



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 177 OF 2012

BETWEEN

BIDCO OIL REFINERIES LIMITED..... PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE COMMISSIONER-GENERAL OF

THE KENYA REVENUE AUTHORITY3RD RESPONDENT

THE COMMISSIONER OF CUSTOMS

AND EXCISE.....4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioner (“BIDCO”) has filed the petition dated 30th April 2012 to challenge the enforcement and collection of taxes against it on the ground that its fundamental rights and freedoms have been violated.
2. BIDCO is a limited liability company incorporated in Kenya under the provisions of the *Companies Act (Chapter 486 of the Laws of Kenya)*. It is engaged in the import, production and refining of edible oils and related products.
3. The Kenya Revenue Authority (“KRA”) is incorporated under the provisions of **section 3** of the *Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)* and is responsible for

collection of taxes in the country. The Commissioner General of the Authority (“the Commissioner General”) and the Commissioner of Customs and Excise (“the Commissioner”) are officers of KRA and act on its behalf. The Commissioner under the ***East African Community Customs Management Act, 2004*** (“***EACCMA***”) acts on behalf of KRA to administer and enforce the Act which is enacted for the purpose of the collection and administration of customs duty and excise tax.

4. For purposes of this judgment reference to KRA shall include the Commissioner and/or the Commissioner General unless the context dictates otherwise.

Background and facts

5. The facts giving rise to this matter are not in dispute and can be gathered from the depositions filed on behalf of the petitioner and the respondents and are clearly outlined in the parties’ written submissions.
6. The origin of the dispute between BIDCO and KRA can be traced back to a contract for the import of edible oils and related products from Josovina Commodities Limited in Singapore by BIDCO. After KRA carried out an audit into BIDCO’s imports for the years January 2004 to July 2008, it alleged, inter alia, undervaluation of value added tax and duty payable on the contract due to tariff misclassification and value undervaluation. BIDCO disputed the allegations and objected to the methodology and parameters used to assess import duty under **section 122** as read with the provisions of the ***Fourth Schedule*** of ***EACCMA*** (“***the Fourth Schedule***”).
7. After this initial demand, BIDCO and KRA engaged in negotiations but the negotiations did not lead to any settlement. By a letter dated 11th September 2009, KRA demanded from BIDCO Kshs.702,334,527.00 as under valuation of duty in respect of various imported edible oils to be paid within 7 days. BIDCO objected to this demand by its letter dated 14th September 2009 asserting that KRA had erred on the assessment of import duty provided for under **section 122** of ***EACMMA*** as read with the ***Fourth Schedule***.
8. In response to the objection by BIDCO, KRA accepted the quantities of oils imported but rejected the contention that its assessment of import duty was wrong. BIDCO responded to KRA by the letter dated 16th September 2009 accusing it of imposing new criteria for determination of duty not provided for in ***EACCMA***. By a letter dated 16th September 2009, KRA rejected this contention and demanded payment of Kshs.702,334,527.00 on the following terms, “*I therefore restate the Departmental position that the demand (undervaluation based on cost) still stands as earlier presented and that a further demand based on undervaluation of undeclared insurance to follow. You are therefore required to make arrangements to pay before the expiry of the demand period.*”
9. After the demand was made, BIDCO sought administrative review of that decision under **section 229(1)** of ***EACCMA*** by a letter dated 22nd September 2009. Before any action could be taken on this request, KRA issued agency notices to BIDCO’s bankers and distributors on 23rd September 2009.
10. By a letter dated 25th September 2009, the Commissioner General replied to BIDCO’s request for administrative review as follows; “*I have read through the provisions of section 229 of EACCMA, 2004 and wish to make the following decisions;*
 - *That my office will constitute a team of technical experts to look into the dispute with a view to reaching an amicable solution.*
 - *That the agency notice will be lifted subject to BIDCO paying security amount of 50% of Kshs. 702,344,527 pending the finding of the constituted team – Section 229(6) of EACCMA, 2004 has reference.*

- *That the findings of the team will be final and subject to no further appeal to my office.*
 - *That if BIDCO is not comfortable with the aforesaid, then the company is at liberty to seek arbitration elsewhere as they deem fit.”*
11. BIDCO alleges that before it could settle the security, the Commissioner insisted on full payment of the duty and in order to forestall recovery of the full amount of duty, it filed an application for judicial review challenging the process and manner in which the demand was made. The case, ***Republic v Kenya Revenue Authority ex parte Bidco Oil Refineries Limited, Nairobi HC Misc. JR No. 568 of 2009***, sought to quash the decision of the Commissioner made on 16th September 2009.
12. In due course ***HC Misc. JR No. 568 of 2009*** was compromised and withdrawn by a consent order recorded on 28th October 2009 on the following terms;
- a. *The respondent shall unconditionally withdraw all assessments of duty and decisions leading to the letter dated 16th of September 2009 calling upon the Applicant to make payment of Kenya Shillings Seven Hundred and Two Million Three hundred and Forty Four Thousand, Five Hundred and Twenty Seven (Kshs.702,344,527/-) and all consequential actions based on the same.*
 - b. *The Applicant shall unconditionally withdraw this Judicial Review Proceeding in its entirety seeking orders of certiorari and prohibition challenging all assessments of duty and decisions based on the letter dated 16th of September 2009 calling upon the Applicant to make payment of Kenya Shillings Seven Hundred and Two Million Three Hundred and Forty Four Thousand Five Hundred and Twenty Seven (Kshs.702,344,527/-) and all consequential actions based on the same.*
 - c. *The Commissioner General of the Respondent as per his letter of 25th September 2009 shall within Seven (7) days of this order appoint a team of technical experts to look into the dispute and to interpret the statutory regime and parameters of determination of value and assessment of duty as provided for under Section 122 and Rule 2, with adjustments under Rule 9 in the Fourth Schedule of the East African Community Customs Management Act, 2004 (“EACCMA Act”).*
 - d. *The Applicant shall be at liberty to make such technical and legal representations to the team of technical experts.*
 - e. *The team of technical experts shall make their report to the parties herein within Fifteen (15) days of their appointment.*
 - f. *The expenses incidental to the Bank Guarantee for Kshs.351,172,263/00 to abide the report of technical experts.*
 - g. *Notwithstanding the provisions of paragraph (a) above the Commissioner shall be at liberty to issue fresh demands, as by law provided, should the technical experts come up with a report that taxes are owing from the imports under reference.*
 - h. *Notwithstanding the provisions of paragraph (b) the above this agreement does not restrict in any way the applicants right to challenge any fresh assessment demands by the respondent, as by law provided.*
13. The Commissioner General thereafter constituted a Technical Team of Experts (“TTE”) to adjudicate over the dispute as agreed in the consent order. BIDCO made its representation to the TTE. The TTE finalized its report which was forwarded to BIDCO on 11th December 2009. KRA followed this up with a fresh demand dated 22nd January 2010 for the sum of Kshs. 780,871,292/00 based on the recommendation of the TTE report to collect the taxes assessed.
14. Following the demand, BIDCO sought review of the fresh demand to the KRA pursuant to **section 229(1) of EACCMA**. In addition, BIDCO filed another application for judicial review; ***Republic v Kenya Revenue Authority ex-parte Bidco Oil Refineries Limited HC Misc. JR No. 38 of 2010*** in which it challenged the composition, process and undertakings of the TTE. The application sought the following orders;

- a. To quash the Report of the Team of Experts appointed by the Commissioner General, Kenya Revenue Authority to look into the decision made by the Kenya Revenue Authority, Customs Services Department pursuant to a consent Order dated the 28th of October 2009 in **Misc. Civil Application No. 568 of 2009 The Republic v Kenya Revenue Authority Exparte Bidco Oil Refineries Limited** forwarded vide the letter of 20th November 2010 and
- b. To quash the decision contained in the letter from the Commissioner of Customs Services of the Kenya Revenue Authority dated 22nd of January 2010 calling upon the Petitioner to make payment of Kenya Shillings Seven Hundred and Eighty Million Eight Hundred and Seventy One Thousand Two Hundred and Ninety Two (Kshs.780,871,292/-)
- c. An order of prohibition to prohibit the Kenya Revenue Authority from demanding, enforcing, collecting or in any other way from taking any step or action in respect of or connected with the Report of the Team of Experts appointed by the Commissioner General, Kenya Revenue Authority to look into the decision made by the Kenya Revenue Authority, Customs Services Department pursuant to a Consent Order dated the 28th of October 2009 in **Misc. Civil Application No 568 of 2009 The Republic v. Kenya Revenue Authority exparte Bidco Oil Refineries Limited** forwarded vide the letter of 20th November 2009.
- d. An order of prohibition to prohibit the Kenya Revenue Authority from demanding, enforcing, collecting, issuing agency notices to the petitioner's Trading Partners, Distributors, bankers or in any other way from taking any step or action in respect of or connected with the decision contained in the letter from the Commissioner of Customs Services of the Kenya Revenue Authority dated 22nd of January 2010 calling upon the Petitioner to make payment of Kenya Shillings Seven Hundred and Eighty Million Eight Hundred and Seventy One Thousand Two Hundred and Ninety Two (Kshs.780,871,292/-)

15. The matter was duly heard by W. Korir J., who dismissed the application on 8th March 2012. Upon dismissal of the application, BIDCO evinced its intention to appeal to the Court of Appeal by lodging a Notice of Appeal dated 8th March 2012.

16. BIDCO thereafter addressed a letter dated 26th March 2012 to the Commissioner demanding a response to the earlier application for administrative review of the demand letter dated 22nd January 2010. The letter stated as follows;

Monday, 26th March 2012

The Commissioner of Customs Services

Commissioner of Custom Services Department

Times Tower Building

Haile Selassie Avenue

12th Floor,

P.O. Box 40160,

NAIROBI

Dear Sirs,

RE: DEMAND FOR EXTRA TAXES – KSHS. 780,871,292.00

We refer to the above matter and to your letter dated 22nd of January 2010 wherein you demanded the payment of the sum of KSHS. 780,871,292.00 as additional taxes consequent upon

the Report of the Technical Team of Experts (TTE) which was forwarded to us vide your letter of 11th of December 2009.

Following the said demand letter dated 22nd of January 2010;

- a. We by a letter dated 8th February 2010 appealed for Review of the same to you pursuant to Section 229 (1) of the East African Community Customs Management Act, 2004.
- b. We also instituted **Misc. Application No. 38 of 2010 Republic –vs- The Kenya Revenue Authority Ex-parte Bidco Oil Refineries Ltd** on 11th of February 2010 to challenge the Report of the Technical Team of Experts (TTE).
- c. The High Court (Honourable Justice Korir) rendered his decision in the above case on the 8th of March 2012 and we have instructed our advocates to institute an appeal against the same.
- d. You have not to date rendered any reply on our appeal for Review to you pursuant to Section 229(1) of the East African community Customs Management Act, 2004.
- e. The pending application for review pursuant to Section 229 (1) of the East African Community Customs Management Act, 2004 was confirmed in the Affidavit of Ruth Wachira sworn on the 10th of May 2010 in the above case at paragraph 54 and the Replying affidavit of Vimal Shah sworn on the 2nd June 2010 at paragraph 66.

In light of the conclusion of the above case in the High Court, we hereby request you for your reply to the application for administrative review of the letter of demand dated 22nd of January 2010 under the provisions of Section 229(1) of the East African Community Customs Management Act, 2004.

We would be very grateful to receive your reply by recorded delivery to the undersigned and with a copy to our Advocate on record.

Your urgent and kind response to this request will be greatly appreciated.

Yours faithfully,

Bidco Oil Refineries Ltd.

(Signed)

DIRECTOR

17.The Commissioner General responded to the application for administrative review by a letter dated 16th April 2012 on the following terms;

16th April 2012

The Managing Director,

Bidco Oil Refineries Limited

P O Box 239,

THIKA

Dear Sir,

RE: DEMAND FOR TAXES IN THE SUM OF KSHS. 780,871,292.00

We refer to your letter dated 26th March 2012 in which you requested for a reply to your application dated 8th February 2010 for review of the demand letter dated 22nd January 2010.

You will recall that on the 11th February 2010, barely three days after your said application, you also moved to court by way of **Judicial Review in Misc. Civil Application No. 38 of 2010 (Republic versus Kenya Revenue Authority exparte Bidco Oil Refineries Limited)** in which you challenged the said demand letter.

The Court granted stay orders in your favour which essentially barred the Commissioner of Customs Services and indeed the Authority from performing anything founded on the demand letter of 22nd January 2010 until the hearing and final determination of your case.

Upon hearing all the parties to the case, the court has now pronounced itself in a judgment dated 8th March 2012 which dismissed your challenge to the taxes demanded in the letter dated 22nd January 2010.

In our view the matter you are now seeking to reopen is overtaken by events as the Commissioner is unable to act as requested in your letter dated 26th March 2012.

Yours faithfully,

(Signed)

Commissioner of Customs Services

18. Following the dismissal of BIDCO's case and rejection of the review, the Commissioner General demanded extra revenue amounting to Kshs.1,377,505,220/00 including penalties and interest by a letter dated 19th April 2012. The demand was then followed by agency notices issued to BIDCO's bankers. It is this demand that precipitated the filing of the petition dated 30th April 2013 in which the petitioner seeks the following principal declarations in prayers (a) and (b) and consequential relief setting aside the demand for taxes and agency notices;

- a. A *DECLARATION BE ISSUED THAT the Agency Notices issued by the 2nd to Fourth respondents in issue herein are null and void and an arbitrary deprivation of property or otherwise interfere with the Petitioner's Fundamental Right to individually, or in association with others, acquire and own property of any description in any part of Kenya and are therefore inconsistent with the fundamental right to the property guaranteed under and enshrined in section 40 of the Constitution of the Republic of Kenya.*
- b. A *DECLARATION BE ISSUED THAT the Respondent's conduct of issuing Agency Notice against the Petitioner in the circumstances hereof are illegal, null and void and unconstitutional as they unreasonably limit the Petitioner from exercising the right to have disputes arising from the decision of the Third Defendant heard and determined by a Tax Appeal Tribunal contrary to Articles 47, 48 and 50(1) of the Constitution on fair administrative action, access to justice and fair and conclusive hearing.*

19. On the date of filing this petition, BIDCO also filed an appeal in the Tax Appeal Tribunal being ***Bidco Oil Refineries Limited v Commissioner of Custom Services Tax Appeal No. 2 of 2012*** which is pending determination. According to the Memorandum of Appeal dated 27th April 2012, BIDCO raised, inter alia, the following grounds for challenging the Commissioners demand and assessment of duty;

[2] The respondent has erred in its appreciation and determination of the statutory regime and parameters of determination of value and assessment of duty as provided for under Section 122 and Rules 9(2) in the Fourth Schedule of the EAC CMA Act.

[4] *The Respondent has erred in re-writing and setting up a new parameter of determination of value and assessment of duty contrary to the mandatory statutory regime that Kenya together with other members of the East African Community established under the East African Community Customs Unions to be the customs law of the East African Community, to wit, the EAC CMA Act.*

The principal prayers sought by the appellant in the tribunal are as follows;

- a. *That the Honourable Tax Appeal Tribunal do interpret the statutory regime and parameters of the value and assessment of duty provided for under section 122 and the Rule 2, with adjustments under Rule 9 in the Fourth Schedule of the East Africa Community Customs Management Act, 2004 (EACCMA).*
- b. *That the demand for tax by the Commissioner of Customs Services dated 19th April, 2012 thereof in the sum of Kshs. 1, 377,505,229.00 be set aside and in place thereof this Honourable Tribunal finds that no tax is payable.*

20. When the matter was filed on 30th April 2012, I granted conservatory orders to restrain the enforcement of the agency notices. After hearing the parties, I granted conservatory orders on 19th July 2012 on terms, pending the hearing and determination of the petition.

Issues for Determination

21. The matter before the court is an application filed to enforce fundamental rights and freedoms under **Article 22** of the Constitution. It is apparent from the facts I have outlined, that there have been proceedings in respect of the subject matter and further proceedings are contemplated. As it will become apparent, it shall not be necessary to address all the issues raised by the petitioner and respondent. I shall therefore limit my findings to what is strictly necessary to resolve the matters in issue in so far as they impinge on the Constitution and the fundamental rights and freedoms of the petitioner in light of the uncontested facts I have set out in the second part of this judgment.

22. The petitioner has made substantial arguments about application of constitutional values and principles and their application to the subject of this case. Reference to the preliminary matters or general provisions relating to the Bill of Rights set out in **Part 1 of Chapter 4** apply to the interpretation of the Bill of Rights. Similarly the values set of in **Article 10(2)** are by virtue of **Article 10(1)** applicable to the court in handling the task of applying and interpreting the Constitution. The Court is also required to apply the provisions of **Article 259** of the Constitution. I am alive to these principles and cases that enunciate them (See **Centre for Rights and Awareness & Others v Attorney General Nairobi Petition No. 16 of 2011 (Unreported)** and **Harun Mwau v The Attorney General & Others Nairobi Petition No. 146 of 2011 (Unreported)**) but ultimately, to paraphrase the words of the great jurist Oliver Wendell Holmes (**Lochner v New York 198 US 45, 76 (1905)**), these important and general principles do not resolve concrete cases, they provide a foundation for the resolution of the dispute between the parties which the Court is called upon to resolve.

23. Having considered the petition, the depositions in support of and in opposition to the petition and the submissions, oral and written and in particular the principal prayers sought by the petitioner, I think there are two broad issues for consideration;

1. Whether there has been a breach of the petitioner's right to fair administrative action under **Article 47(1)**, access to justice under **Article 48** and the right to a fair and conclusive hearing under **Article 50** of the Constitution.
2. Whether there has been a breach of the petitioner's right to property protected by **Article 40** of the Constitution.

Whether Article 47(1), 48 and 50 were violated

Introduction

24. The petitioner's grievance concerns the manner in which **EACCMA** was applied in assessing, demanding and enforcement of payment of duty. Under **Article 47(1)** of the Constitution, the petitioner is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In **Republic v Kenya Revenue Authority ex-parte LAB International Kenya Limited Mombasa HC Misc. App. No. 82 of 2010 [2010]eKLR** the court stated as follows; "By Article 47 of the Constitution of Kenya, 2010 persons such as the applicant have a right to fair administrative action, which must not be denied whether by the respondent, or by the other Government agencies and mechanisms to which the respondent may happen to be operationally attached; the whole set of those agencies, which are statutory and public bodies, are subject to Article 10 of the Constitution which, under the head, "national values and principles of governance", requires "good governance, integrity, transparency and accountability" [Article 10(2)(c)]. If those agencies to which the respondent is operationally related are baldly invoked as governing premise, to justify the respondent's non-delivery, the effect would be to nullify vital private rights safeguarded under the Constitution: that cannot be permitted by this court, which is under the obligation, by Article 159(2)(e) of the Constitution to promote "the purpose and principles of this Constitution."
25. Although reference was made to the provisions of **Article 50**, I do not think it applies to this case. In **Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition 328 of 2011 (Unreported)**, I stated, "[62] **Article 47 and 50(1)** protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. **Article 50(1)** applies to a court, impartial tribunal or a body established to resolve a dispute while **Article 47** applies administrative action generally. **Article 50(1)** deals with matters of a civil nature while the rest of the Article deals with criminal trials. **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."
26. More recently, the application of **Article 50** was discussed in **Diana Kethi Kilonzo and another v The Independent Electoral & Boundaries Commission (IEBC) & 2 others, Nairobi Petition No. 359 of 2013 [2013]eKLR** where the court stated; "[118] We believe the latter part of this complaint pertaining to the alleged breach of Ms. Kilonzo's rights under Article 50(2)(a)(c)(j) and (k) can be easily disposed of. Ms. Kilonzo was not on trial in the proceedings before the Committee, which is not a court that exercises criminal jurisdiction to try offences ... the provisions of Article 50(2) in their entirety have no application to the matters at hand. This Clause is clear that it has application to an accused person facing criminal charges.... It is clear from its wording that the provision is intended to apply to accused persons facing criminal charges."
27. The petitioner did not contend that it was not given a fair hearing in **HC JR No. 568 of 2009 HC** and **JR No. 38 of 2010**. Even if the petitioner did not get a fair trial, the matter could not be raised in this matter but only on appeal from that decision (**Azim Taibjee and Bhalla Advocates and Others v Attorney General Nairobi Petition No. 1173 of 2007 [2013]eKLR** and **Methodist Church of Kenya, Registered Trustees & Another v Rev. Jeremiah Muku and Another CA Civil Appeal No. 233 of 2008 (Unreported)**). In the circumstances, I shall consider the matter as one founded on breach of **Article 47(1)**.

Submissions

28. The core of the petitioner's grievance is that its complaint concerning the assessment of duty under **EACCMA** has never been heard on merits and that therefore its right to fair administrative action under **Article 47(1)** has been violated. Mr Ochieng' Oduol, learned counsel for the petitioner, submitted that the TTE issued a report which became the subject of **HC Misc. JR No.**

- 38 of 2010** but that the court in that case did not deal with the methodology employed by KRA in determining the tax imposed on BIDCO. The Court held that its jurisdiction was limited to determining whether the process was lawful and fair rather than determining the merits or methods employed by the Commissioner and therefore, according to the petitioner, this court was entitled to determine the constitutional validity of taxation under **EACMMA**.
29. Counsel further submitted that no decision was made pursuant to the appeal made under **section 229(1)** of **EACMMA** due to the filing of **HC JR. No. 38 of 2010** thus the Commissioner was wrong in stating that the right of review was overcome by the application for judicial review. In the circumstances, the petitioner's case is that its statutory right to apply for review was taken away. According to counsel, the application for judicial review was not a substitute for the administrative review and its application for review contained in the letter dated 8th February 2010 was not determined.
30. In answer to the contention by Commissioner-General set out in its letter dated 16th September 2013 that its right of review was overcome by the filing of the application for judicial review, Mr Ochieng' Oduol submitted that W. Korir J., declined to deal with the merits of the case therefore it was still open to the petitioner to pursue the review and without a decision by the Commissioner on the matter, the petitioner could not move the tribunal without the decision of the Commissioner on review under **section 229** of **EACMMA**. Hence the refusal to deal with the matter was a violation of its rights.
31. The petitioner further argued that the consent order that led to the Technical Committee was based on the contention in **HC JR Misc. No. 568 of 2009** that the procedures laid under the **EACMMA** had not been followed. That the consent not only set out the mandate of the TTE but also provided that there was a right of review under clause (h). The petitioner argued that it reserved its right to review in the circumstances and that the argument that its right was overcome by the decision of the court was a violation of its fundamental rights and freedoms.
32. The petition was opposed on the principal ground that the entire petition was without merit and is a backdoor method for ventilating the same issues that were determined by the court in **HC Misc. JR . No. 38 of 2010** and that the matter is therefore an abuse of the court process. Mr Gatonye, learned counsel for the 2nd, 3rd and 4th respondents, submitted that this petition is the third matter to be brought to court in regard to the assessment of import duty due from BIDCO and in respect of the last demand there are two pending appeals; one to the Court of Appeal and another to the Tax Appeals Tribunal
33. Counsel submitted that in so far as the petitioner's case was that the assessment was not done in accordance with the law, that issue was dealt with by the judgment in **HC JR Misc No. 38 of 2010**. He submitted that the mandate of the TTE was to determine the assessment in accordance with the law and the Court upheld the assessment by the TTE when it concluded that KRA did not contravene the law. The respondent submitted that the arguments made in the application for judicial review are the same ones made in this petition. Counsel contended that this approach by the petitioner is not acceptable as this court is not an appellate court and it cannot re-open the matter as the tax assessments have been done and upheld by the Court. Counsel referred to **KAPA Oil Refineries v KRA Nairobi Petition No. 370 of 2012 (Unreported)**, **Cut Tobacco Limited v KRA Nairobi Petition No. 152 of 2012 [2013]eKLR**, **Fleur Investments v PS, Ministry of Roads Nairobi Petition No. 173 of 2011[2012]eKLR** and **John Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012 [2012]eKLR** to support the argument that this petitioner's case was an abuse of the court process and ought to be struck out.
34. Mr Gatonye argued that the formation of the TTE was a result of a review by Commissioner and its report was deemed to be a decision by the Commissioner. In counsel's view, before the review could be acted upon the petitioner proceeded to court. In the circumstances, the Commissioner could not review his decision after the court had made its decision as he could not act contrary to the findings of the court. The respondents' position is that the petitioner, having elected to move

the Court which has made a decision that is now the subject of a pending appeal, cannot go back and seek a review before the Commissioner or complain that its rights have been violated.

35. The respondent also submitted that the matter of assessment and determination of taxes is pending before the Tax Appeal Tribunal which is the proper forum of determination whether the Tax assessed by KRA was wrong or right and that the Court should respect the statutory mandates. Further, that the petitioner has the opportunity to agitate the merits of the Commissioner's determination in the Court of Appeal. Ms Kamande, counsel representing the Attorney General, submitted that the Tax Appeals Tribunal is the proper forum to address the substantive issues of assessment and therefore the petition is an abuse of the court process and should be dismissed.

Determination

36. In order to deal with the petitioner's claim, I think it is proper to set out the provisions of **Part XX** of **EACCMA** which deals with appeals and which provides the context for consideration of this matter. The relevant parts of **sections 229, 230 and 231 EACCMA** provide as follows;

229. (1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

(2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

230. (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.

231. 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 purposes of hearing appeals against the decisions of the Commissioner made under Section 229.

37. The first request for administrative review was in respect of the demand letter dated 22nd September 2009. This request for review was dealt with by the Commissioner appointing the TTE to review the manner in which duty had been calculated. Although, the appointment was based on the consent recorded in **HC Misc. JR No. 568 of 2009**, the appointment of the TTE had the effect of dealing with the petitioner's grievance, that is, the manner in which duty had been calculated. In this respect, I agree with the respondents that the TTE report was for all intents and purposes a review by the Commissioner against which the petitioner was entitled to appeal to the Tax Appeal Tribunal under **section 230** of the **EACCMA**. In any case, W. Korir J., held as much in **HC Misc. JR No. 38 of 2010** where he stated, "*The TTE was formed after an application for review was made by the applicant in accordance with section 229 of EACCMA. An application for review under section 229 EACCMA is made to the Commissioner of Customs Parliament clearly intended that the Commissioner of Customs be given an opportunity to review his/her decision before a taxpayer starts the appeal process. That means [the Commissioner] was by law entitled to participate in the review of the decision she made earlier.....*"

38. This brings me to the effect of the judgment in **HC Misc. JR No. 38 of 2010**. In order to understand the import of this case, it is important to set out the salient parts of the judgment. First,

the learned judge appreciated the issues for determination as follows; “*In my view therefore, the issues for determination in this case are limited to the implementation of the consent order dated 28th October, 2009 entered in Nairobi High Court Misc. Application No. 568 of 2009 by the parties herein, The issues can be summarized as follows;*

1. *Whether the TTE was formed, and executed its mandate within the consent order timelines;*
2. *Whether the TTE was properly constituted;*
3. *Whether the TTE breached the rules of natural justice; and*
4. *Whether the TTE exceeded its mandate.”*

39. In dealing with the mandate of TTE the learned judge stated as follows; “*Another question to be answered in this judgment is whether the TTE overstepped its mandate. Counsel for the applicant submitted that the TTE overstepped its mandate by making assessment under Paragraph 3 of the Fourth Schedule and yet the consent had specifically referred to Paragraph 2 of the same schedule*” The learned judge then analysed the meaning of the provisions of **section 122 of EACCMA** and the **Fourth Schedule** together with the material before him in relation to the petitioner’s case. He then concluded that, “*I do not therefore agree with the applicant’s claim that the TTE took extraneous matters into consideration when arriving at its decision. The only conclusion is that the TTE made its decisions within the terms of the consent order.*”

40. In concluding the judgment, the learned judge considered the challenge to the findings by the TTE and the procedure to be used by BIDCO as follows: “*Finally it was argued by the applicant that the assessment and findings by the TTE are contrary to EACCMA and contrary to known customs of valuations by customs authorities and the general agreement of customs valuation by the World Customs Organisation. The applicant would have really assisted this court by pointing out the specific customs valuation rules breached by the respondent. Without any evidence placed before the court to show that the respondent indeed broke the law when making the assessment, the only conclusion is that the respondent did not contravene the law.*

At the end of the day it is clear that the TTE executed its mandate in accordance with the consent order dated 28th October 2009 and the law. The procedure used cannot therefore be faulted. Judicial review looks into the process of making a decision and not into the correctness of the decision made. The applicant may not be happy about the decision reached by the TTE and could have good reasons for challenging that decision. The route the applicant should have taken was that provided by Sections 230 and 231 of EACCMA. The respondent told the court that Tax Appeals Tribunal envisaged by Section 231 was established in December 2009 and the applicant cannot say it had now where to go to after the TTE made its report. Even if a Tax Appeals Tribunal had not been established by the time the respondent demanded payment of taxes from the applicant, the only way the applicant could have approached this court was to challenge the decision through an appeal as provided by Section 251(6) of EACCMA.”

41. It is clear from the judgment that the issue of the TTE Report was central to the determination of the court. Although the court held that it could only deal with the procedure, the court addressed the manner in which the tax was assessed when it considered the mandate of the TTE. Whether the judge ought to have addressed the case in the manner the petitioner would have liked is now a matter that is the subject of the intended appeal to the Court of Appeal which the petitioner has clearly evinced an intention to pursue. I think it would be improper for this court to proceed further to reconsider matters which were in fact considered by the court in the previous case more particularly when the matter will be the subject of determination by the Court of Appeal (see **Kapa Oil Refineries Limited v KRA (Supra)**).

42. I also agree with the respondents’ submission that the matters raised in this petition have been the subject of previous litigation. My view is fortified by the fact that the submissions made on the calculation of import duty under **section 122 of EACCMA** as read with the **Fourth Schedule** are on all fours with those rendered in the previous case.

43. What is the effect of the judgment in **HC Misc. JR No. 38 of 2013** on the request for review by

BIDCO contained in the letter dated 8th February 2010? It will be recalled that the letter of 22nd January 2010 was the demand made after the TTE report was issued and the letter dated 8th February 2010 was a request for review under **section 229(1)** of **EACCMA**. This request was not dealt with as the TTE Report was challenged in the second suit. As I have demonstrated above, the learned judge dealt with the issues raised by the TTE Report and once the petitioner's objection to the TTE Report was determined by the judgment, the petitioner could not go back to the request for administrative review as the matter had now been determined by the High Court. I therefore find and hold that the Commissioner was correct to state that the matter had been overcome by the court proceedings since the petitioner had elected to seek judicial relief rather than the administrative review under the **EACCMA**.

44. This reasoning also applies to the consent recorded in **HC JR Misc. No. 568 of 2009** where the petitioner reserved the right of review in clause (h). This reservation was no more than an expression of the right to invoke **section 229(1)** of **EACCMA** and since the Court has now made a determination, the petitioner cannot rely on that clause to establish a separate right of review apart from the statute.
45. Did the refusal to consider the application for administrative review by the Commissioner violate the **Article 47(1)**? In light of **Part XX** of **EACMMA**, I find and hold that there was no violation for two reasons. First, the petitioner elected to seek judicial review rather than await the decision of the Commissioner. Once it made the election to pursue one remedy, it could not turn back to Commissioner to review the very same matters which the Court considered and made a determination. Second, the petitioner has manifested its intention to appeal to the Court of Appeal. That intention, in my view, removes the matter from the hands of the Commissioner. In addition, the petitioner has lodged an appeal to the Tax Appeal Tribunal hence it still has the opportunity to seek further relief.
46. The petitioner has claimed that its right of access to justice contained in **Article 48** has been violated. The Article provides that, "*The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.*" In **Dry Associates Limited v Capital Markets Authority and Another (Supra)**, I stated, "[110] Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay."
47. Whether this right has been violated is not a matter to be considered in abstract but in reference to the subject matter. In this case the State has provided means to resolve disputes under **Part XX** of **EACCMA** and the right to approach the court has not been denied nor impeded. As I have set out above, the petitioner has had opportunity to invoke the administrative review provisions in **section 291(1)** of **EACMMA**. I also find and hold that the refusal by the Commissioner to consider BIDCO's application for administrative was justified in the circumstances and cannot be construed as a hindrance to access to justice.
48. It is also not disputed that other avenues available for the petitioner to resolve its grievance have been invoked and are still available. There is a pending appeal from the judgment in **HC Misc. JR No. 38 of 2010** and an appeal to the Tax Appeal Tribunal. In the circumstances I find and hold that the petitioner's right under **Article 48** has not been violated.

Whether there has been a violation of Article 40

Introduction

49. The issue whether there has been arbitrary deprivation of property contrary to **Article 40** is closely linked to whether there is a violation of **Article 47(1)** as the prohibition under **Article 40** is against arbitrary deprivation of property.

Submissions

50. Mr Ochieng' Oduol submitted that the Commissioner, is permitted by law to determine the amount of tax in accordance with a formula prescribed by **EACCMA** but that the interpretation by the Commissioner altered the basis of taxation thereby violating the provisions of the **Article 210(1)** of the Constitution which provides the, "*No tax or licensing fee may be imposed, waived or varied except as provided by legislation.*"

51. The substance of this submission was that the Commissioner adopted a different mode of computation of duty which was arbitrary, contrary to statute and practice. Counsel submitted that the regime for determination of value and assessment of duty is clearly provided in **section 122 of EACCMA** and that the Commissioner had no right to alter the formula set by the **EACCMA** as to do so would alter the basis of taxation which action was arbitrary and contrary to law and therefore result in arbitrariness in taxation. He further submitted that taxation must be based on written law and any alteration of manner of taxation must also be grounded on written law as provided under **Article 210(1)**. The petitioner's case is that the violation of that provision resulted in arbitrary deprivation of property contrary to **Article 40** of the Constitution.

52. The respondents' position is that the petitioner has not challenged the constitutionality of **EACCMA**. Mr Gatonye submitted that no declaration of unconstitutionality has been sought and every statute has a presumption of constitutionality. Counsel added that once taxes are lawfully assessed, that there is no violation of the Constitution and the taxing authority is entitled to proceed with recovery in accordance with the law. He referred to the case of **Pili Management v Commissioner of Income Tax and Another CA Msa Civil Appeal No. 154 of 2007 [2010] eKLR** as authority for the proposition that once tax assessments are lawful, it is incumbent upon the taxing authority to enforce collection of taxes. Counsel submitted that the taxes due from the petitioner have been determined and the interpretation urged by the petitioner rejected thus entitling KRA to act according to the law.

Determination

53. The legislative authority to impose taxes and licencing fees is to be found in **Article 210(1)** of the Constitution. The terms of imposition, variation and waiver are part of the legislation imposing the tax or licence fee. Thus for purposes of this case, the provision for the levying of import duties is to be found in **EACCMA**.

54. What constitutes a breach of **Article 210(1)** is not the misapplication or misinterpretation of the statute because the statute provides the manner of administration of the tax which includes assessment, charging, calculating, collection and enforcement of the tax. A tax statute will usually make provision for dispute resolution in the processes governing administration of that tax. I do not hear petitioner saying that the tax imposed on it was one which was not provided for by legislation contrary to **Article 210(1)**. The tax imposed on BIDCO is customs duty which is charged and administered in accordance with **EACMMA**. I therefore find and hold that there has been no violation of **Article 210(1)** of the Constitution.

55. It is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it imposed, calculated and enforced. The arguments made by the petitioner concern how the customs duty is calculated, that is an issue of the application of the Act, rather than its constitutionality. Since statutory application is really the issue here, the consideration whether **Article 47(1)** has been violated is dispositive. In any case, the collection of taxes through the procedures provided by the law cannot, at least in the circumstances of this case, constitute an arbitrary deprivation of property.

56.I therefore find and hold that there has been no violation of **Article 40**.

Conclusion and Disposition

57.I must state that I have avoided commenting on the extensive submissions made on the interpretation of **section 221** and the **Fourth Schedule** of **EACCMA** as it relates to the calculation of duty as the matters may well be the subject of consideration at the Tax Appeal Tribunal and the Court of Appeal.

58.In summary, the petitioner's case lacks merit and must be dismissed for the following reasons;

- a. There has been no violation of the petitioner's rights under **Articles 47(1)** and **48** of the Constitution for the following reasons;
 - i. The first statutory review requested by BIDCO by its letter of 22nd September 2009 was determined by the Commissioner's letter dated 25th September 2009 which proposed the formation of the TTE.
 - ii. The review by the Commissioner was confirmed by the consent order recorded in **HC Misc. JR No. 568 of 2009** which led to the formation of the TTE.
 - iii. The Report by the TTE led to a fresh demand by the Commissioner dated 28th January 2010. This demand, together with the TTE Report, was challenged in **HC Misc. JR No. 38 of 2010** and subsequently dismissed by the judgment delivered on 8th March 2013.
 - iv. Prior to moving the Court, BIDCO also applied for review of the fresh demand dated 22nd January 2010 arising from the findings of the TTE. The Commissioner dealt with the application in his letter dated 16th April 2012 where he stated that the review was overtaken by events in view of **HC Misc. JR No. 38 of 2010**.
 - v. BIDCO has preferred an appeal for the judgment in **HC Misc. JR No. 38 of 2010**.
 - vi. BIDCO has also lodged an appeal to the Tax Appeal Tribunal seeking to set aside the Commissioner's demand made on 19th April 2012 made after the judgment in **HC Misc. JR No. 38 of 2010**.
- b. In view of the fact that BIDCO has had the opportunity to challenge the claim for tax made against it in accordance with the provisions of **EACCMA**, there has been no violation of the petitioner's rights under **Article 40** of the Constitution.

59.The award of costs is in the court's discretion notwithstanding that the claim by the petitioner is one for the enforcement of fundamental rights and freedoms (See **John Harun Mwau and Other v Attorney General Nairobi Petition No. 65 of 2010 (Unreported) [2012] eKLR**)). I have found that this case seeks to litigate matters that have already been determined by the High Court. In the circumstances, an award of costs is appropriate. I therefore award costs to the 2nd, 3rd and 4th respondents.

60.The petition is therefore dismissed with costs to the 2nd, 3rd and 4th respondents.

61.I apologise to the parties for the delay in rendering this judgment as I was assigned to hear election petitions at the Machakos High Court. I must express my gratitude to counsel for their research and very eloquent arguments and submissions made in the prosecution of and in opposition to this petition. If I have not referred to all the authorities cited by counsel, it is not due to disrespect or lack of the appreciation for counsels' industry.

DATED and DELIVERED at NAIROBI this 6th day August 2013

D.S. MAJANJA

JUDGE

Mr Ochieng' Oduol, instructed by Ochieng' Onyango, Kibet and Ohaga Advocates for the petitioner.

Ms Kamande, Litigation Counsel, instructed by the State Law Office, for the 1st respondent.

Mr Waweru Gatonye, instructed by Waweru Gatonye and Company Advocates for the 2nd, 3rd and 4th respondents.