



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 203 OF 2012**

BETWEEN

KAPA OILREFINERIES.....

.....PETITIONER

AND

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE COMMISSIONER OF CUSTOMS SERVICES.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

**JUDGMENT**

**Introduction**

1. The Petitioner, Kapa Oil Refineries, is a limited liability company incorporated in Kenya under the **Companies Act, Chapter 486 Laws of Kenya**. It carries on the business of manufacturing and is particularly engaged in the importation, production and refining of edible oils and related products. It has filed the Petition dated 15th May 2012 challenging the enforcement and collection of taxes against it by the Kenya Revenue Authority, the 1st Respondent on ground that its fundamental rights and freedoms have been violated. In its Petition it therefore seeks the following orders;

*“(a) A declaration be issued that the Respondents' conduct or intention to issue agency notices, levy distress or other action against the Petitioner's property during the pendency of the dispute before the Custom & Excise Appeals Tribunal and in the circumstances hereof is illegal, null and void and unconstitutional and a limit to the Petitioner's right to fair trial or to have its dispute fairly determined before the said Tribunal and contrary to Articles 47, 48 and 50(10) of the Constitution on fair administrative action, access to justice and fair and conclusive hearing.*

*(b) A declaration be issued that the intended issuance of agency notices or levying of distress in the circumstances herein is contrary to the law, null and void and it constitutes arbitrary deprivation of property and inconsistent with the Right to protection of guaranteed under Article 40 of the Constitution.*

*(c) A declaration do issue that the action by the Respondents to demand short levy taxes for the*

*period 2004 to 2008 is contrary to the express provision of Section 135(3) and thus contrary to the protection enshrined under Article 210(1) of the Constitution of Kenya.*

*(d) An order be issued prohibiting the Respondents or any other Government officers or Authorities from acting on the demand for extra revenue by the Commissioner in the sum of Kshs.381,350,584/- pending the hearing and determination of this Petition and/or the Appeal pending before the Custom and Excise Appeals Tribunal.*

*(e) The Honourable Court be please to issue such other or further orders, directions and writs as may be necessary to safeguard and prevent the violation of the Petitioner's Fundamental Rights and Freedom and the Constitution.*

*(f) The costs be provided for.”*

2. On 21st January 2014, when the matter came up for hearing parties consented that the judgment in this Petition shall be binding on **Petition No. 204 of 2012, Pwani Oil Products Ltd v Kenya Revenue Authority and 2 Others** and so it shall.

### **Background and facts**

3. The facts giving rise to this Petition are not in dispute. They can be gathered from the Petition as well as the dispositions filed on behalf of the Petitioner and in particular, the Affidavit of Nitin Shah, the Petitioner's Chief Executive Officer, sworn on 15th May 2012 and are as follows;
4. On 24th February, 2012 the 2nd Respondent, The Commissioner of Customs Services, demanded extra revenue of Kshs.381,350,584/- from the Petitioner following an audit of the Petitioner's books of accounts for the period between 1st January 2004 to 31st December 2008. Upon receipt of the demand, the Petitioner objected and sought a review of the Commissioner's findings. The 2nd Respondent responded to the application for review by revising the sum demanded to Kshs.367,457,667/- and upheld the assessment/demand for extra revenue made on 24th February 2012 alleging that the taxes were payable under **Section 135(1)** of the **East African Community Customs Management Act (EACCMA)**.
5. Subsequently, the Petitioner appealed to the Custom and Excise Appeals Tribunal on 10th May 2012 as provided for under **Section 230(1)** of the **EACCMA**. The matters in dispute herein still pending adjudication and determination by that Tribunal.

### **The Petitioner's Case**

6. The Petitioner claims that the goods subject of the audit and extra revenue demanded by the 2nd Respondent were imported into the country and taxes thereof paid for at the time of import. It is therefore the Petitioner's position that since the audit was conducted after the goods in question had actually been imported into Kenya and paid for, the transaction value for the same was and must be the price actually paid for in accordance with the provisions of **Sections 122(1), 135 (3)** of the **EACCMA** and **Rules 2(1), 9(1) and (2)** of the **Fourth Schedule** to that Act.
7. Further the Petitioner contended that it legitimately expected that in the course of its business, the Respondents would not demand, as they did, the value of the Petitioner's imports since making such a demand would be unconstitutional for substituting a fictitious value or the amount which was not payable for transaction value. It therefore claims that it was entitled to the protection of the law as the amount it paid was the amount shown in the transaction entries and which amount had never been in dispute and therefore met the provisions of the transaction value as laid down in the **Fourth Schedule** of the **EACCMA** and thus no additional duty was payable in respect of the said imports.
8. It is the Petitioner's further case that having paid all the relevant duties imposed, the extra tax demanded by the Respondents is for periods expressly prohibited under the law. And that the demands, agency notice and attachments have in any event been made pending the hearing of the Appeal lodged at the Customs and Excise Appeals Tribunal. The Petitioner therefore claims that the actions of the Respondents are meant to deny it, its right of appeal and effective access to

- justice thus violating the Petitioner's fundamental Right to protection of property, because the taxes demanded are not payable under **Section 135(3), 230 and 231** of the **EACCMA**, because **Section 135(3)** prohibits making of demands after 5 years unless there has been fraud on the part of the tax payer.
9. It is the Petitioner's further contention that the Respondents' demand that it deposits the disputed tax with the Respondents is unlawful, unreasonable and does not guarantee the Petitioner fairness thus a violation of the its right to fair administrative action as provided for under **Article 47(1)** of the **Constitution**.
  10. In any event, it contends that if the Respondent's actions and tax demands are invalid, null and void and unenforceable for contravening the principle of legality under **Article 210(1)** and the national values and principles of governance under **Article 10** of the **Constitution**.

### **The 1st and 2nd Respondents' Case**

11. The 1st and 2nd Respondents, The Kenya Revenue Commission and the 2nd Respondent The Commissioner of Customs Services, respectively, are responsible for collection of taxes in the country. The 1st Respondent through the 2nd Respondent administers the **EACCMA** as the agency for the Government of Kenya for the collection and receipt of all revenue and is responsible for the administration and enforcement of all laws relating to taxation within Kenya with power to assess, collect and account for all revenue in accordance with the law.
12. The Respondents oppose the Petition. They filed a Replying Affidavit sworn by Franklin Onjala Ombaka, An Assistant Commissioner in the 2nd Respondents Customs Department, sworn on 22nd February 2013.
13. The 1st and 2nd Respondents' claim that this Petition does not raise any constitutional issues and is misconceived and is an abuse of the Court process. And further that the dispute herein is being handled by a competent Tribunal after the Petitioner preferred an Appeal to the Customs and Excise Tribunal established under **Section 231** of the **EACCMA**.
14. In any event, the 1st and 2nd Respondents claim that they conducted a routine post clearance audit on the Petitioner for the years 2004 to 2008, to ascertain that the correct procedures were being followed and whether the Petitioner was compliant as regards customs laws and regulations. The audit revealed instances of non-compliance with the provisions of **Section 122** and the **Fourth Schedule** to the **EACCMA**. They claim that after the audit, and while applying the Fourth Schedule of the Act they were unable to determine the correct transaction value as per the documentation presented, since there were two invoices to every consignment both of which had a different cost per unit. And further that the debit and credit cards were always consistently over valued by 10% above the commercial invoice unit value. In a bid to safeguard government revenue therefore, the 1st and 2nd Respondents contend that they chose the higher value of the two unit values which happened to be the unit values on the supplementary invoice and also computed the insurance elements at a rate of 1.5% owing to the discrepancies revealed in the insurance costs. As a result, the 2nd Respondent demanded import duty, VAT and IDF Fee amounting to Kshs.381,350,534/-.
15. Subsequently, following an application for review made by the Petitioner, the Post Clearance Unit of the 1st Respondent held various meetings with Petitioner's management and their consultants to discuss various audit issues arising and also gave the Petitioner an opportunity to provide the correct cost per unit for purposes of customs valuation. Consequently, the 2nd Respondent carried out a review and adjusted the demand to Kshs. 367,457,667/- after taking into account imports under tax remission and exemptions. The Petitioner, aggrieved by the review decision of the 2nd Respondent, appealed to the Customs and Excise Appeals Tribunal. That appeal is pending determination.
16. The 1st and 2nd Respondents further contend that they are statutorily empowered to use other methods of customs valuation where the transaction value cannot be determined or is not conclusive and make the necessary adjustments in determining the customs value for duty purposes. And that the Petitioner cannot seek protection of the law when the audit carried out by the 2nd Respondent revealed that the Petitioner was understating the customs value thus resulting in less payment of duty.
17. They further claim that the 1st and 2nd Respondents have not demanded for the payment of the

- short levied taxes to be paid before the hearing of the appeal as alleged by the Petitioner. And that they have adhered to the law by allowing the Petitioner to exhaust the appellate mechanism stipulated in the **EACCMA** thus they have not violated any of the Petitioner's fundamental rights, in particular the right to property, right to fair administrative action and right to fair trial.
18. It is therefore the 1st and 2nd Respondents case that the taxes have been properly levied in accordance with the law and that they have not enforced the collection of the taxes pending the hearing and determination of the appeal filed in the Customs and Excise Appeals Tribunal as alleged.
19. On the issue of levying after the expiry of five years, the 1st and 2nd Respondents contend that the Petitioner had failed to disclose the real value of the imported goods and had tampered with the credit and debit cards thus the demand for the tax was lawful since the Petitioner's had acted fraudulently.
20. They further claim that the Petition is founded on a fundamental misapprehension of the jurisdiction of this Court under **Articles 22 and 23** since the Petitioner has not demonstrated with precision how its constitutional rights have been infringed by the Respondents. And that the Petitioner has only expressed apprehension and fear that its rights would be violated, which in any case does not amount to an infringement of fundamental rights protected under the Constitution. In any event, that the 1st and 2nd Respondents have demonstrated that the Petitioner's right under **Article 40** of the **Constitution** are limited and the same has not been violated and the taxes demanded were demanded lawfully and procedurally in accordance with the law.

### **The 3rd Respondent's Case**

21. The 3rd Respondent the Attorney General did not file a response to the Petition nor make oral submissions at the hearing.

### **Determination**

22. Before I proceed to determine the merits or otherwise of the Petition before me, I must first address an issue raised by the 1st and 2nd Respondents, that the Petitioner has not set out with some degree of reasonable precision how its constitutional rights have been violated and that the Petition before me raises no constitutional issue for determination.
23. The rule that a constitutional Petition ought to state clearly the alleged violation and relief sought was firmly settled in the case of ***Anarita Karimi Njeru v Republic (1976-1980) KLR 154*** where the Court stated at Page 156 of the judgment that:

***“We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”***

24. This rule has recently been upheld by the Court of Appeal in ***Mumo Matemu –vs- Trusted Society of Human Rights Alliances & Others (2013) e KLR***, when the Court observed as follows;

***“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.***

25. I am duly guided and for a Petition to be competent, the manner in which it is presented must comply with the provisions of **Rule 10** of the **Constitution** of Kenya (**Protection of Rights and**

**Fundamental Freedoms) Practice and Procedure Rules, 2013.** This rule provides that;

**“(1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.**

**(2) The Petition shall disclose the following—**

**(a) the petitioner’s name and address;**

**(b) the facts relied upon;**

**(c) the constitutional provision violated;**

**(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, of persons or community;**

**(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;**

**(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and**

**(g) the relief sought by the petitioner.”**

26.The Petition before me is alleging a violation of fundamental rights and freedoms under **Articles 27, 40, 47, 48 and 50** of the **Constitution**. The particulars then in support of the alleged violations are contained for instance in paragraphs 29, 31, 32, 33, 34 and 37 of the Petition. The same violations are also contained in the Affidavit of Nittin Shah at paragraphs 30, 32, 33, 35, 37 and 38. The Petitioner has also stated the reliefs sought at paragraph 37 of the Petition. In my view therefore, the Petition has provided sufficient particulars to support the alleged violations of the Constitution that would enable this court make a determination whether or not to grant the reliefs sought.

27.Having found that the Petition is properly before this Court, it is clear to my mind that, this Court cannot issue all the orders sought and I will say why, shortly.

28.The facts in this case in relation to the Appeal pending before the Customs and Excise Appeals Tribunal is not in issue. It is also not in issue that the Petitioner on 10th December 2013 was granted interim orders as follows;

**“(a) That the Petitioner/Applicant be and is hereby granted conservatory order by way of an order restraining the Respondents herein whether by themselves, their officers, servants or agents or otherwise howsoever from purporting to levy distress against the property of the Petitioner Applicant including their bank accounts or any of them or issuing agency notices to its bankers and suppliers or any other person related to the Petitioner in relation to the demand for import duty, interest, penalties in the sum of Kshs.367,457,66/- or thereabouts or purporting to take any steps to levy distress or issue agency notices pending the hearing and determination of the Petition.**

**(b) That the Petitioner/Applicant be and is hereby granted conservatory order by way of an order restraining the Respondents herein whether by themselves, their officers, servants or agents or otherwise howsoever form purporting to levy distress or levying distress against the property of the Petitioner Applicant including their bank accounts or any of them or issuing agency notices to its bankers and suppliers or any other person related to the Petitioner in relation to the demand for import duty, interest, penalties in the sum of Kshs.367,457,667/- or thereabouts or purporting to take any steps to levy distress or issue agency notices pending the hearing and determination of the appeal lodged by the Petitioner before the Customs & Excise appeals Tribunal.**

(c) ***That the Petition to be mentioned on 28th September, 2012 for further directions.”***

29. Looking at the Petition again, I am clear that the major issue for determination in this Petition is whether it is lawful under **Article 210** of the **Constitution** and **Section 235(1)** of the **EACCMA** for the 1st and 2nd Respondents to demand the taxes so demanded.

30. That issue in my view is one that ought to be determined by the procedure provided for under **Section 230** of the said **Act**. This Section is to the effect that any person who is aggrieved by the 2nd Respondent's assessment of tax shall appeal to the tribunal established under **Section 231**. This Section provides that;

***“(1) A person dissatisfied with the decision of the Commissioner under Section 229 may appeal to a tax appeals tribunal established in accordance with Section 231.***

***(2) A person intending to lodge an appeal under this Section shall lodge the appeal within forty-five days after being served with the decision and shall serve a copy of the appeal on the Commissioner.”***

31. The Tribunal is then established under **Section 231** of **East African Community Customs Management Act** as follows;

***“Subject to any law in force in the partner States with respect to tax appeals, each partner State shall establish a Tax Appeals Tribunal for the purpose of hearing appeals against the decisions of the commissioner made under Section 229”***

32. 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 and would pre-empt the outcome of the Tribunal's decision. In so holding I am alive to the fact this court has previously held that the Constitution is not a substitute for all other known legal procedures. In ***Alphonse Mwangemi Munga & 10 others v African Safari Club Limited [2008] eKLR***, the Court stated as follows;

***“that does not give the licence to every litigant to come to Court by way of a constitutional application even where there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations. This Court has considered similar applications where the Petitioners seek to enforce service contracts by way of constitutional applications and have held them to be an abuse of Court process – eg in *Rashid Odhiambo Aloggoh & 245 Others vs Haco Industries Ltd HCC Misc 1520/1999*, and *Stephen Ndiboi & 27 Others vs Brookside Dairy Ltd Misc Applic. No. 764/05.*”***

33. I am also aware of the fact that even if this Court has jurisdiction to determine a violation of fundamental rights and freedoms, it must also first give an opportunity to other relevant bodies established by law to deal with the dispute as provided in the relevant statute. This rule was well articulated by the Court of Appeal in ***Narok County Council v Trans Mara County Council [2000] 1 EA 161*** at page 164 where it stated that;

***“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision at Page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.”***

34. This rule has also recently been upheld by the Court of Appeal in ***Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425***, where it held that:-

***“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”***

35.I am duly guided. And looking at the Petition again, there is nothing left for me to determine. Let the parties pursue the matter at the Customs and Excise (Appeals) Tribunal to the final conclusion. In the meantime, the interim orders reproduced elsewhere above remain in force pending the final hearing and determination of the matter at the Customs and Excise (Appeals) Tribunal. Any party dissatisfied with the decision of the Tribunal is at liberty to appeal to the High Court in accordance with the Customs and Excise (Appeals) Tribunal Rules.

36.Consequently, the orders that attract my mind and for avoidance of doubt are the following;

***“That the Petitioner be and is hereby granted conservatory order by way of an order restraining the Respondents herein whether by themselves, their officers, servants or agents or otherwise howsoever form purporting to levy distress or levying distress against the property of the Petitioner Applicant including their bank accounts or any of them or issuing agency notices to its bankers and suppliers or any other person related to the Petitioner in relation to the demand for import duty, interest, penalties in the sum of Kshs.367,457,667/- or thereabouts or purporting to take any steps to levy distress or issue agency notices pending the hearing and determination of the appeal lodged by the Petitioner before the Customs & Excise appeals Tribunal.”***

37.The above orders shall also apply to **Petition No.204 of 2012** and a copy of this Judgment shall be placed in that file.

38.The Petition is determined in the above terms and as for the costs, let each party bear its own costs.

39.Orders Accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Miss Makori holding brief for Mr. Mogen for Petitioner

Mr. Twahir for Respondent

**Order**

Judgement duly delivered. Copies of Judgment to be supplied to parties.

**ISAAC LENAOLA**

**JUDGE**