



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.589 OF 2013**

**BETWEEN**

**PHARMACEUTICAL MANUFACTURING (K) CO LTD.....1<sup>ST</sup> PETITIONER**  
**KUMAR SHAH.....2<sup>ND</sup> PETITIONER**  
**UTAMCHAND G. SHAH.....3<sup>RD</sup> PETITIONER**  
**CHRISTINE D'SOUZA.....4<sup>TH</sup> PETITIONER**

**AND**

**THE COMMISSIONER GENERAL OF THE KENYA**  
**REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**  
**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**  
**THE COMMISSIONER OF CUSTOMS SERVICES.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Application before me seeks the following orders;

“(1) ....

(2) ....

(3) *That this Honourable Court be pleased to suspend/stay the implementation of the 3<sup>rd</sup> Respondent’s demand dated 28<sup>th</sup> November, 2013 that the 1<sup>st</sup> Petitioner/Applicant pays to him Kshs.121,660,538/- within 30 days until further orders of this Court or pending the hearing and determination of this Application.*

(4) *That this Honourable Court be pleased to suspend/stay the implementation of the 3<sup>rd</sup> Respondent’s demand dated 28<sup>th</sup> November, 2013 that the 1<sup>st</sup> Petitioner/Applicant pays*

to him Kshs.121,660,538/- within 30 days pending the lodging, hearing and determination of the Petitioner's intended appeal against the judgment delivered herein on 26<sup>th</sup> August, 2014.

(5) That as alternative to 3 above the 3<sup>rd</sup> Respondent and his officers, be restrained from acting on the demand dated 28<sup>th</sup> November 2013 addressed to the 1<sup>st</sup> Petitioner requiring it to pay to him Kshs.121,660,538 within 30 days pending the lodging, hearing and determination of the Petitioner's intended appeal against the judgment delivered herein on 26<sup>th</sup> August, 2014.

(6) That the 1<sup>st</sup> and 3<sup>rd</sup> Respondents be restrained by themselves, their officers and agents, from demanding any refunds of VAT from the 1<sup>st</sup> Petitioner pending the lodging, hearing and determination of the Petitioner's intended appeal against the judgment delivered herein on 26<sup>th</sup> August, 2014.”

2. It is brought under the provisions of **Order 40 Rule 10(a)** and **Order 42 Rule 6** of the **Civil Procedure Rules** and the factual background to it is that on 26<sup>th</sup> August 2014, this Court dismissed the Petition herein. In that Petition, the issue in contest was whether the Petitioner was lawfully obligated to pay Kshs.121,660,538/- which the 1<sup>st</sup> and 3<sup>rd</sup> Respondents had demanded as import VAT for the period between January 2008 and November 2013. The fact of dismissal of the entire Petition in essence meant that the said sum was due and payable but upon an oral application made by Counsel for the Petitioners, this Court on 26<sup>th</sup> August 2014 granted orders of stay pending the filing of a formal application in that regard. That Application is the one dated 8<sup>th</sup> September 2014 and is now under consideration.
3. At the hearing, Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents raised a number of inter-related issues which I consider important and which must be determined *in limine*. He submitted in that regard that by dint of **Section 3(2)** and **(5)** of the **Kenya Revenue Authority Act** and **Section 16** of the **Government proceedings Act**, Courts are forbidden from granting injunctions against the Government and its agencies including the 1<sup>st</sup> Respondent. Further, that there is doubt as to whether this Court can stay a demand for import VAT due from the Petitioner in the circumstances. There is also the peripheral question raised whether the Application before me is properly before this Court since, upon dismissal of the Petition, the Court allegedly became *functus officio*.
4. Both Counsel for the Petitioner and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents made elaborate submissions on the above issues. On his part, Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents submitted the following authorities in support of their position;
  - i. **Dickson Muricho Muriuki vs Timothy Kagundu Muriuki [2013] eKLR** - the Court of Appeal declared itself *functus officio* once it had delivered its final judgment in the case.
  - ii. **Western College of Arts & Applied Sciences (WECO) vs Orange and others (1976) KLR** – the submission made was that once a suit has been dismissed, no order of injunction can be contemplated.
  - iii. **Amran Ahmed Musa vs Lengeny & Anor, Nakuru H.C. Misc. Application No.151 of 2012** – Waithaka J. held that where there is no substantive suit, an injunction cannot be issued.
  - iv. **Stanbic Bank Kenya Ltd vs KRA Nairobi C.A.294/2007** – it was held that where a judicial review application was dismissed, there was no positive order that could be stayed.
  - v. **KRA vs Enroleaf Tabak Corporation Nairobi C.A 308 of 2005** – it was stated that since KRA collects taxes for the Government, if its operations are limited, that will in turn halt Government

operations including the provision of essential services.

5. On his part, Counsel for the Petitioner relied on the following authorities;

- i. **Erinford Properties Ltd vs Cheshire County (1974)2 All E.R. 448** - Megary J. found no difficulty in holding that where a party seeks to appeal against the dismissal of an application for injunction, the same court could properly grant an injunction pending appeal.
- ii. **Madhupaper vs Kerr (1985) KLR 840** where the Court of Appeal cited with approval the decision in **Erinford Properties(supra)**.
- iii. **Royal Media Services Ltd vs A.G & 2 Others, H.C Petition No.346 of 2012** where Majanja J. upon dismissing the Petition still issued conservatory orders pending appeal.
- iv. **Bankruptcy Causes Nos.25 and 26 of 2010** where Mabeya J. granted a stay of the receiving orders pending the lodging and determination of an intended appeal.
- v. **Royal Media Services vs The Commissioner of Customs and Excise (2002) 2 EACA** where it was held that under Section 84 of the repealed Constitution the Court has power to issue injunctions against the Government.
- vi. **Jaundo vs AG (1971) AC 972, M vs Home Office 91993) 3 All E.R 537** and **Youngstown Sheet & Tube Co vs Sawyer, 343, US 579** where the Privy Council, the House of Lords and the US Supreme Court, respectively took the view that courts have the jurisdiction to grant injunctions against the executive arm of Government.
- vii. **Geothermal Development Co. Ltd vs AG & 3 others [2013] eKLR** where Majanja J. issued a conditional injunction against the Kenya Revenue Authority.

6. Based on the cited decisions, Counsel for the Petitioners submitted that the Court is not *functus officio* as claimed and can properly issue orders as prayed pending the hearing and determination of the intended appeal to be filed or an appeal pending before the Court of Appeal.

7. On my part, I must begin by stating that contrary to the elaborate submissions made on the issues at hand, parties forgot that the Petition that I dismissed on 26<sup>th</sup> August 2014 was not predicated on either a commercial transaction *per se* or a civil debt but *inter alia* allegations of contravention of fundamental rights and freedoms to wit **Articles 27(1), 40, 43 and 47** of the **Constitution**. If that be so, the applicable law is the Constitution itself and **Article 23(3)** creates rules providing for Court proceedings in the enforcement of fundamental rights. The other Articles of the Constitution that required interpretation were **Articles 19, 27 and 201** alongside certain Sections of the **Value Added Tax** and the **Customs and Excise Act**.

8. The Rules contemplated by **Article 23(3)** of the **Constitution** are now the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) **Practice and Procedure Rules, 2013** and they obviously prevail over the **Civil Procedure Rules** which the Parties spent a lot of time on. All the authorities cited in any event were based on the **Civil Procedure Act** and the **Civil Procedure Rules** and none, in my reading, have been cited in the context of the Petition and most are actually based on the law prior to the Constitution, 2010. To that extent, I agree with Counsel for the Applicant that **Article 23(3)** of the **Constitution** must be invoked in addressing the present Application. That Article provides as follows;

“(1) ...

(2) ...

(3) *In any proceedings brought under Article 22, a Court may grant appropriate relief, including—*

- (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.”*

9. The Article is not exhaustive of the remedies to be granted hence the words, “**appropriate relief, including ...**” The point is that the High Court can grant any relief subject to it being “**appropriate**” and is also judiciously granted. It matters not that the Party to whom the orders are directed is the Government or the taxman (read KRA) as the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have argued and it matters not at what stage of the proceedings the orders are sought. I make this categorical statement because **Rules 8** and **23** of the **Rules** under **Article 23(3)** aforesaid provide further as follows;

**“8 (1) Every case shall be instituted in the High Court within whose jurisdiction the alleged violation took place.**

**(2) Despite sub rule (1), the High Court may order that a Petition be transferred to another Court of competent jurisdiction either on its own motion or on the application of a party.”**

and;

**“23(1) Despite any provision to the contrary, a Judge before whom a Petition under Rule 4 is presented shall hear and determine an application for conservatory or interim orders.**

**(2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.**

**(3) The orders issued in sub rule (1) shall be personally served on the Respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.”**

10. One of the remedies under **Article 23(3)** is injunctions as well as conservatory orders. To argue that no such orders can be granted as interim orders after dismissal of a Petition and pending appeal is superfluous. I say so because the jurisdiction to grant injunctions pending appeal in civil law was well settled in the **Erinford** and **Madhupapaer Cases (supra)**. Such a relief is certainly an “**appropriate**” one under **Article 23(3)** and the Rules created thereunder and I see no justification for the position taken by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

11. As to whether an injunction can issue against Government and the Kenya Revenue Authority, the issue is beyond debate in the context of any Petition and application under the Bill of Rights and depending on each specific case. I have said that “**injunctions**” are now constitutional remedies. Under **Articles 2(1) (3) and (4) of the Constitution** all laws, including the **Government Proceedings Act** and the **Kenya Revenue Act** are subject to the Constitution and any conflict is always resolved in favour of the Constitution.

12. In addition under **Article 20(1) (2) and (93)** of the **Constitution**, the Bill of Rights (and the

remedies for violations) is applicable to all and “**binds all State organs and all persons**”. To argue that a constitutional remedy cannot be directed at Government and the KRA is the propagation of a constitutional heresy.

13. It follows that the issues that I sought to address *in limine* are determined in the above terms and the next issue to address is whether the Applicant has made a case for grant of the orders sought.

14. I propose to spend very little time on this issue because once I have found that the remedy of an injunction pending appeal as well as orders of stay pending appeal are appropriate remedies in a Constitutional Petition, even after the said Petition has been dismissed but pending appeal, the only issue is whether the Applicants have made out a case for grant of such orders. What are the considerations to be made in that regard?

15. I have read the rival submissions on this issue and I agree with Counsel for the Applicants that in determining whether to grant orders of injunction or stay under the Constitution, the Court must be guided by the principles in **Article 159** of the **Constitution**, the principles in **Article 23(3)** of the **Constitution** and the procedure set out in the Rules created thereunder. In addition past decisions of this Court would need consideration and I say so because in **Royal Media Services (supra)**, Majanja J stated that;

*“The question as to whether this Court has jurisdiction to grant orders of stay or injunction pending appeal must be seen in light of the provisions of Article 22 and 23 of the Constitution. The provisions of Articles 22 and 23 are the gateway to the Bill of Rights in the sense that without them, the rights and fundamental freedoms guaranteed remain non-justiciable. It is the fact that the Court can be moved to grant relief in case of infringement, violation or threat that gives the bill of Rights teeth. Commenting on the effect on the equivalent provision of the former Constitution, Justice Shields stated in case of Felix Njagi Marete vs Attorney General (1987) KLR 690 of pious platitudes, it has teeth and those teeth and in particular are to be found in Section 84. Article 23(3) entitles the High Court to grant appropriate relief in respect of matters brought under Article 22. Apart from the specific relief in the nature of an injunction set out in Article 23(2) the Court can frame any relief that is appropriate in the circumstances. It follows therefore such relief must also include such as is that the appeal is not rendered nugatory and the right thereby protected is watered down. To argue that the relief secured specific provision in the Constitution or under the Kenya (Supervisory Jurisdiction and Protection of Fundamental rights and Freedoms of the Individual) High Court practice and procedure Rules, 2006 is to undermine the Bill of Rights and its efficacy. I do not read rule 23 to prohibit the Court from granting further relief after hearing and determining a matter. I reject the respondent’s argument that this Court tacks jurisdiction to grant interim relief pending appeal. I find and hold that this Court’s exercise of its power under Article 23(3) is entitled to give orders that give effect to the Bill of Rights including such orders as are necessary to preserve the subject matter pending appeal. In my view, it does not matter that the application to enforce fundamental rights has been dismissed. The Applicant has an undoubted right of appeal and the obligation of the trial Court to consider the facts before it and decide whether interim relief pending appeal is warranted. To decline jurisdiction would be to undermine the very essence of the Bill of Rights. Finally, I refer to the principle stated in the well-known case of Erinford Properties Ltd vs Cheshire county Council (1974) 2 All E.R. 488. The principle is that a judge who has dismissed an interlocutory application for injunction is entitled to grant the unsuccessful applicant an injunction pending appeal against the dismissal. This principle is well established in our jurisdiction and there is no reason why such a principle should not apply to these proceedings.”*

16. I should add that the right of appeal is one aspect of fair hearing and that fact cannot be taken lightly.

17. In that context, a Court confronted with either an application for injunction or stay pending appeal, must balance the right of the succeeding party to benefit from the judgment, and the right of appeal by the losing party.

18. The hardship and inconvenience to be suffered by both must also be weighed against each other.

19. In that context, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents had earlier demanded Kshs.122,660,535/- from the Applicants. After the judgment herein, apparently that sum has not been paid hence the Applicant's apprehension.

20. Noting the circumstances in which the Parties are now in and not to render the intended appeal nugatory and to secure the VAT which has been declared as due and owing by this Court, there would be need to preserve that sum pending appeal. In the event, the proper orders to make are that;

*(i) That the 1<sup>st</sup> and 3<sup>rd</sup> Respondents be restrained by themselves, their officers and agents, from demanding any refunds of VAT from the 1<sup>st</sup> Petitioner pending the lodging, hearing and determination of the Petitioner's intended appeal against the judgment delivered herein on 26<sup>th</sup> August, 2014.*

*(ii) The above orders are granted on the condition that the Applicants do deposit adequate security and which is acceptable to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to the tune of Kshs.122,660,538/- within 60 days of this Ruling failure to which the orders in (i) above shall stand vacated.*

*(iii) Let costs abide the outcome of the Appeal.*

21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MARCH, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kariuki – Court clerk

Mr. Gacheru holding brief for Dr. Kuria for Petitioner

Miss Lamma holding brief for Mr. Matuku for Respondents

**Order**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**