



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 474 OF 2019**

**TOTAL KENYA LIMITED.....PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**AND**

**BARCLAYS BANK OF KENYA LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**CO-OPERATIVE BANK OF KENYA LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**CITI BANK N.A. BANK LIMITED.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGEMENT**

**The Introduction**

1. The Petitioner, Total Kenya Limited, filed the petition dated 25<sup>th</sup> November, 2019 seeking the following orders:

a) A declaration that the Respondent is under an obligation to give prior notice as well as a fair hearing to the Petitioner prior to appointing a tax agent or attaching any funds held to the credit of the Petitioner by the person appointed as a tax agent pursuant to Section 42 of the Tax Procedures Act, 2015.

b) A declaration that the Respondent failed to issue any notice or give a fair hearing to the Petitioner prior to appointing the Interested Parties as tax agents as well as attaching all bank and collection accounts held to the credit of the Petitioner by the said Interested Parties pursuant to Section 42 of the Tax Procedures Act, 2015 contrary to the rights of the Petitioner to fair administrative action as enshrined under the provisions of Article 47 of the Constitution of Kenya, 2010.

c) A declaration that the decisions and actions of the Respondent by way of the Agency Letters dated 19<sup>th</sup> August, 2019 appointing the Interested Parties as tax agents in respect of all monies held to the credit of the Petitioner pursuant to Section 42 of the Tax Procedures Act, 2015 is unconstitutional and therefore null and void.

d) A Conservatory Order restraining the Respondent together with the Interested Parties and/or their employees, servants, agents or any other person appointed by them or acting on their behalf; from implementing, obeying, and/or executing the impugned decision of the Respondent as contained in the Agency Letters/Enforcement Letters dated 19<sup>th</sup> August, 2019 by which the Respondent appointed the Interested Parties as tax agents in respect of the Applicant, and thereby attaching and ordering payment of funds from the attached Bank/collection accounts of the Applicant held with the Interested Parties.

e) A Permanent Order of Injunction restraining the Respondent together with the Interested Parties and/or their employees, servants, agents or any other person appointed by them or acting on their behalf; from implementing, obeying, and/or executing the impugned decision of the Respondent as contained in the Agency Letters/Enforcement Letters dated 19<sup>th</sup> August, 2019 by which the Respondent appointed the Interested Parties as tax agents in respect of the Applicant, and thereby attaching and ordering payment of funds from the attached Bank/collection accounts of the Applicant held with the Interested Parties.

f) An Order of Certiorari to remove into this Honourable Court for purposes of being quashed the Agency Letters dated 19<sup>th</sup>

**August, 2019 issued to the Interested Parties by the Respondent appointing the said Interested Parties as tax agents and of attaching the bank and collection accounts held to the credit of the Petitioner under the guise of Section 42 of the Tax Procedures Act, 2015.**

**g) A Conservatory Order restraining the Respondent from appointing the Interested Parties or any other person or entity as a tax agent against monies/funds held to the credit of the Petitioner by the said Interested Parties or any such other person or entity under the guise of Section 42 of the Tax Procedures Act, 2015.**

**h) A Conservatory Order restraining the Respondent from attaching any monies/funds held by the Interested Parties in any bank and/or collection accounts to the credit of the Petitioner by the said Interested Parties or any such other person or entity under the guise of Section 42 of the Tax Procedures Act, 2015.**

**i) An order for payment of coalesced compensation by the Respondent as a result of the unconstitutional and defamatory actions of the Respondent.**

**j) Costs of this Petition.**

**k) Any other appropriate relief that the Honourable Court may deem fit and just to grant in the circumstances of this Petition.**

2. The Kenya Revenue Authority is the Respondent. Barclays Bank of Kenya Limited (1<sup>st</sup> Interested Party), Co-operative Bank of Kenya Limited (2<sup>nd</sup> Interested Party) and Citi Bank N. A. Bank Limited (3<sup>rd</sup> Interested Party) all operate banking businesses in Kenya and are the Petitioner's bankers.

### **The Petitioner's Case**

3. Through the petition which is supported by an affidavit sworn by Boniface Abala, the Petitioner challenges the constitutionality of the actions of the Respondent in attaching its operating and collection accounts and appointing the interested parties as tax agents in connection to those accounts and the funds held therein in exercise of the Respondent's powers under Section 42 of the Tax Procedures Act, 2015 ('TPA') without giving any notice or fair hearing to the Petitioner. The Petitioner avers that decisions are arbitrary amounting to unfair administrative action and an abuse of the power donated to the Respondent under Section 42 of the TPA.

4. The Petitioner additionally alleges that the Respondent's action in authoring letters to the interested parties attaching the operating and/or collection accounts held by the Petitioner without notice, due diligence and/or fair administrative action constitutes defamation of the Petitioner and unlawfully diminishes its creditworthiness. Additionally, the Petitioner argues that its rights have been violated as the Respondent through the agency notices dated 19<sup>th</sup> August, 2019 has depicted it as a tax evader and defaulter to the tune of Kshs. 148, 473, 558/= which has affected its financial standing and reputation.

5. It is averred that there existed a legitimate expectation created by the Respondent that it would not proceed with any enforcement measures before responding to the Petitioner's notice of objection to the demanded tax and before a decision is made on the oil marketers' request to the National Treasury for waiver of the demanded tax.

6. The Petitioner argues that the failure of the Respondent to notify it in writing of the decision on its objection lodged on 1<sup>st</sup> November, 2019 breached of Section 51(8) and (9) of the TPA. Furthermore, the Petitioner contends that the Respondent's failure to respond to the issues raised in the objection is illegal, irregular and arbitrary, and amounts to unfair administrative action.

7. The Petitioner through the notice of motion dated 25<sup>th</sup> November, 2019 further alleges that the Respondent failed to put in place procedures for the collection of the excise duty in dispute after its introduction in 2015 to enable the Petitioner to collect the same from the consumers and remit it to the Respondent. According to the Petitioner, the relevant guidelines were only developed in September 2016 and the Petitioner was not able to collect and remit the duty in real time prior to the issuance of the guidelines.

8. The Petitioner filed a further affidavit sworn by Boniface Abala on 28<sup>th</sup> November, 2019 asserting that since the filing of the petition the Respondent had issued other agency notices to Standard Chartered Bank (K) Limited and Kenya Commercial Bank Limited demanding immediate payment of Kshs. 148, 473,558/= from them being alleged tax due from the Petitioner for the period of 1<sup>st</sup> December, 2015 to 31<sup>st</sup> August, 2016. It is averred that in total the Respondent had issued four agency notices all dated 19<sup>th</sup> August, 2019 amounting to Kshs 742,367,790/=. The Petitioner contends that the Respondent's act of claiming an aggregate cumulative figure of Kshs. 742,367,790/= against the original claim of Kshs. 72,426,128/= is illegal, fraudulent and an outright abuse of its powers.

9. The Petitioner filed another further affidavit sworn by Boniface Abala on 30<sup>th</sup> January, 2020 asserting that the Respondent in its replying affidavit had admitted receiving its objection dated 31<sup>st</sup> October, 2019 but instead of considering the objection and giving a written decision within sixty days as required by Section 51(8), (9) and (11) of the TPA, it had demanded settlement of the disputed taxes within two weeks after which it proceeded to issue the impugned agency notices.

10. The Petitioner argues that since it has not received any appealable decision as contemplated by Section 52 of the TPA, the assertion by the Respondent that it ought to have filed proceedings before the Tax Appeals Tribunal ('Tribunal') is hollow in law and untenable.

### **The Respondent's Case**

11. The Respondent filed a replying affidavit sworn by Andrew Nyamoko on 9<sup>th</sup> December, 2019 in which it is averred that excise duty on locally supplied Jet A1 fuel was introduced on 1<sup>st</sup> December, 2015 through the Excise Duty Act, 2015. The Respondent deposes that the Petitioner was among the stakeholders represented in deliberations leading to the enactment of the law and was therefore aware at all times of its legal obligation but failed to remit the excise duty.

12. The Respondent avers that despite issuing a demand for the tax in August 2016 which was updated in October 2016, the Petitioner failed to pay and instead sought to consult the National Treasury on the abandonment of the taxes. The Respondent deposes that the Petitioner did not object to the demand but on several occasions wrote to the Respondent seeking suspension of the tax demand as it sought a way forward including engaging the National Treasury for the abandonment of the tax.

13. The Respondent claims that it sent further reminders to the Petitioner through letters dated 3<sup>rd</sup> October, 2019 and 1<sup>st</sup> November, 2019. It is averred that on 6<sup>th</sup> November, 2019 the Respondent's Customs and Border Control Department received the Petitioner's letter dated 31<sup>st</sup> October, 2019 objecting to the demand for the tax.

14. The Respondent states that it granted the Petitioner two weeks to settle the tax on the grounds that the application for abandonment ought to be specific, clear on the amounts involved and supported by sound grounds; and that the demand issued by the Respondent was not a fresh demand since it was for 2015/2016 and had automatically accrued interest and penalties.

15. The Respondent denies the allegation that it did not respond to the objection of the Petitioner dated 22<sup>nd</sup> November, 2019 and argues that the tax demanded in 2019 were due in 2016. The Respondent avers that the Petitioner never objected to the demand issued in 2016 thereby culminating in the issuance of the final demand in 2019 followed by the agency notices in dispute.

16. The Respondent contends that pursuant to the provisions of sections 51, 42 and 53 of the TPA, disputes as to the basis of assessment should be taken before the Tribunal established under the Tax Appeals Tribunal Act, 2013 ('TATA'). The Respondent argues that the orders sought by the Petitioner offend public policy as they seek to usurp its constitutional and statutory tax administrative mandate. The Respondent further argues that the Petitioner has moved the Court prematurely as Section 12 of the TATA provides an appeals procedure.

### The Analysis

17. Having considered the pleadings and submissions, I conclude that the issues for determination are:

- a. Whether the Court has jurisdiction to hear and determine this matter;
- b. Whether the Petitioner had a valid legitimate expectation;
- c. Whether the Respondent infringed the Petitioner's right to fair administrative action; and
- d. Whether the Petitioner is entitled to the orders sought.

### The Doctrine of Exhaustion/The Court's Jurisdiction

18. The Petitioner through the written submissions dated 30<sup>th</sup> January, 2020 argues that because the Respondent failed to issue a written decision on its objection dated 30<sup>th</sup> October, 2019, its right to file an appeal at the Tribunal has not crystallised because it has no appealable decision in its hands. The Petitioner relies on the decision in **Nairobi HC JR No. 599 of 2017 Republic v Kenya Revenue Authority Ex-parte M-Kopa Kenya Limited** where it was held that where the taxman fails to deliver a written decision to a validly lodged objection there is no reason for the taxpayer to appeal and the taxpayer can directly approach the High Court.

19. The Respondent by way of written submissions dated 10<sup>th</sup> December, 2019 asserts that the Petitioner has moved the Court prematurely as there exists a dispute resolution procedure under Section 12 of the TATA and sections 51, 52 and 53 of the TPA. The Respondent relies on Section 9(3) of the Fair Administrative Action Act, 2015 ('FAAA') which requires that the statutory mechanisms for appeal or review should be exhausted before the institution of judicial review proceedings.

20. The Respondent additionally supports its argument on the need to exhaust alternative statutory dispute resolution mechanisms before resorting to the courts by citing the decisions in **Cortec Mining Kenya Limited v Cabinet Secretary Ministry & 9 others [2017] eKLR**; **Jimbe Limited & 2 others v Kenya Revenue Authority [2017] eKLR**; **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**; and **Republic v National Environment Management Authority Ex-parte Sound Equipment Ltd [2011] eKLR**.

21. In order to determine the correct tribunal for this matter, the issues in this petition should be flagged out. The Petitioner has not raised any concern with the amount of tax to be remitted as excise duty or even with the existence of the tax itself. What is in issue is whether the Respondent made a decision on the Petitioner's notice of objection within the sixty days stipulated in Section 51 of the TPA. The Petitioner is not before the Court to contest a decision made by the Commissioner, but rather to contest the fact that the Commissioner failed to make a decision.

22. According to Section 7(2)(j) of the FAAA:

**“A court or tribunal under subsection (1) may review an administrative action or decision, if—**

**j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.”**

23. In this case, the duty imposed by the law which was not discharged by the Commissioner is the failure to decide on the issues raised in the Petitioner’s notice of objection dated 31<sup>st</sup> October, 2019. Although the Respondent did respond through the letter dated 7<sup>th</sup> November, 2019, the response did not address any of the issues in the notice of objection and it cannot therefore be said to be an objection decision. Section 51(10) of the TPA is clear that an objection decision must “*include a statement on findings on the material facts and the reasons for the decision.*” The letter dated 7<sup>th</sup> November, 2019 does not include such a statement or any reasoning and therefore cannot amount to an objection decision as defined by the law.

24. Furthermore, it is pertinent to note that according to Section 51(11) of the TPA, where the Commissioner fails to make an objection decision within sixty days of the notice of objection, the objection shall be allowed. In line with the provision, the Petitioner’s objection to the Respondent’s demand for the amount of Kshs. 72,426,128/= stood allowed upon the lapse of sixty days from the date of receipt of the objection and the Respondent was no longer authorised to pursue the amount from the Petitioner.

25. The fact that the objection was allowed by the law under Section 51(11) of the TPA makes the Respondent’s actions in pursuing the impugned excise duty procedurally unfair hence attracting review by the Court under Section 7(2)(c) of the FAAA. Therefore, the issues brought before the Court are well within its jurisdiction to hear and determine, and the Petitioner has not infringed the doctrine of exhaustion.

26. The Petitioner further argues that there is no appealable decision to be taken before the Tribunal under Section 52 of the TPA as no decision was made by the Commissioner in the first place. This unchallenged submission by the Petitioner strengthens its argument that the issues before this Court are not concerned with the decision of the Respondent but rather the discharge of a statutory duty.

27. My holding finds support in the decision in **Ex Parte M-Kopa Kenya Limited (supra)** that:

**“106. In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the tax payer is seeking further particulars or indulgence to enable it pay the taxes demanded. In this case the applicant had clearly made what was in substance an objection as envisioned under section 51 of the Tax procedures Act, 2015. Accordingly, the Respondent was required to make a decision in respect thereof within sixty (60) days under section 51(11) of the said Act. As the Respondent defaulted in making a termination thereon within the prescribed time, the said objection was deemed to have been allowed.**

**107. As the law deems the objection to have been allowed, there is no reason why the applicant should have appealed. In the premises the question of existence of an alternative remedy does not arise in the circumstances.”**

28. According to Section 9(4) of the FAAA:

**“(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”**

29. In light of the evidence placed by the parties before this Court, it is clear that the Petitioner had no other avenue for pursuing justice apart from approaching this Court. In fact, the Petitioner was precluded from pursuing the appeals mechanism available under the TPA as the Respondent did not render an appealable decision in response to the Petitioner’s objection.

### **Breach of Legitimate Expectation**

30. The Petitioner claims that upon lodging its objection on 1<sup>st</sup> November, 2019 it expected that the Respondent would address the issues raised therein, make a decision and communicate with the Petitioner before taking any precipitate action prejudicial to the Petitioner. The Petitioner further asserts that it has tendered evidence of a meeting held on 15<sup>th</sup> November, 2016 between the Respondent and oil marketing companies where it was agreed that the collection of the subject excise duty would be suspended until an application made to the Cabinet Secretary for the National Treasury for the waiver of the subject tax was determined.

31. It is contended that the Respondent’s actions despite the agreement mentioned above went against the Petitioner’s legitimate expectation that the tax would not be demanded before the Cabinet Secretary made a decision on the recommendation for the abandonment of the tax. Reliance is placed on the holdings in **Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] KLR 240**; and **Ex-parte M-Kopa Kenya Limited (supra)**.

32. The Respondent submits that the Petitioner was aware of the tax due and payable under the Excise Duty Act, 2015 and continuously gave undertakings to pay the same from the year 2016 therefore there arises no legitimate expectation. The Respondent supports its case with the decisions in **Republic v Kenya Revenue Authority Ex-parte Shake Distributors Limited [2012] eKLR**; **Nairobi H.C. Judicial Review No. 294 of 2010, Republic v Commissioner of Domestic Taxes and another, ex-parte Kenton College Trust; Justice Kalpana Rawal v Judicial Service Commissioner & 3 others [2016] eKLR**; and **Republic v Kenya Revenue Authority Ex-parte Bata Shoe Company (Kenya) Limited [2014] eKLR**.

33. The Respondent asserts that it has followed all the procedures under the TPA. Further, that the tax demand is within the law and there is no proven breach of procedure in any way.

34. I am once again persuaded by the decision in **Ex Parte M-Kopa Kenya Limited (supra)** where the Court in answering the question as to whether the applicant had legitimate expectation in circumstances similar to those of this case, cited with approval at paragraph 90 the holding in **Ecobank Kenya Limited v. Commissioner of Domestic Taxes ITA No. 8 of 2010** that:

**“In the English decision of COUNCIL OF CIVIL SERVICES UNIONS V MINISTER FOR CIVIL SERVICE 1985 AC 374 Lord Fraser stated as follows:-**

**‘a legitimate 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.’**

**I would add that the expectation herein is not just a legitimate expectation. It is an expectation backed by a written express waiver and a passive conduct in relation thereto for a period of twenty five years. All this time the Respondent was aware of section 15(7) of the Income Tax Act. In my finding, that expectation became so legitimate, and so strongly grounded, that it established an economic right that only an express, concise, and specific waiver clearly communicated and delivered, could uproot.”**

35. The Court in the above case went on to determine that:

**“96. I therefore have no hesitation in finding that the sudden arbitrary and unexplained about-turn made by the Respondent with respect to the importation of the solar powered televisions amounted to the thwarting of the applicant’s legitimate expectations that the said items were exempt from VAT.”**

36. The Respondent made a recommendation to the Cabinet Secretary for the National Treasury for waiver of the excise duty and stated that it would not pursue the unpaid tax until the Cabinet Secretary responds to the same. However, no decision has been made to date by the Cabinet Secretary and therefore the promise by the Respondent conveyed a valid expectation that no demand for the taxes would be made until the Cabinet Secretary made a decision. This is on top of the statutory enactment that an objection to a tax assessment not responded to within sixty days is deemed to have been allowed by the Respondent. Therefore, the Respondent has indeed breached the Petitioner’s legitimate expectation. I therefore agree with the Petitioner that there was violation of its legitimate expectation that its objection had been allowed by the operation of the law. Additionally, that the tax would not be demanded before a decision was made on the Respondent’s recommendation to the Cabinet Secretary for the National Treasury for the abandonment of the same.

#### **Breach of Fair Administrative Action**

37. The Petitioner submits that the Respondent’s actions have breached Section 51(8) & (9) of the TPA and sections 4 & 6 of the FAAA as read together with Article 47 of the Constitution. The Petitioner cites the cases of **Judicial Review No. 293 of 2013, Republic v Kenya Revenue Authority & another**; and **Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] KLR 240** on the court’s jurisdiction to intervene where there is procedural unfairness in the making of an administrative decision.

38. According to Article 47(1) of the Constitution, every person is entitled to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. This is reiterated in Section 4 of the FAAA which adds that every person has the right to be given an opportunity to be heard and be given a statement of the reasons for the administrative action. The Petitioner further relies on Section 6 of the FAAA which guarantees the right to information necessary to facilitate an appeal or review.

39. The Petitioner asserts that the Respondent did not give it prior notice of its intention to appoint the interested parties as tax agents as well as the attachment of all bank and collection accounts held to its credit by the interested parties. This, according to the Petitioner, violated Section 42 of the TPA and Section 4(3)(a) of the FAAA. I have perused the evidence presented by parties and confirm that the Petitioner was indeed not given notice of the appointment of the tax agents and the attachment of its accounts.

40. According to Section 42 of the TPA, the Commissioner must give notice in writing where it seeks to collect taxes owed by a taxpayer. It is, however, not expected that the Respondent should inform a taxpayer of the measures it intends to take in order to recover taxes that are due. The warning to the Petitioner that failure to pay the outstanding excise duty would lead to invocation of enforcement measures was sufficient notice. Nevertheless, this finding does not change the fact that the demand for the tax in question by the Respondent was erroneous.

41. It has already been established that the Respondent had a statutory duty to respond to the Petitioner’s objection to the tax demand within sixty days but failed to do so hence the objection was deemed allowed. However, the Respondent continued to demand the amount from the Petitioner, and engaged the interested parties through agency notices. Furthermore, it has already been established that the Petitioner had legitimate expectation that it would not be pursued for the excise duty for the period in question as the issue was awaiting the decision of the Cabinet Secretary. In the circumstances, I agree with the Petitioner that the Respondent breached its right to fair administrative action.

#### **Entitlement to Reliefs Sought**

42. The Petitioner seeks an order of certiorari to quash the agency notices issued to the interested parties. The Respondent submits that the remedy of a writ of certiorari cannot issue to quash its decision in the absence of averments of bad faith or ulterior motive on its part. It is asserted that there is no evidence that the Respondent acted without statutory authority or jurisdiction. Further, that the Petitioner has not demonstrated with precision which provisions of the Constitution have been violated. Reliance is placed on the case of **Pili Management Consultants Ltd v Commissioner of Income Tax, Kenya Revenue Authority [2010] eKLR**.

43. It has been established above that this Court has jurisdiction to hear and determine this matter. According to Article 23(3) of the

Constitution, the court may grant the following reliefs:

- (a) a declaration of rights;**
- (b) an injunction;**
- (c) a conservatory order;**
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- (e) an order for compensation; and**
- (f) an order of judicial review.**

44. Furthermore, according to Section 11(1) of the FAAA in proceedings for judicial review, the court may grant an order:

- (a) declaring the rights of the parties in respect of any matter to which the administrative action relates;**
- (b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;**
- (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;**
- (d) prohibiting the administrator from acting in a particular manner;**
- (e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;**
- (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;**
- (g) prohibiting the administrator from acting in a particular manner;**
- (h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;**
- (i) granting a temporary interdict or other temporary relief; or**
- (j) for the award of costs or other pecuniary compensation in appropriate cases.**

45. Additionally, Section 11 (2) states that:

**In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order—**

- (a) directing the taking of the decision;**
- (b) declaring the rights of the parties in relation to the taking of the decision;**
- (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or**
- (d) as to costs and other monetary compensation.**

46. From the foregoing, it is evident that the prayers sought by the Petitioner are well within the law and appropriate for a breach of fair administrative action.

47. The Respondent particularly asserts that an order of certiorari cannot issue as there is no averment of bad faith or ulterior motive on its part. The Court of Appeal in the case of **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** postulated that:

**“Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

48. I have already established that the Respondent's failure to render an objection decision in response to the Petitioner's notice of objection within the stipulated timeline has resulted in the objection being allowed and therefore the Respondent was not in a position to continue to demand the impugned excise duty and to engage the interested parties to collect the tax through agency notices. In doing so the Respondent acted in excess of its jurisdiction and in bad faith. Therefore an order of certiorari properly lies in favour of the Petitioner.

49. The Petitioner seeks an order for compensation by the Respondent as a result of the unconstitutional and defamatory actions of the Respondent. Although it has been proven that the Respondent did infringe the provisions of the Constitution, the Petitioner has not demonstrated in its pleadings or submissions that the Respondent defamed it by issuing the agency notices to the interested parties. It was posited in the case of **Phinehas Nyagah v Gitobu Imanyara [2013] eKLR** that:

**“19. Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one's reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff's reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts.”**

50. In view of the meaning of defamation as outlined in the cited decision, I find that the Petitioner has not made out a proper case for defamation and therefore an order for compensation cannot be granted.

### **The Determination**

51. From my analysis above, it follows that the petition has merit and succeeds in the terms of the orders to be issued hereunder. Judgement is therefore entered in favour of the Petitioner against the Respondent as follows:

- a) A declaration is issued declaring that the decisions and actions of the Respondent by way of the agency letters dated 19<sup>th</sup> August, 2019 appointing the interested parties as tax agents pursuant to Section 42 of the Tax Procedures Act, 2015 in respect of all monies held to the credit of the Petitioner is unconstitutional and therefore null and void.
- b) A permanent order of Injunction is issued restraining the Respondent together with the interested parties and/or their employees, servants, agents or any other person appointed by them or acting on their behalf from implementing, obeying, and/or executing the impugned decisions of the Respondent as contained in the agency letters/enforcement letters dated 19<sup>th</sup> August, 2019 by which the Respondent appointed the interested parties as tax agents in respect of the Petitioner.
- c) An order of certiorari is issued removing into this Court and quashing the agency letters dated 19<sup>th</sup> August, 2019 issued to the interested parties by the Respondent appointing the said interested parties as tax agents and attaching the bank and collection accounts held to the credit of the Petitioner.
- d) An order is issued restraining the Respondent from appointing the interested parties or any other person or entity as a tax agent against funds held to the credit of the Petitioner by the said interested parties or any such other person or entity in respect of excise duty for Jet A1 fuel for the period 1<sup>st</sup> December, 2015 to 31<sup>st</sup> August, 2016.
- e) The Petitioner is awarded costs of the proceedings against the Respondent.

**Dated, signed and delivered virtually at Nairobi this 15<sup>th</sup> day of October, 2020**

**W. Korir,**

**Judge of the High Court**