



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

RULING

Introduction

1. The question for determination is whether or not in the circumstances of this case, the petitioner should be required to post security for the payment of taxes in dispute while it pursues its claim for enforcement of fundamental rights and freedoms under **Article 22** of the Constitution.

2. In the chamber summons dated 30th April 2012 the petitioner sought the following conservatory orders;

(4) This honourable court be pleased to grant the petitioner/Applicant as conservatory order by way of an order restraining the 2nd, 3rd and 4th Respondents herein whether by themselves, their officers, servants, agents or otherwise howsoever from purporting to levy distress or levying distress against the property of the Petitioner/applicant's including their bank accounts or any of them and staying the operation of the Agency Notices issued against the petitioner/applicant to its bankers and suppliers or any other person related to the petitioner or otherwise dated 27th April 2012 or thereabouts in relation to the demand for import duty, interests, penalties in the sum of Kshs.1,377,505,299/00 or thereabouts or purporting to take any steps pursuant to the assessment and demands in relation thereto under challenge herein whether under East African Customs Management Act or any other legislation relating to measures for the recovery of unpaid taxes, interests and penalties pending the hearing and determination of the petition herein.

Petitioner's case

3. The petitioner's case is based on a long standing dispute with the Kenya Revenue Authority regarding the assessment and collection of customs duty on assorted vegetable oils imported from Singapore by the petitioner for use in its manufacturing process in the year 2008.
4. The issue has been the subject of litigation in our courts, the last case being an application for judicial review namely; ***Nairobi Misc Appl. No. 38 of 2010, R v. Kenya Revenue Authority ex-parte Bidco Oil Refineries Ltd.*** In that case, Hon. Justice Korir dismissed the application for judicial review lodged by the applicant seeking to challenge the findings of a Team of Technical Experts who had assessed the tax due as Kshs.780,871,292/00.
5. After the dismissal of that case, the respondents made a demand by a letter dated 19th April 2012 for the sum of Kshs.1,377,505,229/00. This demand was followed by Agency Notices issued to the petitioner's banker to collect taxes.
6. The petitioner avers that demand and collection of taxes not only contravenes the petitioner's fundamental rights and freedoms protected by the Bill of Rights but also that the collection of taxes in the circumstances of the case is a breach of the Constitution. Furthermore, the petitioner contends that the enforcement and collection of taxes by the respondents will prejudice its right to Administrative review under the ***East Africa Community Customs Management Act, 2004*** ("EACCMA, 2004").
7. Mr Ochieng Oduol submitted that the petitioner is a large taxpayer that contributes substantially to the exchequer. It has been paying its taxes save for the taxes due in this disputed matter. Counsel stated that the petitioner raised issues of interpretation of **Article 210** governing the imposition of taxes in relation to the manner of calculating taxes under the 4th Schedule of the ***EACCMA, 2004*** and the fact that the manner in which the calculation was done was in contravention of the statute.
8. The petitioner avers that to make an order of security would be to upholding an illegality as a pre-condition for agitation of fundamental rights and that the petitioner should not be burdened with an order for security when enforcing fundamental rights.
9. Mr Ochieng' Oduol contended that **Article 22** confers on the petitioner an absolute right to institute court proceedings claiming denial, violation and infringement or threat to a right or fundamental freedom and this court should not impose any conditions on the exercise of this right by imposing conditions as to security. Counsel pointed to the provisions of **Articles 19** and **159** to support the arguments that the Constitution must be read in a manner that supports and promotes the objects of the Bill of Rights. An open and liberal approach, counsel urged, would give effect to the right to access to justice protected under the provisions of **Article 48**. Counsel cited the case of ***Ndyanabo v Attorney General (2001) E A 485***.
10. Counsel submitted that in exercise of its jurisdiction the court is not bound by the strictures of the common law and other procedural impediments. He cited the case of ***Royal Media v Commissioner of Customs and Excise [2002] 2 EA 576*** where the court emphasised that ordinary legislation could not impede the court's jurisdiction in granting appropriate relief for the protection of fundamental rights and freedoms. Counsel urged the court not to follow cases cited by the respondent where the court had ordered furnishing of security in judicial review cases as these cases did not concern the enforcement of fundamental rights and freedoms under the Constitution.
11. It is the petitioner's case that an order for security should not be ordered for several reasons on the facts of the case. Firstly, the petition raises serious issues of law. Secondly, the amount demanded by the respondents is substantial by any standard and in the event the petitioner is successful, refund with interest or payment of damages for economic loss caused by an unwarranted demand of tax may be difficult.
12. The petitioner contends that as a going concern, it will be able to pay outstanding taxes should an

unfavourable determination be made at the hearing hereof. On the whole, the petitioner maintains that the particular circumstances of this case demonstrate that it would be unreasonable and unfair to demand any payment or security before the court determines the allegation of breach of the petitioner fundamental rights.

13. The petitioner relied on the affidavit of Mr Vimal Shah, the Chief Executive of the petitioner, sworn on 10th May 2012 and the written submissions dated 11th May 2012.

Respondent's case

14. The respondents submitted that this was a proper case for the court to order security as taxes have been demanded in accordance with an assessment conducted under statutory authority. Mr Waweru Gatonye, counsel for the respondents, submitted that the assessment has been upheld by Hon. Justice Korir in ***Nairobi Misc Appl. No. 38 of 2010***. He informed the court that a 30 day stay was granted by the court and no appeal was preferred and this fact was not disclosed to this court and therefore the petitioner was not entitled to the court's discretion.

15. Mr Gatonye urged the court to consider the fact that the taxes due were for the years 2004-2008 and that the present petition is the 5th attempt to avoid paying the tax and it is the Constitutional and statutory obligation of the respondents to collect taxes. Counsel referred to the case of ***Pili Management Management Consultants Limited v Commissioner of Income Tax and Kenya Revenue Authority Mombasa Civil Appeal No. 154 of 2007 (Unreported)*** where the Court of Appeal elucidated the principle of tax protection.

16. The respondents also averred that payment of the tax should be secured as the tax, interests thereon continues to increase. In counsel's view the imposition of security was not an impediment to access to the court and the court has the right to look into all the circumstances of the case and impose security. Mr Gatonye relied on the on the case of ***Athumani Juma Ganzori & Others v Commissioner of General and Kenya Revenue Authority Nairobi HC Misc. Appl. 60 of 2006 (Unreported)*** to support this proposition. He further submitted that the High Court has from time to time ordered security when issuing conservatory orders and this case was not different from the others.

17. The respondent relied on the written submissions dated 15th May 2012 and the replying affidavit of Ruth Wachira, a Senior Deputy Commissioner, sworn on 10th May 2012. Mr Gatonye urged the court to balance the scales between the public interest represented by the tax collection agency and the individual.

Determination

18. I have heard the rival submissions and for purposes of this decision it is conceded by both parties that the petition is arguable or at least it is not frivolous and since it is an interlocutory application, I shall exercise great circumspection in commenting on the merits of the matter.

19. What I am required to consider is whether I should grant the conservatory order on terms and I think this is to be determined in terms of the rubric of **Article 23(3)** which provides;

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) *an order for compensation; and*

(f) *an order of judicial review. [Emphasis Mine]*

20. The jurisdiction granted to this court under **Article 23(3)** is to “*grant appropriate relief.*” The power to grant any of the relief set out and to frame any other relief is discretionary and the form and nature of the orders to be granted is dependent on the circumstances of the case. What the court is required to do is to secure the rights protected under the Bill of Rights by framing the “*appropriate relief.*”

21. My reading of **Article 23(3)** is that the court is entitled to consider all the circumstances of the case in granting relief and there is nothing in **Article 23(3)** that limits the court’s discretion in imposing terms and conditions whether on the petitioner or respondent in order to secure the rights thereby protected.

22. A further important consideration is the fact that **Article 22** is the gateway to the Bill of Rights. It is an independent right to enforce the Bill of Rights and the court must be wary of imposing any limitation that may impede unhindered access to the Court for purposes of enforcing fundamental rights and freedoms.

23. In addition to the provisions of **Article 22**, **Article 48** obliges this court at all times to ensure access to justice for all persons. Indeed I would adopt the sentiments of the Court of Appeal of Tanzania in the case of *Ndyanabo v Attorney General (Supra)* where it was stated, “*A person’s right of access to justice was one of the most important rights in a democratic society and, in Tanzania, that right could only be limited by legislation that was not only clear but which was violative of the Constitution. The fundamental right of access to justice was what linked together the three pillars of the Constitution, that is, the rule of law, fundamental rights and an independent, impartial and accessible judiciary.*”

24. Apart from being an independent and enforceable right, access to justice is further underpinned by the values contained in **Article 10** and the provisions of **Article 19, 20** and **259** of the Constitution.

25. Coming back to the matter at hand, the petitioner seeks this court’s relief in the form of conservatory order. I do not hear the petitioner to say that access to court has been hindered in any manner. It invokes the court’s jurisdiction to frame an “*appropriate relief*” and in doing so the Court is obliged to consider and balance the interest of the parties.

26. I do not read the provisions of **Article 19** and **48** as taking away or in any way diminishing the court’s jurisdiction under **Article 23** to frame relief which includes the right to impose such terms and conditions as are dependent on the circumstances of the case. The court’s jurisdiction is unfettered but must be exercised taking into account the requirements of the Constitution. What is important is for the court to do justice in each case and doing justice includes granting relief on such terms and conditions as it deems fit. In exercising this discretion I must bear in mind the fact that the imposition of conditions and terms on the grant of relief may indeed impede the right of access to justice.

27. In the case of conservatory orders, the Court is yet to make a final decision as to whether there has been breach of a person’s fundamental right or freedom and it is important for the court to address itself to the relevant facts so to frame the appropriate relief. The grant of a conservatory order is not a matter of right such that every litigant who knocks at the gate to enforce his fundamental rights and freedom is entitled to an order.

28. The court retains jurisdiction to deal with an abuse of the court process in an appropriate case and secondly, to consider whether conservatory or interim relief is warranted by the exigencies of the case. This judicial task which is by no means novel and it would be improper for the court to divest itself discretion reposed by **Article 23(3)** to frame appropriate relief by disavowing any power to impose terms and conditions on orders it may grant.

29. I therefore find and hold that this court has jurisdiction to impose such terms and conditions as are

necessary to secure interim or conservatory relief under the provisions of **Article 23(3)**.

30. I am required to balance the right of the petitioner to be heard on one hand and that of respondent and public interest in securing collection of taxes. The subject of these proceedings is collection of taxes. It is not in dispute that the petitioner has been agitating its case in some form or other in the High Court for the last four years and the High Court has made specific findings in respect of the petitioner's grievances. This court cannot close its eyes to this fact. I have taken into account the fact that the petitioner is a going concern.

31. In balancing the right of the petitioner to agitate these proceedings and the responsibility of the respondent to collect taxes, the order that commends itself to this court is as follows;

a) A conservatory order be and is hereby granted to the petitioner/applicant restraining the 2nd, 3rd and 4th respondents herein whether by themselves, their offices, servants, agents or otherwise howsoever from purporting to levy distress or levying distress against the property of the petitioner/applicant's including their bank accounts or any of them and staying the operation of the Agency Notices issued against the petitioner/applicant to its bankers and suppliers or any other person related to the Petitioner or otherwise dated 27th April 2012 or thereabouts in relation to the demand for import duty, interests, penalties in the sum of Kshs1,377,505,229/00 or thereabouts or purporting to take any steps pursuant to the assessments and demands in relation thereto under challenge herein whether under East African Customs Management Act or any other legislation relating to measures for the recovery of unpaid taxes, interests and penalties pending the hearing and determination of the petition and or further orders;

b) Order (a) is granted on condition that the petitioner shall furnish an irrevocable banker's guarantee from a reputable bank for the sum of Kshs. 200,000,000.00 within 14 days from the date hereof in default, the orders shall stand discharged.

c) The costs of these shall abide by the judgment.

DATED and DELIVERED at NAIROBI this 15th day of June 2012.

D.S. MAJANJA

JUDGE

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

Mr Mutinda, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

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