



**Papyrus Paper & Paper Products Limited & 5 others v Commissioner
for Customs and Border Control (Constitutional Petition
E010 of 2022) [2023] KEHC 1624 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1624 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E010 OF 2022**

A. ONG'INJO, J

MARCH 2, 2023

BETWEEN

**PAPYRUS PAPER & PAPER PRODUCTS LIMITED 1ST PETITIONER
YUSUFI ENTERPRISE COMPANY LIMITED 2ND PETITIONER
KABY HOLDINGS LIMITED 3RD PETITIONER
KENSINGTON TRADERS LIMITED 4TH PETITIONER
UNITECH SUPPLIES COMPANY LIMITED 5TH PETITIONER
JAMPEN ENTERPRISE LIMITED 6TH PETITIONER**

AND

COMMISSIONER FOR CUSTOMS AND BORDER CONTROL . RESPONDENT

RULING

1. The Petitioners herein filed the petition dated March 14, 2022 seeking several reliefs including:
 - a. Declarations that their fundamental rights to the protection to its property and arbitrary deprivation thereof as well as right to fair and administrative action have been breached:
 - b. A declaration that demands made by the Respondents upon them for payment of various amounts made on 2nd, 4th, 7th & 8th February 2022 and undated demand infringe on their constitutional rights and should be quashed and nullified and/or deemed unenforceable.
 - c. A declaration that the Respondent acted inconsistently with & in breach of its powers, duties and obligations under the provisions of Articles 10, 40, 47 and 50 of the Constitution.



- d. The Petitioners also sought an order of permanently prohibiting and/or restraining the Respondents from enforcing payment of the various amounts demanded on account of alleged short levy of duty against the Petitioners.
 - e. The Petitioners also sought to costs of the petition.
2. The Petitioner was filed concurrently with a Notice of Motion dated March 4, 2022 seeking conservatory orders to be issued to stay the demands made by the Respondent upon the Petitioners by way of Agency Notices pending hearing and determination of the application and the petition.
 3. The Application was supported by the affidavit of Yusuf Bakir Director of 1st Petitioner sworn on March 4, 2022 and the grounds on the face of the application.
 4. On March 11, 2022 consent was recorded between the parties for status quo to be maintained pending hearing and determination of the petition; That the petition proceeds to hearing as opposed to hearing of the application; That the Respondent was to file response to the petition within 10 days; That leave to file further affidavit if need be together with submissions within 14 days from date of service.
 5. That the Respondent was to file submissions within 14 days and the petition was to be heard on April 28, 2022. The Respondents filed a Replying Affidavit through Mutahi Wambui sworn on May 27, 2022 and filed on 3rd of June 2022 together with a Notice of Preliminary Objection of even date.
 6. The Notice of Preliminary Objection is to the effect that the Petition offends the mandatory provisions of Section 229(1) and (4) as read with Section 23 of EACCMA of 2004.
 7. The Respondent filed submissions dated October 18, 2022 in respect of the Preliminary Objection in addition to oral submissions made in court on November 23, 2022 to the effect that the petitioners ought to have made an objection or applied for review to the demands for levies made and that if they fail in their objection and/or review they would then appeal to the Tax Appeals Tribunal.
 8. Mr Nyapara argued that the demand by the Respondent were not yet 4 years old and are distinguishable from the authorities relied on by the Petitioners.
 9. Mr Khagram in oral submissions said they had filed & served their submissions and argued that this is a petition and not an appeal and the preliminary objection should be dismissed. He argued that facts of the petition are contested as the conduct of the Respondents is being questioned and the same cannot be determined in the preliminary objection as the petitioners think they didn't act fairly.
 10. Mr Khagram contended that the argument that the Petitioner must follow other remedies before going to the High Court is misconceived as Judicial Review is also remedy. Mr Khagram also argued that the issue of fairness and reasonableness cannot be determined by preliminary objection. He said they had not contested calculation/assessment for tax but reasonableness, efficacy & rationality in making demands 3, 2, & one year after same is due and whether it accords with the Constitution.
 11. Mr. Nyapara argued that there is no constitutional issue in the petition. Having considered the preliminary objection and the submissions by parties advocates the issue is whether the Respondents have satisfied the court for the same to be upheld.
 12. What constitutes a Preliminary objection was ably discussed in the holding in *Mukisa Biscuits Manufacturing Ltd vs West & Distributors Ltd (1969) EA 696* as a point of the Law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit.



13. The issue in this matter are whether there are any short levies that the Respondents is entitled to demand for and whether the demands are within the reasonable period that the can be made. The Petitioners are also claiming that their rights to properties have been infringed and this Court finds that these are issues which requires interrogation by the Court during the hearing of the Petition. They are contested issues and if they are to be determined in the Preliminary objection the Court will have to dig into the pleadings to establish whether the claims are true. That truth can only be established when parties are given an audience in the Court. In any case parties herein on March 11, 2022, entered into a consent to have the petition heard and determined viva voce that consent has not been set aside and the consent order is still in force.

14. In conclusion the Preliminary objection is overrule with no orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS ,THIS
2ND DAY OF MARCH 2023.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Mr. Khagram Advocate for the Petitioners

Mr. Nyapara Advocate for the Respondents

