedings brought by way of Constitutional Petition with regard to the 2nd Respondent and thus the petition should be dismissed with costs.

DETERMINATION

33. Having critically considered the evidence and arguments presented by the parties, I find that in order to determine the petition herein this Court needs to answer the following questions:

1) Was the making of the DTA in violation of the Constitution?

2) What laws governs the making of DTA's?

3) Is the petition merited?

34. Parties to this petition failed to address an issue that could have simplified the issues for determination by not stating how the various laws of the country that regard Treaty making are or are not compliant and violate the provisions of the Constitution. However, since parties did not consider this as vital then the Court will not address the same. This being a Constitutional Court it will only limit itself in matters touching on the violations of the Constitution as alleged in the petition. The articles allegedly violated, according to the petition, include Article 10, 20, 114 and 201 of the Constitution.

In regard to contravention of Article 20 of the Constitution which provides for the application of the Bill of rights, none of the Respondent has disputed against this and further the Petitioner has not demonstrated how any of the Respondents contravened this Articles and precisely which Right was violated. The Petitioner herein needed only to state the right infringed upon and link how the Respondents misdirected themselves in application of that right leading to violation. This Court cannot point out on behalf of the Petitioner the right infringed upon lest it puts itself in the position of the Petitioner. See the principle of particularity of pleading in constitutional cases in ***Anarita Karimi Njeru v. AG.***

35. The Petitioner has alleged that the DTA contravenes Article 10 of the Constitution which provides for National values and principles of governance as it was enacted without public participation, integrity, transparency and accountability. The Constitution is clear that there must be public participation when enacting law, but the question that lingers on is what public participation is and what the process is. I respectfully agree with the 2nd Respondent that there is need for creation of legislation to guide the process of public participation. Article 2(6) of the Constitution provides treaties and conventions forming part of Kenyan law and the same is not in dispute.

What this Court is called on to determine is whether the DTA forms part of a Treaty, convention or agreement. On this issue it is only fair to look for the definition of the same and this can be found within the Treaty Making and Ratification Act 2012. This Act provides the definitions of Treaty, Ratification and bilateral agreement. Bilateral agreements are provided for by section 3(4) of the Treaty Making and Ratification Act which States as follows:-

3(4) Notwithstanding subsection (2) (b), the government may enter into Bilateral agreements:-

a) Necessary for matters relating to government business or

b) Relating to technical, administrative or Executive matters

A keen reading of section 3(4) it qualifies itself as a secial form of agreement from what is provided for by section 3(2) (b) which are Bilateral treaties, due to the use of word "Notwithstanding" at the introduction of the provision. If the intention was for the two provisions to mean the same then there would be no need to distinguish the two by the use of "Treaty" and "Agreement."

36. Having the same in mind and since parties herein are in agreement that all treaties need to be ratified.

The word "Ratification" is defined as:-

"*The international act by the State signifies consent to be bound by a Treaty and includes acceptance, approval and accession where the Treaty so provides*".

This definition clearly shows that participation applies to treaties, however it can also be said that the DTA in this case underwent through some form of Ratification as parties signified consent to be bound by the Agreement by signing the same and Kenya even gazetted the same vide Legal Notice no. 59 published on 23rd May 2014 in the Kenya Gazette.

37. As to the objection that the matters pertaining the process lacked integrity, transparency and accountability, the Respondents herein have demonstrated that there was clear input from the 2nd Respondent, a government entity specially mandated to deal with matters concerning revenue, the State law office, an entity mandated in giving the government legal advice; and the Cabinet which forms part of the Executive arm or rather assists the office of the president. Inclusion of all these entities shows accountability and openness. Accountability in today's democracy must be different from ancient Athenian democracy of direct participation of the people.

38. Further to this on the issue of accountability, I find the petition herein lacks specifics in terms of figures. The Petitioner ought to have shown how much it would lose after the signing of the agreement and focus on other allegations giving examples of which companies have been found evading tax through round tripping etc. Further, I find that the Petitioner has failed to show which law provides for the involvement of parliament in the process of **making or entering** bilateral **agreements** as distinguished from **treaties.**

39. With tremendous respect to Counsel, I find that this Petition lacks merit on the issue of constitutionality of the bilateral agreement subject of the petition.

Tabling before Parliament

40. However, the Legal Notice subject of this petition is a Statutory Instrument, within the meaning of its definition in section 2 of the Statutory Instruments Act as follows-

> *"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued."*

41. The Statutory Instruments Act, 2013 which came into force on **25th January, 2013** required for the tabling of the Legal Notice No. 59 of 2014 before Parliament by virtue section 10 and 11 thereof as follows:

> ***"10. Purpose of Part***
>
> *The purpose of this Part is to facilitate the scrutiny by Parliament of statutory instruments and to set out the circumstances and manner in which the statutory instruments, or provisions of the statutory instruments, may be disallowed, as well as the consequences of the disallowance.*
>
> ***11. Laying of statutory instruments before Parliament***
>
> *(1) Every Cabinet Secretary responsible for a regulation-making authority shall* ***within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.***
>
> *(2) Notwithstanding subsection (1) and pursuant to the legislative powers conferred on the National Assembly under Article 109 of the Constitution, all regulation-making authorities shall submit copies of all statutory instruments for tabling before the National Assembly.*
>
> *(3) The responsible Clerk shall register or cause to be registered every statutory instrument transmitted to the respective House for tabling or laying under this Part.*
>
> ***(4) If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.***
>
> ***[Act No. 4 of 2018, Sch.]"***

42. In terms of section 11 (4) of the Statutory Instruments Act, the Legal Notice NO. 59 of 2014 having not been "**laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.**"

ORDERS

43. **It was not shown that the Legal Notice No. 59 of 2014 was laid before Parliament, and it is the duty of this court to declare that the said Legal Notice No. 59 of 2014 ceased to have effect and became void in accordance with section 11 (4) of the Statutory Instruments Act 2013.**

44. **There shall be no order as to costs in view of the public interest element of the matter.**

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 15TH DAY OF MARCH 2019.

W. KORIR

JUDGE

Appearances:-

Mr. Lengaa for M/S Gitobu Imanyara & Co. Advocates for the Petitioner.

Ms. A. Kamande for the A.g. 1st and 3rd Respondents.

Mr. Nyagah h/b for Mr. Andambi Chabala for the 2nd Respondent.