



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
PETITION NO 394 OF 2013

ABUBAKER SHARIFF SALIM.....1ST PETITIONER

CLARE MARISIANA ODIMWAH.....2ND PETITIONER

MATCO LIMITED.....3RD PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The petitioners in this matter are aggrieved by the provisions of the Finance Act, No 57 of 2012 and the changes that it introduced to the duty on hides and skins. They allege that the changes to the Hides and Skins Code headings 4101, 4102, 4103 and 4301, which resulted in the increase of the export duty rate on hides and skins products from 40% or Kshs 20/= per kilogramme to 80% or Kshs 40/= per kilogramme, and the introduction of a new minimum weight restriction, has resulted in a violation of their rights in that it is discriminatory in its express intentions and application.

2. They are further aggrieved by the demand by the respondent of the amount of Kshs 4, 280, 000/=, Kshs 5, 084, 378/= and Kshs 19, 931, 624/, respectively against them in respect of the duties due as a result of the increase in the export duty of hides and skins following the enactment of the Finance Act 2012 and the amendments to the rate of export duty.

3. The petitioners also fault the process of enactment and application of the Finance Act. It is their contention that due process was not followed as they and other stakeholders were neither given any notice nor consulted regarding the enactment of the new tariff rates.

4. The 1st and 2nd petitioners describe themselves as adults of sound mind who are citizens of Kenya and who are working and carrying on business in Nairobi among other places within the Republic of Kenya. The 3rd petitioner, Matco Limited, is a limited liability company incorporated in the Republic of Kenya which also carries on business in Nairobi, among other places.

5. The petitioners allege that at all material times to the present petition, they were and still are legitimate

traders carrying on the business of selling, including exportation of, hides and skins, and that they have carried out this business from different times since 2003. They claim that they have throughout the period of business complied with all the relevant laws regarding licensing, transportation, grading, health and environmental regulations, and paid all dues, taxes and fees levied on them in the course of trade.

6. They have lodged their claim against the respondent, a statutory body incorporated under Section 3 of the Kenya Revenue Authority Act. Its mandate includes, amongst others, collecting taxes on behalf of the Government of Kenya.

Background

7. The Finance Act, No 57 of 2012 came into force on 7th January 2013. It amended certain provisions of the East African Community Customs Management Act. The amendment resulted in an increase in the export duty rate on hides and skins products. The petitioners claim that the Constitution was violated in the process of enactment of the Finance Act as there was no public participation, and further, that the Finance Act violates their constitutional rights guaranteed under Articles 27(1)-(5), 40(1)-(3) and Article 47 of the Constitution.

8. The petitioners are also aggrieved by the introduction, by the respondent, of a new minimum weight restriction. They contend that in the event that the respondent will proceed to enforce the new tax demands and/or minimum weight restrictions, they and their employees, dealers, servants, agents, assigns or licensees and all other parties claiming under them, would suffer grave irreparable loss not compensable by any award of damages. They have sought the following prayers in their petition dated 30th July 2013.

A. That pending the hearing and determination of this Petition, the respondent whether by themselves, their servants and/or agents or otherwise howsoever be restrained from:

i. Collecting or enforcing tax demands of Kshs 4, 280, 000/=, Kshs 5, 084, 378/= and Kshs 19, 931, 624/= against the first, second and third petitioners respectively.

ii. Debating, freezing and/or in any other manner whatsoever interfering with the petitioners' finances including, inter alia, their bank accounts.

iii. Closing down, suspending or in any other manner whatsoever interfering with or disrupting the smooth running and operation of business by the petitioners, their employees, servants, agents, assigns or licensees.

iv. Interfering in any manner whatsoever with the quiet and peaceable occupation, enjoyment, running and operation of the petitioners' vehicles, stores, godowns and/or other premises.

v. Harassing, intimidating or in any other way whatsoever threatening the petitioners, their employees, servants, agents, assigns or licensees.

B. That pending the hearing and determination of this Petition, this Honourable Court do suspend the implementation of the First Schedule to the Finance Act, No. 57 of 2012 as read together with Section 1 (b) and Section 9 of the Act, particularly those provisions of the First Schedule set out under tariff codes 4101.20.00 to 4301.90.00 and in the interim maintains the Export Duty at the previous rates.

C. That pending the hearing and determination of this Petition, this Honourable do suspend the implementation of the circular dated 27th February, 2013 and issued by the respondent imposing a minimum weight of twenty five (25) tons per twenty (20) feet container on exports of raw hides and skins.

D. That this Court do find and declare that:

i. The Fourth Schedule of the Finance Act, No 57 of 2012 particularly the provisions under tariff codes 4101.20.00 to 4301.90.00 should not be applied retrospectively.

ii. Retrospective application of the various provisions of the Finance Act, No 57 of 2012 and in particular those set out under tariff codes 4101.20.00 to 4301.90.00 thereof, is oppressive, harsh, made in bad faith, prejudicial to the petitioner's rights and as such, intended to defeat the ends of justice.

iii. Retrospective application of the provisions of the Finance Act, No 57 of 2012 and in particular those set out under tariff codes 4101.20.00 to 4301.90.00, is unconstitutional and as such, is null and void and of no legal consequence whatsoever.

iv. The provisions of the Finance Act, No 57 of 2012 which seek to increase the export duty for raw hides and skins while leaving wet blue hides and skins untaxed are discriminatory, unconstitutional and as such, null and void and of no legal consequence whatsoever.

v. The provision of the Finance Act, No 57 of 2012 which seek to increase the export duty for items set out under tariff codes 4101.20.00 to 4301.90.00 from 40% to 80% is unconstitutional and as such, is null and void and of no legal consequences whatsoever.

vi. The respondent is not entitled to the sums of Kshs 4,280,000/=, Kshs 5,084,378/= and Kshs 19,931,624/= demanded from the first, second and third petitioners respectively as the demand notices were unconstitutional, and as such null and void.

vii. The circular dated 27th February, 2013, issued by the respondent imposing a minimum weight of twenty five (25) tons per twenty (20) feet container on exports of raw hides and skins is illogical, impractical, irregular, unreasonable and a restraint to trade which is discriminatory, illegal and unconstitutional.

E. That the demand notices by the respondent for Kshs 4,280,000/=, Kshs 5,084,378/= and Kshs 19,931,624/= demanded from the first, second and third petitioners be withdrawn immediately, and unconditionally.

F. That the circular dated 27th February, 2013 and issued by the respondent imposing a minimum weight of twenty five (25) tons per twenty (20) feet container on exports of raw hides and skins be withdrawn, nullified and/or revoked.

G. That the costs of this Petition together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order be awarded to the petitioners.

H. That any such other or further relief as this Honourable Court may deem appropriate to be made.

The Petitioners' Case

9. The petitioners' case is contained in their petition dated 30th July, 2013 together with the affidavits in support sworn on the same date by the 1st and 2nd petitioners and a representative of the 3rd petitioner, Mr. Abdimahad Mohamed Gedi, on 30th July 2013, as well as submissions dated 18th October 2013.

10. In his affidavit in support of the petition, which is similar in content to those sworn by or on behalf of his co-petitioners, the 1st petitioner deposes that the export of raw hides and skins was not subjected to any taxation until a rate of 10% export duty, subsequently reviewed to 15% and later to 20%, was

introduced in 2003. In June 2007, the rate was again reviewed upwards to 40% in the 2007/2008 financial year budget. He deposes that this change amounted to a 100% increase in export duty.

11. It is also Mr. Abubaker's deposition that between 2003 and 2009, there were at least three meetings involving stakeholders from the leather industry in Kenya held to discuss how to implement a tax regime. The meetings resulted in, among other things, an agreement that the tax would be gradually increased from 15% in 2003. According to the 1st petitioner, the latest of such meeting was held on 4th April 2013 and the members of the Kenya Hides and skins Association lobbied to have the export duty imposed on raw hides and skins spread to cover wet blue hides and skins.

12. The petitioner avers that in his business transactions, he has always complied with provisions of all the relevant laws and paid all taxes due from him, particularly those due under the East African Community Customs Management Act, 2004 (EACCMA).

13. The 1st petitioner states that on 7th January 2013, the Finance Act 2012 (Act No 57 of 2012) came into force. It, inter alia, increased the export duty rates for raw hides, skins and other related commodities from 40% or Ksh 20/= per kilogramme to 80% or Ksh 40/= per kilogramme with effect from 9th January 2013. The change amounted to a further 100% increase in export duty.

14. The 1st petitioner avers that while the intention of government was to discourage the exportation of raw hides and skins and to encourage value addition to hides and skins before export, the concept was implemented in an unfair and discriminatory manner. This was because, according to the petitioner, the Finance Act 2012 retained the rate of export duty on wet blue hides and skins at 0%.

15. The 1st petitioner avers that this was done despite the fact that the wet blue process does not involve value addition to raw hides, and is merely a form of preservation of raw hides and skins which involves the removal of hair. It is the petitioner's case that the zero rating of export duty on wet blue hides and skins has therefore given the exporters of wet blue hides and skin undue and unfair advantages over those, like the petitioners, who deal with wet-salt hides and skins since, in the petitioners' view, those who deal with wet-blue hides and skins do not actually add any value to their products.

16. The 1st petitioner avers that at the time the Finance Act 2012 came into force, he had ongoing export business consisting of tens of tonnes of raw hides and skin which were procured while the rate of export duty was still at 40% or Kshs 20/= per kilogramme. He had also presented his export entry applications in January, February and March 2013, and the exports had been charged export duty at the rate of 40% or Kshs 20/- per kilogramme which was the rate prior to the assent to the Finance Act 2012.

17. The petitioners are therefore aggrieved that in March 2013, the 1st respondent sought to enforce the provisions of the Finance Act 2012 retrospectively. The 1st petitioner alleges that the 1st respondent issued him with a demand for Kshs 4,000,000/- as additional export duty on the hides and skins which had already been exported and for which export duty had been assessed and paid at the rate of 40% or Ksh 20/- per kilogramme. He argues that the demand was made without any regard to his constitutional rights to fairness and to the fact that the practice was discriminatory. He contends further that no notice was given or consultations held by the 1st respondent regarding implementation of the new tax tariffs, especially concerning the effective date, and he has therefore been called upon to pay excessive, exorbitant and unconscionable taxes which threaten to paralyse and close down his business.

18. According to the 1st petitioner, the 1st respondent claimed that short levying of duty had occurred due to its failure in updating its Simba 2005 system data to reflect the correct rates of customs duty; and that it threatened him with imposition of a penalty of 5% in addition to late payment interest of 2% per month. He avers that the imposition of a penalty of 5% above the principal amount in addition to late payment interest of 2% for each month in default is excessive and unreasonable since the error was caused by the first respondent itself.

19. The 1st petitioner states that the respondent thereafter, on 29th April 2013, issued an agency notice to the 1st petitioner's bankers, Barclays Bank of Kenya Limited under Section 131 of EACCMA demanding the payment of ksh 4,280,000/- being the principal duties, penalties and late payment interest.
20. The 1st petitioner avers that the change of export duty rate from 40% to 80% has negatively affected the operations of his business as well as the business operations of the entire raw hides and skins industry at large, leading to business losses and shrinking of the market for hides and skins which he attributes to the fact that his goods have become much more expensive than those of competitors after imposition of the new taxes.
21. He also alleges that the option of local value addition is not appropriate in all cases as local tanners have been rejecting raw hides and skins which he delivers to them citing the presence of hair slip and branding, and he is therefore unable to sell raw hides and skins locally.
22. The 1st petitioner is also aggrieved by the fact that the respondent has imposed a weight restriction on the export of hides and skins. He avers that on 27th February 2013, the 1st respondent issued a circular to the effect that there would be no export or import of raw hides and skins without the weigh bridge ticket, and that the declared weight should not be less than the minimum standard weight of twenty five (25) tonnes per twenty (20) feet container.
23. According to the 1st petitioner, while he welcomed the idea of having imports and exports of hides and skins passing through a weigh bridge, he was aware that around the world, the maximum weight restrictions of exports and imports vary from one sea port to another; that some ports only accept imports or exports of 20 feet containers with a maximum load of 20 tonnes. He contended that the respondent has not taken into account the weight restrictions imposed on Kenyan exports by Kenya's trading partners, and its imposition of a minimum weight restriction that is above the maximum weight restriction of other countries is an irregular and unreasonable restraint to trade which is discriminatory, illegal and unconstitutional.
24. The 1st petitioner avers that as a result of the minimum weight restriction imposed by the respondent, he and other exporters of raw hides and skins are effectively excluded from exporting their hides and skins through ports with maximum weight restrictions of below 25 tonnes.
25. The 1st petitioner further avers that he is aware that the Kenya Roads Board has clear regulations on the weight of loads transported on Kenyan roads; that the regulations provide, inter alia, that a vehicle should carry a maximum load of eight (8) tonnes per axle which in the case of a three (3) axle truck, translates to a maximum load of twenty four (24) tonnes; that the common means of transporting raw hides and skins is 20 foot containers loaded onto a three (3) axle truck; and that the maximum weight of a load transported by a three (3) axle truck now falls below the minimum weight of twenty five (25) tonnes prescribed by the respondent in the said circular.
26. He avers further that the Kenya Roads Board imposes criminal sanctions upon any truck loaded with more than eight (8) tonnes per axle, and the restrictions imposed by the respondent therefore mean that it will be impossible for the petitioner to transport raw hides and skins to the port of Mombasa by road, and he will therefore no longer be able to conduct his business. It is his contention therefore that the imposition of the minimum weight restriction is illogical, impractical, irregular, unreasonable and a restraint to trade which is discriminatory, illegal and unconstitutional, as a result of the implementation of which he has lost and continues to lose a lot of business.
27. The 1st petitioner alleges that neither he nor other exporters of raw hides and skins were involved in either the amendment of the law or the formulation of the Finance Act 2012 or the implementation of the laws and related policies. It is his case therefore that the claims by the respondent are unlawful and unconstitutional as they are discriminatory and were effected without notice or consultation in violation of the cardinal principle of citizen participation. He also contends that neither he nor other exporters of raw hides and skins were involved in the formulation and implementation of the weight restrictions, and

he therefore considers it unconstitutional.

28. Similar averments are made by the 2nd and 3rd petitioners. The 2nd petitioner avers that a demand for Kshs 4,751,756/= was made against her, and an agency notice for Kshs 5,084,378/= sent to her bank, NIC Bank Ltd. With respect to the 3rd petitioner, a claim for Kshs 16,522,235 was made, and an agency notice sent to its bank, Standard Chartered Bank Kenya Ltd with respect to a claim of Kshs 19,931,624/=. They too argue that the demands against them were made without any regard to their constitutional rights, to fairness or to the fact that the practice was discriminatory. They further aver that no notice or consultations were held by the respondent regarding implementation of the new tax tariffs, especially with regard to the effective date; that the imposition of a weight restriction is unlawful and unreasonable, and they join the 1st petitioner in praying that the Court grants the orders sought in their petition.

The Case for the Respondent

29. The respondent opposes the petition and has filed an affidavit in reply sworn by Mr. Franklin Onjala Ombaka on 19th September 2013, as well as submissions dated 30th January, 2014. The respondent argues that its mandate is to assess and collect taxes imposed under Article 209 of the Constitution and as determined by the relevant legislation, in this case, the EACCMA as read with the Finance Act 2012.

30. The respondent concedes that it did, on 26th March, 2013, issue demand notices to the petitioners pursuant to Section 135 (1) of EACCMA and it gave the petitioners thirty days within which to pay, in default of which further duty of a sum equal to 5% of the amount demanded plus a penalty of 2% for each month in default would accrue, as provided under Sections 135 (2) and 249 of EACCMA. It states further that it informed the petitioners through their advocates, by letter dated 26th April, 2013, of the amounts due, and that an error in the system did not absolve the petitioners of liability.

31. The respondent further contends that upon the expiry of the 30 day notice, an Agency Notice dated 29th April, 2013 was issued to the petitioners' bankers to recover the demanded taxes but the Agency Notices were unsuccessful since the banks denied operating any bank accounts for the petitioners. It further avers that owing to no response from the petitioners, and out of necessity, it suspended the Simba password belonging to the petitioners' clearing agent through a memo to the Ag. Deputy Commissioner-Licensing Section on 10th May, 2013, pursuant to Section 147 of EACCMA.

32. According to the respondent, following its suspension of the petitioners' passwords in the Simba System, the 3rd petitioner's clearing agent vide a letter to the respondent dated 17th May, 2013 protested the suspension of the Simba password, blaming the short levy of taxes on the failure of Simba System to update the changes in duty rates.

33. With regard to the 2nd petitioner, the respondent avers that by a letter to the respondent received on 31st July, 2013, the 2nd petitioner requested for a grace period of three months as the company sought legal redress. It states that engagements were made between it and the petitioners and explanations were given to them with regard to the law on the basis of which the respondent took action to levy the duty against them.

34. The respondent maintains that the legislation it is implementing emanates from the provisions of Article 209 and 210 of the Constitution, and is therefore unassailable. It prays that the funds in the petitioners' respective banks be released to it to enable it perform its mandate under Article 210 of the Constitution.

35. In its written submissions, the respondent questions the jurisdiction of the Court to determine the present petition. It relies on the decisions in **The Owners of the Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1** and **John Githongo and 2 Others vs Harun Mwau and 5 Others, Petition No 44 of 2012** to submit that this Court lacks the capacity to entertain the instant complaint because the evidence by the petitioners is wanting in view of the fact that payments were made after the effective date

of the Finance Act.

36. It is also its submission, on the authority of the decision in **Alphonse Mwangemi Munga and 10 Others vs African Safari Club Limited [2008] eKLR**, that the Court should not be bogged down by every issue for which recourse is available elsewhere and that parties should make use of the normal procedures under the various laws to pursue their remedies instead of moving to the constitutional court to be heard on issues that are not within the confines of Article 22 as read with Article 165 of the Constitution. In its view, the present petition is an abuse of the court process and should be dismissed with costs.

The Petitioners' Rejoinder

37. In response to the averments by the respondent, the petitioners, in the replying affidavit sworn by the 1st petitioner, reiterate that the provisions of the Finance Act on the export duty rate on hides and skins products are retrogressive, unconstitutional, in conflict with existing laws and discriminatory. They maintain that the respondent did not inform them of the coming into force of the Finance Act on 7th January; that it did not inform them until 26th March, 2013 when it issued demand notices without due regard to its role as the State agent mandated with the responsibility of collecting taxes.

38. They contend that the respondent admits that it only disseminated the information on the coming into force of the provisions of the Act on the 12th March, 2013 when it advised the Deputy Commissioner to call for the short levied taxes with effect from 9th January, 2013. It is their contention therefore that they should not be subjected to penalties due to the respondent's failure, and they pray that the respondent's claims in respect of the export duty be dismissed.

39. The petitioners deny that there was any engagement between them and the respondent, and that no efforts were made by the respondent to explain or inform them the basis of the export duty levied, and they term its actions punitive, discriminative and unconstitutional.

Determination

40. I have read the respective pleadings and submissions of the parties which they filed in Court and asked that the Court relies on in rendering its judgment. I have also set out in some detail above the averments by the parties, as well as the prayers that the petitioners seek.

41. From the pleadings, it is apparent that the petitioners are aggrieved by two things. The first is the Finance Act, 2012, which increased the rate of export duty on hides and skins by 40%. They claim that the Act is unconstitutional, on the basis that they were not consulted in the process of its enactment; but also on the basis that it is discriminatory as it zero rates duty on wet blue hides and skins. They also allege that the provisions of the Act have been applied retrospectively. The petitioners are also unhappy that the respondent has set restrictions on the import and export weight load of hides and skins.

42. In my view, the issues that arise for determination in this matter are as follows:

- 1. Whether the present petition is properly before this Court;***
- 2. Whether the Finance Act 2012 is unconstitutional for lack of public participation;***
- 3. Whether the respondent's action of implementing the duty in the Finance Act 2012 amounts to retroactive application of legislation;***
- 4. Whether there has been any violation of the petitioners' rights.***

Jurisdiction

43. The respondent has questioned the capacity of this Court to deal with the present matter, arguing that it raises no constitutional issue, and that not every issue should be brought as a constitutional issue when there are remedies available under other provisions of law.

44. Courts in this jurisdiction have addressed themselves to the question of jurisdiction on several occasions. The leading case in this regard is the decision in **The Owners of the Motor Vessel “Lillian S” (supra)** in which the Court used the oft quoted words that jurisdiction is everything, and without it, a Court should not take any further steps but should down its tools.

45. The jurisdiction of this Court is set out in Article 165 (3) of the Constitution, which states that:

3. Subject to clause (5), the High Court shall have-

a. Unlimited original jurisdiction in criminal and civil matters.

b. Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened;

c. Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 44;

d. Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of this Constitution including the determination of –

i. The question whether any law is inconsistent with or in contravention of this Constitution;

ii. The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (Emphasis added)

46. The petitioners have challenged the process that led to the enactment of the Finance Act claiming that the constitutional requirement for public participation was not followed, that the implementation of the Act is unconstitutional and that the provisions seeking to increase the export duty are unconstitutional.

47. The respondent has submitted that its mandate is to assess and collect the taxes imposed under Article 209 of the Constitution and as determined by the relevant legislation. The Constitution grants every person the right to institute proceedings claiming a violation or threat of violation of constitutional rights, or a violation or threat of violation of the Constitution. The provisions of Article 22 and 258 of the Constitution are clear on this. Article 22 states that:

22. (1) Every person 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.

.....

48. Article 258 provides that:

Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

49. The petitioners are challenging the constitutionality of the Finance Act, 2012, and the process of its enactment, which they allege falls short of constitutional requirements. They also allege that its application has been retrospective and discriminatory. In my view, these challenges fall within the ambit

of Article 22, 165 and 258 of the Constitution, and it is my finding therefore that this Court has the jurisdiction to hear and determine the petition.

Whether the Finance Act 2012 is Unconstitutional for Lack of Public Participation

50. The petitioners have alleged that the Finance Act, 2012 and the changes it brought to the tax regime on raw hides and skins are unconstitutional as they did not participate in the legislative process in accordance with the principles of public participation enshrined in Article 10 (2) (a) of the Constitution. They contend that neither they nor other exporters of raw hides and skins were involved in the formulation and implementation of the export duty nor of the minimum weight restrictions imposed by the respondent, and so the changes were effected without notice or consultation, and are therefore unconstitutional. It is their contention that had they and their association been consulted, they would have lobbied at least for lower increases, instead of the sharp and abrupt 100% increase, and would have negotiated for reasonable implementation time lines.

51. In response, the respondent maintains that the legislative process in Kenya on Finance Bills is participatory, with the public being involved through the budget making process in which stakeholders have an opportunity to present their views on taxation measures in areas that are likely to impact on them. It is its case that the process leading to the enactment of the Finance Act proceeded as required; that the legislation was properly initiated through public participation in the Medium Term Expenditure Framework; that there was debate thereon, and it was duly enacted.

52. It is correct, as the petitioners submit, that the principle of public participation is enshrined in our Constitution. It is one of the national values and principles of governance enunciated in Article 10 (2)(a): which provides that:

(2) The national values and principles of governance include-

a. Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

53. The question is what public participation entails. Courts in this jurisdiction have had occasion to consider the issue, and I need only refer to a few of the many decisions emanating from our Courts.

54. In the case of **Moses Munyendo and 908 Others vs-Attorney General and Another, Petition Number 16 of 2013** the Court pronounced itself on the issue as follows:

***“[21] As concerns the pre-parliamentary or consultative stage, the Permanent Secretary has given evidence on how different stakeholders were consulted. Some of the organizations consulted include the following; Kenya National Federation of Cooperatives, National Cotton Growers Association, Meru Central Dairy Co-operative Union Limited, Cereal Growers Association and the Horticultural Farmers and Exporters Association. The organisations 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 it is necessary that every person or professional be invited to every forum in order to satisfy the terms of Article 10. Thus the contention that by the first petitioner, “I am aware that majority of Kenyans producers, processors, professionals or policy makers have not been invited to any stakeholders meetings to enrich any of the law” is not necessarily decisive of the lack of public participation...*”** (Emphasis added)

55. In **Consumer Federation of Kenya (COFEK) vs Public Service Commission and Another, Petition No. 263 of 2013**, the Court observed that:

“[13] The Petitioner has latched on to the phrase “participation of the people” in a selective and selfish manner. I have said that there is no express requirement that “participation of the people” should be read to mean that “the people” must be present during interviews but taken in

its widest context that their in-put is recognized.”

56. Finally, in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs County of Nairobi Government and 3 Others, Petition No 486 of 2013** the High Court stated:

“[47] Further, it does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in Minister of Health v New Clicks South Africa (PTY) Ltd (supra) where he expressed himself as follows;

“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 issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”

57. See also the decisions of the Court in **Kenya Small Scale Farmers Forum and 6 Others vs Republic Of Kenya and 2 Others, Petition No 1174 of 2007**, **Robert N. Gakuru and Others vs The Governor Kiambu County and 3 Others, Petition No 532 of 2013**, and **Coalition for Reform and Democracy and Others vs Attorney General, Petition No 628 of 2014**.

58. Was there any public participation in the present case? I observe, first, that the petitioners are only challenging the provisions pertaining to the export duty on raw hides and skins, and not the Finance Act in its entirety. This Act was passed through the legislative process and as mandated in the Standing Orders of the National Assembly, and is presumed to be constitutional unless the petitioners establish the contrary- see the case of **Ndyanabo –vs- Attorney General [2001] EA 495** to the effect that there is a general presumption that every Act of Parliament is constitutional, and the burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.

59. Secondly, it is to be observed, as averred by the petitioners, that there had been stakeholder meetings and engagements on the issue of taxation in the hides and skins sector, which the petitioners were aware of and participated in.

60. Thirdly, there has been in place a process of engagement in the financial sector during the budget making process in the form of the “Medium Term Expenditure Framework” alluded to by the respondent. None of the parties produced evidence on this framework. However, according to the **Citizen’s Handbook on the Budget: A Guide to the Budget Process in Kenya, 2nd Edition** by the Institute of Economic Affairs (available at <http://www.internationalbudget.org/wp-content/uploads/2011/01/CitizenBudgetHandbook.pdf>) the **Medium Term Expenditure Framework (MTEF)** is described as follows:

“This is a three year rolling budget framework that was born out of the recommendations of the 1997 Public Expenditure Review (PER'97). The PER concluded that there was no link between budgeting and planning. MTEF was not introduced until 2000. The primary objective of MTEF was to create the link between the two processes, budgeting and planning. The three year rolling budget process has been widely adopted by developing countries with the assistance of multilateral donors, especially the Bretton Woods Institutions, the World Bank and the International Monetary Fund. The first year represents the current year financial plan while the two outer years represent tentative fiscal plans. The MTEF seeks to (i) link policy making with planning, budgeting and implementation of programs and projects; (ii) maintain fiscal discipline by establishing hard budget targets (iii) and facilitate expenditure prioritization. Following introduction of the Economic Recovery Strategy for Wealth and Employment Creation (ERS) in 2003, policies and expenditure proposals, in the budget, are now required to target poverty reduction within the MTEF budgeting cycle. MTEF planning and budgeting cycle allows for wider consultations to ensure that budget formulation, implementation and oversight benefits from the input of the diverse economic actors and interest groups in the economy and output of

both the national and district planning processes. Since its introduction in 2000, the MTEF has changed a few times, necessitated by among other things, an early start of the budget process and a need to make it more inclusive. The current budgeting process starts early and benefits from more stakeholder input and participation such as budget hearings and wider circulation of Budget documents such as Budget Outlook paper (BOPA) and Budget Strategy Paper (BSP)."
(Emphasis added)

61. Once it is accepted that there has been stakeholder engagement prior to the budget making process, and that consultation of various stakeholders through the **Medium Term Expenditure Framework** has been a feature of the financial legislation process for the past decade or more, then it is inevitable to conclude that the public and players in various sectors have had an opportunity to participate in the processes of government.

62. That they do not do so cannot be laid at the feet of the state. What public participation requires is vigilance from stakeholders, so that they can ensure that the interests they represent present their views in the legislative process. That they fail to do so cannot be held to vitiate the process. I therefore find that in the instant case, there was an opportunity for participation which the petitioners did not avail themselves of. They cannot therefore be heard to challenge the legislation on the basis of lack of public participation.

Whether the Respondent's actions Amount to Retroactive Application of Legislation

63. The petitioners have argued that the respondent has applied the increased export duty rates on exports procured by the petitioners prior to the date of commencement of the law. They contend that they had been operating their businesses in the period between January and March 2013, and had sold their hides and skins in the market at particular prices in the faith that they had secured prudent bargains.

64. They submit, further, that they carried out their business as stated above with the acquiescence, approval and authority of the respondent who assessed and collected export duty as they continued with their business with the legitimate expectation that their affairs were in order and in line with the legal requirements based on the respondent's conduct. They have relied on the decision in **Keroche Industries Ltd vs Kenya Revenue Authority and Others [2007] eKLR** in support of their argument that the retrospective application of legislation is contrary to public policy and illegal.

65. The respondent argues in response that laws take effect on the date they are assented to and published in the Kenya Gazette. It maintains that it is under an obligation to collect taxes and cannot circumvent collections which have been legally sanctioned by dint of Article 210 of the Constitution. It is its contention that from the export entries declared by the petitioners and payments made through various banks, it is evident that the transactions were effected after the date of the publication of the Finance Act on 9th January, 2013.

66. It distinguishes the **Keroche Industries** case on the basis that the issues that arose in that matter were with regard to the decision making process by the respondent within judicial review parameters, and that it was a mere challenge to the exercise of power by an administrative body. It contrasted the position in the present case which in its view relates to a challenge by the petitioner of the alleged retrospective application of a statute.

67. The respondent is correct in its assertion that legislation comes into effect upon its gazettment or as may be stipulated by the legislation in question. The Finance Act was assented to on 7th January, 2013. It contains at Section 1 provisions with respect to the dates on which various sections of the Act would come into force by stating as follows:

i. This Act may be cited as the Finance Act, 2012, and shall come into operation, or be deemed to have come into operation, as follows-

a. sections 2, 6, 8, 16(b)(ii), 17(a)(iii), 23(a), 23(c), and 25(a)(i) on the 15th June, 2012;

b. sections 9(a), 9(b), 10(a), 10(b), 11 and 12, on the 1st July, 2012;

c. sections 4, 5, 7, 19, 20, 21, 23, 24, 28, 29, 31 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57 and 58, on the 1st January, 2013;

d. section 18 on 1st July, 2013;

e. sections 26 and 27, upon the final announcement of all the results of the first general elections for Parliament under the Constitution of Kenya, 2010;

f. all other sections, on publication.

68. The petitioners ask the Court to suspend the implementation of the First Schedule to the Finance Act, No. 57 of 2012 as read together with Section 1(b) and Section 9 of the Act, particularly those provisions of the First Schedule set out under tariff codes 4101.20.00 to 4301.90.00, and to maintain the export duty at the previous rates. The Finance Act provided expressly that sections 9 (a) and 9(b) would be deemed to have come into effect on 1st July 2012. Thus, at the time the business in respect of which the petitioners complain was transacted, between January and March 2013, the provisions of Sections 9 and the First Schedule to the Finance Act were already in force. The Court notes, from the documents that the petitioners have placed in evidence, that the petitioners procured goods on diverse dates: in the case of the 1st petitioner, on 11th January 2013, in respect of pallets of wet salted cowhides; on the 21st January, 2013, 12th February, 2013, 26th February, 2013 and 20th March, 2013. In the case of the 2nd petitioner, on 6th January, 2013, 20th January, 2013, 7th February, 2013, and 22nd February, 2013; and in the case of the 3rd petitioner, on a number of dates between 6th January, 2013 and 22nd February, 2013.

69. I therefore find and hold that at the time the petitioners undertook the transactions duty on which they allege has been applied retrospectively, the provisions of the Finance Act 2012 were already in force and were subject to the tax rates that were introduced by the Act. The respondent therefore exercised its mandate in accordance with the provisions of the Act, and its actions cannot be faulted as applying the Act retrospectively.

Whether There has Been Violation of the Petitioners' Rights as Alleged

70. The petitioners have alleged violation of their constitutional rights under Articles 10, 27 (1), (2), (3), (4) and (5), 40 (1), (2) and (3) and 47 (1) and (2).

Violation of Article 27

71. The petitioners contend that the provisions of the Finance Act which increased export duty on raw hides to 100% is discriminatory both in its express intentions and in its applications. Their argument is premised on the fact that although the purpose of the duty increase in the Finance Act was to discourage the exportation of raw hides and skins and to encourage value addition to hides and skins before export, the concept was implemented in a discriminatory manner because the Act retained the rate of export duty on wet blue hides and skins at 0%. It is their contention that levying of 80% export duty on raw hides and skins while maintaining the export duty on wet blue hides and skins at 0% is discriminatory and gives an unfair advantage to exporters of wet blue hides because the wet blue process does not involve any value addition but is merely a form of preservation of raw hides and skins which involves the removal of hair. They therefore allege violation of their right under Article 27 of the Constitution.

72. As I understand it, the petitioners' claim of discrimination is premised on the different rates applied to **items** for export by the Finance Act, 2012. Their claim is that the imposition of taxes on raw hides and skins, and the zero rating of tax on wet blue hides and skins, is discriminatory as it gives an advantage to those who trade in wet blue hides. The provisions of Article 27 which are relevant to the present inquiry are as follows:

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

3.

4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

5.

73. It seems to me to be to attempt to stretch the non-discriminatory provisions somewhat to allege that because one particular item of trade attracts duty and another doesn't, that amounts to discrimination. The prohibited grounds under Article 27 are clear, and even were one to take the view, as this Court does, that the list of prohibited grounds is not closed given the use of the word "including", in the Article, it would be difficult to see how the nature of business or goods one trades in can be said to be a ground of discrimination. The petitioners trade in raw hides and skins today. Tomorrow they may be trading in wet blue hides, or in an entirely different item altogether. They cannot be heard to complain that legislation is discriminatory because it imposes different rates of taxation on different items.

74. In any event, the imposition of taxes is within the mandate of the executive and legislature. It is a policy matter whose formulation is within the ambit of the executive, and once the people's representatives, within whose mandate the decision to enact legislation on taxation falls, have enacted such legislation, then, unless the legislation can be clearly shown to be unconstitutional, this Court cannot presume to question the wisdom or otherwise of imposing a certain level of tax on raw hides and skins, and to impose a zero rate on wet blue hides. It is therefore my finding that there is nothing before me that can lead to the conclusion that the imposition of different taxes on raw hides and skin and on wet blue hides and skins is discriminatory and in violation of Article 27 of the Constitution.

Violation of Article 40

75. Article 40 of the Constitution provides the guarantee of the right to property in the following terms:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

76. The petitioners allege that as a direct consequence of the implementation of the weight restrictions by the respondent, they have lost and continue to lose a lot of business for the export of raw hides and skins. They argue that the respondent has used its power to effect changes that are improper, discriminatory and done in bad faith, and they rely on the decision in **Keroche Industries Limited (supra)** in support. It is their contention that in imposing the weight restriction, the respondent did not take several important factors into account, inter alia, the weight restrictions imposed on Kenyan exports by countries which buy

Kenyan goods, the fact that the minimum weight of twenty feet containers imposed is above the maximum weight restriction imposed by Kenyan trading partners such as the Chinese Ports of Qingdao and Lianyungang; as well as the load requirements imposed by the Kenya Roads Board, which has prohibited the haulage of loads weighing above eight (8) tonnes per axle or twenty four (24) tonnes per three (3) axle truck.

77. I must observe that it is unclear from the petitioners' averments and submissions how the weight restrictions by the respondent impact on the right to property. It seems to the Court that the obligation is on the petitioners to comply with the restrictions imposed by the respondent, and should they have an impact on their international trade, then engage with the respondents on the policy issues and considerations that will facilitate such trade. It is not within the mandate of this Court to determine what the appropriate weight restriction should be.

78. More importantly, no evidence has been placed before this Court to demonstrate the weight requirements in the alleged ports, but even if it were, the question must arise as to the manner in which goods for export will be packed, and whether it is for the Court to direct that goods comply with restrictions in the diverse ports to which such goods are exported. Suffice to say that I am unable to see the weight restriction question as a constitutional issue which this Court can determine, and it is my finding therefore that no violation of the right to property has been demonstrated.

Right to fair Administrative Action

779. It is the petitioners contention that the abrupt increase of export duty on raw hides and skins by 100% without notice or consultation amounts to unfair, unjust administrative practice. However, as observed elsewhere above, the petitioners had notice, or should have had notice, that the Finance Act had increased the rate of duty. In addition, in light of my finding that an opportunity for public participation had been provided, and that there had been stakeholder engagement on the issue of export duties on hides and skins with a view to encouraging value addition, I am unable to find that the petitioners have made out a case of violation of their right under Article 47 to *"...administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."*

80. In light of my findings above, I am not satisfied that there is any merit in the petitioners' case, and the petition is hereby dismissed. With regard to costs, I direct that each party bears its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 15th day of April 2015

MUMBI NGUGI

JUDGE

Mr. Kamaara instructed by the firm of P. M. Kamaara & Associates Advocates for the petitioner

Mr. Ontweka instructed by the firm of D. O. Ontweka & Co. Advocates for the respondent