



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**PETITION 99 OF 2011**

**KENAFRIC INDUSTRIES**

**LTD.....PETITIONER**

**VERSUS**

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

**COMMISSIONER OF INVESTIGATION & ENFORCEMENT.....2<sup>ND</sup>  
RESPONDENT**

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

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

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

**JUDGMENT**

**Introduction**

1. This claim is brought by the petitioner to enforce fundamental rights and freedoms under **Article 22**. **Article 22** is intended to provide a direct and simple mechanism for the enforcement of fundamental rights and freedoms. The procedure provided is not for the litigation of general issues of law or matters unrelated to the enforcement of fundamental rights and freedoms.

2. The petition and depositions filed by the petitioner contain several contested facts and arguments which, in my view tended to obscure the real issues in controversy. I shall therefore limit this judgment to what is relevant and necessary to determine whether there has been a violation of the petitioner’s fundamental rights and freedoms.

3. The petitioner’s case presents three broad issues for determination;

(a) Whether the issuance of a provisional assessment dated 17<sup>th</sup> December 2010 is a violation of the right to fair administration protected under **Article 47(1)**.

(b) Whether the failure to process the petitioner’s Value Added Tax refund is a violation of the right to

fair administration protected under **Article 47**.

(c) Whether the withholding of the petitioner's VAT Tax refunds is unconstitutional and a breach of the **Article 40** which protects the right to property.

### **The Parties**

4. The petitioner is an importer, supplier, manufacturer and exporter of Taxable goods within the meaning of the **Value Added Tax Act(Chapter 476 Laws of Kenya)**("the VAT Act").

5. The 4<sup>th</sup> respondent, the Kenya Revenue Authority is the statutory body established under the provisions of **Kenya Revenue Authority Act(Chapter 469 of the Laws of Kenya)**("the KRA Act"). It is the central body for the assessment of revenues and administration and enforcement of laws relating to revenue. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents are offices established under the provisions of **section 13** of the **KRA Act** for the efficient performance of the functions of the authority. In this judgment the respondents shall refer to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents collectively unless otherwise stated.

### **Manufacture, Import and Export**

6. The Government of Kenya through the Tax Remission Exports Office (TREO) runs a scheme meant to encourage manufacturers export more goods and be competitive so as to earn the country more foreign exchange. Goods manufactured and exported do not attract VAT or Custom duties. Under this scheme raw materials are imported duty free under customs bond and exported under customs supervision.

7. The petitioner also imports goods that are not classified under the TREO regime for which it pays VAT at the port of entry. It also purchases raw material locally to manufacture goods for export. The petitioner pays VAT on these goods which it is entitled to refund under **section 24** of the **VAT Act**. Upon the import of non-TREO goods, the petitioner submits the goods and its records to the Customs and Excise department personnel who are stationed at the port of entry. The process is monitored by the KRA and goods verified upon export before the refund is processed.

### **Petitioner's Case**

8. The petitioner's case is set out in the petition dated 16<sup>th</sup> May 2011 which is supported by the affidavit of Sohini Shah, its financial controller, sworn on the same date. Sohini Shah has also sworn a further affidavit sworn on 18<sup>th</sup> November 2011. Counsel for the petitioner, Mr Mogeni, adopted the skeleton arguments filed on 23<sup>rd</sup> January 2012 and written submissions dated 23<sup>rd</sup> November 2011.

9. The petitioner's case is that over the years it has documented and submitted its claims for verification and its complaint is that from the year 2000 to date it has applied for VAT refunds and no consideration given to its application nor refunds made.

10. The petitioner contends that it has made application for refund of the VAT having satisfied the conditions set out in **section 24** of the **VAT Act** and having presented all the documents required to be attached.

11. As soon as the respondents received the applications for VAT refund, they referred the matter to the Investigation and Enforcement Department for audit and investigation. The respondents' auditors came to the petitioner's premises where they were allowed access to all records of imports, manufacture and export. The petitioner avers that it has complied with the provisions of the **Value Added Tax Regulation 1994 ("VAT Regulations")** and it is therefore entitled to refund of tax.

12. The petitioner avers that on 11<sup>th</sup> December 2010, during the investigation and audit conducted by the respondents' representatives, the petitioner provided all information on its exports on country to country basis especially to Democratic Republic of Congo for auditing. On 17<sup>th</sup> December 2010, the

Commissioner of Investigations and Audit raised a provisional assessment on Value Added Tax and Corporation Tax in the sum of Kshs.296,445,773.96 and 38,155,942.00 respectively. According to the petitioner, the figures quoted in the letter of 17<sup>th</sup>December 2010 were exactly the sum total of the petitioner's sales to DRC earlier given to the respondents.

13. The petitioner avers that provisional assessment was made solely to deny the petitioner its various claims for VAT refund and had no basis in law or in fact to issue the said demand. The petitioner accuses the respondents of attempting to manipulate documents to justify the case that parallel exports were made to companies that did not exist or companies that were involved in ghost "cargo kitting."

14. The petitioner also claims that it has made various applications for VAT refunds over the years and the same have remained unpaid without explanation. The unpaid refunds due to it amount to KShs.114,033,660.00. The petitioner states that the **VAT Act** does not set out the period within which the Commissioner is to act and pay the refund and the lack of these provisions has been abused as it entitles the respondents to avoid processing VAT claims.

15. The petitioner further avers that the advance payment of VAT does not by itself make the said amount due to the respondents for their appropriation but is to be held in an escrow account pending export as the petitioner at all material times discloses to the respondent that the goods are destined for manufacture and export. The petitioner therefore prays that a declaration that the advance payment of taxes for export is not a tax payment but a security deposit to the respondents pending exports and therefore moneys due to the petitioner upon export of relevant goods. The petitioner submits that the failure by the respondents to pay the refund of tax constitutes a violation of the petitioner's right to property guaranteed under **Article 40** of the Constitution.

16. The petitioner argues that the **VAT Regulations** infringe the petitioner's rights to fair administrative justice contained in **Article 47**. Mr Mogeni, counsel for the petitioner, argued that **section 24** of the **VAT Act** does not provide for the officers to give reasons for withholding refunds which means that the respondents can withhold payments due to the petitioner for an indefinite period. The petitioner prays that in as much as the provisions of **Section 24** of the **VAT Act** and **Regulation 10** and **11** or any other provision does not provide for the payment of the refunds within a specified period the said provisions contravene the provisions of **Article 40(1), (2) and (3)** of the Constitution and are to that extent null and void.

17. The petitioner is aggrieved by the fact that it has explained to the respondents all its trading relations and disclosing all the material of its exports and the respondents have remained irrational and have maintained their stubborn unreasonableness that the petitioner did trade with the alleged companies. The petitioner avers that the respondents' decision is made in bad faith and for improper purpose with the sole improper motive of denying the petitioner its claims for refund. The petitioner maintains that the respondents have failed to consider the relevant material and information as required under the **VAT Act** and the **VAT Regulations**.

18. According to the petitioner, the indecisive actions on the part of the respondents to withhold the petitioner's VAT refunds without explanation or a reasonable time is a violation of the petitioner's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair guaranteed under **Article 47(1)**. As such a declaration should issue requiring the respondents to respond with a decision or VAT refunds within a period of 30 days.

19. The petitioner asserts that the action of the respondents and the provisions of **section 24** of the **VAT Act** and the **VAT Regulations** in as much as they do not allow the petitioner to be awarded interest on the unpaid tax refunds undermine and violate the values that underline an open and democratic society based on human dignity, equality, equity and freedom as set out in **Article 20(4)(a)**.

20. The petitioner contends that delayed payment of taxes attracts a penalty and interest at a rate of 20% and 2% per month respectively but the Government does not have a corresponding duty to also pay interest on the delayed VAT refunds. Mr Mogeni argued that in order to ensure equality and equity in

application of the law, the respondents must have the provisions relating to interest and penalties apply to them on delayed payments. The petitioner therefore prays that interest be awarded to it on all delayed payments by way of compensation at the applicable rates until payment in full.

21. The petitioner seeks the following prayers in the petition:

- (a) *There be a permanent stay of the decision of the Commissioner of Investigations and Audit made on the 17<sup>th</sup> December 2010.*
- (b) *A Judicial Review order of Certiorari do issue to remove into the High Court to have it quashed the decision of the Commissioner of Investigation and audit made on 17<sup>th</sup> December 2010.*
- (c) *A Judicial Review Order of Mandamus do issue, to compel the Commissioner of Domestic Taxes to effect the VAT refunds due to the petitioner now being Kshs.114,033,660/=*
- (d) *A declaration do issue declaring that the advance payment of VAT for export is not a tax payment but a deposit to the respondents pending export and is therefore moneys due to the petitioner upon export of the relevant goods and should not be declared as income of the respondents.*
- (e) *A declaration do issue that the petitioner is entitled to payment of interest on all delayed payments of VAT refunds due at the rate of 20% global and thereafter at the rate of 2% per month until payment in full in line with democratic principles of equity and equality enshrined in the constitution.*
- (f) *An order for compensation do issue to compensate the petitioner for the delayed payments at the same rate the respondents charge and penalize tax payers in the form of penalty and interest.*
- (g) *A declaration do issue declaring section 24 of the VAT Act and Rule 10 and 11 of the VAT Regulations 1994 unconstitutional null and void to the extent that they violate the petitioner's right to property guaranteed under the provisions of Article 40(1) (2) and (3) of the constitution.*
- (h) *A declaration do issue that the regulation 10 and 11 of the VAT Regulations 1994 in so far as they do not set time limits for the decisions on refunds or to effect refunds are a violation of the petitioner's rights to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed under the provisions of Article 47 of the constitution.*
- (i) *A declaration do issue that decisions made under Regulations 10 and 11 if any should be made within a reasonable period but not later than 20 days thereafter.*
- (j) *A declaration do issue to declare Section 24 of the VAT Act and Rules 10 and 11 of the VAT Regulations 1994 to the extent they allow the Respondents to treat different tax payers in a similar situation differently are unconstitutional as they do not afford the petitioner equal protection of the law contrary to the provisions of Article 27 of the Constitution.*
- (k) *A declaration that any compensation by way of interest or otherwise made as a consequence of the respondents default should not be used to benefit the respondents and must therefore be tax exempt.*
- (l) *Costs of the petition be awarded to the petitioner.*
- (m) *Such further and other order be made in favour of the petitioner as the court may deem fit.*

### **The Respondents' Case**

22. The respondents oppose the petition on the basis of the replying affidavit of Weldon Ng'eno, a senior revenue officer, sworn on 10<sup>th</sup> October 2011 and a further affidavit sworn on 21<sup>st</sup> October 2011. Mr H. Ng'ang'a, counsel for the respondents relied on written submissions dated 13<sup>th</sup> January

2012.

23. The respondents' case is that in the execution of its mandate under **sections 235 and 236** of the *East Africa Community Management Act* ("EACCMA"), the respondents are duty bound to carry out post clearance audit on the import and export declarations made by taxpayers through verifying the accuracy of the entry of goods or documents and investigate whether any party has made correct Customs declaration and paid all the taxes.

24. The respondents also aver that **section 56(1)** of the *Income Tax Act* (**Chapter 470 of the Laws of Kenya**) and **section 20** of the *VAT Act* authorize officers of the respondents to carry out investigations by requiring the production of books, records and documents for examination and investigation.

25. The respondents' case is that the audit and investigation was carried out in accordance with the established procedures and was intended to establish whether the petitioner was diverting export sales to the local market, under declaring its sales by failing to disclose local sales and therefore evading payment of taxes and whether it was making fraudulent VAT refund claims. The respondent contends that its investigation confirms that it found specific evidence that the petitioner has been involved in a massive and intricate scheme of tax evasion.

26. It is the respondents' contention that the findings of the investigation were communicated to the petitioner but instead of engaging the petitioner and following the prescribed statutory procedures, it instead filed this petition to stop the respondent from carrying out its statutory and constitutional mandate of collecting taxes.

27. The respondent therefore avers that the petition is not only premature but does not raise any constitutional issues to be determined by this court and the issues raised cannot be ventilated through a petition of this nature as there are statutory and alternative mechanisms to ventilate its claims. In this regard, counsel submitted that **Article 159** obliges this court to promote alternative dispute resolution mechanisms which are provided for under the *Income Tax Act*, the *VAT Act* and the *EACCMA*. The petitioner should be obliged to follow these procedures without burdening the court.

28. The respondents also submit that **Article 24** which sets out the parameters for the limitation of rights and fundamental freedoms entitles the respondent to assess and demand taxes in a manner that limits the petitioner's fundamental rights and freedoms and that limitation is authorized by the various taxation laws.

29. According to the respondents, the petitioner ought to have invoked the ordinary judicial review procedures as **Article 47** makes reference to a remedy by way of judicial review to challenge administrative action. According to the respondents, the judicial review procedures are in compliance with the provisions of the Constitution and this jurisdiction is preserved without alteration by **section 7** of the **Sixth Schedule** to the Constitution.

30. The respondents deny breach of the provisions of **Article 47** as alleged. They contend that the provisional assessment dated 17<sup>th</sup> December 2011 was intended to accord the petitioner an opportunity to present evidence for the respondent's consideration. Furthermore, the basis of the provisional assessment was clear in its import and the petitioner ought to have engaged the respondents instead of filing the petition.

31. The respondents also argue that the fact that the period for paying the VAT refund is not specifically legislated is not in breach of **Articles 40 and 47** because the process of establishing any given claim is complex and must be determined on a case by case basis.

32. Mr Ng'ang'a submitted that the provisions of **section 24** of the *VAT Act* and the *VAT Regulations* are not unconstitutional null and void as alleged. Counsel referred to the cases of *The Queen v Big M. Drug Mart Ltd* [1985] 1SCR 295 and *Olum and Another v Attorney General of Uganda* [2002] 2 EA 508 as establishing the principle that the court must look at the objective of the statute before declaring it

unconstitutional.

33. According to the respondent the purpose of **section 24** of the **VAT Act** is to facilitate refund of tax. It is not geared towards infringement of the fundamental rights and freedoms and the refund must be made in accordance with the regulations and ensure that such claims are clearly vetted to filter out fraudulent claims. The respondents deny they have any intention to deny the petitioners the right to a refund once a valid claim is established. In this case, the respondents contend that the investigations revealed that the claim was fraudulent and was intended to deprive the Government of revenue.

34. Mr Ng'ang'a contested the allegation that there was a breach of **Article 40**. Firstly, he contended that **Article 40(6)** provides that the right to protection of property does not extend to any property that has been fraudulently acquired. Hence, the petitioner's application for a tax refund cannot benefit from constitutional protection as the claim is fraudulent.

35. The respondent's position is that tax whether paid in advance or in arrears is revenue imposed by statute pursuant to constitutional provision and the same cannot be a security deposit and therefore subject to appropriation in the manner contended by the petitioner. The TREO regulations and **section 24** of the **VAT Act** that allow the petitioner to claim VAT refund are a tax incentive and the legislature did not thereby intend the petitioner or those taking advantage of the scheme to be entitled to interest.

### **Jurisdiction and alternative remedies**

36. Before considering the three broad issues which I identified in the first part of this judgment, I will deal with the respondents contention that the petitioner should have pursued alternative remedies provided by the tax enforcement statutes particularly in light of the provisions of **Article 159** and that the petition does not raise any constitutional issues.

37. These arguments were raised by the respondents' in the case of **Samura Engineering Limited and Others v Kenya Revenue Authority Nairobi Petition No. 54 of 2011 (Unreported)**. In relation to the issue of an alternative I stated as follows; “[53] *The right of access provided under Article 22 and 23 is independent and constitutionally guaranteed and cannot be made subservient to an alternative remedy. The Constitution is the supreme law of the land and the provisions of Article 22 and 23 are not subject to any other alternative remedies existing in law. Once the court comes to the conclusion that there has been an infringement of a fundamental right and freedoms, it is by virtue of the Article 23 entitled to frame any remedy that will ameliorate the wrong done to the petitioner. [54] I am also satisfied that neither the Value Added Tax Appeals Tribunal established under section 32 of the Value Added Tax Act nor the Local Committee and the Tribunal the established under sections 82 and 83 of the Income Tax Act respectively have jurisdiction to deal with the violations of fundamental rights and freedoms protected under the Constitution which are a preserve of the High Court under the Constitution.*”

38. As regards the issue whether the petition discloses a constitutional or violation of fundamental rights and freedoms, I stated as follows, “[49] *The respondent has taken the view that the facts do not disclose a constitutional matter and therefore this matter should be dismissed. I think this is the wrong approach to the exercise of this court's jurisdiction under Article 22. The duty of the court is to determine, on the facts as pleaded and presented, whether or not there has been a violation of the petitioner's rights. It is not to decide whether, in fact, there is another suitable remedy or whether the matter could have been resolved in another forum or whether the matter is merely a civil matter.*”

39. The provisions of **Article 159** oblige the court to promote alternative dispute settlement. This provision must be read in light of the provisions of **Article 22**. Under **Article 165(3)(b)** the High Court is granted jurisdiction to adjudicate over matters of violation of fundamental rights and freedom and the right for a party aggrieved is not limited by the existence of alternative dispute resolution mechanisms. Though the court may, in framing appropriate relief, take into account the existence of an alternative remedy or indeed the possibility of pursuing alternative dispute resolution.

40. The case of **Republic v National Environmental Management Authority Nairobi Civil Appeal No.**

**84 of 2010 (Unreported)**, cited by the respondents is distinguishable. The Court of Appeal dealt with the issue whether an alternative remedy was a consideration in the grant of orders of judicial review. The court in upholding the decision of the trial judge stated, “[W]here there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted . . . .” This petitioner’s is about the enforcement of fundamental rights and freedoms protected by the Constitution under **Article 22** and this salutary principle cannot override or extinguish the right of access to the High Court.

41. I therefore find and hold that this matter is properly before the court for determination and I shall now proceed to determine the issues framed.

#### **Violation of Article 47**

42. The issue of VAT refunds, the provisional assessment issued by the respondents and the investigation into the tax affairs of the petitioner are intimately linked. The issue for consideration is whether the respondent’s conduct is a violation of the right to fair administration protected under **Article 47** which states as follows as follows:

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

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

43. In the case of *Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 (Unreported)* at paragraph 62, 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.**”

44. The petitioner avers that it is owed VAT refunds to the tune of **Kshs. 114,033,660.00** which sum the respondents have refused, failed or neglected to pay. **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**

**(a) .....**

**(b) .....**

**The Commissioner shall, except as otherwise provided by 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.**

45. The petitioner contends since the provision does not set out a time limit for processing the refund then it is unconstitutional as it gives the respondents unfettered authority to determine how and when to effect refunds.

46. It is now a well-established principle that before a court can declare statutory provisions unconstitutional, it must have reference to both the purpose and effect of the impugned provisions

**(See Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported))**. The purpose of **Section 24** of the **VAT Act** is to facilitate tax refunds. The petitioner in its submissions stated that, “Parliament while enacting those provisions did not expect the respondents to act the way they have done.” I do not think that the provisions in themselves can be held as unconstitutional merely on the ground that they will necessarily lead to the “undesired” effect if abused as that is not the test but rather whether the implementation to the “letter” that leads to an infringement of the Supreme law. In this regard I do not find the provisions unconstitutional.

47. Furthermore, the provision cannot be said to be unconstitutional as submitted by the petitioner. To do so would deny the petitioner the very right to a refund it seeks and the petitioner would lose the right to apply for a tax refund. For the purpose of these proceedings, what **Article 47** governs is administrative conduct, that is, the manner in which the administrative action or process of refunding is applied and whether it meets the standards set out in **Article 47(1)** and **(2)**.

48. The respondents do not deny that they have received the petitioner’s application for VAT refund and that the refunds have not been made. Their contention is that the petitioner has been engaged in fraudulent conduct which it is entitled to investigate and make the appropriate finding. It is also not in dispute that the respondents have the right to investigate fraudulent conduct as demonstrated by the various statutory provisions Mr Ng’ang’a referred to.

49. The petitioner’s case is that instead of dealing with the issue of its VAT refund, the respondents decided to commence investigations. The letter dated 17<sup>th</sup> December 2010 which triggered these proceedings is in the following terms;

**INVESTIGATIONS AND ENFORCEMENT DEPARTMENT**

**KRA/KIL/01/10**

**17<sup>th</sup> December 2010**

*The Managing Director,*

*Kenafric Industries Ltd,*

*Off Baba Dogo road, Ruaraka,*

*P.O. Box 39257-00200,*

**NAIROBI**

*Dear Sir/Madam,*

**RE: PROVISIONAL ASSESSMENT – VAT & CORPORATION TAX**

*Records held on this office and our subsequent investigations carried out on your company, show that you have not been disclosing your true tax liability.*

*We have thus, analyzed your records for the period 2006 up to July 2009 and so far the tax liability established is as shown below:*

*Our assessment is based on:*

- 1. Sales made to Lac Wood Enterprises which are not reflected in your sales ledge.*
- 2. Sales made to Everest General Distributors*

3. Goods sold to Datson (K) Ltd trading as MCD – Nairobi for export to various persons in Congo.

As a result of the above, tax so far established is as follows;

**VAT**

Principal tax .....Kshs. 296,445,773.96

**CORPORATION TAX**

Principal tax .....Kshs. 38,155,942.00

**Please note that investigation into your tax matters is still ongoing.** Meanwhile you are required to pay the outstanding tax liability, to accumulation of interest and penalties. Cheques should be made payable to the Commissioner of VAT and Income Tax for the respective taxes.

Yours faithfully

(signed)

D N Mbingi (Mrs.)

Ag. Senior Assistant Commissioner,

**INVESTIGATIONS AND ENFORCEMENT DEPT.**

50. According to the respondents the purpose of the provisional assessment was to elicit information from the petitioner. MrNg’ang’a stated that the investigations were ongoing when the conservatory order in this matter was issued and the investigations are now completed but for these proceedings the respondents are to issue assessment notices in accordance with the statutory provisions. It is for this reason that I have exercised great circumspection in commenting on the facts regarding the alleged fraud involving the petitioner.

51. In resolving the petitioner’s grievance, my take on this matter is that the rights of the petitioner to obtain “**expeditious, efficient, lawful, reasonable and procedurally fair**” administrative action must be balanced with the responsibility of the respondents to enforce their constitutional and statutory obligation to collect taxes.

52. I have read and re-read the respondents depositions. The respondents do not state the amount due to the petitioner as VAT refund or part of it that was not affected or infected by fraudulent conduct. It is possible that the calculation of the final amount must await the final completion of the investigations in the claim. It was therefore procedurally unfair and unreasonable to make a provisional assessment to forestall the VAT refund claim by the petitioner. In fact, respondents have not stated in clear terms the reason they have not processed or paid the petitioner’s VAT refund claims. The letter dated 17<sup>th</sup> December 2010 does not make any reference to the fact that the VAT refund claims are being investigated or cannot be paid because of investigations. I think it is proper for the petitioner to be informed of the status of VAT refund so that it can take whatever steps it deems necessary. The failure to inform the petitioner of the status of its VAT refund claims prejudices its right to seek legal relief. Fair administrative action does not condone silence as a decision.

53. In any case, the petitioner is entitled to expeditious and efficient processing of its VAT refund claims and where this is not possible the petitioner must be informed the reasons for failing to process the claims timeously. A provisional assessment such as that issued on 17<sup>th</sup> December 2010 does not address the issue of VAT refund and I find and hold that the respondents have failed meet the standards set out in **Article 47.**

54. It is in light of these findings then that the provisional assessment must be seen. My conclusion

based on the material before me is that the provisional assessment was intended to forestall the petitioner's claim for the VAT refund. Such conduct is neither fair nor reasonable.

55. I think that the words of Justice Ojwang' in the case of ***Republic v Kenya Revenue Authority ex-parte L.A.B International Kenya Limited Mombasa HC Misc. No. 82 of 2010 (Unreported)*** are apposite, "*In practical terms, Government has a public duty to effect change to any unprogressive arrangements, such as those that may characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in this regard, ordinary statutory arrangements cannot qualify the constitutional provisions. On this account, the respondent has no justification for failing to make VAT refunds timeously.*"

56. The respondents' have to act on the petitioner's VAT refunds timeously. I find and hold that the failure to consider the petitioner's application for refunds is a breach of **Article 47(1)**.

#### **Breach of Article 40**

57. In view of my findings in respect of **Article 47(1)**, it is unnecessary to consider whether the provisions of the **Article 40** were breached as what I have found sufficiently disposes of the petitioner's grievances. Further and in view of the fact that the amount due to the petitioner is unascertained, it is unnecessary to determine whether the withholding of refund is a violation of the right to property.

#### **Disposition and Conclusion**

58. The duty of the court where a breach or violation of fundamental rights and freedoms is found is to frame appropriate relief under the provisions of **Article 23**.

59. In framing the appropriate relief, I have taken into account the statutory responsibility of the respondents to collect taxes and where necessary to investigate fraud and also their duty to act in accordance with the dictates of **Article 47(1)** which require fair and efficient administrative action.

60. I must express my gratitude to counsel for their research and very eloquent arguments and submissions made in the prosecution and opposition of 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.

61. In the circumstances I make the following orders;

(a) I declare that the petitioner's fundamental rights and freedoms under **Article 47(1)** of the Constitution have been violated by the 4<sup>th</sup> respondent.

(b) An order of certiorari be and is hereby issued to remove into the High Court and have it quashed the decision of the Commissioner of Investigation and Audit contained in the letter dated 17<sup>th</sup> December 2010.

(c) An order of mandamus directing the respondents, jointly and severally and within **thirty(30) days** from the date hereof to consider and determine the petitioners application for VAT refunds in accordance with the **Value Added Tax Act** and the **VAT Regulations**.

(d) The costs of this petition shall be borne by the 4<sup>th</sup> respondent.

**DATED and DELIVERED at NAIROBI** this 27<sup>th</sup> day of July 2012.

**D.S. MAJANJA**

**JUDGE**

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

Mr H. Ng'ang'a, Advocate instructed by the Kenya Revenue Authority for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent.