



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 217 OF 2016**

**IN THE MATTER OF SECTIONS 1 AND 3 OF THE REPEALED CONSTITUTION AND ARTICLES 1, 2, 3, 10, 12 (1A), 19, 20, 21, 22, 23, 24, 27, 35, 40, 43, 46, 47, 50(1), 73, 75, 159, 165, 201, 210, 226(5), 232, 258, & 259, AND SECTION 6 OF THE SIXTH SCHEDULE TO THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE ALLEGED VIOLATION AND INFRINGEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 27,40,43,46 AND 47, AND OF THE VALUES AND PRINCIPLES OF GOVERNANCE IN ARTICLES 10, 201, 210, AND 259 (1) OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF THE REPEALED VALUE ADDED TAX ACT (CAP 476), THE VALUE ADDED TAX ACT 2013, THE CUSTOMS AND EXCISE ACT (CAP 472), THE EAST AFRICA COMMUNITY CUSTOMS MANAGEMENT ACT 2004 (EACCMA), THE GOVERNMENT PROCEEDINGS ACT, AND THE LIMITATION OF ACTIONS ACT (CAP 22).**

**IN THE MATTER OF THE PUBLIC INTEREST IN SECURING COLLECTION OF TAXES AND THE ALLEGED TAX EVASION AND TAX FRAUD BY BIDCO AFRICA AMOUNTING TO SOME 5.7 BILLION.**

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> PETITIONER**

**NYAKINA WYCLIFFE GISEBE ..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

**BIDCO AFRICA ..... 1<sup>ST</sup> RESPONDENT**

**VIMAL SHAH ..... 2<sup>ND</sup> RESPONDENT**

**THE KENYA REVENUE AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**HENRY TIOLE NDIEMA ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. In the notice of motion dated 25<sup>th</sup> May, 2018, brought under Articles 22, 50, 159(2) (d), 165, and 258 of the Constitution, the 1<sup>st</sup> petitioner/applicant herein seeks the following orders:

**1. That the Honourable court be pleased to join the Tax Appeals Tribunal to these proceedings as the 6<sup>th</sup> respondent, and allow the petitioner to amend the petition accordingly.**

**2. That in the alternative, these proceedings be stayed to await the determination of Tax Appeal No. 2 of 2012, Bidco Oil Refineries vs. Commissioner of Customs Services pending before Tax Appeals Tribunal.**

**3. That costs be in the cause.**

2. The application is premised on the grounds, inter alia, that the proposed 6th respondent, the Tax Appeals Tribunal (hereinafter “the

Tribunal”) is a necessary party to these proceedings and that **Tax Appeals No. 2 of 2012** involving **Bidco Oil Refineries vs. Commissioner of Customs Services**, which is still pending before the Tribunal, has been invoked by the respondents as an absolute bar to the instant proceedings and as reason why part of the tax in question remains unpaid. The applicant further contends that there is inordinate delay, by the Tribunal, in determining the dispute and that under Article 165(6) of the Constitution, this court has supervisory jurisdiction over the said tribunal.

3. The application is supported the 1<sup>st</sup> petitioner’s affidavit dated 25<sup>th</sup> May 2018 in which he repeats the grounds listed on body of the application and states that he wrote letters to the tribunal enquiring about the status of the appeal pending before it and that in a letter dated 6<sup>th</sup> July 2016 the tribunal confirmed that the subject appeal No. 2 of 2012 was still pending. He avers that it is the duty of this court to promote and safeguard constitutionalism and the rule of law by determining the issues raised in the application.

#### **1<sup>st</sup> and 2<sup>nd</sup> respondents’ response**

4. The 2<sup>nd</sup> respondent, on his own behalf and on behalf of the 1<sup>st</sup> respondent, opposed the application through a replying affidavit sworn on 8th June 2018, wherein he avers that the petitioners do not have a legal right to the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s tax affairs and further, that the issue of the kshs 1.3 billion that is pending before the Tribunal was expressly disclosed to in the replying affidavit to the petition. He further states that the Tribunal is exercising a statutory mandate over the dispute and cannot therefore be enjoined in a misconceived petition filed by the petitioner. He further states that any party aggrieved by the tribunal’s decision is at liberty to appeal against it to the Court of Appeal.

5. The 1<sup>st</sup> respondent’s case is that the instant petition is a delaying tactic intended to unnecessarily prolong the hearing and determination of the petition.

#### **Interested party’s case**

6. Through the replying affidavit of its director Tom Onyango, sworn on 13<sup>th</sup> June 2018, the interested party supports the application and states that the applicant has the locus standi, under Articles 19 (3) (a), 22 (1), (2) (b) and (c) of the Constitution, to question the 1<sup>st</sup> and 2<sup>nd</sup> respondents tax affairs. He further states that the Tribunal has not offered any explanation for its failure to hear and determine the appeal that has been pending before it since the year 2012 when it was first lodged. He confirms that the instant petition arose from this court’s decision in **Bidco Oil Refineries Ltd vs Attorney General & 3 Others HC Miscellaneous Application No. 38 of 2010** wherein the court ordered the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay kshs 1.3 billion in taxes owed to the 3<sup>rd</sup> and 5<sup>th</sup> respondents herein which decision led to the filing of an appeal, by the 3<sup>rd</sup> respondent, to the Court of Appeal and that the Court of Appeal then referred the matter to the Tribunal and ordered for stay of its proceedings pending the hearing and determination of the appeal before the tribunal.

7. He contends that it is now almost 4 years since the Court of Appeal granted the said stay order yet the Tribunal has not taken any active steps to determine the appeal contrary to the provisions of Section 13 (7) of the Tax Appeal Tribunal Act which provides that the Tribunal is mandated to hear and determine appeal within ninety (90) days from the date of the filing of the Appeal with a proviso that during the period of one (1) year from the date of its first sitting, the Tribunal may extend the period for hearing of the appeal for a period of up to sixty (60) days if there are sufficient grounds to do so. The interested party’s case is that the period granted to the Tribunal has been exceeded by over two (2) years without any plausible excuse for the delay and adds that there has been a concerted effort by the parties herein to have the matter delayed for as long as possible.

8. He further avers that the interested party supports the joinder of the Tribunal to these proceedings so that this court can exercise its supervisory jurisdiction over it and for the expedient determination of the tax dispute in the interest of justice for all the Kenyan citizens as the Tribunal has exhibited reluctance to deal with the matter expeditiously. He further avers that failure by the 3<sup>rd</sup> and 5<sup>th</sup> respondents to collect taxes from the 1<sup>st</sup> and 2<sup>nd</sup> respondents due to the continued delay by the courts of justice in resolving the dispute before it due to technicalities is a furtherance of the violations complained of in the instant petition.

9. At the hearing of the application, the applicant abandoned prayer (2) of the instant application and therefore this ruling is only in respect to prayer (1) wherein the applicant seeks the joinder of the Tribunal to this case and for leave to amend the petition.

#### **Applicant’s submissions**

10. The applicant submitted that under Article 165 of the Constitution, this court has supervisory jurisdiction over tribunals and that Section 13 (7) of the Tax Appeal Tribunal Act sets the timelines within which the tribunal must hear and determine the appeals before it after which it loses jurisdiction over the matter. He argued that the fact that the proceedings before the tribunal have been pending since 2012 has had the effect of stalling the proceedings before the Court of Appeal and the said proceedings before the Tribunal have been cited as barring this court from dealing with the instant petition.

11. He argued that the Tribunal is bound by the law and cannot therefore sit on an appeal indefinitely. He further submitted that under Article 260 of the Constitution, the tribunal suits the description of a party that can sue and be sued when issues covered under Article 22 of the Constitution arise. It was the applicant’s case that the delay by the Tribunal is not innocent and that the instant petition would not have been instituted had the Tribunal discharged its mandate.

12. He further argued that the appeal before the tribunal strikes at the heart of the instant petition such that unless the Tribunal disposes of the appeal, the instant petition and the public at large will be prejudiced as access to justice will not be guaranteed. He urged the court to hold the Tribunal to account for the manner in which it has conducted itself by calling upon it to explain why it has acted contrary to the law.

#### **Interested party’s submissions**

13. Mrs. Ligunya, learned counsel for the interested party aligned herself to the applicants, submissions and argued that it was imperative that the Tribunal be brought into these proceedings because of, what she termed, the apparent concerted efforts by the 1st and 2nd respondents to delay this matter. She emphasized that the petition before the court was a constitutional matter in which the petitioners seek to know the reason(s) why the 3<sup>rd</sup> respondent has been unable to collect taxes from the 1<sup>st</sup> and 2<sup>nd</sup> respondent in line with Article 201 of the Constitution which requires transparency in respect to the collection of taxes, public finances, openness and accountability including public participation.

14. Counsel cited the provisions of Article 159(2) of the Constitution on expeditious disposal of cases in support of her submission that the Tribunal had since the year 2014 been unable to determine the dispute before it without giving any plausible reason. She reiterated that this court has supervisory jurisdiction over the tribunal and is therefore empowered to call for the proceedings before the Tribunal so as to dispose of this matter.

### **The 1st and 2nd respondent's response**

15. Mr. Ngatia Senior Counsel, learned counsel for the 1<sup>st</sup> and 2nd respondents submitted that since it was through an order by the Court of Appeal that the case was referred to the Tribunal to be heard on merit, any complaint over the delay by the Tribunal ought to have been referred to the Court of Appeal. Counsel further stated that the instant petition makes no complaint against the Tribunal and neither does it seek any orders against it so as to warrant its inclusion in the case.

16. Counsel further submitted that the petitioner was, through the instant petition seeking to mutate and/or delay the case by seeking the inclusion of the Tribunal to the case as a way of running away from his initial grievances that had been fully and clearly answered by the respondents. He argued that there were no valid grounds for enjoining the tribunal to this case as the Tribunal was only exercising its statutory mandate.

### **3<sup>rd</sup> respondent's submissions**

17. Mr. Ontweka, learned counsel for the 3<sup>rd</sup> respondent supported the submissions of the 1<sup>st</sup> and 2<sup>nd</sup> respondent's counsel and reiterated that the Tribunal was already being supervised by the Court of Appeal which is the court that had referred the matter to it for consideration and that this court could not therefore purport to supervise the Tribunal. According to the 3<sup>rd</sup> respondent, the instant application was intended to delay the speedy disposal of the petition.

### **DETERMINATION**

18. I have carefully considered the application and the rival submissions made by the 1<sup>st</sup> applicant and counsel for the respondents and interested parties herein. The application primarily seeks the joinder of the Tribunal to this petition on the basis that an appeal, being **Tax Appeal No. 2 of 2012 Bidco Refineries vs. Commissioner of Customs Services** is pending before the said Tax Tribunal and that the said appeal had been invoked by the respondents as an absolute bar to the instant proceedings and further, that there was an inordinate delay, by the Tribunal, in determining the said appeal.

19. I find that the issues for determination is whether or not the Tribunal should be enjoined in these proceedings and, depending on the answer to the first issue, whether the petitioner should be granted leave to amend the petition. The undisputed facts are that the tax dispute between the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent was the subject of **Nairobi Constitutional Petition No. 177 of 2012** whose decision gave rise to the appeal pending before the Court of Appeal, being **Civil Appeal No. 214 of 2013( as consolidated with Civil Appeal No. 217 of 2013)** which appeal is still pending before the said court as it was stayed pending the outcome of the decision of the Tribunal to which the matter was referred, by the Court of Appeal, for determination.

It was also not disputed that Tax Appeal No. 2 of 2012 is still pending the determination by the said Tribunal.

20. In the instant petition, the applicants seek the joinder of the Tribunal as a respondent in the petition. Order 1 Rule 3 of the Civil Procedure Rules provides as follows as regards parties who may be joined as defendants:

***“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”***

*Sarkar's Code of Civil Procedure (11<sup>th</sup> Ed. Reprint, 2011, Vol. 1 P. 887)*, states as follows on the provision for joinder of parties:

***“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”***

21. The Court of Appeal adopted the same approach in **Central Kenya Ltd. V. Trust Bank & 4 Others, CA No. 222 Of 1998**, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

***“The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”***

22. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10 (2) of our Civil Procedure Rules, in **Tanga Gas Distributors Ltd V. Said & Others [2014] EA 448**, stated that the power of the court to add a party to proceedings can be

exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

23. From the above cited provisions and case law, it is clear that courts have adopted a liberal approach to the issue of joinder of parties and amendment of pleadings. This does not however mean that a party is at liberty to include any Tom, Dick and Harry to a case merely because the law allows it. Courts have held that only parties who are necessary in the determination of a case may be enjoined in a suit. The test of who a necessary party to a suit is was discussed by Ringera J. (as he then was) in the case of **Werrot and Company Ltd and others v Andrew Douglas Gregory and others, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 (1998) LLR 2848 (CCK)** where he held as follows:

***“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”***

24. In the instant case I note that the petitioners have not sought any specific prayers against the Tribunal in the petition that require action to be taken by the Tribunal as all prayers sought are in the nature of declarations. The applicants have also not demonstrated that the orders sought in the petition cannot be granted or effected in the absence of the Tribunal as party in these proceedings. They stated the reasons for seeking to enjoin the Tribunal to this case to be; firstly, that an appeal is pending before it and; secondly, that the Tribunal has delayed in determining the appeal. To my mind, these are not reasons that would warrant the joinder of the Tribunal to these proceedings as they fall short the test of a necessary party as was stated in the case of **Werrot and Company Ltd case** (supra).

25. In support of the application for joinder of the Tribunal to these proceedings, the applicant argued that the Tribunal lacked jurisdiction to handle the appeal having exceeded the statutory period within which it should have heard and determined the appeal. The applicant maintained that this court has supervisory jurisdiction over the Tribunal and cited the provisions of Article 165 (6) and (7) of the Constitution.

Article 165 (6) provides that **“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”**

Article 165 (7) on the other hand provides that

***“For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”***

The Concise Oxford English Dictionary defines the word ‘supervise’ as to “observe and direct the execution of (a task or activity) or the work of (a person).”

26. The question which then arises is how the High Court can undertake this task of supervising the subordinate courts or bodies exercising quasi-judicial functions. Courts have held that the scope of the jurisdiction of this court under Article 165 (6) & (7) of the Constitution is in this regard to issuing of prerogative orders in the form of writs of *certiorari*, *mandamus* and *prohibition* which writs can be availed only to stop, quash, remove, adjudicate on the validity of judicial acts. Atkin, L.J. thus summed up the law on this point in **Rex v. Electricity Commissioners 1924-1 KB 171 at p.205 (C)**

***“Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”***

27. The writs as are referred to above are intended to be issued in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or where there is an error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice.

28. In the instant case, I find that if the applicant’s position is that the Tribunal is acting without jurisdiction in view of its apparent inordinate delay in determining the appeal, then the correct procedure for challenging the offending proceedings would be through filing of separate proceedings for judicial review for orders of *certiorari* which is generally granted when a court, a tribunal or a body has acted without or in excess of its jurisdiction. The applicant may also take up the issue of the delay before the Court

29. My take is that the critical factor to be considered in this application is how the joinder of the Tribunal to these proceedings will assist this court resolve the dispute at hand considering that the applicant has not disclosed that he seeks any specific orders against the Tribunal.

30. Under the above circumstances, I find that this court cannot purport to supervise the Tribunal on a matter in which it is technically *functus officio* having made an earlier determination that is now the subject of an appeal before the Court of Appeal. In that regard, I find that allowing the instant application would be tantamount to usurping the jurisdiction of the Court of Appeal which is currently seized with the matter pending before the Tribunal whose outcome the Court of appeal is still awaiting.

31. For the above reasons, I decline to allow the application dated 25<sup>th</sup> May 2018 which application I hereby strike out with orders that costs shall abide the outcome of the main petition.

**Dated, signed and delivered in open court at Nairobi this 3<sup>rd</sup> day of July 2018**

**W. A. OKWANY**

**JUDGE**

**In the presence of**

Mr Ogada holding brief for Ligunya for the interested party.

Mr Chabala holding brief for Ontweka for the 3<sup>rd</sup> respondent.

Miss Nyaga for Ngatia for the 1<sup>st</sup> respondent and the petitioner.