



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 72 of 2011

MOUNT KENYA BOTTLERS LIMITED.....1ST PETITIONER

RIFT VALLEY BOTTLERS LIMITED.....2ND PETITIONER

NAIROBI BOTTLERS LIMITED.....3RD PETITIONER

KISII BOTTLERS LIMITED.....4TH PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

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

THE COMMISSIONER-GENERAL OF

THE KENYA REVENUE AUTHORITY.....3RD RESPONDENT

THE COMMISSIONER OF CUSTOMS & EXCISE.....4TH RESPONDENT

J U D G M E N T

Introduction

1. The Petitioners herein are limited companies and licensees of the Coca-Cola company. Pursuant to the said agreements, the Petitioners are authorised to prepare or manufacture, package, distribute and sell beverages covered by an industrial secret belonging to the Coca-Cola company under Trade Marks owned by the Coca-Cola company with full authority to use such Trade Marks and none other when doing so. The Petitioners are also licensed to manufacture liquid soda under bond in their respective premises. There are currently about six bottlers in the Kenyan market for Coca-Cola Products.

2. In the course of their business, the Petitioners have set up a model of distribution of the products using returnable bottles and plastic crates for packing, distributing and delivering the majority of their products, consisting mainly of liquid soda which includes popular brands like 'Coke', 'Sprite' and 'Fanta', to consumers (*hereinafter referred to as "the products"*). Under the model, the Petitioners manufacture the products and package some of them in glass bottles for transportation in plastic crates. Both the glass bottles and plastic crates are returnable to the Petitioners by distributors, wholesalers, retailers and everyone else down the supply chain. These packaging containers are obtained from various manufacturers locally and some imported from other countries like Egypt.

3. In order to secure that the said containers are returned, the Petitioners charge and require all suppliers down the chain to pay a predetermined deposit for each bottle or crate with the Petitioners later refunding such distributors, wholesalers, retailers and everyone else down the supply chain upon return of the bottles and/or crates.

4. Apart from returnable glass bottles, the Petitioners also sell the products using dispensers installed in several establishments whereat the customer obtains the product in paper cups and in other cases, cans and plastic bottles which are not returnable.

5. This model of distribution of the products according to the Petitioners was informed primarily by the desire to ensure that the products supplied to the ultimate consumers meet environmental conservation concerns which entails recycling and re-use of most of the Petitioners' packaging containers. The model has been used by the Petitioners for several years and has developed into an accepted industry practice.

The Petitioner's case

6. This case relates only to the Excise and Value added Tax treatment of the returnable glass bottles and plastic crates in which the liquid is packaged and distributed. The said issue emanates from the fact that on diverse dates in the year 2009, the Petitioner has argued, that the 2nd Respondent purported to carry out various tax audits upon the Petitioners for different periods between the years of 2006 and 2009 and they are aggrieved by the Respondent's demand of tax arrears, penalties and interest thereon amounting to Kshs.5,620,730,161/- on account of unpaid tax in respect of returnable containers for the period 2006-2009, disclosed by the Tax Audit aforesaid.

7. The Petitioners bring this suit both in their own interests and for and on behalf of various soft drink manufacturers in the country and on behalf of the Coca Cola company whose products they sell and distribute within the country and also that the Petition is in the public interest.

8. In their Petition dated the 13th May, 2011, the Petitioners are seeking the following Orders;

(i) A declaration be issued that each and all of the purported assessments of Excise duty and VAT together with interest and/or penalties thereon imposed by the 2nd to 4th Respondents upon the Petitioners for the period 2006 to 2009 as regards returnable containers in which

their products are packaged, transported and/or delivered to consumers are unconstitutional and illegal and are consequently invalid, null and void and the demands made upon the Petitioners for the payment of the amounts so imposed together with interest and penalties thereon.

(ii) That the Court be pleased to issue such other or further Orders, Directions and Writs as may be necessary to safeguard and prevent the violation of the Petitioners' fundamental rights and freedoms under the constitution;

(iii) The costs consequent upon this Petition be borne by the Respondents in any event.

9. The gist of the Petitioners' case is that the recyclable bottles and crates ought not to be subjected to tax as the property in them never passes to the distributors and that the same are therefore never sold. They rely on **Section 19** of the **Sale of Goods Act**, Chapter 31 Laws of Kenya which provides thus:

“(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred;

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.”

It is their contention that the nature of their business with their distributors is that property in the returnable bottles and crates never passes to the distributors and there is therefore no element of 'selling' within the meaning of **Section 19** above and therefore no tax as demanded should be chargeable on the transactions.

10. The Petition is supported by the affidavit and a further **Supplementary Affidavit** sworn on 13th May, 2011 and 29th November 2011 respectively by **Cyrus Chege Gitau**, the Finance Manager of the 3rd Petitioner. The Petitioners basically contend that the 2nd Respondent unlawfully and wrongfully demanded excise duty and VAT tax from the Petitioners for the returnable packaging and that the total sums demanded from the 1st, 2nd, 3rd and 4th Petitioners inclusive of interest stood at Kshs.5,620,730,161/- at the time of filing the Petition.

11. The Petitioners further argue that the Respondents misinterpreted the Law, their argument being that the ex-factory selling price of the products, which is the legal basis for liability of excise duty under the **Customs and Excise Duty (CEA), Chapter 472 of the Laws of Kenya** at the material time excluded value added tax and excise stamps and cannot and could not include such refundable security deposits paid so as to secure the returnable containers. They claim that the Respondents' assessment was illegally and unfairly based on the *ex post* determination of the cost or value of the deposits paid or payable for the returnable containers.

12. It is also the Petitioners' contention that levying excise duty on returnable bottles and containers would subject them to **multiple taxation** as each bottle would be re-used at least 18 times over its useful life. They argue that the law as it stood at the material time confined excise duty to the *ex-factory* selling price which is defined as the price at which goods are sold from a factory exclusive of VAT, excise duty and the cost of excise stamps. In any event, the Petitioners further submit, they do not manufacture any bottles or plastic containers of their own but merely purchase the same for purposes of packaging and ensuring the safe and hygienic delivery of the products which they manufacture and which is excisable. On the principle against double taxation, the Petitioners referred this Court to *Bennion Statutory Interpretation, A Code (Butterworths, 1997)* at page 727 for the proposition that it is regarded as penal for a person to be taxed twice over the same subject matter.

13. They refute the Respondents' claims that the Petitioners sell bottles to distributors at a fee terming it as incorrect and assert that as a matter of fact, the distributors and consumers down the supply chain pay a predetermined deposit as security for the returnable bottle. They aver that this is a matter of public notoriety and indeed industry practice and that what is purchased is not therefore the bottle or crate but the contents therein.

14. The Petitioners further aver that the Respondents' demand that they deposit with the 4th Respondent the full taxes as assessed before any appeal could be entertained is oppressive.

15. The Petitioners go on to argue that the Respondents' tax demands against them is inconsistent with the Constitution and is a violation of the Petitioners' fundamental rights and freedoms; is illegal, arbitrary, oppressive and unreasonable and derogates from their constitutional rights under **Article 210(1)** of the **Constitution**. They contend that the 2nd Respondent's assessment and demands for additional tax are invalid for being unconstitutional, unlawful, null and void for failure to comply with the relevant legislation, to wit, **Section 2(1)** as read together with **Section 127C (2)** of the **Customs and Excise Act (Cap. 472)**.

16. They further accused the Respondents of coming in late in the day to make their demands contending that the audits of the Petitioners accounts that came in the year 2009 covering the period 2006 to 2009 was inordinately late as the Petitioners had by then believed that their respective tax returns for the years 2006 to 2009 had been accepted by the Respondents as being proper and in compliance with the relevant tax legislation. That the Petitioners consequently had no opportunity to pass on to their customers any of the taxes now sought and therefore the Respondents' demand to pay tax would be oppressive.

17. Mr. Ohaga, counsel for the Petitioners argued further that there is need for clarity in taxation legislation and that there is no room for 'intendment' or 'presumption' or 'implied' taxation. He urged the Court to find that taxation legislation ought to be strictly construed and that if there was any ambiguity, then it ceases to have any effect. He referred this Court to various authorities including that of *R v The Commissioner of Income Tax ex parte SDV Transami (Kenya) Limited, Nairobi High Court Misc. Appl. No. 212 of 2004*) and *Keroche Industries v The Kenya Revenue Authority, Nairobi High Court Miscellaneous Civil Application No. 743 of 2006* at 71. In the *Keroche case*, the Court stated *inter alia* that;

“I find and hold that you cannot strain the language of the Act and the Schedule in order to impose additional tax on a taxpayer...You cannot tax by inference or analogy. Any attempt to do so perpetrates an illegality; it is arbitrary and oppressive.”

18. Mr Ohaga also contended that the Petitioners had not evaded tax and relied on an annexure to the Replying Affidavit of one Justus Kivivu being an internal memo of the 2nd Respondent to buttress that point.

19. The Petitioners therefore seek the substantive orders elsewhere set out above.

The Respondents' case

20. In their Replying Affidavit dated 9th November, 2011 sworn by **Justus Kivivu**, a Senior Assistant Commissioner of the 2nd Respondent, the 2nd, 3rd and 4th Respondents ("the Respondents") opposed the Petition. They denied the Petitioners' assertion that their business was to sell the liquid in the bottles and not the bottles themselves contending that the liquid cannot be sold separately from the bottle and that in fact, the bottle was also sold to the distributors at a fee. They argued that the price of the bottles could not be divorced from that of the liquid in them.

21. The Respondents claimed that the tax audits revealed that although the bottles were bought once from the manufacturer, each individual bottle was resold at a cost along with its contents to the distributor as evidenced by the Petitioner's invoices. It was their further contention that although glass bottles and plastic crates were not excisable when sold on their own from the manufacturer to the bottlers, the proceeds from the sale of the returnable containers is excisable every time a bottler sells the container to the distributor.

22. The Respondents discounted the Petitioners' contention that the bottles and crates were reusable and ought not attract excise duty asserting that they treated the containers just like any other sale as the bottles were sold to the distributor at a price, an invoice was issued and ownership passed from the Petitioners to the distributor and that when the bottles were taken back to the Petitioners for refill, they were regarded as the property of the distributors and not the Petitioners. It was their argument that despite the fact that the bottles were recycled frequently, each bottle was invoiced at a value every time it was filled and dispatched from the factory.

23. According to the Respondents, in determining the selling price, a tax auditor must go to the taxpayer's inventories, balance sheet etc and that the glass bottles are treated as inventory items by the Petitioners and on receipt at the factory, the carrying cost is written down and the difference is expensed directly as a deferred bottle cost. Likewise, that the carrying cost of the crates is written down and the difference between this figure and the actual cost expensed. They contended that for taxation purposes, this translated into the Petitioners enjoying tax deductions, due to the fact that their treatment of bottles in their accounting records showed that they are capital assets and not items of inventory.

24. The Respondents also watered down the Petitioners reliance on the alleged industry practice that they did not sell the containers but rather exchanged them temporarily with a money deposit which was refundable upon the return of the container. On this, the Respondents submitted that there was the element of sale as defined under the Sale of Goods Act as there was a transfer of ownership as both the bottle and liquid physically passed to the distributor as a complete product at a fee or price.

25. The Respondents also raised the issue of forum by contending that there existed an alternative remedy under **Section 127E** of the **Customs and Excise Act (CEA)** which provides for the establishment of an Appeals Tribunal and that this forum had not been exhausted.

26. Mr Bitta, State Counsel representing the 1st Respondent also opposed the Petition contending that the Petitioners did not exhaust the conditions given by the Appeals Tribunal and in support of the proposition that there existed an alternative remedy, reliance was made on authorities including **Coastal Bottlers Ltd v KRA(Misc. Appl. No. 1756 of 2005)** and **Sound Equipment Ltd v National Environmental Management Authority(C.A No. 84 of 2010)** where that issue was addressed.

27. On the Petitioners' contention that there was no legal basis for taxing the Petitioners, the Respondents were emphatic that **Section 127C** of the **Customs and Excise Act (CEA)** at the material time did not exclude the costs of returnable containers from computation of excise tax. That as a result of the 2004 amendment, which deleted the exclusion of returnable containers, there was no longer a statutory basis for the Petitioners to exclude the cost of returnable bottles in their computation of excise duty.

28. It was further contended that the Constitution of Kenya, 2010 cannot apply retrospectively to matters prior to the year 2010 and that only **Article 40(6)** of the Constitution could assist the Petitioner but that the same provision stopped reliance on a benefit for an advantage unduly obtained and that the finding on tax unpaid by the Petitioners was a benefit unlawfully obtained.

29. They further submitted that the onerous payments cannot be said to be unconstitutional for that fact alone. On this, they made reference to Principles of Statutory Interpretation(7th edition) by Justice G.P Singh p 588-589 where it is stated thus: ***“The principle of strict construction applicable to taxing statutes does not, however, mean that where the subject falls clearly within the letter of the law, the Court can avoid the tax by putting a restricted construction on some supposed hardship, or on the ground that the tax, or penalty imposed is heavy or oppressive... When intention to levy the tax is clearly shown by the words used by Parliament, it is not open ‘to speculate’ on what would be the fairest and most equitable mode of levying the tax.”***

The Respondents now pray that the Petition for the above reasons should be dismissed with costs.

Issues for Determination and Disposition

30. Advocates for all parties have made reference to several authorities and if I do not directly refer to them, it is not because they were not illuminating in the determination and disposition of this matter neither do I mean any disrespect.

For purposes of determination, I have framed the key contentious issues for determination as follows:

(a) ***Whether this court should entertain the Petition in view of the available alternative remedy of appeal to the Appeals Tribunal set up Customs and Excise Act.***

(b) ***Whether the Respondents were within the law in demanding tax as returnable bottles and crates of liquids packaged by the petitioners.***

(c) ***Whether the Respondents' actions in any way infringed on the Petitioners' fundamental rights and freedoms/Whether the administrative action was fair, and whether it was against the doctrine of legitimate expectation.***

(a) **Whether the matter is properly before Court**

31. The Respondents have argued that the Petitioners did not exhaust the remedies as provided under **Section 127E of Customs and Excise Act (CEA)**. The Petitioners opposed the Respondents' contention that this Court should not entertain the matter on grounds of an alternative and available remedy citing **Article 22 of the Constitution**. They also relied on several authorities to support their contention that the matter was properly before Court.

32. In one of the authorities relied upon by the Respondents- **Coastal Bottlers Ltd v KRA (Misc. Appl. No. 1756 of 2005)** the court stated *inter alia*:

“We are of the view that this is a purely commercial matter as the Applicant is disputing the assessment of excise duty. S. 159 of the Customs and Excise Act gives the Applicant a remedy... This is a matter where there would be need to adduce evidence on how assessment was arrived at and it would be impossible to dispose of this dispute by way of judicial review in any event..”

33. It is notable however that the authorities referred to by the Respondents dealt with judicial review in the old Constitutional order which is different from this matter as the Petitioners specifically allege breach of their fundamental rights and freedoms. It is the duty of this Court and indeed any other Court to protect and enforce the Constitution. **Article 22 of the Constitution** provides a right for every person to approach this Court alleging that their fundamental right or freedom has been contravened. As long as there is alleged contravention of fundamental rights and freedoms, then this Court should not close doors to these claims as doing so would be tantamount to absconding its very duty. In so doing, it does not mean this Court is sitting in an appellate role but indeed assessing the adherence to constitutional provisions and specifically the Bill of Rights. This would be different if the allegations were merely on the basis of merits of decisions made by the administrative bodies which raised no clear constitutional issues. In this regard, I would agree with the sentiments expressed in the case of **Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248** at paragraph 99, where the South African Constitutional Court defined the constitutional duty of the Court in the following terms:

“The primary duty of Courts is to the Constitution and the Law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that

constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.”

I wholly adopt the same reasoning as if it were mine and I would without hesitation hold and find that this matter is properly before this Court.

(b) Whether the Respondents acted within the law

In determining whether the Respondents acted within the law, I am guided by the words of Lord Simonds in ***Russell v Scott [1948] 2 ALL ER 5*** where he stated as follows; ***“My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him”*** (See also ***Stanbic Bank Kenya Limited v Kenya Revenue Authority CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR*** per Nyamu JA).

Any tax imposed on a subject has therefore to be dictated by the terms of legislation and it is upon the taxing authority to first satisfy itself that the transaction fits within the definition of the statute. In ***Adamson v Attorney General (1933) AC 257*** it was stated thus:

“The Section is one that imposed a tax upon the subject, and it is well settled law that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt of ambiguity, this defect, if it be in view of the Crown a defect, can only be remedied by legislation.”

34. I wholly agree with the above reasoning and in order to determine this aspect of the matter, I think it is important to set out the relevant Law and legislative history of the section in question; It is as follows;

Prior to the year 2003, **Section 127C of Customs and Excise Act (CEA)** read as follows:

“(3) For the purpose of subsection (2), the ex-factory selling price shall be determined in accordance with Part II of the Seventh Schedule and include-

(i) *the cost of any wrapper, package, box bottle or other container in which the excisable goods are packaged;*

(ii) *the cost of any other goods contained in or attached to the wrapper, package, box, bottle or other container; an*

(iii) *any other cost incidental to the sale of goods including advertising, financing, warranty, commission, transportation, markup or any other cost incurred related to delivery to the point of sale.”*

(4) Notwithstanding subsection (3)(b), the cost of returnable containers and excise stamps shall be excluded from the excisable value.

In the year 2003, the **Section** was amended by the **Finance Act, 2003** (No. 15 of 2003) by deleting **Subsections (3) and (4)** and replacing with a new Subsection. The new Subsection read as follows:

(2) *The value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price and*

(3) *For purposes of Subsection (2), the ex-factory selling price shall not include:-*

(a) value added tax;

(b) cost of returnable containers; or

(c) cost of excise stamps.” (Empasis added)

The *ex-factory price* is defined under **Section 2** of the **Customs and Excise Act (CEA)** as the price at which goods are sold from a factory.

In the year 2003 therefore, Parliament expressly excluded the cost of returnable containers from the computation of the value of excisable goods for purposes of excise duty under the **Act**.

35. Later, in the year 2004, there was again an amendment to the Section which left out the provision on returnable containers in the list of excluded items. The provision read as follows:

“(2) The value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price and

(3) For purposes of subsection (2), the ex-factory selling price shall not include-

(a) Value added tax;

(b) cost of excise stamps.”

The Law as I understand is on the subject of exclusionary clauses is as follows;

According to *Halsbury’s Laws of England, 4th edition Vol. 44(1) Butterworths, 1995*, at para 1494: **“Expressing one thing excludes another. It is one of the linguistic canons applicable to construction of**

legislation that expression unius est exclusion alterius (to express one thing is [by implication] to exclude another). There is no room for the application of this principle where some reason other than the intention to exclude certain items exists for the express mention in question....”[Emphasis added].

Note that only these two items are excluded expressly and therefore between the year 2004 and half of year 2010, the Act did not expressly exclude the cost of returnable containers. This was the status of the law until the year 2010 when the Finance Act, 2010 amended the section again to read as follows:

“(2) The value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price and

(3) For the purposes of Subsection (2), the ex-factory selling price shall **not** include-

(c) **Value added tax;**

(d) **Cost of excise stamps”**

36. The Petitioners have argued that ‘It is clear that at the material time Parliament deliberately omitted the cost of returnable containers from consideration of value for Excise Duty purposes given that in earlier versions of **Section 127C of the Act**, the same was expressly referred to.’

Section 13 of the 2004 **Finance Act** (Act No. 4 of 2004) that brought about the amendment read as follows:

“13. Section 127C of the Customs and Excise Act is amended in Subsection (3) by deleting paragraph (b).”[Emphasis mine]

37. Upon a clear analysis of the above provisions and the authorities, it is my finding that the intention of the Law makers was to unequivocally do away with the earlier exemption on cost of returnable containers thus bringing the same under the taxable bracket. The intention could not have been otherwise as alleged by the Petitioners and as I understand it, where a provision is so clear and unambiguous, however distasteful it may be, it must be upheld and as Wiles J. stated in Lee vs Bude in Torrington Ry (1871) L.R. 6, the Courts cannot act as “regents” over what is done in Parliament because such an authority does not exist. Further, I although agree with the advocate for the Petitioners that taxation cannot be implied or presumed, neither can it be ignored in institutions where the Law as I have rendered above is so clear as to remove any doubt as to what the Law makers intended. Exclusion of a taxable item cannot be the inclusion of another and vice-versa and that is why the statement by Justice G. P. Singh reproduced elsewhere above must hold true in this case. Whether the taxation imposed is unfair, harsh or inequitable cannot be the reason for holding that it should not be imposed. It is the duty of the state to impose taxation and it is the duty of its subjects to pay such taxes as are so imposed. It follows therefore that the Respondents were lawfully within their mandate in imposing the taxes.

(c) Fair Administrative Action, Doctrine of Legitimate Expectation and whether there was breach of fundamental rights.

38. The Petitioners have contended that during the period between 2004 to 2010, they were entitled to legitimately expect that the cost of returnable containers (which had in the year 2003 been excluded from the computation of excise duty) would remain so excluded. They have contended that the Respondents' actions were in violation of their right to legitimate expectation. The question that arises in this; could the doctrine of legitimate expectation lie and if so, were the Petitioners' expectations legitimate? The issue of fair administrative action and breach of rights will be addressed in that context.

39. The Petitioners allege that the cost of returnable containers was not factored in the computation of tax as the industrial practice developed had been that these were returnables. When does legitimate expectation arise? According to Lord Fraser in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 401: “[a] **legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.**”

40. In J.P. Bansal v State of Rajasthan & Anor, Appeal(Civil) 5982 of 2001, the Supreme Court of India stated as follows:

“The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions and Others v Minister for the Civil Service(1985 AC 374(408-409)(commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either(i)he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...”

41. Where there is established practice based on legislation, I think that the expectation that the practice will continue indefinitely is illegitimate given that laws are not cast in stone but keep on being amended ever so often. In the case of R v Ministry of Agriculture and Fisheries and Food, ex parte. Hamble (Offshore) Fisheries Ltd, Sedley J. observed that ***“where a practice is generated by a policy which is itself liable to change, the practice cannot logically be expected to survive such a policy change.”***

42. I would in the circumstances disagree with the Petitioners' argument and would find that practice alone cannot be said to oust clear provisions of the written law especially where such prior practice was based on the same Law. In the year 2004, Parliament found it necessary to take a positive action to remove the provision that excluded the cost of returnable containers from the list of excluded items for purposes of excise duty. The amendment was deliberate and instructive for that matter as it read, ***‘by deleting paragraph (b)...’***

43. The **Finance Act** is an annual legislation which amends several **Acts of Parliament** dealing with

revenue. The **Act** amends existing law giving the Government power to levy tax in the manner provided and depending on the Government's budgetary needs which vary from time to time. I therefore do not find plausible the tenor of the Petitioners' argument that the industrial practice excluded cost of returnable bottles from excise tax. Taxation is based on law. The practice was based on existent law and the Law having been amended, so did the practice.

44. In this regard, I would also adopt the sentiments in R V Secretary of State for Health, ex parte US Tobacco International Inc. [1992] 1 All ER 212 where it was stated that, **"a Minister cannot fetter a discretion given him under statute. Providing he acts within his statutory powers, rationally and fairly, he is entitled to change his policy."**

45. In the publication entitled **The Applicant's Guide to Judicial Review** authored by Lee Bridges among others and published by London Sweet and Maxwell 1995, it is stated as follows:

"if the decision maker unreasonably departs from the publicly stated policy or customary practice or reneges on an earlier decision or undertaking thus confounding the Applicant's legitimate expectations from the decision maker, then it can also be argued that there has been a breach of the duty to act fairly. A person or a group may have a legitimate expectation that they will be consulted by the decision maker or if the decision maker has made promises or given undertakings which the decision in question will alter see – Attorney General of Hong Kong v Ng Yuen Shiu 1983 AC 629 and R v Liverpool Corporation exp Liverpool Taxi Fleet Operators Association [1972] 2 QB 299. However, this procedural approach does not prevent the public body changing its policy, so long as it does so in a proper manner taking account of legitimate expectations for consultation, an oral hearing or whatever else is necessary to comply with the duty to act fairly."

Further, in R v Devon County Council exp Baker (1999) [1995] 1 ALLR 73, 88-89 the Court of Appeal (Simon Brown L.J.) summed up this approach thus:

"These authorities show that the claimant's right will only be found to be established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how the power would be exercised is inconsistent with the statutory duties imposed on it. The doctrine employed in this sense is akin to an estoppel."

I wholly agree with both holdings and therefore would find that mere change in legislation would not by itself constitute a breach of the Petitioners' legitimate expectation, and I see no reason to invoke the doctrine of estoppel.

46. Having found that the Respondents were right in law in levying tax on the returnable containers, the next issue would be whether in carrying out this mandate, there was a violation of any of the Petitioners' fundamental rights and freedoms.

47. **Article 47** of the **Constitution** succinctly provides that, **"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."**

Under **Article 10**, some of the values underpinning governance includes equity, social justice, equality, human rights and good governance. In interpreting the Constitution, this Court is enjoined to adopt the interpretation that most favours the enforcement of a right or fundamental freedom as provide for under **Article 20(3)(b)**.

48. In assessing whether the Respondent's decision was fair and within the Constitution, I must balance the rights of the Respondents to collect tax for the running of the Republic and the need for these duties to be performed within the law. I have held above that the actions of the Respondents cannot be said to be unlawful and I have dismissed the argument that there is any substance in the Application of the doctrine of legitimate expectation. The Petitioners have argued that their rights under **Article 210(1)** of the **Constitution** have been breached. That **Section** provides as follows;

(1) No tax or licensing fee may be imposed, waived or varied Imposition of tax except as provided by legislation.

fee—

(2) If legislation permits the waiver of any tax or licensing

(a) a public record of each waiver shall be maintained together with the reason for the waiver; and

(b) each waiver, and the reason for it, shall be reported to the Auditor-General.

(3) No law may exclude or authorise the exclusion of a State officer from payment of tax by reason of—

(a) the office held by that State officer; or

(b) the nature of the work of the State officer.

49. The amendments to the Act which I have elaborately reproduced above were in the nature of parliament in its wisdom, enacting Legislation and neither this Court nor the Petitioners can enter that arena and determine for Parliament what kind of legislation it can enact (unless the same is made in breach of the Constitution). In the instant case, I see no such breach and would find and hold that no

constitutional right has been breached at all.

Conclusion

It is obvious to me that the Petitioners, inspite of their spirited argument to the contrary have made no case that they are entitled to the orders sought in the Petition and I shall therefore order as follows;

- (1) The Petition dated 13th May 2011is dismissed.
- (2) Cost thereof shall be paid to the Respondents.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2012

**ISAAC LENAOLA
JUDGE**