



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 100 OF 2015

FAIRSURE INSURANCE BROKERS LTD1ST PETITIONER

AON INSURANCE BROKERS LTD.....2ND PETITIONER

CANOPY INSURANCE BROKERS LTD.....3RD PETITIONER

FARMAX INSURANCE BROKERS LTD.....4TH PETITIONER

SAPON INSURANCE BROKERS LTD.....5TH PETITIONER

FOUR M INSURANCE BROKERS LTD.....6TH PETITIONER

PACIFIC INSURANCE BROKERS LTD.....7TH PETITIONER

STARLIT INSURANCE BROKERS LTD.....8TH PETITIONER

METHODIST INSURANCE BROKERS LTD.....9TH PETITIONER

LIASON GROUP 91.B) LTD.....10TH PETITIONER

PRIMEKEN INSURANCE BROKERS LTD.....11TH PETITIONER

UTMOST INSURANCE BROKERS LTD.....12TH PETITIONER

WAUMINI INSURANCE BROKERS (K) LTD.....13TH PETITIONER

ECB INSURANCE BROKERS LTD.....14TH PETITIONER

PELICAN INSURANCE BROKERS LTD..... 15TH PETITIONER

MEKHAN INSURANCE BROKERS LTD.....16TH PETITIONER

PLAN AND PLACE INSURANCE BROKERS.....17TH PETITIONER

BTB INSURANCE BROKERS LTD.....18TH PETITIONER

VERSUS

THE COMMISSIONER OF CUSTOMS & EXCISE1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. The petitioners filed this petition to challenge the levying of excise duty on bodies registered under the Insurance Act. In the petition dated 16th March 2015, the petitioners seek the following orders.
 - a. *A declaration that, in so far as their application to the petitioners is concerned, the said amendments are in violation of Articles 10, 27, 28, 40, 43 and 46 of the Constitution of Kenya and are subsequently impossible to be implemented on the petitioners.*
 - b. *A prohibition order directed to the 1st respondent against purporting to implement the said amendments.*
 - c. *A prohibition order directed to the 1st respondent from purporting to demand, collect or take any step or action to recover any excise tax allegedly due from the petitioners pursuant to the said amendments.*
 - d. *That costs of the suit be provided for.*
 - e. *Such other order(s) as this Honourable Court shall deem just.*
2. The 1st respondent filed a Notice of Preliminary objection dated 23rd May 2015 in the following terms:
 1. *The applicants' notice of motion and indeed the entire petition is totally incompetent, bad in law and amounts to an abuse of the court process.*
 2. *The suit offends the provisions of section 8 of the Civil Procedure Act, Cap 21; and is res judicata for reasons that;*
 - i. *The issues raised in this petition and the application were heard and determined in Nairobi HC Petition no 383 of 2013: Mark Obuya, Tom Gitogo, Thomas Maara Gichuhi acting on behalf of the Association of Kenya insurers as the 1st petitioners and others Vs the commissioner of Domestic Taxes & 2 Others*
 - ii. *The said petition sought to challenge the constitutionality of the amendments made by the Finance Act 2013 to part III of the Fifth Schedule to the Custom and Excise Act (cap 472) Laws of Kenya in so far as it defines financial institutions to include among others persons licensed under the insurance Act and which imposed 10% excise duty on fees, charges and commissions charged by the said financial institutions.*
 - iii. *The petitioners were through its Association parties to the said petition suing as the 6th Petitioners.*
 - iv. *That by judgment of the court delivered on 30th June 2014 the said petition was dismissed.*

v. *The petitioners' did not proffer an appeal against the said decision of the court.*

vi. *As a result of the said Judgment, the 1st respondent being the Agency for the government for the collection and receipt of all revenues was at liberty to collect excise duty pursuant to the said amendment to the law.*

3. This Honourable Court has no jurisdiction to hear, determine or otherwise deal with this petition and or grant conservatory orders as prayed for in the Notice of Motion application.

3. The parties filed written submissions on the preliminary objection which was argued on 27th May 2015.
4. In his submissions on behalf of the 1st respondent, Mr. Ontweka argued that the present petition is *res judicata*, the issues it raised having been the subject of **Petition No 383 of 2013 – Mark Obuya and Others acting on behalf of the Association of Kenya Insurers vs Kenya Revenue Authority & Another**. The said petition raised the same issues as this petition regarding the taxation measures introduced by the Finance Act, 2013. Counsel relied on paragraph 33-36 of the judgment, which he submitted confirmed that the Finance Act 2013 was the subject of the decision in which the Court (Majanja J) dismissed the petition.
5. The 1st respondent also relied on the decision in **Petition No 173 of 2011 – Freur investment Ltd vs Permanent Secretary Ministry of Roads** **Petition No 173 of 2011 and 4 Others and John Githongo vs John Harun Mwau** **Petition No 44 of 2012** for the proposition that where a petition seeks the same relief as a sought in a previous matter on the same facts, it is an abuse of the Court process. It was the 1st respondent's submission that this petition is *res judicata* and the Court cannot sit to review matters arising out of the Finance Act 2013. It therefore prayed that the petition be struck out.
6. The 2nd respondent, the Attorney General, supported the preliminary objection filed by KRA, as well as the submissions made by Mr. Ontweka.
7. In response, Mr. Arwa for the petitioner made several arguments in response to the preliminary objection. It was his contention, first, that it is a well-known principle that a preliminary objection can only be raised on a pure point of law, not on a point of fact. His submission was that the preliminary objection before the Court was based on a pure point of fact, yet no affidavit is annexed to support the allegations of fact and the preliminary objection must fail.
8. It was his submission, secondly, that the Court is not in a position to determine the preliminary objection. To do so, it must consider the pleadings in the other suit, which information is not before the Court, so it is impossible to determine the allegations. Counsel argued that the Court cannot tell what the issues were or the reliefs sought by looking at the judgment which the respondent had produced as an authority.
9. With regard to the provisions of section 7 of the Civil Procedure Act, Counsel submitted that the rule binds only parties to the suit. His contention was that none of the petitioners was involved in the earlier suit. The allegation by the 1st respondent that the 6th petitioners in **Petition No. 383 of 2013 – Mark Obuya and Others Vs Kenya Revenue Authority** acted on behalf of the present petitioners because they acted on behalf of the Association of Insurance Brokers was incorrect. According to the petitioners, the judgment shows that the 6th petitioners were acting on behalf of the Association of Insurance Brokers, not the petitioners. In his view, even if some of the petitioners were members of the Association, it would be preposterous to argue that the position of the Association compromises that of the petitioners or members of the Association.
10. Counsel argued that the respondent has misunderstood what matters in issue means, his

submission being that matters in issue must mean the entire subject of the controversy. His contention was that the respondent had misconstrued what the petitioners were seeking; that in the previous petition, the Court was asked to declare the Finance Act 2013 unconstitutional, which is not what the petitioners are seeking in the present matter.

11. Their argument, they submit, is that the implementation of the Act as against them violates their constitutional rights; that they do not seek to annul the Act but to ensure that they should be exempt from its application. According to the petitioners, the issues that they raise are totally new and were not raised in the previous suit; they do not charge commissions but only receive payments which are fixed by insurance companies; and to do what the Act requires would render them out of business.
12. The petitioners further contend that under Article 159, as well as section 1A and B of the Civil Procedure Act, the Court should look to the substance of the case and avoid removing litigants from the judgment seat on the basis of mere technicalities.
13. In response, Mr. Ontweka submitted that the 1st respondent was clear that the present petition sought the same orders as were the subject of **Petition No. 383 of 2013**, citing specifically paragraph 12 and 15 thereof which made reference to the Finance Act 2013. In its view, the issue of the taxation of insurance brokerages was already settled by the Court in a decision on a matter brought by the Association of Insurance Brokers.
14. Mr. Ontweka termed the present petition a collateral attack on the Finance Act 2013. Counsel pointed out that the petitioner concedes that the law is constitutional, arguing only that it is difficult to implement. It was KRA's submission that the petitioners could not argue on one hand that the law being challenged is constitutional and on the other that it is violating their rights. In its view, should the problem be implementation, there would be another forum to challenge the implementation, and how the demand for tax is affecting the petitioners. The matter in dispute in this petition, as in the previous petition, is the taxation of insurance services in Kenya, which was at issue in **Petition No. 383 of 2013**, and the constitutional issue that the petitioner alleges it raises has already been settled.

Determination

15. The starting point in determining the preliminary objection in this matter is to consider the petitioners' argument with respect to the preliminary objection, which Mr. Arwa submitted did not qualify as a preliminary objection as it adverted to matters of fact. In the case of **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] E.A. 696**, Law, JA stated as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. In the present case, the 1st respondent raises the issue of res judicata. The issue of res judicata goes to the jurisdiction of the Court, in that the Court has no jurisdiction to hear and determine a matter that has been heard and finally determined by a Court of competent jurisdiction. It is therefore my finding that the 1st respondent's point is well taken.
17. The second point to consider is the law relating to the principle of *res judicata*. First to the meaning. Black's Law Dictionary (9th Edition) at page 1425 defines **res judicata** as follows:

“Latin 'a thing adjudicated' 1 an issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are 1. An earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.....”

18. Section 7 of the **Civil Procedure Act, Cap 21** states as follows with regard to the principle:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

19. The Civil Procedure Act then provides explanations with respect to what is considered to be *res judicata*, Explanation 1-3 of which are relevant for present purposes and are in the following terms:

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

20. With regard to the application and implications of the rule, the Court of Appeal in **Nicholas Njeru vs Attorney General & 8 Others (2013)e KLR** expressed itself as follows:

“This doctrine has been applied in a number of cases including; Reference No. 1 of 2007 EACJ, James Katabazi & 21 Others vs The Attorney General Of The Republic Of Uganda where the court stated that for the doctrine to apply;

- The matter must be directly and substantially in issue in the two suits.

-The parties must be the same or parties under whom any of their claim, litigating under the same title; and

-The matter must have been finally decided in the previous suit (see Uhuru Highway Development Limited vs Central Bank & 2 Others – Civil Appeal No. 3 of 1996.”

21. See also **Job Kipkemei Kilach vs Director of Public Prosecutions and 2 Others (2014) eKLR; Charo Kazungu Matsere and 273 Others vs Kencent Holdings Limited and Another (2012) eKLR; and Karia and Another vs the Attorney General and Others (2005) 1EA 83.**

22. In its decision in **Swamy Atmananda vs Sri Ramakrishna Tapovanam [(2005) 10 SCC 51]**, the Supreme Court of India, when considering the *res judicata* rule, stated as follows:

“[26] The object and purport of the principle of res judicata as contended

in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment. [27] The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment.”

23. The decision of the Court in the English case of **Henderson vs Henderson (1843-60) ALL E.R.378** is also apposite in a consideration of the *res judicata* rule. In that case, the Court expressed the following view:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.” (Emphasis added)

24. Applying the principles set out in the above case, I pose the question whether the issues raised in this petition are the same as the ones raised in **Petition No. 383 of 2013 – Mark Obuya & Others vs KRA**, and whether they could have been dealt with in the same suit.

25. The petitioners in the **Mark Obuya** case sought the following orders:

1. *A declaration that the public notice published by the respondents on 23rd July 2013 in so far as it applies to persons registered under the Insurance Act has been issued in violation of the petitioners’ rights under Article 47(1) of the Constitution.*
2. *An order restraining the respondents from enforcing the said public notice as against persons registered under the Insurance Act.*
3. *A declaration that the imposition of excise duty in so far as it applies to persons registered under the Insurance Act is unlawful and violates the petitioners’ rights pursuant to Article 47(1) of the Constitution.*
4. *In the alternative, a declaration that the imposition of excise duty without giving the petitioners’ members sufficient time to implement the necessary systems and software is an infringement of the right to fair administrative action.*
5. *An order restraining the respondents from imposing or collecting excise duty in so far as it applies to the petitioners’ members as persons registered under the insurance Act.*

26. I have already set out above the prayers sought in this petition. In summary, the petitioners seek a declaration that the application to them of the amendments to the Finance Act 2013 violate

Articles 10, 27, 28, 40 43 and 46 of the Constitution, and are therefore impossible to implement with respect to them. The petitioners also seek an order to prohibit the 1st respondent from implementing the amendments, demanding, collecting or taking any action to recover the excise tax pursuant to the amendments to the Act.

27. Two issues stand out in respect of both petitions. As the petitioners submit, their problem is that the implementation of the Act with respect to them is impossible. They allege that such implementation will violate their rights under Articles 10, 27, 28, 40, 43 and 46 of the Constitution. The question is how this claim of violation of these Articles can be distinguished or separated from the claim in **Mark Obuya & Others** in which the petitioners alleged that the Act was unconstitutional and a violation of their rights under Article 47 of the Constitution.

28. The petitioners in the said petition were challenging a notice issued by the respondent demanding payment of excise tax by the petitioners, all of whom were representing associations of persons registered under the Insurance Act. They were also challenging the amendments made by the Finance Act, 2013 to Part III of the Fifth Schedule to the Customs and Excise Act (Chapter 472 Laws of Kenya) in so far as it defines financial institutions to include, among others, persons licensed under the Insurance Act, the Banking Act (Chapter 488 of the Laws of Kenya), the Central Bank of Kenya Act (Chapter 491 of the Laws of Kenya), the Savings and Credit Co-operative Societies Act (Act No. 14 of 2008) and the Kenya Post Office Savings Bank.

29. The petitioners in the present petition are insurance brokers. They were represented in the previous petition, **Mark Obuya & Others vs KRA** by the 6th petitioners, namely **Dennis Nyongesa and Thomas Mulwa**, who were acting for or on behalf of the Association of Insurance Brokers of Kenya. The issues in the said petition, which was heard and determined by Majanja J in his judgment dated 30th June 2014, related to the amendments to the Finance Act, 2013, which introduced the payment of excise duty by persons registered under the Insurance Act.

30. That being the case, can the petitioners, or any member of the associations who were represented in the **Mark Obuya** case properly bring a petition before the Court challenging the amendments to the Finance Act, 2013, and the introduction of excise duty for players in the insurance industry? I think not. Does it make a difference, as the petitioners submit, that they have added three provisions of the Constitution that they say are being infringed, namely Articles 10, 27, and 40? Again in my view the answer is in the negative. Does it matter that their challenge in this case relates to what the petitioner states is the problem of implementation of the provisions? Again, the answer must be in the negative, given that a problem of implementation does not, of itself, render a statute unconstitutional, and even if it did, nothing prevented its being raised in the previous petition.

31. I must agree with the respondents that this petition is *res judicata*. The petitioners have sought to clothe the same dispute that was heard and determined in **Petition No. 383 of 2013 Mark Obuya & Others vs KRA** in different garb, and present it to the Court as a different petition raising different issues. The question of the constitutionality of the amendments to the Finance Act 2013 was heard and determined by a court of competent jurisdiction, and it is an abuse of the court process to try to revive it in a different petition.

32. In the circumstances, the preliminary objection by the 1st respondent succeeds. The petition is hereby struck out with costs to the respondents.

Dated, Delivered and Signed at Nairobi this 17th day of September 2015

MUMBI NGUGI

JUDGE

Mr. Arwa instructed by the firm of Rachier & Amollo & Co. Advocates for the petitioners.

Mr. Ontwenka instructed by the firm of Sheila C. Sanga & Co. Advocates for the 1st respondent.

Mr. Mohamed instructed by the State Law Office for the 2nd respondent.