



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 383 OF 2013**

**BETWEEN**

**MARK OBUYA**

**TOM GITOGO**

**THOMAS MAARA GICHUHI acting for or on behalf of**

**ASSOCIATION OF KENYA INSURERS ..... 1<sup>ST</sup> PETITIONER**

**JADIAH MWARANIA**

**PETER MAINA**

**CALISTO OGAYE acting for or on behalf of**

**ASSOCIATION OF KENYA**

**REINSURERS ..... 2<sup>ND</sup> PETITIONER**

**ALBERT MUREITHI**

**JAMES MWANGI KARANJA**

**JOSEPH NDERITU MIRICHU acting for or on behalf of**

**MOTOR VEHICLE ASSESSORS**

**ASSOCIATION OF KENYA ..... 3<sup>RD</sup> PETITIONER**

**MAURICE OKUMU acting for or on behalf of**

**THE INSTITUTE OF LOSS ADJUSTERS AND**

**RISK SURVEYORS ..... 4<sup>TH</sup> PETITIONER**

**MIKE MUNYWOKI**

**SAMJIM MWANYOSI**

**DANIEL MUTHURI** acting for or on behalf of

**THE NATIONAL ASSOCIATION OF**

**KENYA INVESTIGATORS ..... 5<sup>TH</sup> PETITIONER**

**MUCHEMI NDUNGU**

**DENNIS NYONGESA**

**THOMAS MULWA** acting for or on behalf of

**THE ASSOCIATION OF**

**INSURANCE BROKERS OF KENYA ..... 6<sup>TH</sup> PETITIONER**

**AND**

**THE COMMISSIONER OF**

**DOMESTIC TAXES ..... 1<sup>ST</sup> RESPONDENT**

**THE KENYA REVENUE**

**AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioners, as their names suggest, are representative organisations of businesses involved in various aspects of the insurance industry. These businesses are licenced to conduct business under the *Insurance Act (Chapter 487 of the Laws of Kenya)*. The 2<sup>nd</sup> respondent (“the Commissioner”) is an office established under the Kenya Revenue Authority (“KRA”) and is mandated to administer various domestic taxes including the Customs and Excise Tax in accordance with the applicable statutes under the general control and direction of KRA.
2. On 23<sup>rd</sup> July 2013, the Commissioner acting on behalf of KRA published a public notice (“the Notice”) in the newspaper stating as follows;

*PUBLIC NOTICE*

*EXCISE DUTY ON MONEY TRANSFER SERVICES AND OTHER FEES CHARGED BY FINANCIAL INSTITUTIONS*

*Kenya Revenue Authority wishes to inform the public that the Finance Bill 2013, has now made the following clarifications:-Financial institutions have now been defined to include persons licensed under the Banking Act, Insurance Act, Central Bank Act, Sacco Societies Act and Kenya Post Office Bank.*

*‘Other fees’ is defined to include any fee, charge, or commission charged by financial institutions*

but excludes interest.

Excise duty shall be charged at a rate of 10% of the excisable value and shall become due when the service is purchased by the consumer.

The service providers shall collect the duty and pay to the Commissioner not later than the 20th day of the succeeding month. The excise duty for the month of June is payable by 20th July 2013.

Prescribed excise return form for payment of excise duty on services is available on the KRA website [www.kra.go.ke](http://www.kra.go.ke) or from any KRA office....

3. The petitioners have filed this Amended Petition dated 24<sup>th</sup> April 2014, challenging the Notice and 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, Banking Act (Chapter 488 of the Laws of Kenya), Central Bank of Kenya Act (Chapter 491 of the Laws of Kenya), Sacco Societies Act (Act No. 14 of 2008)** and the Kenya Post Office Bank.

4. The provision introducing excise tax on certain financial services was introduced as an amendment to **Part III** of the **Fifth Schedule** of the **Customs and Excise Act** under the **Finance Act, 2012** as follows;

4. Part III of the Fifth Schedule to the Customs and Excise Act is amended by;

(a) .....

(b) inserting the following new items immediately after item 6 as follows;

7. Excise duty charged for money transfer services by cellular phone service providers, banks, money transfer agencies and other financial service providers shall be ten percent

8. Excise duty on other fees charged by financial institutions shall be ten percent.

5. The **Finance Act, 2013** further amended **Part III** of the **Fifth Schedule** of the **Customs and Excise Act** deleted financial service providers and substituted it with financial institutions as follows;

6. The Fifth Schedule of the Customs and Excise Act is amended in part III-

(a) By deleting the words 'financial service providers' appearing in item 7 and substituting thereof the words 'financial institutions'

(b) By inserting the following new paragraph immediately after paragraph 8

9. For the purposes of items 7 and 8 financial institutions means

(a) A person licensed under-

(i) The Banking Act

(ii) The Insurance Act

(iii) The Central Bank of Kenya Act, or

(iv) The Micro Finance Act, 2006

(b) A Sacco society registered under the Sacco Societies Act, 2008 or

(c) The Kenya Post Office Savings Bank Act

'other fees' includes any fees, charges or commissions charged by financial institutions, but does not include interest. [Emphasis mine]

6. The effect of the amendments introduced by **section 6** of the **Finance Act, 2013** is that the term 'financial service providers' was replaced by 'financial institutions' which are defined as persons licensed under the **Banking Act, Insurance Act, Central Bank Act, Sacco Societies Act** and the Kenya Post Office Bank. As a result of the amendment, KRA claimed that the petitioners' members being persons licensed under the **Insurance Act** are liable to pay excise duty.
7. The petitioners claim that the imposition of excise duty on fees for services they provide is a violation of their fundamental right to fair administrative action as provided under **Article 47(1)** of the Constitution. They therefore seek the following reliefs;
  - a. ?This Honourable Court be pleased to declare that the public notice published by the First and Second Respondents on 23<sup>rd</sup> 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.
  - b. ?This Honourable Court be pleased to issue an order restraining the First and Second Respondents from enforcing the public notice issued on 23<sup>rd</sup> July 2013 as against persons registered under the Insurance Act.
  - c. This Honourable Court be pleased to declare that the imposition of excise duty under paragraphs 7, 8 and 9 of Part III of the Fifth Schedule of the Customs and Excise Act 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.
  - d. In the alternative, this Honourable Court be pleased to declare that the imposition of excise duty in paragraphs 7, 8 and 9 of Part III of the Fifth Schedule of the Customs and Excise Act without giving the petitioners' members sufficient time to implement the necessary systems and software is an infringement of the right to fair administrative action.
  - e. This Honourable Court be pleased to restrain the First and Second Respondents from imposing or collecting excise duty set out in paragraphs 7, 8 and 9 in so far as it applied to the petitioners' members as persons registered under the Insurance Act.
  - f. Costs of this Petition.
  - g. Such other orders as this Honourable Court shall deem just.

### **The Petitioners' Case**

8. The petitioners contend that excise duty as defined under **section 2** of the **Customs and Excise Act** only applies to goods manufactured in Kenya or imported into Kenya and does not include services nor do the services provided by the petitioners fall within the definition of goods. The petitioners submit that the meaning of excise duty cannot be stretched to extend to services as one only has to look at the intendment of the statute which is application of customs duty and excise on goods. Ms Malik, counsel for the petitioners, cited the case of **T. M Bell v Commissioner of Income Tax [1960] EALR 224** and **Cape Syndicate v Inland Revenue Commissioners [1920] 1 KB 64** to support this principle.
9. The petitioners further contend that the imposition of excise duty on services, when those services are not included in the definition of excise duty under **section 2** of the **Customs and Excise Act** is *ultra vires* and amounts to an illegality. Counsel submitted that **Article 47 (1)** of the Constitution protects the petitioners' right to fair administrative action that is just and lawful therefore the amendments to the **Fifth Schedule** which seek to impose the collection of excise duty on the petitioners' services are unlawful and a violation of this right.

10. The petitioners claim that as stakeholders in the insurance industry they were not consulted before the **Finance Bill, 2013** seeking to impose excise duty on their services was published. They maintain that they should have been given an opportunity to voice their concerns regarding the proposed amendments considering their effects on the insurance industry.
11. The petitioners submit that the **Finance Bill, 2013** did not specify the date by which the excise duty was to be remitted and that the notice issued in the media was published on 23<sup>rd</sup> July 2013 after the date for collecting and remitting the excise duty had lapsed. They urge that they were not aware of the date by which they were supposed to collect and remit excise duty and would not be in a position to recover excise duty for services already rendered during the month of June 2013 and would thus become liable for payment of the same. They argue that the publication was unfair and unreasonable and a violation of their rights under **Article 47(1)** of the Constitution.
12. The petitioners assert that the collection of excise duty retrospectively is unfair and unlawful because the notice demanded they should have collected and paid excise duty for the month of June which had already passed by the time the notice was issued. Counsel cited the case of **Keroche Industries Ltd v Kenya Revenue Authority Nairobi HC Misc. Appl. No. 743 of 2006 [2007]eKLR** to support the case that retrospective application of the law amounts to a violation of rights.
13. Ms Malik submitted that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> petitioners' members are motor assessors, loss adjusters, risk surveyors and investigators and that their businesses are not financial institutions. That they do not provide financial services and it is therefore unfair, unreasonable and a violation of **Article 47(1)** of the Constitution for them to be charged excise duty in respect of their non-financial services by virtue of the fact that they are licensed under the **Insurance Act**. Counsel submitted that it was not clear whether the charges for the services offered by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> petitioners would fall within the definition of 'other fees'. She stated that it is not clear whether the definition of other fees includes premiums and administration fees levied by insurance companies for fund administration. Counsel cited the case of **Commissioner of Income Tax v Westmont Power (K) Ltd Tax Income Appeal No. 626 of 2002 [2006]eKLR** where the court held that tax laws must be clear without any room for ambiguities and any ambiguities must be resolved in favour of the tax payer.
14. The petitioners aver that the imposition of excise duty on fees charged by the petitioners amounts to multiple taxation on the same transaction. For example, they submit that premiums paid are already subject to other levies and that the insurance sector is highly regulated and insurance companies are also governed by other statutes such as **Income Tax Act (Chapter 470 of the Laws of Kenya)**, **Competition Act (Act No. 12 of 2010)** and **Retirement Benefits Authority Act, 1997** under which they pay other levies and therefore imposition of excise duty would therefore serve to increase the tax burden on the insurance companies which would in turn pass to the consumers thus making insurance services unaffordable and in the end the insurance industry would collapse.
15. The petitioners' aver that prior to the imposition of excise duty on fees charged for services provided by persons registered under the **Insurance Act**, there was no obligation whatsoever on such persons to collect and pay excise duty. As a result the petitioners' members do not have the necessary processes, systems and software in place to enable them capture the various transactions in order to collect and remit the excise tax, as such the imposition of the tax without giving the petitioners sufficient notice to enable them make the necessary arrangements for collection of the tax is a violation of **Article 47(1)** of the Constitution.

### **The Respondents' case**

16. KRA and the Commissioner oppose the petition. Their position is also supported by the 3<sup>rd</sup> respondent. They filed grounds of opposition dated 11<sup>th</sup> September 2013 and an "amended" replying affidavit sworn on 2nd May 2014 by James M. Ojee, Chief Manager of the Large Tax

Payers Office.

17. The respondents contend that **section 2** and **section 117** of the *Customs and Excise Act* as read with the **Fifth Schedule** has clearly set out the services to be levied excise duty and that the petitioners are interpreting the Constitution, the *Customs and Excise Act* and the *Finance Bill, 2013* in a self-serving manner.
18. KRA contends that under **section 117(d)** of the *Customs and Excise Act*, excise duty is imposed in respect of excisable goods and services provided in the **Fifth Schedule** and **Part III** of the **Fifth Schedule** provides that excise duty is charged on services offered by financial institutions. They thus claimed that there is no contradiction as the law was clear that excise duty was payable on services rendered by financial institutions.
19. As regards the effect of the public notice issued by the Commissioner vis-à-vis the commencement date, the respondents contend that the amendment to **section 6** of the *Customs and Excise Act* became effective on 18<sup>th</sup> June 2013 by dint of **section 2** of the *Provisional Collection of Duties and Taxes Act (Chapter 415 of the Laws of Kenya)* which provides that a Finance Bill imposing a tax may come into operation before it is passed into law. Ms Sanga, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, submitted that the amendment became effective on the date named in the Gazette being 18<sup>th</sup> June 2013 and not the date of publication of the Gazette. She further submitted that the notice published in the newspaper on 23<sup>rd</sup> July 2013 made it clear that the excise duty for the month of June is payable by 20<sup>th</sup> July 2013 as provided by the law. She maintained that the notice was not a creation of the Commissioner as it was intended to remind the public and reinforce the provisions of the law. The respondents submit the *Finance Bill* is a matter of public record and it is effective whether or not the respondents notify the public of the same.
20. Ms Sanga argued that that motor assessors, loss adjudicators, risk surveyors and the investigators are financial service providers in the insurance sector and being persons licensed under the *Insurance Act*, they are, for purposes of collection of excise duty within the definition of financial institutions under **Part III** of the **Fifth Schedule** of the *Customs and Excise Act*.
21. The respondents contend that the petitioners have not tendered any evidence of any difficulties in implementing the tax. And in any case, the implementation of the collection of taxes under **Part III** of the **Fifth Schedule** to the *Customs and Excise Act* does not require the overhaul of the core operating system software. That it only requires a change in the accounting formula to take into account the computation of new taxes and that the difficulties in collecting tax do not necessarily render the tax illegal and unconstitutional. They relied on the case of *Association of Gaming Operators and Others v Attorney General & Others Nairobi HC Petition No. 56 of 2014 [2014]eKLR*.
22. The respondents deny that imposition of excise duty on premiums will lead to double taxation. Ms Sanga submitted that excise tax is charged on the consumer and the insurance company is merely an agent in the collection of this duty. That corporation tax levied under the *Income Tax* is a charge on the profits of the insurance company and therefore the issue of double taxation would not arise. On the concern raised by 6<sup>th</sup> petitioner in regard to payment of excise duty from its own pockets for policies cancelled before expiry, the respondents reply that such an argument is misleading because excise duty will not accrue as no commission will be payable to a broker on such cancelled or varied policy.
23. The respondents submit that it is within the legislative mandate of the legislature to amend the **Fifth Schedule** of the *Customs and Excise Act* and that the petitioners cannot question the acts of the legislature as it is the body mandated to make laws. They contend that the burden of taxation ought to be shared equally and in bringing this petition the petitioners are seeking preferential treatment contrary to the provisions of **Article 202(b) (1)** of the Constitution.

24. The 3<sup>rd</sup> respondent filed grounds of opposition dated 16<sup>th</sup> September 2013 and written submissions dated 27<sup>th</sup> May 2014. Ms Gitiri submitted that the court's jurisdiction is to consider whether the impugned provisions are unconstitutional but not to navigate into how they were enacted or how they are enforced. She cited the case of *US v Butler* 297 U.S 1 (1936) and the *Commission for the Implementation of the Constitution v Parliament of Kenya* [2013] eKLR where it was held that it was not for the courts to determine the wisdom of legislature in enacting statutes and that the court should exercise utmost restraint in declaring provisions of statutes unconstitutional.

25. The Attorney General submits that even if the words used in the *Finance Bill, 2013* are ambiguous, the court should interpret them in a manner that will aid to realize the intention of the legislature, which is to impose tax. Counsel relied on the principle stated in *Heydon's Case* [1584] 76 ER 637 which established that four things to be discerned and considered are; first, what was the law before enactment, what was the mischief or defect for which the law old law did not provide, what remedy the Act or law intended to cure and the true reason of the remedy. The 3<sup>rd</sup> respondent urged the court to consider these elements while considering the *Finance Act, 2013* and its effects.

### **Determination**

26. The petitioner made extensive submissions on the issue of public participation. However, the issue was not pleaded in the petition and no relief was sought in that respect. The issue whether there was public participation is both a legal and factual matter and without a pleading to that effect, the respondents are effectively denied the opportunity to rebut the contention that the petitioners right to public participation was denied. I shall therefore not consider the matter or make a finding in that respect.

27. From the pleadings and parties submissions, there are two issues for determination;

- a. Whether the provisions of the *Finance Act, 2013* amending the provisions of the **Fifth Schedule** of the *Customs and Excise Act* in so far as it applies to persons registered under the *Insurance Act* violates the petitioners right to fair and administrative action under **Article 47(1)** of the Constitution.
- b. Whether the notice published by the Commissioner on 23<sup>rd</sup> July 2013 amounts to retrospective imposition of excise duty.

### **Whether the provisions the of *Finance Act, 2013* amending the Fifth Schedule of the *Customs and Excise Act* violates the petitioners rights**

28. In summary the petitioners claim is that excise duty as defined under the *Customs and Excise Act* is only imposed on goods manufactured in Kenya or imported into Kenya and specified in the **Fifth Schedule** and that services offered by the petitioners are not goods capable of attracting excise duties. That the petitioners are not financial institutions.

29. The petitioners' case calls for interpretation of the statute to see whether it excludes the imposition of excise duty on services and more particularly financial services. It is the duty of the court to read the statute as a whole in order to discern the intention of the legislature. **Section 2** of the *Customs and Excise Act* defines excise duty "*means a duty imposed on goods manufactured in Kenya or imported into Kenya and specified in the Fifth Schedule.*" The same section then defines goods as, "*includes all kinds of articles, wares, merchandise and livestock, and, where any such goods are sold under this Act, the proceeds of sale.*" This, however, this is not the end of the matter as the opening words of **section 2(1)** are as follows, "*In this Act, except where the context otherwise requires .....*" Therefore the definition of "*excise duty*" as referring to goods is not exclusive nor does it exclude the imposition of duty on services under the *Act*. It is worth noting that in the definition of "*duty*" in the definition "*includes excise duty, import duty, export duty, levy, imposition, tax or similar imposition on goods, services and gaming takings under the Act.*"

[Emphasis mine]

30. **Section 117(1)(d)** of the **Act** provides the basis for charging excise duty on services. It provides as follows;

117. (1) *Subject to provisions of this Act, there shall be charged-*

*(d) in respect of excisable goods and services specified in the second column of the Fifth Schedule, excise duties at the respective rates specified in the Schedule.*

[Emphasis mine]

31. It is therefore clear that under **Part III** of the **Fifth Schedule** excise duty is levied on services rendered by financial institutions which are persons licenced under the respective Acts applicable. The petitioners' members are all licensed under the **Insurance Act** and are categorized as financial institutions. I find and hold that there is no ambiguity in the intention of the legislature to capture services offered by all the persons who are licenced under the applicable statutes to provide certain services.

32. The legislature is the law making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of the Constitution, the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court licence to declare it unconstitutional.

33. The petitioners impugned the **Finance Act, 2013** on the basis that it presents difficulties in collecting and implementing the tax. In response to this argument I reiterate what I stated in **Kenya Union of Domestic, Hotels, Education, Institutions and Hospital Allied Workers (KUDHEIHA) Union v Kenya Revenue Authority and Others Nairobi Petition No. 544 of 2013**[2014]eKLR “[24] *Before I deal with the constitutionality of the impugned provisions, I think it is important to establish the legislative authority of the legislature to impose taxes. Article 209 of the Constitution empowers the national government to impose taxes and charges. Such taxes include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. The manner in which the tax is defined, administered and collected is a matter for Parliament to define and it is not for the court to interfere merely because the legislature would have adopted a better or different definition of the tax or provided an alternative method of administration or collection. Under Article 209 of the Constitution, the legislature retains wide authority to define the scope of the tax. (See Bidco Oil Refineries v Attorney General and Others Nairobi Petition No. 177 of 2012, paras. 53 – 56.)*”

34. The decision whether to impose a tax and to who is within legislative authority hence it has a right to decide what institutions fall within the definition of ‘*financial institutions*’ under the **Act**. That power falls squarely with the legislature. This Court cannot therefore intervene and I therefore find nothing unconstitutional in regard to that aspect of the petition.

35. I decline the petitioner’s entreaty to determine whether the definition of “*other fees*” in the **Financial Act, 2013** is vague and ambiguous. The petitioners’ members charge various kinds of fees as such the issue must be determined on a case by case basis.

### **Whether there is retrospective imposition of Excise Duty**

36. The petitioners claim is hinged on the fact that the Commissioner issued a notice on 23<sup>rd</sup> July 2013 purporting to call for collection of taxes from the 20<sup>th</sup> July 2013. I must agree with the respondents the the effect of the notice is for information purposes and whether or not the law is retrospective must be determined from a reading of the statutory provisions applicable.

37. The **Finance Bill, 2013** was published in the **Kenya Gazette Supplement No. 81 (National**

**Assembly Bills No. 2)** on 18<sup>th</sup> June 2013. **Section 1** of the **Act** stipulates its commencement date in the following terms;

*1. This Act may be cited as the Finance Act 2013, and shall come into operation or be deemed to have come into operation as follows;*

*(a) Sections 2, 3, 4, 6 and 7 on the 18th June 2013.*

*(b) Sections 5 on the 1st July 2013*

*(c) All other sections on the 1st January 2014.*

38. **Section 6** of the **Finance Bill, 2013** is the provision that introduced duty on financial institutions which include members of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> petitioners. The commencement date was 18<sup>th</sup> June 2013 hence the legal provision was already in force by the time the notice was published. **Section 6** of the **Finance Act, 2013** came into force by dint of **section 2** of the **Provisional Collection of Duties and Taxes Act** which provides that, “*If a Bill is published in the Gazette whereby, if such Bill were passed into law, any tax or duty, or any rate, allowance or administrative or general provision in respect thereof, would be imposed, created, altered or removed, the Minister may, subject to this Act and notwithstanding the provisions of any other written law relating to taxes and duties, make an order that all or any specified provisions of the Bill relating to taxes or duties shall have effect as if the Bill were passed into law.*”

39. I find and hold that the Notice had no legal effect and could not be relied upon to negate the legal obligation to pay duty imposed by **Finance Bill, 2013** from 18<sup>th</sup> June 2013 irrespective whether the petitioner and their members had knowledge of the law. I further find and hold that the petitioners’ right to fair administrative action has not been violated as alleged or at all.

### **Disposition**

40. In summary, my findings on the two issues framed for determination are as follows;

- a. **The provisions of the Finance Act, 2013 amending the provisions of the Fifth Schedule of the Customs and Excise Act in so far as it applies to persons registered under the Insurance Act does not violate the petitioners’ right to fair and administrative action under Article 47(1).**
- b. **The Public Notice demanding the payment of excise duty from the petitioners for the entire month of June 2013 does not have any legal effect as the obligation to pay Excise Duty was imposed by the Finance Act, 2013 which commenced on 18<sup>th</sup> June 2013.**

41. Consequently, the petition is dismissed. As the matter was brought by stakeholders in the insurance industry to clarify the law, I direct each party to bear its own costs.

**SIGNED BY**

**D. S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> JUNE 2014.**

**I. LENAOLA**

**JUDGE**

Ms Malik, instructed by Kaplan and Stratton Advocates for the petitioners.

Ms Sanga, Advocate instructed by Kenya Revenue Authority for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Ms Gitiri, Litigation Counsel, instructed by the State Law Office for the 3<sup>rd</sup> respondent.