



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 87 OF 2012**

**KENYA DATA NETWORKS LIMITED.....PETITIONER**

**AND**

**THE KENYA REVENUE AUTHORITY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This matter pertains to a dispute between the tax authority, Kenya Revenue Authority (Hereafter **KRA**), and a tax payer, Kenya Data Networks (Hereafter **KDN**) over payment of Value Added Tax (VAT) refunds on imported goods to the tax payer by the taxing authority. It also raises the question on whom, between the tax payer and the tax authority, liability for the fraudulent acts of a clearing agent lies.

2. According to its pleadings, KDN is a limited liability company duly incorporated under the provisions of the Companies Act and having its registered office in Nairobi. KDN is one of the leading Information Communications Technology (ICT) infrastructure providers in the East Africa region and one of the largest IP networks in the African continent, offering data and internet backbone services in the region. Since 2003, KDN has been duly authorised by the Communications Commission of Kenya to operate as a telecommunications company in the country.

3. Due to the nature of its services, KDN is from time to time required to import various materials for the assembling of key telecommunications components such as fibre optic cables. It has over the years paid VAT, which is an input tax, and in respect of which it is entitled to obtain refunds from KRA.

4. To facilitate importation of the goods and materials that it requires, KDN appointed Bax Logistics, a clearing agent duly licensed by KRA, in 2005 as one of its agents to facilitate clearing and forwarding of its imports, a practice that is common in the import and export industry and endorsed by KRA which licenses the clearing agents. As its clearing agent, Bax Logistics (hereinafter, “**clearing agent**”) would invoice KDN for taxes and duty due on its imports and KDN would then remit payment to the clearing agent for onward transmission to the KRA.

**The Petitioner's Case**

5. The petitioner’s complaint is fairly straightforward. It is aggrieved by the failure by the

respondent to process and pay its VAT refund claims for the period 2009 to date. KDN argues that this failure amounts to an infringement of several of its rights under the Constitution. First, it is a violation of its right to property under **Article 40** of the Constitution. As at 8<sup>th</sup> August 2012, the VAT refunds had shot up from Kenya Shillings 585 million which was the original amount at the time of filing the Petition in March, 2012 to Kshs. 912 million.

6. The petitioner is also aggrieved by the respondent's demand, on diverse dates, of the sum of Kshs **395,740,530** comprising Kshs. **283,257,024** being the total of tax arrears due from KDN and Kshs **112,483,506** being tax refunds allegedly erroneously paid to it.

7. Counsel for the petitioner, Mr. Kiragu Kimani, contended that KDN had paid all taxes due on its imports and averred that no release of its goods could have taken place without such payment. He submitted that KRA's demands are aimed at forcing the petitioner to make a double payment of taxes and duty already paid.

8. Mr. Kimani submitted further that despite KDN having complied with its tax obligations and applied for a Compliance Certificate, KRA refused to issue KDN with the said certificate as a result of which the petitioner had been unable to participate in various lucrative tenders and therefore lost out on considerable business opportunities. It is KDN'S case that failure to process the refunds has caused the company undue financial hardship. According to KDN, KRA did not issue it with a Compliance Certificate until 20<sup>th</sup> July, 2012, by which time it had lost the opportunity to participate in several government tenders.

9. The petitioner therefore seeks, in its Petition dated 19<sup>th</sup> March, 2012, the following reliefs from this Court:

- (a) *A declaration that the failure by KRA to process and pay the VAT refunds due to the petitioner is an infringement of its constitutional right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (b) *An order for judicial review by way of mandamus to compel the Kenya Revenue authority to process and pay the petitioner the value added tax refunds due to it forthwith.*
- (c) *An order for such compensation as the Court may order against KRA including but not limited to a sum equal to interest at commercial rates on the VAT refunds withheld in the sum of Kshs586,220,540 from such dates as the Honourable court shall set until payment in full.*
- (d) *A declaration that the Agency Notices dated 28<sup>th</sup> February 2012 and all Agency Notices issued prior thereto are unconstitutional and in contravention of Article 40 of the Constitution to that extent that the same were issued arbitrarily and without regard to the due process of law and without consideration of the evidence of payments produced the petitioner's agent.*
- (e) *An order for judicial review by way of an order of Certiorari to remove to this court and quash the decision by KRA to make demand and the demand contained in the letters dated 21<sup>st</sup> December 2010, 31<sup>st</sup> march 2011, and 28<sup>th</sup> February 2012 requiring Kenya Data networks (the petitioner) to pay taxes in the sum of Ksh283,257,024/- allegedly due from it and/or Kshs 112,483,506 being VAT refunds allegedly erroneously paid to it.*
- (f) *An order for judicial review by way of prohibition to prohibit Kenya Revenue authority from commencing, instituting or proceeding with any other enforcement actions against the petitioner or its directors and/or officers in relation to and/or an account of the disputed value added tax in the sums of Kshs283,257,024/- and Kshs112,483,506.*
- (g) *An order for judicial review by way of prohibition to prohibit Kenya Revenue authority from commencing, instituting prosecution actions against the petitioner or its directors and/ or officers in*

relation to the alleged fraud by the agent, Bax logistics Limited.

(h) *An order for judicial review by way of mandamus to compel the Kenya Revenue authority to investigate the conduct of Bax logistic Limited as a licensed clearing agent of the Kenya Revenue authority.*

(i) *An order for judicial review by way of Mandamus to compel the Kenya Revenue Authority to collect any Customs Duty allegedly outstanding, the penalties and interests from Bax Logistics Limited to whom reimbursement was made after the payment of the duties and taxes impugned by the Kenya Revenue Authority.*

(j) *An order for judicial review by way of Mandamus to compel the Kenya Revenue Authority to carry out a thorough and proper investigations into the issue and submit a report of its findings to the criminal Investigations Department and the Kenya Ethics and anti-corruption commission for further action.*

(k) *An order for judicial review by way of mandamus to compel the Kenya Revenue authority to process and issue the petitioner with a tax Compliance certificate.*

(l) *An order of injunction to compel KRA to account for all payments made by or on behalf of the petitioner and reconcile such payments against the demands made by it for Kshs 283,257,024/-.*

(m) *An order of injunction to restrain KRA from taking any enforcement action relating to the demand contained in the letter dated 28<sup>th</sup> February 2012 or any other amount arising from the allegedly unpaid import taxes and or valued added tax on imports pending the reconciliation of all payments made by or on behalf of the petitioner with respect to import taxes and VAT. For the avoidance of doubt the Kenya Revenue authority and the Commissioner of Investigation & Enforcement be stopped from taking any steps to collect any money on account of the disputed taxes.*

(n) *An order for costs of this application.*

10. The Petition is supported by an affidavit sworn on the 19<sup>th</sup> of March, 2012 by **Shahab Meski**, the Chief Executive officer of the petitioner, and an affidavit sworn by **Roger Warren**, its Chief Financial Officer, on 8<sup>th</sup> August, 2012. KDN also relied on written submissions dated 28<sup>th</sup> September, 2012 together with a list of authorities.

11. The petitioner termed KRA's demand for tax and its refusal to pay its VAT refunds as unreasonable on the basis that the petitioner's outstanding tax refunds which totaled over Ksh585,000,000/- at the time of filing the Petition had not been processed by KRA, and that the tax refund was far greater than the alleged tax arrears being claimed by KRA. The total amount due to the petitioner by way of tax refunds, for which a breakdown was provided, was **Ksh 912,765.283/-** The period covered was from April, 2007 to July, 2012, with the first demand for a refund having been made on 21<sup>st</sup> April, 2009 and the last demand on 20<sup>th</sup> April, 2012.

12. In any event, according to the petitioner, Bax Logistics, the clearing agent whose alleged fraudulent acts were the basis on which KRA was demanding tax arrears, was at all material times duly appointed by KRA as a licensed clearing agent, and the petitioner only engaged the agent because they were duly licensed by KRA. The petitioner submitted, therefore, that if any fraud is alleged to have occurred, the petitioner was not liable for such fraud and it should be imputed against the clearing agent.

13. The petitioner maintained that it had no control over the verification and clearance process manned by KRA as its goods were cleared by KRA after being subjected to KRA's rigorous verification process; that it was not aware and could not have been aware of the alleged under-declaration or fraudulent clearance of its goods; and that if any fraud was perpetrated by the clearing agent, it could not have been perpetrated without the complicity of the respondent's own employees. At any rate, according

to the petitioner, even if there was alleged to be fraud which KRA required to investigate, KRA had not shown any reason why it had not made the refund for the period that was outside its investigations, namely for the years 2010 and 2011.

14. This is where the second violation of the petitioner's constitutional right arises. According to the petitioner, KRA's refusal to process the VAT refund applications and make payment, while pursuing the petitioner for alleged unpaid taxes, is unconscionable, unfair and in bad faith. Its refusal to respond to the refund claim between 2009 until early 2012 when it asked for additional documents amounts to a violation of the petitioner's right under **Article 47** to administrative action that is expeditious, efficient, lawful and reasonable. Mr. Kimani submitted that while KRA was justified in seeking to verify KDN's claim, this had to be done within a reasonable period and a period of 3 years cannot be said to be reasonable.

### **The Respondent's Case**

15. In opposition to the petition, the respondent relies on the replying affidavits of **Joseph Kaguru** and **Sylvester Okello Ogello**, both Assistant Commissioners at KRA working in the Investigations and Enforcement Department (Business Intelligence Division) sworn on 19<sup>th</sup> July and 26<sup>th</sup> October, 2012 respectively.

16. KRA's basic contention as set out in the two affidavits and the written submissions dated 34<sup>th</sup> October 2012 is that it refused to process and pay out the petitioner's refund claims because they were based on documents that turned out to be forgeries. It contends that it carried out investigations and it discovered that the consignments imported by the petitioner were cleared on the basis of invoices that were not genuine and on false entries that resulted in under-valuation of the petitioner's goods. It also alleged that the duty payment receipts used by the clearing agents to invoice the petitioner were fake, a fact it states was confirmed by the National Bank of Kenya where the taxes were supposed to be paid.

17. The respondent submitted that it relies on a self-declaration tax regime under which a tax payer assesses its tax liability and self declares either by way of Income Tax Returns or in case of Customs Duty, by way of declaration of value in the *Simba* electronic system of clearance. It states that after the self-assessment, the Commissioner has powers to audit and conduct valuation and verification by requiring production of the relevant documents by the taxpayer. If the taxpayer is found to have under-declared, under-paid or under-valued, the Commissioner is empowered under the law to make an additional assessment and demand the extra tax.

18. In the case of the petitioner, the respondent contended that its officials were not able to detect the fake or forged entries until after the goods had been cleared; that few of the receipts now produced in the bundles produced by the petitioner before the court had been given to them before, and they were in the process of getting confirmation from the bank that they too are fake receipts. The respondent further alleged that sometime in October, 2010, it discovered that it had made erroneous refunds to the petitioner, upon which it conducted a raid on the clearing agent, Bax Logistics, in a bid to unearth the extent of the fraud. It was discovered that the agents were clearing consignments for the petitioner while not paying the requisite duly assessed duties.

19. Ms Lavuna, Counsel for the respondent, maintained that the petitioner's claim for refunds was based on documents that were forgeries; that KRA cannot make a refund if no tax was paid or if tax was paid in error, or if a tax claim is larger than the amount of refund claimed. She based her argument on several judicial precedents including **Republic –v- Commissioner of Lands Ex parte Somken Petroleum Co. Ltd, H.C. Misc. Appl. No. 54 of 2010** and **R –v- KRA exp Altex EPZ Limited R, Misc. Civil Application No. 709 of 2008** and contended that if the petitioner was a victim of fraud by its agent, this did not discharge its liability to pay tax as the respondent is not privy to the dealings between the petitioner and its agent. Counsel also pointed out that under the **East African Community Customs and Management Act, 2004** (EACCMA), a principal remained liable for the acts of its agent and that therefore, KDN was liable for the fraudulent acts of Bax Logistics.

## **Determination**

20. In my view, this matter calls for determination of two related, but independent issues. The first is whether the respondent was justified in law in withholding the tax refunds to the petitioner. The second issue is whether the petitioner is liable for the alleged fraud committed by its agent, Bax Logistics, which resulted in the underpayment of duty being demanded by the respondent and on the basis of which the respondent has declined to make VAT refunds to the petitioner.

21. In making my determination of these issues, I am conscious of the fact that this court is not a court of appeal on the substance or merits of the matter before it. Rather, its task is to evaluate whether, in the discharge of its duty, the taxing authority, KRA, was in breach of the Constitution or any other law. As was stated in the case of **Associated Provincial Picture Houses, Ltd -v- Wednesbury Corporation [1947] 2 All E.R 680:**

*“It must always be remembered that the Court is not a court of appeal. The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion [of the decision-making body] is an absolute one and cannot be questioned in any court of law.”*

22. Similarly, in **Shidiack -v- Union Government (Minister of the Interior) (1912) AD 642**

*“Now it is settled that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary, no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own.”*

23. It is not in dispute that the petitioner is entitled to input tax refunds under **Part IV** of the Value Added Tax Act, nor is it in contention that it has made the requisite application for refund as provided by law. **Section 24** of the VAT Act provides as follows:

**24. Where-**

**(a) taxable goods have been manufactured in or imported into Kenya and tax has been paid in respect of those goods and, before being used, those goods have been subsequently exported under customs control; or**

**(b) any tax has been paid in error; or**

**(c) in the opinion of the Minister, it is in the public interest to do so, the Commissioner shall, except as otherwise provided by the regulations, refund the tax which has been paid in respect of those goods:**

***Provided that no refund shall be made under paragraph (b) of this section unless the claim in respect thereof is lodged within twelve months from the date the tax became due and payable under section 13.***

24. What the respondent contends is that while the petitioner is indeed entitled to the VAT refunds, it has not made the said refunds as the petitioner is in arrears of duty arising from the fraudulent acts of its agent, Bax Logistics, which resulted in under-declarations and under-payment of tax lawfully due. It contends that the petitioner is liable for the acts of its agent and should pay the arrears of duty resulting from the fraud committed by its agent. The petitioner, on its part, contends that it cannot be held liable for the acts of an agent who is licensed by the respondent, and that if there was any fraud committed, it could only have been committed with the collusion of the respondent's employees. This is the first issue that I would like to address.

## Liability for the Acts of the Agent

25. It is not in contention that at the material period, the petitioner employed the services of Bax Logistics as one of its clearing agent. It is also not contested that the clearing agent was at the material time duly licensed by the KRA as a clearing agent. What is the bone of contention is liability regarding acts of fraud allegedly committed by the clearing agent.

26. It has long been an established common law principle that a master is vicariously liable for the acts of its agent. The Court of Appeal in the case of **Ndoo t/a Ngomeni Bus Service –v- Kakuzi Limited**, [1984]KLR 554 stated as follows:

*“A master is not responsible for a wrongful act done by his servant, unless it is done in the course of his employment...But a master is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorised, that they might be regarded as modes-although improper modes-of doing them. In other words, a master is responsible not merely for what he authorised his servant to do, but also for the way he does it..”*

27. This principle does not become any less relevant when it comes to taxation law, and has been upheld in decisions by our courts. In **Republic –v- Commissioner of Customs Services ex-parte SDV Transami (K) Limited Misc. Civil Application No. 81 of 2011 (Unreported)** Justice Warsame observed that

*“It is clear that an owner of any goods who authorizes an agent to act for him shall be liable for the acts and declaration of such duty by the authorised agent. Consequently, the respondent was perfectly right in making a demand against the applicant ...”*

28. More importantly, the position that a principal is liable for the acts of its clearing agent enjoys clear statutory backing. **Sections 145 to 148 of the East Africa Community Customs Management Act, 2004** specifically provides for authorised agents and states as follows:

*“147. A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:*

*Provided that nothing herein contained shall relieve the owner of such goods from such liability.*

*148. An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorized agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:*

*Provided that-*

*(i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorised agent unless the owner actually consented to the commission of the offence;*

*(ii) nothing herein contained shall relieve the duly authorised agent from any liability to prosecution in respect of any such offence.” (Emphasis added)*

29. In dealing with a similar matter regarding the liability of a principal for the acts of his clearing agent and the above provision, Justice Majanja observed as follows in the case of **Republic –v- Kenya Revenue Authority ex parte Alltex EPZ Limited Misc. Civil Application No. 709 of 2008;**

*“The language of the statute leaves no doubt that the legislature intended that for purposes of collection of duty, the owner of the goods would be liable for the actions of the agent whatever the*

*circumstances. At the time the goods were cleared, it is not in dispute that... was the applicant's employee and therefore its agent."*

30. As I conclude on this issue I adopt the sentiments of Korir J. in **R -v- Kenya Revenue Authority ex parte African Boot (K) Limited HC Misc. Civil Application No. 54 of 2010** (Unreported) where the learned judge stated;

*"...The same case applies here so that when a customs agent engages in fraudulent activities, the importer cannot ask Kenya Revenue Authority for compensation. The importer has to bear the loss with fortitude and find a way of recovering money misappropriated from the customs agent. A prudent taxpayer will always monitor the activities of its agent so as to ensure compliance with the law. The only civil duty a tax payer can do is to report the agent so that the licence can be revoked by the respondent .... The applicant argued that Hellman acted in concert with the respondent's employees so as to defraud it of the money that was meant to pay custom duties. This may well be true but just as the applicant did not authorise its agent(Hellman) to steal so did the respondent not authorise its employees to engage in fraudulent activities. May be the applicant could have had a stronger case had it established that Hellman was the respondent's agent. It is however clear that the applicant was defrauded by its agent... It is unfortunate that the applicant suffered such a big loss. The only answer to its application, however is that the same must be dismissed and it is so dismissed."*

31. The petitioner, therefore, is liable for the alleged fraudulent acts or omissions of its clearing agent. It follows that the respondent acted within the law in holding the petitioner liable for taxes due on alleged false entries and in demanding the tax arrears in the sums of Kshs 283,257,024. Whether the entries were indeed fraudulent or goods under-declared, however, as contended by the respondent is not within the purview of the present petition.

#### **KRA's Claim For Erroneous Refunds**

32. The petitioner has submitted that the respondent's claim of refunds it erroneously made to it was unreasonable and in breach of the principle of legitimate expectation. In its submissions on the issue of legitimate expectations, it has relied on the dictum in **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374** with regard to the meaning of the principle:

*A legitimate exception may arise either from an express promise given by a public authority or from a regular practice which the claimant can reasonably expect to continue."*

33. Counsel for the petitioner also cites **De Smith, Woolf & Jowell, "Judicial Review of Administrative Action"** (5th ed) Sweet & Maxwell, page 417 where it is stated as follows:

*"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken."*

34. I think that there can be no dispute that in appropriate circumstances, the principle of legitimate expectations will be upheld and applied in favour of a party. However, in the present case, can a party who receives a tax refund erroneously be allowed to keep it on the basis of legitimate expectations? Aside from relying on the principle of legitimate expectations, the petitioner has not cited any provision in the very elaborate VAT Act which would prohibit the tax authority from reclaiming amounts erroneously refunded to a tax payer. I believe that logic and the public interest would require that if the tax authority makes a payment that it ought not to have made to a tax payer, such payment must be recoverable from the tax payer. Indeed, this has been expressly captured in **Section 25** of the VAT Act which allows the Commissioner to recover any refund or rebate erroneously paid. The section is in the following terms:

(1) *Where any tax has been remitted or refunded, or any rebate of tax has been allowed in error,*

*the person to whom the refund, remission or rebate has been erroneously made or allowed, shall, on demand by the Commissioner, pay the amount erroneously remitted or repay the amount refunded in error, or in respect of which rebate has been allowed in error, as the case may be.*

(2) *Where a demand has been made for any amount of tax under subsection (1), that amount shall be deemed to be due from the person liable to pay the tax on the date upon which the demand is served upon him and if payment is not made within thirty days of the date of service an interest of two per cent per month or part thereof of such unpaid amount shall thereupon forthwith be due and payable.*

*Provided that the interest chargeable under this subsection shall not exceed one hundred percent of the tax originally due.*

35. These provisions are further echoed in **Section 135 of the East African Community Customs Management Act, 2004** which states that:

*“(1) Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.”*

36. The response to the petitioner’s argument with regard to the demand by KRA for refunds erroneously made is that the doctrine of legitimate expectations will not be of much avail to it as the doctrine cannot be invoked to oust clear statutory provisions: **R -v- Secretary of State for Health, ex parte US Tobacco International Inc. [1992] 1 All ER 212** and **Mount Kenya Bottlers Limited & 3 others -v- the Attorney General & 3 others, Petition No. 72 of 2011**). I therefore find and hold that the respondent acted within its statutory authority in demanding the refund of Kshs 112,483,506, the amount alleged to have been erroneously refunded to the petitioner.

### **Violation of the Right to Fair Administrative Action**

37. The petitioner submits with regard to its pending VAT refund claims that once it had submitted all the requisite documents, it expected to receive an expeditious, efficient, lawful, reasonable and procedurally fair service from the respondent. It contends that no rational reason has been given by the respondent for its failure to make the refunds, particularly for the period that was not affected by the alleged fraud of the clearing agent. The failure by KRA to make the refunds was therefore unreasonable and in breach of the petitioner’s rights under Article 47 of the Constitution.

38. It is trite law that there is an implied duty of fairness attached to all administrative actions. Where an Act of Parliament confers an administrative power on a public authority, there is a presumption that such administrative power will be exercised in a manner which is fair. *See R -v- Registrar of Societies Exp Smith Khisia Waswa & Others Misc Civil Application No. 769 of 2004*. This requirement has also received express constitutional underpinning in **Article 47** of the Constitution which provides that:

*“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”*

39. In the case of **Dry Associates Limited -v- Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 (Unreported)** cited in **Kenafic Industries Ltd -v- Commissioner of Domestic Taxes & 4 Others, Petition No. 99 of 2011**, the Court noted that:

*“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.”*

40. I am also guided by the words of Justice Ojwang in **R -v- Kenya Revenue Authority ex parte L.A.B. International Kenya Limited, Misc. Civil Application No. 82 of 2010**, relied on by the petitioner, where he stated that:

*“The common law, in its evolution, has defined the rules of conduct for a public authority taking a public decision, entrusting the overall jurisdiction in the hands of the Courts of law; but for Kenya, such a general competence of the Courts is now no longer confined to the terms of statute law and subsidiary legislation, but has a fresh underwriting in the Constitution of Kenya, 2010, Article 47, which imposes a duty of fair administrative action, and [Art. 10(a)(c)] demands “good governance, integrity, transparency and accountability.”*

41. It is therefore beyond doubt that the petitioner was entitled to expect from the respondent administrative action that is *“expeditious, efficient, lawful, reasonable and procedurally fair.”* The question is whether KRA’s acts and or omissions with regard to the petitioner’s claim for VAT refunds met the test of fair, expeditious and reasonable administrative action. With regard to the failure by the respondent to address the application for VAT refunds by KDN, I adopt the sentiments of my brother, Justice Majanja, in **Isaac Gathungu Wanjohi & others -v- The Attorney General & Others Nairobi HCC Petition Number 154 of 2011** where he observed that the purposes and duty of any statutory body is to serve its constituents with utmost care, speed, and diligence.

42. I take the view that KRA was within its powers and mandate to investigate the tax affairs of the petitioner, its conduct and the conduct of its clearing agent to ascertain the amount of tax due. It was also fully entitled to withhold refunds for any amounts erroneously claimed, or for any period during which the alleged fraud by the agent occurred. There is, however, in my view, no justification for withholding tax refunds for periods that fell outside the span during which the respondent alleges acts of fraud in self-assessment and self-declaration were committed by the petitioner’s agent for which it needed to carry out investigations.

43. The respondent had a duty to act on the petitioner’s VAT refunds timeously. While recognising that it is mandated by statute to collect taxes, and while appreciating the pivotal role that collection of taxes plays in a country’s economic development and provision of services for citizens, KRA must also be always cognizant of the possible ramifications of its actions or omissions in dealing with taxpayers, and the impact on investment, revenue collection and the general welfare of the country. While there is no statutory period within which KRA ought to make good tax refund claims, it cannot have any basis for failing to process tax refund claims several months, and in some cases several years after they were made. It is no answer to the petitioner’s claim for tax refund for the respondent to demand in turn that the petitioner pays arrears of tax. Further, the petitioner is correct when it argues that it is unreasonable for the respondent to withhold tax refunds which are much higher than the amount allegedly due as tax arrears and erroneous tax refunds. I therefore find and hold that the failure by the respondent to consider the petitioner’s application for refunds is a breach of the petitioner’s right to fair administrative action under **Article 47(1)**.

## **Reliefs**

44. In light of my findings on the various issues in this matter, specifically that the respondent was within the law in demanding the amounts paid to the petitioner erroneously as VAT refunds, that the respondent is also entitled to demand tax that is in arrears and that the petitioner is liable for the acts of its agent, Bax Logistics, I am unable to grant the orders sought by the petitioner which would have the effect of interfering with the respondent’s lawful exercise of its statutory authority.

45. I have, however, found that the failure by the respondent to process the petitioner’s VAT refunds even for periods when there is no dispute is a violation of Article 47 of the Constitution. Article 23 empowers the Court to grant appropriate relief in any matter before it relating to the enforcement of fundamental rights. In the circumstances, I issue the following orders:

i. A declaration that the petitioner’s fundamental rights to fair and expeditious administrative action

under **Article 47** has been violated by the respondent.

ii. An order of *Mandamus* directed to the respondent compelling it to expeditiously and in any case within a period of not more than sixty (60) days from the date of this judgment to consider, process and pay out in accordance with the law all outstanding VAT refund claims by the petitioner.

iii. The petitioner shall have the costs of this petition.

46. I am greatly indebted to Counsel for the parties for their well-researched submissions and for their diligence in prosecuting their respective cases.

**DATED at NAIROBI this 25<sup>th</sup> day of January 2013**

**MUMBI  
JUDGE**

**NGUGI**

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of January 2013**

**D.  
JUDGE**

**S**

**MAJANJA**