



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**PETITION 99 OF 2011**

**KENAFRIC INDUSTRIES LTD.....PETITIONER**

**VERSUS**

**COMMISSIONER OF DOMESTIC TAXES .....1<sup>ST</sup> PETITIONER**

**COMMISSIONER OF INVESTIGATION &**

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

**COMMISSIONER OF CUSTOM SERVICES.....3<sup>RD</sup> PETITIONER**

**THE KENYA REVENUE AUTHORITY.....4<sup>TH</sup> PETITIONER**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> PETITIONER**

**RULING**

1. This matter came up for directions on 22<sup>nd</sup> November 2011 when counsel for the petitioner applied to the Court for an order to cross-examine the deponent of 1<sup>st</sup> to 4<sup>th</sup> Respondents' replying affidavits, Mr Weldon Ng'eno sworn on 10<sup>th</sup> October 2011 and 21<sup>st</sup> October 2011.
2. Mr Mogeni wishes to cross-examine Mr Weldon Ng'eno on certain aspects of his affidavits particularly relating to third party companies which were subject of investigations. He submits that the Court should, in considering the matter, have a proper appreciation of the petitioner's connection with the companies, the investigations conducted, whether they were proper or not, and the outcome thereof. It is important, Mr Mogeni submitted, for the Court to have the benefit of the outcome of those investigations in order to determine this matter.
3. Mr Ng'ang'a for the respondents contended that the provisions of **Rule 35** of the *Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules* provide for evidence to be adduced by way of affidavit and there being no provision for cross examination or viva-voce evidence, this Court should exercise great circumspection in acceding to the petitioner's request. Counsel relied on the case of *John Mureithi & Others v Attorney General and Others Nairobi Petition No. 398 of 2006 (Unreported)*.

4. The Court while exercising jurisdiction to hear matters of enforcement of fundamental rights and freedom is engaged in a fact finding mission. It must resolve legal and factual issues just presented to it just as it does while exercising its ordinary jurisdiction. There is no magic in a hearing conducted under **Article 22**. The obligation of the court to evaluate the evidence before it does not change whether the matter is proved by oral or affidavit evidence. The reason for insisting on affidavits is that such matters concerning fundamental rights and freedoms are required to be dealt with expeditiously as was held by Justice Nyamu in *John Mureithi & Others v Attorney General and Others (Supra)*. The Court, though, retains discretion to take *viva-voce* evidence or permit cross-examination of deponents and it may give directions to that effect.
5. The issue for consideration is whether I should exercise my discretion in the petitioner's favour. The petitioner's case is one for enforcement of fundamental rights and freedoms under **Article 22**. It is now well established that the petitioner must set out with particularity the right or fundamental freedom alleged to be infringed and how it is infringed by the respondent in respect to it (See *Anarita K Njeru v Attorney General No. 1 [1979] KLR 154*). In the petition dated 16<sup>th</sup> May 2011, the petitioner has set out what it alleges are breaches of **Article 40** and **47** of the Constitution and it is the burden of the petitioner to prove the alleged breaches by way of affidavit evidence.
6. The respondents have denied the breaches through the two affidavits of Mr Weldon Ng'eno and if they seek to rely on the limitations in **Article 24** they bear the burden of doing so in their responses.
7. I have considered the petition and replying affidavits, I do not see the need to call *viva-voce* evidence or at any rate call for the cross examination of Mr Weldon Ng'eno. My view is fortified by the fact that the provisional assessment letter dated 17<sup>th</sup> December 2010 from the 4<sup>th</sup> respondent and which forms the basis of the petitioner's case, refers to three companies; Lac Wood Enterprises, Everest General Distributors and Datson (K) Ltd has been known to the petitioners and since it is the petitioners case, then it may, if it wishes, comment on its relationship with the companies as part of its burden of proving its case.
8. Furthermore, the petitioner has had the full opportunity to respond to both replying affidavits and detail the nature of its relationship with those companies through its further affidavit.
9. I am afraid, I cannot accede to the petitioner's request and the application to call *viva-voce* evidence and or to cross-examine Mr Weldon Ng'eno is dismissed.

**DATED** and **DELIVERED** at **NAIROBI** this 21<sup>st</sup> day of May 2012.

**D.S. MAJANJA**

**JUDGE**

Mr K. Mogeni instructed by Kelvin Mogeni Advocates for the petitioner

Mr N. Nganga instructed by the Kenya Revenue Authority for the 1<sup>st</sup> to 4<sup>th</sup> Respondent.