



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 177 of 2012

**BIDCO OIL REFINERIES
LIMITED.....PETITIONER**

AND

**THE ATTORNEY GENERAL.....1ST
RESPONDENT**

**THE KENYA REVENUE AUTHORITY.....2ND
RESPONDENT**

**THE COMMISSIONER-GENERAL OF THE KENYA REVENUE AUTHORITY.....3RD
RESPONDENT**

**THE COMMISSIONER OF CUSTOMS AND EXCISE.....4TH
RESPONDENT**

RULING NO. 2

1. The application for consideration is a Chamber Summons dated 1st October 2012 in which the 2nd, 3rd and 4th respondents (“the applicants”) seeks an order that, *‘This Honourable Court do certify the petition dated 30th April 2012 (together with the response thereto) as raising substantial constitutional as well as legal issues of great public interest and that the same be referred to the Honourable Chief Justice for purposes of setting up a three (3) judge bench to hear and determine the petition.’*

2. **Article 165(4)** of the Constitution sets the standard for referring a matter to the Chief Justice to constitute a bench of uneven judges not being less than three to hear a matter. It provides, **“ Any matter certified by the court as raising a substantial question of law under clause (3) (b)(d) shall be heard by an uneven number of judges, being nor less than three, assigned by the Chief Justice.”**

3. In the case of **Community Advocacy and Awareness Trust and Others v Attorney General Nairobi Petition No. 243 of 2011 (Unreported)**, I observed that, *“[8]The Constitution of Kenya does not define, “substantial question of law.” It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine a matter [10]... giving meaning to “substantial question” must take into account the provisions of the Constitution and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter.”*

4. According to the applicants, the petitioner and the response filed thereto raised fundamental

constitutional and legal issues which involve public interest and deserve a hearing by an uneven number of judges not being less than three. The issues enumerated are as follows;

i. Whether taxes already assessed by the tax assessment and collection Agency (Kenya Revenue Authority) and upheld by the High Court in a judicial review challenge can subsequently be challenged in a constitutional petition in the High Court.

ii. The Constitutionality as well as the interpretation and applicability of the ***East Africa Community Customs Management Act, 2004 (EACCMA)***, a key legislation that guides management of customs in the East African region.

iii. Whether a demand to pay lawfully assessed taxes amounts to arbitrary taking and deprivation of private property.

iv. Whether a dispute already determined in a judicial review challenge can be subject of a constitutional petition notwithstanding the appeal process, a process that needs sound pronouncement of the court to guide future litigants.

5. Apart from the argument that the issues in the matter constitute substantial issues of law, the applicants contend that the pendency of the petition has now created a wind of uncertainty in the assessment and collection of customs duty within the provisions of the ***EACCMA*** and the issues need a just and proportionate determination. The applicants further contend that the filing and pendency of this petition is of great concern to the edible oil industry and since the filing of this petition similar litigation has been filed in the High Court and also at the Customs Appeals Tribunal.

6. The respondents oppose the application on the basis that the applicants have not met the threshold for the case to be referred to **Article 165(4)**. The petitioner opposes the application on three broad grounds. In summary it contends that the issues raised in the petition and the response are not complex to the extent that they can be said to raise a “*substantial question of law.*” Secondly, the petitioner submits that mere public interest in the outcome of the case is insufficient to bring the case within the scope of **Article 165(4)**. Thirdly, the petitioner dismisses the contention that the fact that the matter is important for stakeholders in the edible oils industry is a ground for reference under **Article 165(4)**.

7. The 1st respondent also denies that the subject of this suit is a matter for reference to the Chief Justice. It submitted that although the suit raises weighty issues that may be of public interest such issues are not substantial to require the constitution of a bench under **Article 165(4)**.

8. I have considered the written submissions filed by the parties in light of the pleadings and depositions on either side. The parties have already filed written submissions in support of and in opposition to the petition which I have had occasion to read. I have already dealt with the interlocutory application for conservatory orders. In my view although the issues raised by the applicants are weighty, I do not think that they raise any novel issues of law or matters of law that require the court to tread new ground to the extent that I would consider that this matter raises substantial questions of law.

9. The applicants have annexed to the supporting affidavit of Charles Waweru Gatonye sworn on 1st October 2012 an article in one of the leading newspapers titled, “*Taxman, Bidco in historic face-off.*” I agree that the subject of this suit is a matter of public interest. Public interest, of itself is not necessarily a determinant in the exercise of discretion under **Article 165(4)**. And if it were, the Constitutional and Human Rights Division of the High Court would have to be sitting in division of three as a rule. I am in agreement with the petitioner that the large sum of money involved and the consequent effect of the exchequer is also not, of itself, a matter that would sway my mind in exercising discretion in the applicants’ favour.

10. Lastly, the fact that there are several matters filed by other persons with similar interest in the outcome of this case does not necessarily warrant the empanelling of a three judge bench. Those cases are not before this court and have not been consolidated with this matter. They will be determined on their

own merits.

11. In conclusion, I adopt the statement of Justice M. Ngugi in ***Gilbert Mwangi Njuguna v Attorney General Nairobi Petition No. 267 of 2009 [2012]eKLR***, “*Weighed against the yardstick of what constitutes a ‘substantial question of law’ the issues may indeed be substantial and of great public interest. However, in my view, they do not merit hearing by an uneven number of judges and can be adequately dealt with by a single judge. Should any party not be satisfied with the decision of the single judge, the appeal process in which the matter fall for consideration before a bench of 3 appellate judges in the Court of Appeal and where there is the option of further appeal to the Supreme Court will be open to the party.*”

12. I therefore dismiss the 2nd, 3rd and 4th respondents Chamber Summons dated 1st October 2012. The costs shall be in the petition.

DATED and DELIVERED at NAIROBI this 5th day of April 2013.

D.S. MAJANJA

JUDGE

Mr Ochieng’ Oduol instructed by Ochieng’ Onyango, Kibet and Ohaga Advocates for the petitioner.

Mr W. Gatonye instructed Waweru Gatonye and Company Advocates for the 2nd, 3rd and 4th respondents.