



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 461 OF 2011**

**KENYA PIPELINE COMPANY LIMITED.....PLAINTIFF**

**- VERSUS -**

**CORPORATE BUSINESS FORMS LIMITED.....DEFENDANT**

**RULING**

1. The defendant lodged a Notice of Preliminary Objection in the following terms;

***“1. The suit herein does not lie in law by virtue of Article 25, 50 and 157 of the Constitution of Kenya 2010, Section 313, 347, 351 and 353 of the Penal Code and with Section 187 (f), 205 and 209 of the Customs & Excise Act, Cap. 472 of the Laws of Kenya.***

- 2. The suit herein is barred by section 127 b (1) – (b) and 127 F of the Customs and Excise Act, Cap. 472 of the Laws of Kenya.***
- 3. The suit herein is barred by section 229 and 230 of the East African Community Customs Management Act, 2004.***
- 4. There is no valid resolution authorizing the appointment of the firm of Lilan & Koech Associates Advocates LLP to file proceedings on behalf of the plaintiff”.***

2. Based on the preliminary objection, the defendant invited the court to strike out the suit, with costs to the defendant.

3. In its submissions, the defendant asserted that the acts which the plaintiff had complained about were criminal offences under the Penal Code and under the Customs & Excise Act.

4. In relation to such criminal offences, the persons deemed culpable would ordinarily be tried by a magistrates’ court.

5. As the defendant or its officers had never been tried and convicted of the alleged offences of fraud, the defendant submitted that the plaintiff should not be allowed to plead fraud in this case.

6. This court is sitting as a Civil Court. Therefore, the defendant submitted that it lacked jurisdiction to try the alleged offence.

7. The plaintiff’s response was that its claims against the defendant were founded upon contract. According to the plaintiff, the defendant had contracted with the plaintiff, to provide clearing and

forwarding agency services to the plaintiff.

8. In the course of performing its obligations under the contract, the defendant is alleged to have made representations to the plaintiff, which were false.

9. The plaintiff's assertion was that through the said representations, it was caused to believe that the defendant had remitted money to the Kenya Revenue Authority, on behalf of the plaintiff.

10. Acting on the belief that the defendant had paid duty on its behalf, the plaintiff alleges that it did reimburse the said payments to the defendant.

11. Later, the plaintiff alleges that it was made aware that the defendant had actually not remitted money to the Kenya Revenue Authority, for the payment of duty which was payable by the plaintiff.

12. In effect, the defendant would have obtained money from the plaintiff on the basis of an untruth; if the plaintiff is right.

13. In paragraph 7 of the Plaint it was asserted that the conduct of the defendant amounted to a fraud, as the defendant had claimed and had received from the plaintiff reimbursement for payments which it had never made on behalf of the plaintiff.

14. In **SILAS MAKE OTUTE Vs ATTORNEY GENERAL & 3 OTHERS, PETITION No. 44 of 2013** the Court noted as follows;

*“As discussed below, the nature and particulars of fraud pleaded in this Petition manifest themselves in the criminal offences of forgery and uttering under sections 351 and 353 of the Penal Code”.*

15. The court was the view that;

*“there is no escaping the fact that what the Petition was essentially alleging against the Interested Party and the IEBC constitutes not just any vague fraud, but a gross violation of the law; in fact criminal offences”.*

16. Does that mean that any assertion that a person had committed a fraud implied that the person had committed a criminal offence?

17. The court, in the case of **SILAS MAKE OTUTE Vs ATTORNEY GENERAL & 3 OTHERS, (above)**, looked up the definition in the **BLACK'S LAW DICTIONARY, 9<sup>TH</sup> EDITION**, and noted that fraud is;

*“a knowing misrepresentation of truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (especially when the conduct is willful) it may be a crime-also termed as intentional fraud”.*

18. It therefore follows that just because a person is alleged to have committed a fraud, it does not necessarily imply that the person is said to have committed a criminal offence.

19. Indeed, as expressly pointed out above, fraud is usually a tort.

20. In the **OTUTE** case (*above*), the material placed before the court, which the court was intended to use when determining whether or not there was fraud, were reports obtained from the Criminal Investigations and the Intelligence Department and the Council of Higher Education of Uganda.

21. In the circumstances, the court concluded that it lacked the requisite expertise, mandate and

wherewithal to investigate what was essentially a criminal matter; and then entertain its prosecution by private persons before the Constitutional Court, with a view to making definite findings as to criminal culpability of **HASSAN ALI JOHO**.

22. But the court was clear in its mind about the fact that it had the requisite and undisputed jurisdiction. However, in the prevailing circumstances, the court was persuaded not to assume or to exercise that jurisdiction.

23. Part of the reason which informed that decision was the fact that the serious allegations in that case, required intensive fact finding enquiries.

24. Compared to that case, there are no prior or anticipated investigations by any agency entrusted with the investigations or prosecution of criminal cases.

25. In any event, as the court pointed out in that case, it did have jurisdiction. Therefore, by making the choice not to proceed with the hearing of the constitutional petition, the court was exercising discretion.

26. The defendant submitted that this suit was triggered by a demand made by the Kenya Revenue Authority, requiring the plaintiff to pay duty.

27. Therefore, the defendant considers this case to be premature because it by-passed the Customs & Excise Act; and the East African Community Customs Management Act.

28. Those 2 statutes are said to have vested exclusive jurisdiction to the Kenya Revenue Authority and the Appeals Tribunal to determine tax disputes.

29. As the case herein was not the appeal contemplated by the 2 statutes, it is the defendant's contention that the plaintiff must first exhaust the specific procedures provided by law, before it could come to the High Court.

30. In **REPUBLIC Vs. KENYA REVENUE AUTHORITY EX-PARTE BATA SHOE COMPANY (KENYA) LIMITED JR CASE No. 36 of 2011**, the W.K. KORIR J. quoted with approval, the following words from **REG Vs I.R.C Ex PARTE PRESTON H.L (E) [1985] 846**;

*“My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge; it is not an appeal. Where Parliament has provided, by statute, appeal procedures, as in the taxing statutes, it will only be very rarely that courts will allow the collateral process of judicial review to be used to attack an appealable decision...”*

31. The plaintiff in this case has not sought Judicial review, nor has it brought an action in lieu of an appeal.

32. The suit is not even against the Tax authorities.

33. There cannot have been an appeal between the plaintiff and the defendant as there had been no decision made earlier, between them.

34. And because neither the plaintiff nor the defendant was a tax authority, there cannot have arisen any process of appeal, which the plaintiff could invoke.

35. I find that there is no merit in the contention that the plaintiff had not yet exhausted the procedures available to it.

36. In **KAPA OIL REFINERIES Vs THE KENYA REVENUE AUTHORITY & 2 OTHERS**,

**PETITION No. 203 of 2012**, the issue at hand was with regard to the procedures prescribed for handling a matter in which a person was aggrieved by the Tax assessment carried out by the Commissioner of Customs Services.

37. The petitioner moved the Constitutional and Human Rights Division of the High Court.

38. The court held as follows;

1. ***“Following the assessment of taxes due, the petitioner being dissatisfied with that assessment exercised its right of appeal to the Customs and Excise (Appeals) Tribunal. All the issues raised by the Petitioner, therefore, are within the mandate of that Tribunal which is already seized of them. It would be improper for this Court to proceed and determine those issues, as to do so would in essence, usurp the Tribunal’s powers...”***

39. That decision further fortifies my finding, that the case before me is not one in which the plaintiff could have sought an appeal, because the plaintiff’s case was not an appeal. The plaintiff was not challenging the assessment of the duty by the Kenya Revenue Authority.

40. If the plaintiff had been challenging the Kenya Revenue Authority, it would have had to pursue that entity; and would then have been required to follow the procedures provided for by law.

41. I find and hold that the plaintiff cannot be faulted for moving this court by way of a Plaintiff.

42. On the issue as regards the alleged absence of authority under seal, to authorize the Law Firm of Lilan & Koech Advocates, to file suit on behalf of the plaintiff, the parties do not agree on the facts. On the one hand, the plaintiff insists that there is an appropriate authority which it gave to the Law Firm, whilst, on the other hand, the defendant says that no such authority exists.

43. Pursuant to the provision of Order 1 Rule 13(2) of the Civil Procedure Rules, 2010;

***“The authority shall be in writing signed by the party giving it and shall be filed in the case”.***

44. A literal reading of that rule would suggest that when the signed authority was not filed in the case, there would have been a violation of the rule. That therefore leads to the question concerning the timing of the resolution: does it have to be filed at the time the plaint was being filed?

45. In **LEO INVESTMENTS LIMITED Vs. TRIDENT INSURANCE COMPANY LIMITED [2014] e KLR**, Odunga J. held that the mere failure to file the resolution of the corporation together with the plaint did not invalidate the suit.

46. In **REPUBLIC Vs REGISTRAR GENERAL & 13 OTHERS [2005] e KLR**, Kimaru J. held that the resolution of the Board of Directors of a company may be filed at any time before the suit is fixed for hearing.

47. I share the views expressed by my 2 learned brothers. Therefore, the fact that the resolution had not yet been filed in court, at this stage, cannot be the basis for striking out the plaint.

48. In the final analysis, there is no merit on any of the grounds canvassed as the Preliminary Objection. Therefore, the said Preliminary Objection is overruled. The defendant will pay to the plaintiff the costs of the Preliminary Objection.

49. However, the plaintiff will not be permitted to proceed to the trial of the case until and unless it files in court and also serves upon the defendant, the written authority, through which the Law Firm of Lilan & Koech Associates, LLP Advocates, was duly instructed by the plaintiff, to institute these proceedings.

**DATED, SIGNED and DELIVERED at NAIROBI this 25<sup>th</sup> day of April 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Miss Olando for Lilan for the Plaintiff

Gachuba for the Defendant

Collins Odhiambo – Court clerk.