



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.217 OF 2016**

**IN THE MATTER OF SECTIONS 1 & 3 OF THE REPEALED CONSTITUTION AND ARTICLES 1,2,3,10,12(1A),19,20,21,22,23,24,27,35,40,43,46,47,50(1),73,75,159,165,201,210,226(5), 232,258 & 259 AND SECTION 6 OF THE 6<sup>TH</sup> SCHEDULE OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 27, 40, 43, 46, & 47 AND OF THE VALUES AND PRINCIPLES OF GOVERNANCE IN ARTICLES 10,201,210 AND 259(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE REPEALED VALUE ADDED TAX ACT (CAP 476), THE VALUE ADDED TAX ACT, 2013, THE CUSTOMS AND EXCISE ACT (CAP 472), THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004 (EACCMA), THE GOVERNMENT PROCEEDINGS ACT AND THE LIMITATION OF ACTIONS ACT (CAP 22)**

**AND**

**IN THE MATTER OF THE PUBLIC INTEREST IN SECURING COLLECTION OF TAXES AND THE ALLEGED TAX EVASION AND TAX FRAUD BY BIDCO AFRICA AMOUNTING TO SOME 5.7 BILLION**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....1<sup>ST</sup> PETITIONER**

**NYAKINA WYCLIFE GISEBE.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**BIDCO AFRICA.....1<sup>ST</sup> RESPONDENT**

**VIMAL SHAL.....2<sup>ND</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**HENRY TIOLE NDIEMA.....5<sup>TH</sup> RESPONDENT**

**AND**

**UHAI LAKE FORUM.....INTERESTED PARTY**

**JUDGMENT**

## **Petitioners Petition**

1. The Petitioners through a petition dated 25<sup>th</sup> May 2016 and filed on 26<sup>th</sup> May 2016, seek the following declarations:-

**"i) A declaration that Kshs.1.3 billion tax arrears, the subject in Bidco Oil Refineries Ltd vs Attorney General & Others [2013] eKLR, Nairobi Constitutional Petition No. 177 of 2012 plus the interest and penalties remains uncollected from the 1<sup>st</sup> & 2<sup>nd</sup> Respondent.**

**ii) A declaration that as at 31<sup>st</sup> December 2015 and as stated in the whistle blower report, the 1<sup>st</sup> Respondent's total tax exposure on the unpaid duty (including VAT) was some Kshs.4,394,779,047.00.**

**iii) A declaration that the 1<sup>st</sup> Respondent's total tax exposure as demonstrated in the instant Petition is some Kshs.5.7 billion.**

**iv) A declaration that the Kshs.5.7 billion tax arrears plus interest and penalties should immediately be collected by the 3<sup>rd</sup> Respondent from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**v) A declaration that the 3<sup>rd</sup> Respondent should conduct a comprehensive forensic audit of the tax evasion scam to establish the 1<sup>st</sup> Respondent's total tax exposure before, during and after the 1992-1998 period covered by the 26 C15 customs entries highlighted in the report.**

**vi) A declaration that the 2<sup>nd</sup> and 5<sup>th</sup> Respondents willfully colluded to enable the 1<sup>st</sup> Respondent evade paying taxes."**

2. The petitioners filed affidavit in support of the petition dated 25<sup>th</sup> May 2016.

## **Respondents Response**

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are opposed to the petition and in doing so, filed a Replying affidavit dated 24<sup>th</sup> June 2016 sworn by Vimal Shah on 24<sup>th</sup> June 2016.

4. The 3<sup>rd</sup> Respondent is similarly opposed to the petition and relies on its Replying affidavit dated 22<sup>nd</sup> August 2016.

5. The 5<sup>th</sup> Respondent on his part filed a preliminary objection dated 23<sup>rd</sup> December 2016.

6. The 5<sup>th</sup> Respondent raised a preliminary objection dated 13/12/2016 as to the misjoinder.

## **Interested Party Response**

7. The Interested party did not file any response and opted to rely on its written submissions. It associated itself fully with the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners and sought that the petition be allowed.

## **The allegations raised in the petition**

8. The petition brought before this court several allegations of violations of several provisions of the Constitution of Kenya 2010 under Articles 1,(3) (b); 2(c) (d), 6(3); 10(1)(c), 20(4)(a); 27, 43, 73, 201 and 210. The petitioners urged the court to intervene and protect the public interest by enforcing the law to ensure, that he alleged outstanding amount of Kshs.5.7 billion in tax arrears owed by the 1<sup>st</sup> Respondent to the 3<sup>rd</sup> Respondent is collected with interest and penalties and, that all those who conspired with intend to help the 1<sup>st</sup> Respondent evade paying the tax arrears are held accountable to the law.

9. Further perusal of the petition reveal, that the petition is broken into two board categories being as follows:-

a) Matters that were raised in High Court petition No. 177 of 2012, Bidco Oil Refineries Ltd vs Attorney General and 3 others (in respect of dispute of Kshs. 1.3 billion dispute).

b) The extortion Report (Kshs.4.39 billion claim)

## **Analysis and Determination**

10. I have carefully considered the petition, the Replying affidavits; preliminary objection, petitioners and counsel rival written submissions, as well as oral submissions made by the petitioners and the counsel for Respondents and interested party. From the above several issues arises and dong the best in the circumstances, the following are main issues, that I feel should be considered in this petition:-

**a) Whether the petitioners have filed the present suit prematurely before exhausting other available mechanisms hence rendering it moot and incompetent?**

**b) Whether declaration can issue that Kshs. 1.3 Billion tax arrears together with interest and penalties, subject in Nairobi Constitutional petition No. 177 of 2012 between Bidco Oil Refineries Ltd vs Hon. Attorney General & others, remains uncollected from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents?**

**c) Whether the 5<sup>th</sup> Respondent is wrongly enjoined in the present suit as no personal responsibility attaches?**

**A) Whether the petitioners have filed the present suit prematurely before exhausting other available mechanisms hence rendering it moot and incompetent?**

11. It is settled law, that a party approaching court must invoke the requisite jurisdiction of the court in a matter laid down by the relevant law; constitution or common law.

12. The 5<sup>th</sup> Respondent contends, that the petitioners filed the present petition in disregard of the provisions of **section 3 and 11 of the Ethics and Anti-corruption Act 2011 and Article 252 of the Constitution of Kenya 2010.**

13. **Section 3 of the Public Officers Ethics Act No. 4 of 2003** provides:-

**" The Public Service Commission is the responsible Commission for the public officers in respect of which it exercises disciplinary control and for the public officers described in paragraphs (d) and (e) of section 107(4) of the Constitution and for public officers who are officers, employees or members of state corporations that are public bodies."**

The 5<sup>th</sup> Respondent contend, the 5<sup>th</sup> Respondent being a public officer under public service commission was subject to integrity and disciplinary control of the commission; which offered the petitioners another statutory mechanism, that must be explored before resorting to the court but the petitioners ignored the same.

14. In support of the above proposition the 5<sup>th</sup> Respondent referred to case of **Council of County Governors vs Attorney General & 12 others (2018) eKLR** in which Hon. Justice E.C. Mwita found the petitioners had filed the petition skipping vital process. The court found that;

**"Having carefully considered the petition, responses submissions and the relevant authorities and applied my mind to the constitution and applicable law, the conclusion I come to is that the petitioner skipped a vital constitutional and legal step and filed this petition prematurely hence it is unsustainable. Consequently, the petition dated 11<sup>th</sup> December 2015 is hereby struck out."**

15. In the instant petition, it is evidently clear, that vital steps were skipped and/or ignored, resulting to usurping the powers and jurisdiction of the Ethics and Anti-corruption Act. Any attempt by a party in to bringing a cause of action before court of law other than by legally established channel is in my view a total disregard of available mechanisms amounting to disenfranchising this court of the necessary jurisdiction.

16. In the case of **Council of County Governors vs Attorney General and 12 others (supra)** the court stated thus:-

**"Flowing from the above authorities, the law is plain that only after exhausting alternative statutory mechanism provided for, should a party move to court. In the present case the petitioner had to first to exhaust the mechanism provided for in Part IV of the Intergovernmental Relations Act, before instituting court proceedings."**

17. The petitioners submit, that the matter is a public interest litigation; however the petitioners have not demonstrated, that a matter of this nature can be litigated on behalf of public by anyone skipping, indeed vital constitutional and legal steps and overstep the institution mandated to deal with particular matters such as this; I find that by allowing such acts may lead to propagating an illegality. In the case of **Michael Kojo Otieno & another vs County Government of Homa Bay & 9 others (2018) eKLR** Hon. Lady Justice H.A. Omondi stated thus;

**"Certainly Article 258(1) grants every person the right to institute court proceedings claiming that the constitution has been contravened, or is threatened with contravention. I think the petitioners had a valid concerns (sic) following the sectoral reports and the audit queries, but Okiya Omtatah Okoiti & Another vs Bidco Africa & 4 others they were in haste and did not await the structural modes set in place to play their role."**

18. Whereas a party under Article 22(1) has the right to institute court proceedings claiming, that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened on his own behalf or their own interest or on acting on behalf of another person who cannot act on their own name or acting as a member or, in the interest of group or class of person or on acting on public interest or an association acting in the interest of one or more of its members, the petitioners however filed their petition prematurely by failing to exhaust available mechanism before filing this petition.

19. I have perused the powers donated to **EACC** and I have noted, that **EACC** has investigative powers, which cannot be used at whim, and who should have been given time to investigate the matter against the 5<sup>th</sup> Respondent before the petitioners action of filing this petition. The petitioners moved to court before all the matters has been investigated by **EACC**. The provision of Articles 22 of the Constitution should not be taken to mean a petitioner can by-pass vital laid down structural procedures so as to file a petition. In **Kenya Builders & Concrete Company Limited vs National Government Constituency Development Fund Committee-Embakasi South and another (2017) eKLR** Hon. Justice Mativo stated:-

**"Article 22 and 258 gives any one a right of access to the court on allegations of breach or threatened breach of the bill of rights. Article 165 give the High Court unlimited jurisdiction. However, the Constitution does not operate in a vacuum and did not oust the normal statutory mechanisms unless these are shown to be contradictory to constitutional provisions."**

20. In this petition, the petitioners have not demonstrated, that they have invoked the investigative powers of the Ethics and Anti-corruption Commission nor have they demonstrated, that the exercise of the said powers or that the authority vested on the commission is contrary to the constitutional dictates. From this, I find, that the petitioners attempt to leap frog, and disregard legally established channel untenable and renders, the petition before the court incompetent, as the underlying omission disenfranchises the court of any jurisdiction to entertain the matter.

21. This court is alive to the fact, that without jurisdiction, the court has no power to take any further step and must consequently down its tools as established in the case of **Owners of Motor Vessel "Lillian 5" vs Caltex Oil (Kenya) Ltd (1989) eKLR**.

22. However notwithstanding my finding on the issue of jurisdiction, I will proceed to consider the other two remaining issues, in case, I am faulted in my findings on the issue of jurisdiction.

**B) Whether declaration can issue that Kshs. 1.3 Billion tax arrears together with interest and penalties, subject in Nairobi Constitutional petition No. 177 of 2012 between Bidco Oil Refineries Ltd vs Hon. Attorney General & others, remains uncollected from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents?**

23. Upon perusal of paragraphs 17 and 27 of the petition, the petitioners state, that on 6<sup>th</sup> August 2013, the High Court in **petition No. 177 of 2012, Bidco Oil Refineries Limited vs Attorney General and 3 others** allowed the 3<sup>rd</sup> Respondent to collect tax arrears and other fees to the tune of Kshs. 1.3 billion from the 1<sup>st</sup> Respondent. In the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Replying affidavit sworn on 24<sup>th</sup> June 2016 at paragraphs 11-38, the facts giving rise to petition No. 177/2012 have been clearly set out. The dispute in the aforesaid petition is between the 1<sup>st</sup> Respondent and Customs Services Department of the 3<sup>rd</sup> Respondent which arose out of a contract for import of edible oils and related products from Josovina commodities PTE Singapore. The same dispute is also the subject of Tax Appeal No.2 of 2012 still pending hearing and determination in Customs and Excise Appeals Tribunal.

24. The judgment in petition No. 177 of 2012 was delivered on 6<sup>th</sup> August 2013 dismissing the petition. The 1<sup>st</sup> Respondent was aggrieved by the court's decision and preferred appeal to Court of Appeal being Civil Appeal No.2014 of 2013 and on 29<sup>th</sup> September 2014, Court of Appeal made the following orders:-

**"a) The underlying dispute between the parties herein would best be resolved and conclusively determined by the Customs and Excise Appeals Tribunal in Tax Appeal No.2 of 2012, Bidco Oil Refineries vs Commissioner of Customs Services filed by the appellant herein.**

**b) Consequently, the Customs and Excise Appeals Tribunal to first hear and determine Tax Appeal No.2 of 2012 Bidco Oil Refineries Ltd vs Commissioner of Customs Services filed by the appellant on its merits.**

**c) The consolidated Civil Appeals No. 214 of 2013 and 217 of 2013 be and are hereby adjourned pending the determination of Tax Appeal No. 2 of 2012 Bidco Oil Refineries Ltd vs Commissioner of Customs Services by the Customs and Excise Tribunal on merits.**

**d) In the meantime, there shall be A STAY of enforcement of the letter of demand dated 22<sup>nd</sup> January 2010 and demand letter dated 19<sup>th</sup> April 2012 pending the determination of Tax Appeal No. 2 of 2012 Bidco Oil Refineries Ltd vs Commissioner of Customs Services.**

**e) Liberty be and is hereby granted to both parties to move the court upon the determination of Tax Appeal No. 2 of 2012, Bidco Oil Refineries Limited vs Commissioner of Customs Services."**

In essence the decision of the Court of Appeal stayed the 3<sup>rd</sup> Respondent's letters of tax demand dated 22<sup>nd</sup> January 2010 and 19<sup>th</sup> April 2012 to the 1<sup>st</sup> Respondent in the sum of Kshs.780,871, 292/- and Kshs.1,377,505,229 pending the hearing and determination of Tax Appeal No. 2 of 2012.

I find until Tax Appeal No. 2 of 2012 is determined, it would be contrary to the decision of the Court of Appeal in Court Appeal No. 214 of 2013 for the 3<sup>rd</sup> Respondent to enforce its demand against the 1<sup>st</sup> Respondent in the sum of Kshs.1.3 billion.

25. The petitioners in seeking orders regarding the 3<sup>rd</sup> Respondent's tax demand in the sum of Kshs.1.3 billion, are inviting the court to review or set aside or sit on appeal on an order by the Court of Appeal made on 29<sup>th</sup> September 2014. That if this court was to grant the orders sought it would amount to reversing the orders of Court of Appeal aimed at establishing the actual taxes due and owing by the 1<sup>st</sup> Respondent. I find as regards the orders sought by the petitioners this court has no jurisdiction to purport to review, set aside or sit on appeal on the decision of Court of Appeal. The petition as drawn and as regards the orders sought is an abuse of court process.

26. The court in the case of **Greenfield Investments Limited & Another vs State of The Republic of Kenya & 3 Others [2013] eKLR**, the High Court stated as follows;

**"In that regard, it is trite that this Court cannot purport to sit as a supervisor or superintendent of a concurrent Court or**

purport to determine by way of an appeal (by whatever other name called) a decision of such a court. It baffles this Court why litigants who are ably represented by Counsel, such as the Petitioners in this case, cannot see that under Section 60 of the Repealed Constitution and Article 165 of the Constitution, 2010 there is only one High Court. That High Court can only exercise jurisdiction conferred on it by the Constitution and not by itself, the Chief Justice or litigants.....I know no law nor do I know any other legal authority which confers on this Court the jurisdiction to purport to sit on appeal or supervise and thereby review, set aside or otherwise overturn a decision of the Court of Appeal, the High Court or the Supreme Court. To do so would amount to judicial heresy. I say so because the system of our Courts is vertical hierarchy where Courts in the lower ranks defer to those in the higher ranks. Article 162 of the Constitution ranks superior Courts in that order as being the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in Article 162(2) i.e the employment and labour relations Court and the environment and use of occupation of, and the title to land, Court. The High Court is specifically denied jurisdiction in matters reserved exclusively to the Supreme Court and the Courts mentioned in Article 162(2) and under Article 164(3) (a), any party dissatisfied with the decisions of the High Court may appeal to the Court of Appeal and thereafter to the Supreme Court under Article 163(3) (b) of the Constitution."

27. In this petition, it is submitted by 3<sup>rd</sup> Respondent that as at December 2015 and as stated in the alleged whistle-blowers report, the 1<sup>st</sup> Respondent's total tax exposure on unpaid duty inclusive of VAT was Kshs.4,894,779/047 and further that the 1<sup>st</sup> Respondent's total tax exposure as demonstrated in the instant petition is Kshs.5.7 billion. The 3<sup>rd</sup> Respondent is the only statutory agency under **section 5 of the Kenya Revenue Authority Act**, which is mandated to assess, collect and receive taxes on behalf of the Government. Any purported estimates arbitrarily made by unnamed busy bodies purporting to be whistle-blowers, and/or the petitioners herein, is without any legal basis as it would be absurd for honourable court to be called upon to legally declare such estimates, which are unauthenticated, and whose source is unascertainable as the correct outstanding taxes and more so, when the 3<sup>rd</sup> Respondent has rejected the same and termed them as arbitrarily estimates by unnamed busy bodies. I find by granting the petitioners prayers sought, that will not only amount to usurping the statutory provisions and functions of the 3<sup>rd</sup> Respondent but will also be prejudicial to tax payers including the 1<sup>st</sup> Respondent who will be deprived of a fair and due process and when the issues to the outstanding taxes by the 1<sup>st</sup> Respondent is actively pending before the Tax Appeals Tribunal and the Court of Appeal.

28. As regards declaration, that 5.7 Billion Tax arrears plus interest and penalties should immediately be collected by the 3<sup>rd</sup> Respondent from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and that the 3<sup>rd</sup> Respondent should conduct a comprehensive forensic audit of the tax evasion scam to establish 1<sup>st</sup> Respondent's tax exposure during and after 1992-1998 period covered by the 26 c 15 customs entries highlighted in the report. The 3<sup>rd</sup> Respondent avers it does not operate and function in the abstract but within the realm of the law. I find that it would be wrong and unlawful for the 3<sup>rd</sup> Respondent to be compelled to wrongfully and unlawfully collect and/or receive Kshs.5.7 Billion together with interest and penalties illegally and without any basis on purportedly assessed and levied by the petitioners and other busy bodies, against the 1<sup>st</sup> Respondent. There has to be basis for the demand and collection of any tax from any tax payer. Secondly the issue as to tax due and owing as between the 1<sup>st</sup> and 3<sup>rd</sup> Respondents is actively before court and proceeding otherwise will be contempt of court. The petitioners as patriotic citizens can proceed to volunteer any information regarding any tax evasion scam by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and or/any other person, to the 3<sup>rd</sup> Respondent and other relevant law agencies for necessary action. The declaration sought to issue will be unlawful as this court lacks jurisdiction to do so, and any declarations that may issue would be contrary to Cardinal Rules of Natural justice, that demands, that the 2<sup>nd</sup> and 5<sup>th</sup> Respondents be afforded an opportunity not only to be heard but to meet and challenge their would be accusers.

29. In the instant petition, and in view of my findings, herein above, I find the Court of Appeal decision and pending case before Tax Appeals tribunal should be awaited. I find the petitioners have no right in law to intermeddle in the 2<sup>nd</sup> Respondent's tax affairs save to give any relevant information to tax agencies. I further find as far as the petitioners seek to commence parallel litigation of the issues pending before the Court of Appeal and Tax Appeals Tribunal, their suit is not only an abuse of the court process but is misconceived.

30. At paragraphs 18-21 of the Petition, the Petitioners allege that an undisclosed whistle blower's investigative report reveals, that through fraud and deceit, for the period June 1992 to April 1998 and vide 26 C15 customs entries, the 1<sup>st</sup> Respondent evaded paying duty (including VAT) in the sum of Kshs.4.39 billion on imported High-Density Polyethylene (HPDE), multiplier film for packaging and Refined, Bleached and Deodorized (RBD) palm olein and palm stearin.

31. The Petitioners have placed reliance on an alleged Whistleblower's report, which is undated, unsigned, untitled and the maker of the report has not been disclosed. This is in contravention of the provisions of Section 35 of the Evidence Act, Cap 80 Laws of Kenya. The omission has deprived the Respondents an opportunity to cross examine the maker of the document and test his/her credibility and the veracity of the contents of the alleged report.

32. I have considered the whistle blower's report, which is undated, unsigned, untitled and whose maker is not disclosed and find the same fails admissibility test as the marker has not been disclosed and has not produced the same. The document has not been proved to be authentic. No reliance can be placed on the same for it contravenes the provisions of section 35 of the Evidence Act.

33. The petitioners claim to be litigating on behalf of public interest and urged, that Article 3(1) of the constitution obligates every person to respect, uphold and defend the constitution. Further to the above Article 22 of the constitution gives every person right to institute court proceedings claiming, that a right or fundamental freedom in the Bill has been denied, violated or infringed or is threatened and lastly Article 258 of the constitution provides that every person has the right to institute court proceedings, claiming that the constitution has been contravened or is threatened with contravention. This is what the petitioners said made them to file the petition claiming to be litigating in public interest. I find no reason why I should find otherwise. It is my view, that what motivated the petitioners to prefer the petition was due to public interest and not for personal gain. The petitioners might have taken the wrong procedure but that in itself cannot be a basis to hold that the petitioners herein do not have a *bonafide* and genuine claim against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and were not acting in public interest.

34. Having said that much I proceed to make the following orders;

**a) The petition is struck out.**

**b) In the alternative to (a) above the petition is without merit and is dismissed.**

**c) As the petition as filed is in public interest, I order each party to bear its own costs.**

**Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of May, 2019.**

.....

**J .A. MAKAU**

**JUDGE**