



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 412 OF 2013

ALEX MURIUKIPETITIONER

VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

THE CABINET SECRETARY, THE

NATIONAL TREASURY2ND RESPONDENT

THE COMMISSIONER OF DOMESTIC TAXES3RD RESPONDENT

THE COMMISSIONER OF CUSTOMS

SERVICES4TH RESPONDENT

THE KENYA REVENUE AUTHORITY 5TH RESPONDENT

JUDGMENT

Introduction

1. In his petition dated 6th August 2013, the petitioner challenges the constitutionality of section 31 of the **Value Added Tax (VAT) Act**, Section 18 of the **Finance Bill 2013** in which Parliament sought to amend the Income Tax Act, and section 174 of the **Customs and Excise Act**. He states in the petition and affidavit in support that he has filed the matter on his own behalf and on behalf of other tax payers.
2. At the hearing of the petition, the petitioner abandoned his challenge of section 31 of the VAT Act which had been repealed at the time of the hearing, as well as his claim in relation to section 18 of the Finance Bill 2013. This judgment therefore addresses the petitioner's claim in relation to the alleged unconstitutionality of section 174 of the Customs and Excise Act. He contends that the said section violates the provisions of Articles 31, 40 and 47 of the Constitution.
3. At Prayer 3 of the petition which is now the only issue before the Court, the petitioner prays that:

A declaration do issue that section 174 of the Customs and Excise Act is unconstitutional null and void and therefore invalid to the extent that it allows the

2nd Respondent unfettered discretion to arbitrary enter into Tax payer's premises and carry out inspections, searches and seizures without Court warrant.

The Petitioner's Case

4. The petitioner's case is contained in his petition, his affidavit sworn on 6th August 2013, and written submissions dated 7th November 2013. In his submissions on behalf of the petitioner, Mr. Muumbi argued that the petitioner was seeking a determination whether the provisions of section 174 of the Customs and Excise Act, which makes provision for the 4th respondent to search tax payers premises, are constitutional. He contended that the section is unconstitutional as it violates Article 31 on the right to privacy, as well as Article 40 and 47.
5. The petitioner's case is not based on any incident that has occurred either to him or to another tax payer in order to trigger the petition and raise the need for the Court to determine the issue. Instead, Mr. Muumbi contended that, contrary to assertions by the respondents, the petition is not based on apprehensions; that there is evidence from various cases such as **Samura Engineering & 10 Others v Kenya Revenue Authority (2012) eKLR** that the respondent has been conducting searches of premises without a warrant; that section 174 provides the powers for search of premises without a warrant; that it provides for both routine and non-routine searches without a court warrant which the petitioner contends is in violation of Article 31. Counsel relied on the case of **Patrick Lorenz Martin Garertner & 2 Others Vs Minister for Finance, Commissioner SARS & 9 Others No (12632/12)**. He contended that the provisions of section 174 do not accord with the limitation provisions contained in Article 24 of the Constitution of Kenya.
6. It was also the petitioner's contention that the section violates the right of citizens to property guaranteed under Article 40 by allowing the respondents to seize a tax payers' property, as well as section 47 on fair administrative action.
7. Counsel argued that the Court has power under section 23 to declare the section unconstitutional, and he asked that the petition be allowed with regard to section 174.

The 1st and 2nd Respondents' Case

8. The 1st and 2nd respondents oppose the petition. Their Learned Counsel, Ms. Gitiri, relied on the submissions and supplementary submissions filed on their behalf dated 29th November 2013 and 29th January 2014 respectively.
9. Ms. Gitiri submitted that Article 201 on the principles of public finance requires that the burden of taxation be shared fairly; that the intention of the law is to ensure that revenue is collected and is not frustrated; and that the impugned provision of the law is intended to ensure that unscrupulous individuals do not evade tax and hide goods from tax authorities.
10. Ms. Gitiri relied on several authorities on constitutional interpretation and the power of the Court when considering an invitation to declare provisions of a statute unconstitutional. She observed that declaring an Act unconstitutional has serious consequences and asked the Court to exercise caution before declaring section 174 of the Customs and Excise Act unconstitutional, particularly in view of the fact that no clear reasons had been established for declaring the section unconstitutional.

The Case for the 3rd, 4th and 5th Respondents

11. Mr. Matuku for the 3rd, 4th and 5th respondents relied on the affidavit of **Mr Sylvester Okello Ogello** sworn on 28th August 2013 and written submissions dated 28th November 2013.
12. In their oral and written submissions, the respondents emphasise the principles of statutory

interpretation and the basis on and circumstances in which an Act of Parliament can be declared unconstitutional. Mr. Matuku submitted that warrantless searches and seizures cannot be challenged before they happen, placing reliance on the case of **Samura Engineering vs Kenya Revenue Authority** (supra). It was their case that the present petition is based only on apprehensions.

13. Counsel however, defended the provisions of section 174 of the Customs and Excise Act, arguing that the search envisaged under the section is a routine search and inspection which has constitutional validity with a view to making sure the objectives of the Act are attained. It was their case that it could not be expected that every time a customs officer intends to carry out routine inspections and regulatory acts, s/he has to go to Court to obtain a warrant; that the inconvenience, delay, cost and diversion of judicial resources would be great and would not be justified in order to protect privacy.

Determination

14. I have carefully read the pleadings of the parties and their submissions on the issues before me. I have also set out above, with extreme brevity, the respective submissions of the parties in this matter. While I am very grateful to the parties for their detailed and well researched submissions, it is my view that this Court cannot enter into an examination of the issues raised in this petition, or purport to make any findings with regard to the constitutionality or otherwise of the provisions of section 174 of the Customs and Excise Act.

15. The reason for this are apparent from the petition itself, the submissions of the petitioner, and the jurisdiction of the Court as can be discerned from the Constitution and judicial precedents.

16. Having read the affidavit in support of the petition sworn by Mr. Muriuki, I note that he makes various depositions with regard to his knowledge of the law and tax matters, then deposes as follows at paragraphs 15-18:

“15. That I believe that the proposed amendment to section 119 of the Income Tax Act as well as sections 31 of the Value Added Tax Act and 174 the Customs and Excise Act as unconstitutional for reasons that they violate and/or limit and/or are a threat to the constitutional protections of the right to privacy Article 310 right to lawful reasonable and fair administrative action (Article 47) and the right to property (Article 40).

16. That I believe that the reason for the requirement for court warrant before exercise of the powers for entry, inspection, search and seizure is to safeguard the rights of the persons(s) affected or likely to be adversely affected by such entries, searches, inspections or seizures and to ensure that their rights are not unnecessary violated at the pretext of enforcement of the provisions of the law.

17. That I believe the amendment to section 119 of the Income Tax Act through section 18 of the finance Bill, 2013 removes the safeguards provided under the law thereby paving the way for violation of the constitutional protections guaranteed under the Constitution.

18. That likewise, the provisions of sections 31 and 174 of the value Added Act and the Customs and Excise Act respectively also allow the 3rd and 4th Respondents respectively, the leeway to enter and carry out searches and seizures on tax payers’ premises without a Court warrant and are therefore a serious threat of violation of tax payer’s aforementioned constitutional rights.”

17. These averments must be weighed against the jurisdiction of the Court under Articles 22, 23 and 165 of the Constitution. The Court’s jurisdiction is to determine whether a right or fundamental

freedom has been denied, violated, infringed, or threatened. In bringing a claim under Article 22, a party is required, as the Court held in **High Court Petition No. 385 of 2012 Consortium for the Empowerment & Development of Marginalized Communities and 2 Others vs The Chairman, the Selection Panel for Appointment of Chairperson and Commissioners to Kenya National Human Rights Commission and Others**, to show which provisions of the Constitution have been violated, and the manner of violation:

“As a basic minimum, the petitioners are required to not only cite the provisions of the constitution which have been violated, but the manner in which they have been violated with regard to them-see Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation.” (Emphasis added).

18. Mr. Muumbi submitted that the petition is not based on apprehensions as there have been cases such as the **Samura Engineering** case, in which the respondents have been conducting searches without warrants. This submission, in my view, captures the fatal weakness of the petitioner’s case. The petitioner is asking the Court to declare an Act unconstitutional, to basically render an academic pronouncement on its constitutionality or otherwise, on the basis of his belief and apprehensions that occasion may arise, as evidence from other cases indicates, where the implementation of the provisions of section 174 of the Customs and Excise Act may result in violation of the rights to privacy, property and fair administrative action. What the petitioner is asking the Court to do is address its mind to a purely hypothetical situation. This the Court cannot do.

19. It is, I believe, settled law that courts do not deal with abstract issues: there must be a real dispute or controversy for the Court to exercise its jurisdiction. In the case of **John Harun Mwau and Others v Attorney General and Others, Nairobi Petition No. 65 of 2011 (Unreported)** the Court, while acknowledging the jurisdiction of the High Court to examine the legality of any act done pursuant to the Constitution and any law, nonetheless warned that:

“...this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.”

20. Similarly, in the case of **Andrew Okiya Omtatah Okoiti & Others vs Attorney General Nairobi Petition No. 351 of 2012 (Unreported)**, the Court observed as follows:

“[18] The petitioners’ case is that the High Court should intervene to resolve raging controversies surrounding the Presidential power and capacity to be sued and related important questions that would have grave implications on the implementation of the Constitution. The jurisdiction of the High Court under Article 165 is wide but it does not exist in a vacuum to be exercised when a party requests the Court to answer to a “question.” The “question” contemplated in Article 165 must arise from a real controversy or case.” (Emphasis added)

21. The jurisdiction to render an opinion on an issue, in the absence of a real controversy or dispute, is vested by the Constitution in the Supreme Court, the caveat being that such advisory opinion should relate to any matter concerning county government. Article 163(6) provides that:

“(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to

any matter concerning county government.”

22. There being no real controversy or dispute in the matter presently before me, I decline to enter into the merits or otherwise of the matter as such exercise would only be of academic value.

23. The petition is therefore dismissed with no order as to costs.

Dated Delivered and Signed at Nairobi this 16th day of May 2014.

Mumbi Ngugi

Judge

Mr. Muumbi instructed by the firm of Omari, Muumbi & Kiragu Co. Advocates for the petitioner

Ms. Gitiri, Litigation Counsel, instructed by the State Law Office for the 1st and 2nd Respondents

Mr. Matuku instructed by the Kenya Revenue Authority for the 3rd, 4th and 5th Respondents.