



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 217 OF 2016

BETWEEN

OKIYA OMTATA OKOITI.....1ST PETITIONER

NYAKINA WYCLIFE GISEBE.....2ND PETITIONER

VERSUS

BIDCO AFRICA.....1ST RESPONDENT

VIMAL SHAH2ND RESPONDENT

THE KENYA REVENUE AUTHORITY.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

HENRY TOILE NDIEMA.....5TH RESPONDENT

AND

UHAI LAKE FORUMINTENDED INTERESTED PARTY

THE COMMISSION ON ADMINISTRATIVE JUSTICE.....PROPOSED INTERESTED PARTY

RULING

THE APPLICATIONS

[1] This is a ruling on a twin application for joinder of proposed interested parties filed by the an intended Interested Party and the Petitioners respectively on 13th July 2016 and 31st October 2016 on the grounds set out in the said applications as follows:

“I. NOTICE OF MOTION DATED 13TH JULY, 2016

THAT leave be granted to the Applicant herein, Uhai Lake Forum, to be enjoined in the above petition as an interested party.

FOUNDATIONS:

1. THAT the intended interested party is a non-governmental organization with expertise in and dedicated to the protection and promotion of the right to a clean and safe environment within Lake Victoria and its environs with most of its funding being from donors.
2. THAT Organizations such as the intended Party exist to supplement or in many cases to fill the gap of what are properly speaking government functions such as the provision of a clean and safe environment amongst other public utilities such as socio-economic rights as discussed in the Constitution under the Bill of Rights.
3. THAT the intended interested party and similar organizations are carrying out these said public utility activities meant for the government because of the government because of the government's inability to sustain its budgetary requirements, or to meet the vast needs in the county with its available resources.
4. THAT the government's financial deficit and resulting inability to sustain its budgetary requirements is attributed inter alia to the 3rd Respondents inability to collect taxes as at and when they are due both due to inefficiencies and maladministration.
5. THAT the Intended Interested party and its employee are tax payers and strive to pay taxes despite their meager earnings and despite the fact that its activities are meant to enhance public utilities and its funding is donor based.
6. THAT the intended *interested party*, just like any other citizen has legitimate exceptions from the 3rd Respondent to collect taxes transparently and the same to be applied in provision of public service countrywide.
7. THAT based on the foregoing the cause of action relates to and directly affects the Applicants herein being a tax payer and a facilitator of human rights and hence the pressing needs for its involvement in the above petition.
8. THAT the inclusion of the intended *Interested Party* will not prejudice any party but rather will foster opened, accountability and public participation in this matter as required by the Constitution under the national values and principles of governance and in public finance matters.
9. THAT the intended *interested party* intends to demonstrate that failure by the 3rd Respondent to collect taxes owing and due to the Government by the 1st Respondent amounts to tax maladministration and such action is against all the basic tenets and Principles of taxation, particularly the principles of;
 - (i) *Adequacy* whereby it's the responsibility of the 3rd Respondent to collect taxes from where they are due such as from 1st Respondent in order to generate revenue required for the provision of essential public services.
 - (ii) *Convenience* whereby it's the 3rd Respondents responsibility to ensure that taxes are collected in a manner that facilitates voluntary compliance to the maximum extent possible.
 - (iii) *Efficiency* whereby tax collectors efforts by the 3rd Respondent should not inordinately cost a high percentage of tax revenues be it at the point of collection or enforcing collection using the mechanisms put in place.
 - (iv) *Equity* whereby the 3rd Respondent should collect taxes from all taxpayers in the same economic circumstances due so that they are equally burdened; and

(v) Neutrality whereby the 3rd Respondent should collect taxes without favouring particular person such as it has done to the 1st respondent.

10. THAT further, the unexplained and prolonged delay by the 3rd Respondent to collect taxes due and owing from the 1st Respondent is discriminatory against all other tax payers who are entitled to equal application and protection of the law as stipulated by Article 27 of the Constitution.

11. THAT the government is in need of more funds to sustain its budget and the Ksh. 1.6 Billion owing by the 1st Respondent which has maliciously not been collected by the 3rd Respondent is sufficient to cover a significant portion of the current government expenditure on public utilities.

12. That the 1st Respondent is not excluded by any known law or legal notice from paying the taxes due and owing and hence the 3rd Respondent is abdicating its duties and colluding with the 1st Respondent in defrauding taxes from the Government and the Citizens.

II. NOTICE OF MOTION BY THE PETITIONERS DATED 31ST OCTOBER 2016

THAT the Honourable Court be pleased to join the proposed interested party, the ombudsman, in the suit herein and grant the CAJ leave to tender evidence, and participate in other ways in the proceedings herein.

GROUND:

(a) THAT the Commission on Administrative Justice (CAJ) also known as the Office of the Ombudsman is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

(b) THAT the Commission has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public Administration in any Sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

(c) THAT since the failure to collect taxes constitutes a grave miscarriage of the Administrative functions on the 3rd Respondent, the matter which is before the Honourable Court gravely affects the Proposed Interested Party's constitutional Mandate.

(d) THAT the Proposed Interested Party should be accorded the opportunity to provide any information and evidence that will assist this Honourable Court to arrive at a just determination of the matters herein.

(e) THAT it is in the interest of Justice that an opportunity be availed to the proposed Interested Party to participate in the proceedings herein.”

[2] The Petition before the Court seeks primarily to compel the 3rd respondent tax regulator to collect specified amount of taxes from the 1st Respondent which the former is alleged, in collusion with the latter, to have failed to do. The particular prayers in the Petition dated 25th May, 2016 are as follows:

A. A declaration that the Ksh.1.3 million tax arrears, the subject in Bidco Refineries Limited v Attorney General & 3 others [2013] eKLR, Nairobi Constitutional Petition No. 177 of 2012, plus the interest and penalties, remains uncollected from the 1st and 2nd Respondent.

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

C. A declaration that the 1st Respondent's total tax exposure as demonstrated in the instant petition in some Kshs. 5.7 billion.

D. A declaration that the Kshs. 5.7 billion tax arrears plus interest and penalties should immediately be collected by the 3rd Respondent from the 1st and 2nd Respondents.

E. A declaration that the 3rd Respondent had an obligation to collect the Ksh. 5.7 billion tax arrears but failed, ignored, and/or refused to collect tax arrears from the 1st and 2nd Respondents.

F. A declaration that the 3rd Respondent should conduct a comprehensive forensic audit of the tax evasion scam to establish the 1st Respondent's total tax exposure before, during, and after the 1992 – 1998 period covered by the 26 C15 custom entries highlighted in the report.

G. A declaration that the 2nd and 5th Respondents willfully colluded to enable the 1st Respondent evade paying taxes.

H. A declaration that the 5th Respondent should be held personally liable for the loss of public assets pursuant to Article 226(5) of the Constitution.

I. A declaration that the 5th Respondent is unfit and/or unsuitable to hold public office.

J. A declaration that upon determination of the instant petition the court file should be placed before the Director of Public prosecution (DPP) for purposes of his ordering the inspector General of police to criminally investigate the 2nd and 5th Respondents, and any other culpable persons, with a view to having them criminally prosecuted by the DPP for collusion to enable the 1st Respondent evade paying taxes and for other economic crimes against the aforesaid Republic.

K. A declaration that the rights and fundamental freedoms of the petitioners and those of other members of the public, enshrined in Article 27, 40,43,46 and 47 of the Constitution, have been violated and continue to be violated by the 1st and 2nd Respondents by their failure to pay the 5.7 tax arrears herein.

L. A declaration that the 1st and 2nd Petitioners are entitled to the payment of damages and compensation by the 1st and 2nd Respondents for the violation and contravention of their Articles 40 and 47 rights and fundamental freedoms.

M. A mandatory order ordering the 1st, 2nd and 5th Respondent to pay the 1st and 2nd Petitioners the quantum of damages and compensation assessed by the Court for the violation and contravention of their Articles 27, 40, 43, 46 and 47 rights and fundamental freedoms.

N. A mandatory order ordering the 1st and 2nd Respondents to immediately pay the Kshs. 5.7 billion tax arrears plus interest and penalties to the 3rd Respondent.

O. A mandatory order ordering the 3rd Respondent to collect the Kshs. 5.7 billion tax arrears plus interest and penalties from the 1st and 2nd Respondents.

P. A mandatory order ordering the 3rd Respondent to conduct a comprehensive forensic audit of the tax evasion scam to establish the 1st Respondent's total tax exposure, during, and after the 1992-1998 period covered by the 26 C15 custom entries highlighted herein.

Q. A mandatory order debarring the 5th Respondent from holding public office in the aforesaid

Republic.

R. A mandatory order ordering the 4th Respondent to hold the 5th Respondent personally liable for the loss of public assets pursuant to Article 226(5) of the Constitution.

S. A mandatory order ordering the Registrar of the High Court to place the court file before the Director of Public Prosecutions (DPP) for purposes of his ordering the inspector General of Police to criminally investigate the 2nd and 5th Respondents, and any other affected persons, with a view to having them criminally prosecuted by the DPP for collusion to enable the 1st Respondent evade paying taxes and for other economic crimes against the aforesaid Republic.

T. THAT this Honourable Court gives any other orders required to advance the cause of justice and the rule of law in this case.

U. THAT the costs of this petition be borne jointly and severally by the 1st, 2nd and 5th Respondents.”

[3] In its defence, the 3rd respondent tax collector denies failure to collect tax from the 1st respondent company and cites frustration by numerous court and tribunal cases hampering its effort to recover tax due from the 1st respondent.

[4] The Court has considered the grounds of opposition and skeleton submissions filed by the parties and the supplementary oral argument made by their Counsel in Court as well as the caselaw and statutory authorities cited in support of the respective contentions urged.

SUMMARY OF SUBMISSIONS

[5] While the petitioner and the first intended Interested Party urged that the proceedings before the court were in public interest and the interested parties has an interest in the outcome of the petition as to justify their joinder under the Rules of Court, the respondents were united in the contention, relying on section 125 of the Income Tax Act, that tax matters were private disputes between the tax payer and the tax collector and that the intended Interested Party was a mere busy body with no tax expertise and no special interest in the matter and whose interest could be adequately represented by the Petitioners, and that the proposed Interested Party as a constitutional body has a clear statutory mandate to receive and investigate complaints in administration of Justice and could not take up a matter which already *sub judice* before the Court.

DETERMINATION

[6] It must be clarified at the outset that the Court does not at this stage consider the merits of the petition and substantive questions as to whether the matter is a public interest litigation or otherwise; that determination must remain with the trial court. At this stage, the court will only consider whether the application for joinder of the proposed interested parties may be granted to allow them participate in the substantive hearing for the determination of the dispute in the Petition.

[7] The court must accept that the interest of the intended interested/proposed interested parties must not be an interest that must succeed at the trial of the main petition. The Court of Appeal at Mombasa in *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR considered the issue of joinder of a defendant in a civil suit under Order 10 Rule (2) of the Civil Procedure Rules and held:

“From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the

event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

[8] It is a matter, in my view, balancing the rights of the parties to a fair hearing under Article 50 (1) and promoting access to justice in accordance with Article 48 of the Constitution.

[9] Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 provide for the joinder of interested parties in the following terms:

“7. (1) A person, with leave of the Court, may make an oral or written application to be joined as an interested party.

(2) A court may on its own motion join any interested party to the proceedings before it. ”

The Rules define “ interested party” as follows:

“?interested party means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

[10] In interpreting its own rules on joinder of parties, the Supreme Court of Kenya in ***Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others*** [2014] eKLR and held as follows:

*“[18] Consequently, **an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.** On the other hand, an amicus only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a ‘friend’ of the Court, his cause is to ensure that a legal and legitimate decision is achieved..”*

[11] As pointed out above, the Court is at this stage not making a determination as to the merits of the Petition, and the petitioners may be able to bring their petition within the exceptions to section 125 of the Income Tax Act upon which the respondent’s objection as the matter being a private dispute between the 1st and 3rd respondent, the tax payer and the tax collector. The trial court will determine whether the proceedings before it is a public interest litigation or otherwise and in the prosecution of the petition the tax information between the tax payer and the tax collector may be disclosed in public interest.

[12] For purposes of the application for joinder, the Court accepts that there is an arguable case, which need not succeed at the trial, that the proceedings before the court are public interest litigation for the enforcement of the Constitutional provisions of Article 210 of the Constitution. If so, the trial court will in discretion deal with questions for disclosure of tax information relating to the 1st respondent and, the court cannot therefore at this stage shut out a party who seeks to demonstrate that the litigation before the court is in public interest.

[13] Indeed, in the October 2016 decision of the United Kingdom’s Supreme Court in ***R (on the application of Ingenious Media Holdings plc and another v. Commissioners for her Majesty’s Revenue and Customs*** [2016] UKSC 173, Lord Toulson, (with whom Lady Hale, Lord Mance, Lord Kerr and Lord Reed agreed) observed that disclosure of confidential information may sometimes be permissible:

*“31. As a matter of principle, a disclosure of confidential information may sometimes be permissible on a restricted basis. (In the case of *W v. Egdell*, previously cited, the doctor was lawfully justified in passing on his report to those who had responsibility for the plaintiff’s care, whereas it would not have been lawful to pass it to someone who had no such responsibility.) But*

an impermissible disclosure of confidential information is no less impermissible just because the information is passed on in confidence; every school child knows that this is how secrets get passed on.”

[14] Even the old cases of ***Re Brown’s Trustees v. Hay*** (1897) Vol. III (1890-1898) Tax Cases 598 and ***In re Joseph Hargreaves, Limited*** (1898 - 1903) Vol. IV Tax Cases 173, that the jurisdiction of the court to order the production of confidential documents is discretionary.

[15] Similarly, in Kenya, agreed that the High Court in ***Timothy Njoya v. AG & Anor.*** (2014) eKLR (Lenaola, J. as he then was) held that section 125 of the Income Tax Act was constitutional, the same section has exception to the principle of confidentiality therein, as follows:

“125(1) An officer and any other person employed in carrying out the provisions of the Act shall have regard and deal with all documents and information relating to the income of a person and all confidential instructions in respect of the administration of the Income Tax Department which may come into his possession or to his knowledge in the course of his duties as secret.

(1A) An officer appointed under section 13 of the Kenya Revenue Authority Act for purposes of this Act shall, on appointment, make and subscribe before a magistrate or commissioner for oaths, a declaration in the prescribed form.

(2) No officer and no other person employed in carrying out the provisions of this Act, shall be required to produce in court a document, or to communicate to a court, information, which has come into his possession or to his knowledge in the performance of his duties under this Act except as may be necessary for the purpose of carrying into effect the provisions of the Act or in order to assist in the course of a prosecution for an offence committed in relation to tax.

(3) Nothing in this section shall prevent -

(a) an officer or person from revealing a document or information relating to the income of a person or confidential instructions in respect of the administration of the Income Tax Department to another officer or person so employed in the course of his duties, or to a person authorized in that behalf by the Minister in relation to a person resident in Kenya, or to a court or person for the purposes of this Act.

(b) an officer from revealing a document or information solely for revenue or statistical process to a person in the service of the Government in a revenue or statistical department where that document or information is needed for the purpose of the official duties of that last mentioned person and where the last mentioned person has made a subscribed declaration of secrecy in relation to information coming to his knowledge in the course of his official duties;

(c) an officer from revealing a document or information to the Controller and Auditor General, or to an authorized member of his Department, where that document or information is needed for the performance of his official duties.

(d) An officer from providing to the Board established under the Higher Education Loans Board Act, the name and address of any person granted an education loan or his employer, where such information is required for the performance of the Board's official duties in recovery of the education loans.

(4). Where under a law in any country, or under a special arrangement, provision is made for the allowance of relief from income tax in respect of the payment of tax in Kenya, the obligation as to secrecy imposed by this section shall not prevent the disclosure to the authorized officers of the government of the place with which that arrangement was made of such facts as may be necessary for the obtaining of that relief or for the prevention of fraud or for the administration of statutory provisions against legal avoidance in relation to those taxes.”

[16] The purposes of the Act as given in the long title of the Income Tax Act is

“ An act of Parliament to make provision for the charge, assessment and collection of income tax: for the ascertainment of the income to be charged; for the administrative and general provisions relating thereto; and for matters incidental to and connected with the foregoing”.

Constitutional obligation to collect tax

[17] Article 210 of the Constitution is in terms as follows:

“210. (1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

(2) If legislation permits the waiver of any tax or licensing fee—

(a) a public record of each waiver shall be maintained together with the reason for the waiver; and

(b) each waiver, and the reason for it, shall be reported to the Auditor-General.

(3) No law may exclude or authorise the exclusion of a State officer from payment of tax by reason of—

(a) the office held by that State officer; or (b) the nature of the work of the State officer.”

[18] There is, in my view, a clear obligation on the tax authority to collect tax in accordance with legislation enacted for that purpose, the income Tax Act in this case, and there is an arguable case whether failure to so collect due tax, if it can be shown to be the case, gives rise to a cause of action in public law, even though the exact amounts of the tax and assessment thereof may be matters of private law.

CONCLUSION

[19] The Intended Interested Party as an NGO involved in provision of services supplemental to government's effort and as tax payers share a public interest with the rest of us to see the implementation of the tax obligation on all persons liable to pay tax in accordance with Article 210 of the Constitution. As such the NGO and indeed any person is entitled in accordance with Article 258 which gives standing to sue for enforcement of the Constitution. The petition herein is expressed to be brought under Article 259 among others of the Constitution.

[20] It appears to me that the petition herein is two-fold: a claim for the enforcement of taxation responsibility of the 3rd Respondent tax collector which as a constitutional duty, the Interested Party must have Article 258 *locus standi*; and secondly a claim for mandatory injunction to recovery of specified amount of duty which the trial court may, in discretion, permit disclosure of tax information. The determination of the two claims is the purview of the trial court.

[21] The intended Interested Party has a clear interest in the outcome of the litigation as recovery of the tax obligation will enable the government to offer services and reduce the reliance of the community that the NGO serves on its provisions. In addition, as with all citizens more tax recovered should mean better services rendered by the government. The question of the applicant's expertise in tax matters does not arise as they do not seek to be joined as amicus but as interested party, just like the petitioners are no tax experts.

[22] However, for the 'Interested Party' proposed for joinder by the Petitioners, herein called proposed Interested Party, clear statutory Ombudsman's mandate as administrative complaint's mechanism for receipt and investigation and report on public affairs militates against the joinder of the Commission on

Administrative Justice.

[23] As shown in section 8 of the Commission on Administrative Justice Act No. 23 of 2011, the Commission created there under pursuant to Article 59 (4) of the Constitution

“8. Functions of the Commission

The functions of the Commission shall be to—

- (a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;*
- (b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;*
- (c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;*
- (d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;*
- (e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;*
- (f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;*
- (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;*
- (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;*
- (i) publish periodic reports on the status of administrative justice in Kenya;*
- (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;*
- (k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;*
- (l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and*
- (m) perform such other functions as may be prescribed by the Constitution and any other written law.”*

[24] The Commission is expressly prohibited for taking up for investigations matter that are pending determination before the Court, and, in addition, its appearance in Court may embarrass it in future proceedings that may be brought before it. The petitioner has served his application for joinder upon the proposed interested party, and it is not a wonder that the Commission has ignored the matter altogether. There is no basis for joinder of the proposed Interested Party. If there are any relevant reports that the Commission has made, the same should be public documents and may be relied on by the Petitioners in

accordance with the rules of Evidence.

Locus Standi of the Intended Interested Party

[25] In addition to suing in their own interest, the petitioners and the Intended Interested Party as with ‘every person’ have locus standi “*a person acting in the public interest*” under Article 258 (1) (c) of the Constitution have “*the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*” This, with respect, is what I understand to be the object of the Petition before the Court.

[26] The Court would rather err on the side of granting a hearing to a person who wishes to be heard on a question pending determination before the Court for the just determination of the proceedings. As observed by counsel for the 1st respondent company, the court has not determined that the petition merits as a public interest litigation but in making such determination the court is entitled to hear arguments on both sides. Hence the joinder of the interested party whose proposition is that the litigation before the court is in public interest.

ORDERS

[27] Accordingly, for the reasons set out above, the Petitioner’s Notice of Motion dated 31st October 2016 is declined and the Intended Interested Party’s Notice of Motion dated 13th July 2016 is granted as prayed.

[28] Costs in the Cause.

EDWARD M. MURIITHI

JUDGE

**DATED AND DELIVERED THIS 20TH DAY OF APRIL
2017.**

E. C MWITA

JUDGE

Appearances:

Petitioners in person

M/s Ligunya Sande & Associates Advocates for Intended Interested Party

M/s Ngatia & Associates for 1st and 2nd Respondent

Mr Moses Ado, Advocate with Ms. Almadi and Mr. Ochieng for 3rd and 4th Respondent.

M/S Kipkenda & Co Advocates for 5th Respondent