



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 3 OF 2018

UNIVERSAL CORPORATION LIMITED.....1ST PETITIONER

ELYS CHEMICAL INDUSTRIES LIMITED.....2ND PETITIONER

DAWA LIMITED.....3RD PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. Universal Corporation Limited, Elys Chemical Industries Limited, and Dawa Limited being the respective 1st to 3rd petitioners are registered companies whose principal business is the manufacture and supply of pharmaceutical products in Kenya.

2. The 1st Respondent, Kenya Revenue Authority, is a State corporation established under the Kenya Revenue Authority Act, Cap. 469. Its core mandate is assessment, collection and accounting of all taxes in accordance with the tax laws of Kenya.

3. The 2nd Respondent is the Attorney General whose mandate includes being the principal legal advisor to the national government.

4. Through the petition dated 5th December, 2017 the petitioners seek the following orders:

i) A declaration to the effect that section 1(a) of the said legislation is unconstitutional and therefore null and void.

ii) A declaration that the Petitioners are entitled to VAT refunds pursuant to Section 18 of the VAT Act of 2013.

iii) An Order of Certiorari quashing the Respondents' decision rejecting the VAT claims lodged by the Petitioners herein purportedly because they were lodged out of time.

iv) An Order of Mandamus compelling the Respondent to pay the Petitioners herein their VAT refund claims as were duly lodged with the Respondents.

v) Any further orders that this Honorable Court shall deem just and fit to grant in the circumstances.

5. The petitioners' case is that as manufacturers of medicaments and other pharmaceutical products they ordinarily purchase raw materials for the manufacture of their products on which they pay input Value Added Tax ("VAT") upon importation.

6. According to the petitioners, the Value Added Tax Act, 2013 ("VAT Act, 2013") exempted raw materials for the manufacture of medicaments from the provisions of the Act but contained a provision in Section 18 to the effect that where by a future legislation the exempt supplies became taxable after a person had incurred the input VAT thereon, then that person may claim relief for the tax shown to have been incurred in the form of VAT refund provided such claim is lodged within three months from the date the exempt supply became zero-rated.

7. On the 15th September, 2015 Section 6 of the Finance Act, No. 14 of 2015 ("Finance Act, 2015") zero-rated raw materials for the

manufacture of medicaments which had previously been exempt. Subsequently, the 1st Petitioner claimed input VAT from the 1st Respondent amounting to Kshs. 84,916,108/= on 20th November, 2015. On 9th December, 2015 the 2nd Petitioner and the 3rd Petitioner claimed input VAT amounting to Kshs. 39,851,133/= and Kshs. 57,637,605.37/= respectively.

8. The claims of the petitioners were rejected by the 1st Respondent on the ground that they had been made outside the three-month period that is stipulated in Section 18 of the VAT Act, 2013. The decision of the 1st Respondent was anchored on Section 1(a) of the Finance Act, 2015 which provides that sections 2, 3, 4, 5 and 6 came into force on 12th June, 2015.

9. The petitioners' contention is that the three-month window provided by Section 18 of the VAT Act, 2013 started running from the publication date of 15th September, 2015 as opposed to the commencement date of 12th June, 2015 of sections 2, 3, 4, 5 and 6 as stated in Section 1(a) of the Finance Act, 2015.

10. It is thus the petitioners' case that Section 1(a) of the Finance Act, 2015 is unconstitutional for contravening Article 116(2) of the Constitution. In their view, Article 116(2) does not contemplate a situation where an Act of Parliament can come into force prior to its publication in the Kenya Gazette.

11. The 1st Respondent opposed the petition through an affidavit sworn on 4th October, 2018 by Samuel Kamiri. It is the 1st Respondent's averment that the Finance Act, 2015 which was assented to on the 11th September, 2015 and published in the Kenya Gazette on the 15th September, 2015 introduced Section 6(c) which zero-rated raw materials for the manufacture of medicaments which were before that date VAT exempt.

12. The 1st Respondent further deposed that Section 1 of Finance Act, 2015 provided that the Act shall come into operation or be deemed to have come into operation at various dates and that as per Section 1(a), the provisions of sections 2, 3, 4, 5 and 6 came into operation on 12th June, 2015.

13. The 1st Respondent acknowledged that the petitioners had indeed lodged their claims for the input VAT. It is, however, the 1st Respondent's case that since the claims were made over three months from 12th June, 2015, when Section 6 of the Finance Act, 2015 came into force, they were properly rejected for being filed outside the three months within which the claims were to be made from the time the tax was imposed as required by Section 18 of the VAT Act, 2013.

14. The 1st Respondent stated that Article 116(2) of the Constitution does not require that an Act of Parliament must come into force on a future date as averred by the petitioners. It is the 1st Respondent's case that the provision allows Parliament to decide the commencement date of a law, and that date can be in the future or in the past.

15. The 1st Respondent additionally relied on Section 9(3) of the Interpretation and General Provisions Act, Cap. 2 in support of the averment that Parliament is mandated to determine the date of the commencement of an enactment.

16. The 1st Respondent further deposed that Parliament did not contravene Article 40(2) of the Constitution as it did not deprive the petitioners of their property or interest in property, rather, Parliament zero-rated raw materials for the manufacture of medicaments which were previously exempt and it is this zero-rating that gave the petitioners as taxpayers the power to claim input tax from 15th September, 2015 when the Finance Act, 2015 was published.

17. The 2nd Respondent filed grounds of opposition dated 30th May, 2018 and opposed the petition on the grounds that it offends the doctrine of presumption of constitutionality of statutes; that estoppel cannot be used to circumvent constitutional provisions or override express statutory procedures; and that the prayers should be disallowed for being unmerited.

18. Having carefully considered the petition, the responses thereto and the submissions of the parties, I find the following issues arise for determination:

- i. Whether Section 1(a) of the Finance Act, 2015 should be declared unconstitutional by virtue of being criminally retroactive;
- ii. Whether the petitioners' right to property has been infringed as a result of the implementation of Section 1(a) of the Finance Act, 2015;
- iii. Whether Section 1(a) of the Finance Act, 2015 violates Articles 10 and 24 of the Constitution;
- iv. Whether Section 1(a) of the Finance Act, 2015 frustrated existing contractual rights and/or impaired accrued substantive rights; and
- v. Whether the petitioners are entitled to the orders sought in their petition.

19. Should Section 1(a) of the Finance Act, 2015 be declared unconstitutional by virtue of being criminally retroactive? Section 1(a) of the Finance Act, 2015 states:

“This Act may be cited as the Finance Act, 2015, and shall come into operation, or be deemed to have come into operation, as

follows-

(a) sections 2, 3, 4, 5 and 6, on the 12th June, 2015.

20. Section 6(c) of the Finance Act, 2015 provides for zero-rating of various medicaments.

21. From the cited provisions it is apparent that Section 6(a) is retroactive, in the sense that it operates from 12th June, 2015 yet its enactment is 15th September, 2015. This begs the question whether the retrospective application of the impugned provision of the Finance Act, 2015 results in criminal retroactivity.

22. The petitioners, in their submissions dated 12th November, 2018, point out that Section 19 of the VAT Act, 2013 provides that:

(1) Tax shall be due and payable at the time of supply.

(2) Notwithstanding the provision of subsection (1), a registered person may defer payment of tax due to a date not later than the twentieth day of the month succeeding that in which the tax became due.

23. The petitioners went ahead to state that Section 95 of the Tax Procedures Act, 2015 criminalizes late payment of taxes by providing that:

A person commits an offence if that person fails to pay tax by the due date.

24. According to the petitioners, the Finance Act, 2015 at sections 3 and 6 introduced new tax obligations which corresponded to Section 95 of the Tax Procedures Act, 2015 that makes it an offence to fail to pay tax on the due date.

25. The petitioners argued that if the taxes imposed by the Finance Act, 2015 became due as from 15th June, 2015, then it follows that the petitioners and all manufacturers of medicaments immediately became victims of retroactive imposition of criminal liability in accordance with Section 19 of the VAT Act, 2013 as read with Section 95 of the Tax Procedures Act, 2015.

26. It was submitted by the petitioners that Article 50(2)(n) prohibits retroactive imposition of criminal liability by stating that:

Every accused person has the right to a fair trial, which includes the right-

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law.

27. It is therefore the petitioners' case that Section 1(a) of the Finance Act, 2015 is unconstitutional to the extent that it purports, in conjunction with Section 19 of the VAT Act, 2013 and Section 95 of the Tax Procedures Act, 2015, to impose retroactive criminal liability.

28. The question therefore is whether sections 3 and 6 of the Finance Act, 2015 gave rise to new tax obligations that could occasion criminal liability to the petitioners.

29. Section 3 of the Finance Act, 2015 states:

Section 17 of the Value Added Tax Act, 2013 is amended by deleting the proviso to subsection (5) and substituting therefore the following new proviso-

Provided that any such excess shall be paid to the registered person by the Commissioner where-

(a) the Commissioner is satisfied that such excess arises from making zero rated supplies; and

(b) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax becomes due and payable.

30. Section 6 of the Finance Act, 2015 then proceeds to zero-rate assorted medicaments under various codes as follows:

The Second Schedule to the Value Added Tax Act is amended-

(c) Inserting a new Part C immediately after paragraph 9, Part B Medicaments of the following HS Codes shall be zero rated..."

31. A reading of the amendment to the proviso of subsection (5) of Section 17 of the VAT Act, 2013 shows that Section 3 of the Finance Act, 2015 seeks to ensure that any excess between the deductible input tax and the output tax due for the period is refundable to a registered person once such claim is made within twelve months and to the satisfaction of the Commissioner. Further, Section 6 zero-rates medicaments which were previously tax exempt. The question therefore is whether permitting a claim for reimbursement or zero-rating of commodities creates new tax obligations.

32. **Black's Law Dictionary, 9th Edition** at page 1600 defines tax liability as:

“The amount that a taxpayer legally owes after calculating the applicable tax; the amount of unpaid taxes.”

33. In light of the above definition can it be said that new tax obligations arise from sections 3 and 6 of the Finance Act, 2015? The 1st Respondent weighed in on the above sections and submitted that Section 3 of the Finance Act, 2015 amended Section 17 of the VAT Act, 2013 which deals with credit for input tax against output tax.

34. The 1st Respondent proceeded to refer to the definition of input tax in Section 2 of the VAT Act, 2013 thus:

(a) tax paid or payable on the supply to a registered person of any goods or services to be used by him for the purpose of his business; and

(b) tax paid by a registered person on the importation of goods or services to be used by him for the purposes of his business.

35. The same Section 2 of the VAT Act, 2013 is identified as defining output tax as tax which is due on taxable supplies.

36. The amendment introduced by Section 3 of the Finance Act, 2015 simply allowed the Commissioner to pay or reimburse taxpayers the input tax which they had incurred in making zero-rated supplies. It therefore follows that the provision did not introduce a tax obligation with any criminal liability, rather, it conferred upon the taxpayers, the petitioners included, a benefit by requiring the Commissioner to refund any excess between the input tax and output tax incurred in making zero-rated supplies.

37. With respect to Section 6 of the Finance Act, 2015 it is observed that Part A of the Second Schedule to the VAT Act, 2013 deals with zero-rated supplies. This part introduced paragraphs 9, 10 and 11. Part B of the Second Schedule to the VAT Act, 2013 deals with zero-rated supplies to public bodies, privileged persons and institutions. Part C of the Second Schedule to the VAT Act, 2013 was an entirely new provision brought about by the Finance Act, 2015 that gave HS codes of all the medicaments which had been zero-rated pursuant to the addition of paragraph 11 on Part A of the Second Schedule. It is worth noting that the supplies that were zero-rated in 2015 were previously tax exempt.

38. What then is the difference between zero-rated and tax exempt supplies? According to Tax Policy Center, a United States based tax agency, for a zero-rated good, the government doesn't tax its sale but allows credits for the value-added paid on inputs. If a good or business is “exempt”, the government doesn't tax the sale of the good, but producers cannot claim a credit for the value added tax they pay on inputs to produce it. (See <https://www.taxpolicycenter.org> as on 6th April, 2021).

39. The 9th Edition of **Black's Law Dictionary** at page 1599 states that tax-exempt is by **“law not subject to taxation.”**

40. Before the Finance Act, 2015 was passed, raw materials for the supply of medicaments were tax-exempt. The amendment to the VAT Act, 2013 through the Finance Act, 2015 therefore moved raw materials for the supply of medicaments from being an exempted supply to being a zero-rated supply.

41. Section 2 of VAT Act, 2013 defines exempt supplies to mean supplies specified in the First Schedule which are not subject to tax. This means that if exempt supplies incur input tax in obtaining raw materials for the manufacture of exempt supplies, this input tax is passed on to purchasers of exempt supplies. For zero-rated supplies, Section 2 of the VAT Act, 2013 defines the same as a supply listed in the Second Schedule.

42. The main distinction between exemption and zero-rating is that, for exemption, input tax incurred is passed on to purchasers whereas for zero-rating, the input tax is claimed by the suppliers from the 1st Respondent.

43. It is also important to consider the legal position on retroactivity of laws. The issue of retroactivity of laws was addressed by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** as follows:

“(59) Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. *Black's Law Dictionary* (6th Edition) to which we have been referred, defines retrospective law as:

“A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred.”

(60) Most constitutions in common law jurisdictions almost invariably frown upon retroactive or retrospective criminal

statutes. This general prohibition finds expression in Article 50 (2) (n) of the Constitution. That article provides that:

“Every accused person has a right not to be convicted for an act or omission that at the time it was committed or omitted was not an offence in Kenya; or a crime under international law”.

(61) As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (*Halsbury’s Laws of England*, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:

(i) *is in the nature of a bill of attainder;*

(ii) *impairs the obligation under contracts;*

(iii) *divests vested rights; or*

(iv) *is constitutionally forbidden.*

(62) Applying these legal principles to the matter before us, it is clear that what is in question is not the seeming retroactive elements (if any) of section 15(1) of the Supreme Court Act, but *whether Article 163 (4) (b) of the Constitution was intended to confer appellate jurisdiction upon the Supreme Court the exercise of which would have retrospective effect upon the vested rights of individuals.* At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution.”

44. When the stated principles are applied to sections 3 and 6 of the Finance Act, 2015, it becomes apparent that the provisions do not introduce a new tax obligation, or new duty, nor does it impose a new disability upon the petitioners in respect of transactions or considerations already past. In fact, what these sections confer to the petitioners is a benefit that previously did not exist. The benefit is the zero-rating of medicaments that were previously exempt supplies. It therefore means that no criminal liability will be occasioned as a result of the retroactive enactment of Section 1(a) of the Finance Act, 2015. I therefore find and hold that Section 1(a) is not criminally retroactive and cannot therefore be said to be unconstitutional on that score.

45. There is also the question as to whether the petitioners’ right to property has been infringed as a result of the implementation of Section 1(a) of the Finance Act, 2015. The petitioners are seeking a declaration that they are entitled to VAT refunds pursuant to Section 18 of the VAT Act, 2013. They are also seeking an order of certiorari to quash the 1st Respondent’s decision to reject their VAT claims and an order of mandamus compelling the Respondent to refund the VAT claims. Their case is pegged on the alleged infringement of their right to property under Article 40 of the Constitution.

46. Section 18(1)(a) of the VAT Act, 2013 provides:

“Where—

(a) on the date exempt supplies made by a registered person become taxable, and the person had incurred input tax on such supplies; or

(b) on the date he is registered, a person has incurred tax on taxable supplies which are intended for use in making taxable supplies, the person may, within three months from that date, claim relief from any tax shown to have been incurred on such supplies:

Provided that this subsection shall apply where such supplies are purchased, within the period of twenty-four months immediately preceding registration or the exempt supplies becoming taxable.

47. The Finance Act, 2015 stipulated different commencement dates for different sections of the Act. The commencement date of Section 6 which zero-rated raw materials for medicaments which were previously tax-exempt was set by Section 1(a) as 12th June, 2015. From this enactment, it may be inferred that Parliament clearly intended that taxpayers were to commence enjoying the benefits from the date of the commencement of the law being 12th June, 2015. Parliament was clear that it did not want taxpayers to recover reliefs from supplies that had already been made and which were previously exempt supplies. It is noted that zero-rated products are cheaper for consumers since the suppliers are allowed to claim the cost of input tax and not pass it to consumers as is the case with exempt supplies.

48. The respondents are indeed correct that taxation which is executed within the terms of the Constitution cannot be said to be unconstitutional. This statement finds support in the decision of **Pharmaceutical Manufacturing (K) Co Ltd & 3 others v Commissioner General of Kenya Revenue Authority & 2 others [2017] eKLR** where the Court of Appeal stated that:

“The unfettered power of the national Government under Article 209 to impose, waive or vary any form of taxation, be they income tax, value-added tax, customs duties and other duties on import and export goods or excise tax, is subject only to one qualification; that no tax may be imposed, waived or varied except as provided by legislation. It cannot be a violation of the Constitution if the Constitution itself has permitted it. It cannot, similarly constitute arbitrary deprivation or an infringement of a right to property if the deprivation, if any, is in accordance with the law.”

49. The legitimacy of Section 1(a) of the Finance Act, 2015 cannot be impugned on the ground of its retroactive application. Article 116(2) of the Constitution provides that an Act of Parliament shall come into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates that it shall come into force on a different date or time. I have already referred to the holding of the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** that constitutional and legal provisions can apply retrospectively in certain instances.

50. In **Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited [2018] eKLR** the Court of Appeal spoke to the issue as follows:

“18. From the above authorities it is clear that there are exceptions to the general rule that a statutory provision is not retrospective. The important consideration being the intention of the legislature in enacting the statute.

We are guided by the case of ***Amalgamated Society of Engineers vs. Adelaide Steamship (1920) 28 CLR 129 at 161-2*** where Higgins J stated as follows:

“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable.”

51. My interpretation of Article 116(2) as read with the pronouncements of the Supreme Court and the Court of Appeal is that legislation which is passed by Parliament should be applied prospectively unless it is expressly stated within the document that the legislation should apply retroactively. Section 1(a) of the Finance Act, 2015 clearly shows that the lawmaker intended that Section 6, among other sections, should apply retroactively.

52. The stated position finds jurisprudential grounding in decisions from jurisdictions with constitutions like ours. For instance, in **Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service & Another (87760/2014) ZAGPPHC 231** the South African High Court set out instances under which the legislature may enact tax laws that are retroactive in nature without offending the Constitution when it held that:

“99. There is no authority for the proposition that retrospective tax legislation would survive constitutional scrutiny only if there were “good reasons” for it. It is not for a Court to say what a good “reason” is. Foreign law also does not support such an approach. The only question is whether a legitimate legislative purpose is indicated. In the present case, the Government’s purpose was to remove the tax exemption in amalgamated transactions. To do so retrospectively was also justified, because there was loss of STC revenue rising from amalgamations which was previously intended to be deferred and not permanently lost. More importantly, there was a general announcement that the intended amendment would remove that loop-hole. That was sufficient. I agree with Mr Semenya SC’s submission in this regard, and I have given my reasons....

102. I agree with Mr Semenya SC’s conclusion that the constitutional attack on the impugned provision must fail. There is nothing in our Constitution which prohibits parliament from passing retroactive or retrospective legislation. There is nothing in other jurisdictions of similar constitutional structure that prohibits such passing. Also, and more significantly, there is nothing internal in the Rule of Law which renders retrospective legislation per se unconstitutional.”

53. It is therefore my finding that the petitioners cannot claim deprivation of property based on the simple reason that Parliament determined that the law should operate retrospectively.

54. Another ground upon which the petitioners base their case is that Section 1(a) of the Finance Act, 2015 violates Articles 10 and 24 of the Constitution. The petitioners averred that Article 10 provides the national values and principles of governance, including the rule of law, which binds all State organs in the discharge of their mandates. They additionally assert that Article 10(1)(b) requires Parliament to comply with the national values and principles of governance whenever it enacts legislation.

55. It is the petitioners’ submission that it is a fundamental principle of the rule of law doctrine that law cannot require a person to do what cannot be done. According to the petitioners, any legislation that purports to command an individual on 15th September, 2015 to lodge his tax input claim on or before 15th June, 2015 violates the rule of law doctrine and is *ipso facto* null and void.

56. It was further the petitioners’ submission that Article 24(1) of the Constitution provides that a right or fundamental freedom shall not be limited except where the legislation which imposes the limitation is **“reasonable and justifiable in an open and democratic society.”** The petitioners proceeded to submit that a limitation which is premised on a condition that cannot be fulfilled since it directs an individual on the 15th September, 2015 to lodge a refund claim on or before 15th June, 2015 cannot be described as reasonable or justifiable in an open and democratic society.

57. The petitioners supported their arguments by reference to the holding in **Keroche Industries Ltd v Kenya Revenue Authority & 5**

others [2007] that:

“Law is something more than mere will exerted as an act of power. It must not be special rule for a particular person on a particular case but ..., the general law ...” so that every citizen shall hold his life, liberty property and immunities under the protection of the general rules which govern society, and this excluding as not due process of law acts of attainder bills of pains and penalties acts of confiscation ...’ and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects is not law, whether manifested as the decree of a personal monarch or an impersonal multitude.”

58. The question that comes to mind is whether Section 1(a) of the Finance Act, 2015 violates Articles 10 and 24 of the Constitution. On this question, the 1st Respondent contended that the legislature, which is the constitutionally mandated law-making organ in Kenya, expressly conferred a benefit to taxpayers, the petitioners included, that was previously unavailable to them but also limited the extent to which that benefit could be enjoyed.

59. The 1st Respondent further submitted that since Parliament expressly set the commencement date of sections 2 to 6 of the Finance Act, 2015 as 12th June, 2015, and the Act was published on the 15th September, 2015, there is no doubt that it intended that the taxpayers should only enjoy input tax relief that accrued from 12th June, 2015 onwards and not to get relief for all the unsold stock which had been purchased within 24 months from the date the exempt supplies became taxable as contemplated by Section 18 of the VAT Act, 2013.

60. The 1st Respondent additionally submitted that there is no loss incurred by the petitioners since the disallowed input tax is passed on to consumers and it is not the petitioners who bear the tax.

61. It is important to consider the arguments of the parties by first highlighting the two constitutional provisions upon which the petitioners’ arguments are premised. Article 10 of the Constitution provides:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**
- (c) makes or implements public policy decisions.**

(2) The national values and principles of governance include—patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;**
- (c) good governance, integrity, transparency and accountability; and**
- (d) sustainable development.**

62. Article 24 of the Constitution states:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right or fundamental freedom;**
- (b) the importance of the purpose of the limitation;**
- (c) the nature and extent of the limitation;**
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

- (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation**

specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

63. In my view, Section 1(a) of Finance Act, 2015 abides by the principles and values of good governance as stipulated under Article 10 of the Constitution since the amendment confers a benefit to residents of Kenya by making the medicaments which are essential human commodities zero-rated. The expected benefit of zero-rating of medicaments is that the commodities would become cheaper and more affordable to consumers thereby improving and bettering their lives.

64. It is clear from the impugned enactment that, by indicating that the Section 6 of the Finance Act, 2015 would be deemed to have come into operation on 12th June, 2015, Parliament specifically wanted taxpayers in the category of the petitioners to claim for relief under the provision as from 12th June, 2015 when the Act was enacted and not under Section 18(1) of the VAT Act, 2013 which gave three months to a registered person from the date the exempt supplies became taxable to claim relief from any tax shown to have been incurred on supplies within the period of twenty-four months immediately before the exempt supplies became taxable.

65. Therefore, the case of **Keroche Industries Ltd v Kenya Revenue Authority & 5 others [2007] eKLR** doesn't apply since the 1st Respondent has demonstrated that there was no infringement on the right to property and also that there was no new tax that was introduced retroactively. It cannot therefore be said that Article 24 of the Constitution was violated because no breach of any of the constitutional rights has so far been established by the petitioners.

66. The petitioners also claimed that Section 1(a) of the Finance Act, 2015 frustrated existing contractual rights and also impaired accrued substantive rights. It is submitted that Section 18(1) of the VAT Act, 2013 expressly provides that on the date when the exempt supplies become taxable, the petitioners would be entitled to claim input tax which they had incurred 24 months prior to that date. The petitioners contended that since the Finance Act, 2015 was enacted on the 15th September, 2015, it followed that taxpayers affected by the change of the tax regime were entitled to claim input taxes incurred between 15th September, 2013 and 15th September, 2015.

67. The petitioners further submitted that by purporting to commence the amendments on 15th June, 2015, the respondents denied them the right to claim tax relief under Section 18(1) of the VAT Act, 2013. According to the petitioners, Section 1(a) of the Finance Act, 2015 purports to divest them of their accrued substantive right to claim input tax by rendering such input tax as not claimable since it was impossible for them to lodge the input tax claims in the past. The petitioners supported their arguments by referring to the decision of **Ruturi & another v Minister of Finance & another [2001] 1 EA 253**.

68. The petitioners are indeed correct that a law which imposes obligations in respect of past actions or take away accrued rights is likely to be declared unconstitutional. This position of the law was stated by the Court of Appeal in **Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited [2018] eKLR**, which cited with approval the statement of the Privy Council in **Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833** that:

“Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.”

69. The question is whether the impugned provision does indeed frustrate existing contractual rights or impair accrued substantive rights. The 1st Respondent submitted that the right to claim input tax did not exist previously and came into existence when the Finance Act, 2015 came into force. It was further the 1st Respondent's argument that since the petitioners' supplies were previously exempt, they did not have a right to claim input tax and therefore no substantive rights had accrued to them that were divested. The 1st Respondent contended that what the Finance Act, 2015 did was to vest upon the petitioners a benefit that was not previously in existence but limit the period from when the benefit was to be enjoyed. The 1st Respondent therefore urged that there were no contractual rights in existence that could have been violated.

70. The 1st Respondent further submitted that no rights of the petitioners were in existence prior to the legislation and no new obligations were created or new duties imposed or new disability attached by sections 2 to 6 of the Finance Act, 2015 in order for the provisions to be said to be unconstitutional.

71. The 1st Respondent's argument is persuasive considering that no new tax obligation was introduced by Section 1(a) of the Finance Act, 2015. It is also noted that the petitioners were not entitled to claim tax relief on their supplies prior to the taxation on medicaments introduced by the Finance Act, 2015. No rights were therefore in existence that can be said to have been negatively affected by the impugned law. The retrospective application of Section 6 of the Finance Act, 2015 cannot therefore be faulted on the above ground. My finding finds resonance with the statement of the Court of Appeal in **Commissioner of Income Tax v Pan African Paper Mills (E.A.) Limited [2018] eKLR** that:

“From the above authorities it is clear that there are exceptions to the general rule that a statutory provision is not retrospective. The important consideration being the intention of the legislature in enacting the statute.”

72. The question that remains is whether the petitioners are entitled to the orders sought. I have already found that Section 1(a) of the Finance Act, 2015 is constitutional as it does not give rise to criminal liability or impose new tax obligations and duties or attach a new disability in respect of transactions or considerations already past. Rather, this provision confers a benefit to both the consumers of medicaments and the dealers in medicaments as the zero-rating of medicaments make them more affordable to consumers and allows the dealers to claim input tax. In the circumstances none of the prayers sought by the petitioners can be granted.

73. Even if the petitioners had succeeded in convincing this Court that the impugned law is unconstitutional, the prayers would not have been granted in the manner in which they are framed. Although Section 18(1) of the VAT Act, 2013 allows taxpayers to claim tax relief on supplies purchased within 24 months from the date exempt supplies become taxable, this is further qualified by Section 18(2) of the VAT Act, 2013 which provides:

(2) Where the Commissioner is satisfied that the claim for relief is justified, he shall authorise the registered person to make an appropriate deduction of the relief claimed under subsection (1) from the tax payable on his next return.

74. The power to determine whether a claim is allowable remains in the hands of the Commissioner. The 1st Respondent submitted that in satisfying himself as to whether a claim should be allowed, the Commissioner undertakes verification of unsold stock of the supplies purchased by the taxpayers for the past twenty-four months. It was urged that the need for taking stock of unsold goods is because the input tax for the supplies already sold has been passed to consumers so it is only what was unsold and was bought within the twenty-four months that the Commissioner can consider for input tax relief. This therefore means that a claim for a relief is not automatically allowed, rather, the Commissioner must be satisfied that the claim is justified.

75. Although it is not the duty of this Court to assess taxes and order refunds as suggested by the petitioners through their prayers in the petition, a casual perusal of the petitioners' evidence being the annexures marked AP-1 and VTR will show that the petitioners have not indicated the unsold stock from which their input VAT may be claimed. They merely indicated figures which may have included sold stock and this may be unfair and unjust enrichment on their part since the inclusion of sold stock in the figures would mean that the petitioners would benefit by getting input tax relief from the 1st Respondent for tax already passed to consumers. Had the petitioners succeeded in this matter, the appropriate order would have been to remit the petitioners' claims for tax relief to the 1st Respondent for consideration.

76. In light of what has been stated in this judgement, the answer to the petitioners' case is that the same has failed. The petition is dismissed. This petition has helped in clarifying the provisions of the Finance Act, 2015. For that reason, parties are directed to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MAY, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT