



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NO. 283 OF 2014

BETWEEN

PHARMACEUTICAL MANUFACTURING (K) CO LTD.....1ST APPELLANT

KUMAR SHAH.....2ND APPELLANT

UTAMCHAND G. SHAH.....3RD APPELLANT

CHRISTINE D' SOUZA.....4TH APPELLANT

AND

THE COMMISSIONER GENERAL OF

THE KENYA REVENUE AUTHORITY..... 1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF CUSTOMS SERVICES..... 3RD RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya (Lenaola, J.) dated 26th August, 2014

in

Human Rights Division Petition No. 589 of 2013)

JUDGMENT OF THE COURT

On 3rd March, 2017 we rendered our decision in this appeal and reserved the reasons to today, the 10th March, 2017. These are therefore our reasons for dismissing this appeal with costs.

The 1st appellant is a limited liability company engaged in pharmaceutical manufacturing business. The 2nd, 3rd and 4th appellants are, respectively its shareholder, Managing Director, and Administrative Manager.

Following a demand notice from the Commissioner of Customs Services (the 3rd respondent) requiring the 1st appellant to pay to it Kshs.121,660,538/= in unpaid import Value Added Tax (VAT) for the period between January, 2008 and November, 2013, the appellants petitioned the High Court for protection claiming that the 1st and 2nd Schedules to **Sections 2 and 7 (2)** of the VAT Act, 2013 (Chapter 476 of Laws of Kenya) contravened **Article 201** of the Constitution on the principles and framework of public finance; that to the extent that the aforesaid **Section 7 (2)** imposes on the 1st appellant VAT on raw and packaging materials imported for the purpose of manufacturing medicine, it was null and void; that the enactment of that law infringed upon the appellants' rights under **Article 27 (1)** which guarantees them the right to equal protection and equal benefits of the law and the right to non-discrimination; that the 1st appellant's rights not to be arbitrarily deprived of property was equally violated by the Act, whose application had the effect of depriving the 1st appellant of the VAT exemptions which it had enjoyed over the years; and that the 2nd to 4th appellants' right to health, as citizens were also compromised by the passage of the Act as it affected the entire pharmaceutical manufacturing industry in Kenya.

The appellant petition had an extremely long list of reliefs against the respondents. Because of what we shall shortly be saying about those prayers, we reproduce them hereunder;

?(a) A declaration that customs duty and import VAT exemptions granted to a pharmaceutical/medicine manufacturer in Kenya who acquires a factory or makes any other investment in that industry on the basis of the assurance by the State that the exemptions will always be forthcoming are property within the meaning of Article 40(1) of the Constitution.

(b) A declaration that a pharmaceutical/medicine manufacturer in Kenya who acquires a factory or makes any other investment in that industry on the basis of the assurance by the State that the exemptions will always be forthcoming has a right under Article 19 (3) of the Constitution not to have that property destroyed by *ex post facto* legislation like the Value Added Tax Act, 2013.

(c) A declaration that the First and Second Schedules referred to in Sections 2 and 7(2) of the Value Added Tax Act, 2013 were enacted in contravention of the guiding principles in Article 201 of the Constitution mandating that the country's public finance system promotes an equitable society, ensures that the burden of taxation is shared fairly and also that the financial management shall be responsible and consequently that the said second schedule referred to in Section 7(2) of the Value Added Tax Act, 2013 is null and void to the extent that it imposes on the 1st petitioner import VAT on raw and packaging materials imported for the purposes of manufacturing medicine in the Republic of Kenya and exempts from payment of import VAT on imported medicine.(sic)

(d) A declaration that the 1st Respondent has contravened the 1st Petitioner's right to equal protection and equal benefit of law within the meaning of Article 27(1) of the Constitution, and discriminated against it within the meaning of Article 27(4) of the Constitution purely for being a local pharmaceutical manufacturer, by permitting, vide the First and Second Schedules in Sections 2 and 7(2) of the VAT Act, 2013, foreign manufacturers of medicine to sell their medicines in the Kenya market without paying import VAT whilst requiring the 1st petitioner, a local pharmaceutical manufacturer, to pay import VAT on imported raw and packaging materials used by the 1st Petitioner to manufacture the medicines which it sells in Kenya and neighbouring countries.

(e) A declaration that the 1st Respondent has contravened the 1st Petitioner's right under Article 40 of the Constitution not to be deprived of property taking the form of import VAT exemption, not to be arbitrarily deprived of its property by imposition vide Section 7(2) of the VAT Act, 2013 of import VAT on the raw and packaging materials used in manufacturing medicine in Kenya thereby rendering the 1st Petitioner's investment worth Kshs. 800 Million on L.R No. 209/6371 idle to the extent of 60% production capacity as from 1st September, 2013.

(f) A declaration that the 1st Respondent has, through the institution of the Parliament of Kenya which enacted the Second Schedule described in Section 7(2) of the VAT Act, 2013, contravened the 1st Petitioner's right under Article 40(2) of the Constitution not to have made a law, like the said Second Schedule described in Section 7(2) of VAT Act, 2013, which restricts the enjoyment of the 1st Petitioner's property rights over LR. No.209/6371 by rendering the same idle as it is after 1st September 2013, financially ruinous to manufacture medicine in Kenya.

(g) A declaration that the purported denial of the 1st Petitioner, a pharmaceutical manufacturer, of exemption from payment of import VAT on raw and packaging materials by Section 7(2) of the VAT Act, 2013 is State deprivation of such pharmaceutical manufacturers of financial incentives necessary for the Country's security in medicine supply and abolition/reversal of the policy of import substitution in the Country's pharmaceutical industry.

(h) A declaration that the purported deprivation, through the Second Schedule described in Section 7(2) of the VAT Act, 2013 of financial incentives to the 1st Petitioner and other manufacturers of medicine in Kenya is arbitrary, unfair defeats legitimate expectations created in the investors in that industry since 1960's, and is a contravention of the 1st Petitioner's right under Article 47 of the Constitution to an administrative action that is lawful, reasonable and procedurally fair and is null and void.

(i) A declaration that the Second Schedule described in Section 7(2) of the VAT Act, 2013 is void to the extent that it denies the 1st Petitioner exemption from payment of import VAT on raw and packaging materials imported after 1st September, 2013.

(j) A declaration that through the enactment of the Second Schedule described in Section 7(2) of the VAT Act, 2013 the 1st Respondent has contravened the rights of the 2nd to 4th Petitioners to the highest attainable standard of health care, services and affordable medicines in that the costs of medicines have been increased arbitrarily and unreasonably.

(k) A declaration that the 1st Petitioner enjoys and is, under Second Schedule described in Section 7(2) of the VAT Act, 2013 entitled to exemption from payment of import VAT on raw and packaging materials imported for the manufacture in Kenya of medicines.

(l) A declaration that between 1st January, 2008 and 31st August, 2013, the 1st Petitioner's importation of raw and packaging materials for manufacturer in Kenya of medicine was governed by Section 8(2) of the Repealed Vat Act Chapter 476 of the laws of Kenya and the 1st Petitioner enjoyed exemption from payment of the said import VAT.

(m) An order that the Respondents do refund forthwith to the 1st Petitioner all the import VAT paid on raw and packaging materials imported as from 1st September, 2013 for manufacture of medicine in Kenya.

(n) General damages.

(o) A declaration that the 3rd Respondent's demand of 28th November, 2013 that the 1st petitioner. pays it Kshs.121,660,538/- as import VAT or the period between 1st January, 2008 and 21st November, 2013 is a contravention of the 1st Petitioner's right under Article 47 of the Constitution to an administration action which lawful, reasonable and procedurally fair and is illegal null and void.

(p) A declaration that between 1st January, 2008 and 21st November, 2013, the 1st Petitioner enjoyed under Section 8(2) of the Repealed VAT Act, Chapter 476 of the Laws of Kenya exemption from payment of import VAT on raw and packaging materials imported by it for manufacture of medicine.

(q) As an alternative to (p) above, a declaration that between 1st January 2008 and 21st November, 2013, the 1st Petitioner enjoyed under paragraph 26 of Part B of the Fifth Schedule made under Section 114(2) of the East African Community Customs Management Act, 2004 Kenya exemption from payment of import VAT on raw and packaging materials imported by it for manufacture of medicine.

(r) An order of *certiorari* do issue to remove from the 3rd Respondent and bring to the High Court for quashing the demand dated 28th November, 2013 that 1st Petitioner pays to the 3rd Respondent Kshs.122,660,538/-within 30 days.

(s) (i) An order of prohibition do issue restraining the 1st, 2nd, and 3rd Respondents from acting on the demand that the 1st Petitioner pays Kshs. 121,660,538/-

(s) (ii) An order of prohibition do issue restraining the 1st and 3rd Respondents from claiming from the 1st Petitioner Kshs.212,660,538/- or any other sum by way of purported Import VAT for the period between January, 2008 and November, 2013.

(t) (i) An order of mandamus do issue compelling the 1st and 3rd Respondent's to process in future the 1st Petitioner's import documents and release to the 1st Petitioner the imports to it under exemption code 'B0260';

(t) (ii) An order that the Respondents do refund forthwith to the 1stPetitioner all the import VAT paid after 1st September, 2013 together with interests as compound rates;

(u) (t) General and Exemplary Damages.

(v) (u) Costs of the suit.

A total of twenty four (24) prayers are too many by any measure. They are, to say the least, and with respect, prolix, repetitive and tend to obfuscate the issues in controversy.

It has repeatedly been said by the courts, that in terms of **order 2** of the Civil Procedure Rules, and depending on the nature of the suit, pleadings must be concise, precise and clear, and must contain only, a statement in a summary form of the material facts on which the party pleading relies and no more, so as to give the parties on the other side as well as the court fair and proper notice of the case.

See . **Mae Properties Limited v William Olotch**, Civil Appeal No. 137 of 2004. We do not think the situation should be any different under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (2013) under which the appellants filed their petition.

At this stage it should be clarified that the amount of Kshs.121,660,538/= originally demanded was subsequently corrected and reduced to Kshs. 43,579,768/= which is now the subject of this litigation.

Before we consider those grounds, it is most apposite for us at this stage to outline briefly the evidence from both sides, as it is from those facts that we shall determine whether or not to uphold the decision of the court below.

It was the case of the appellants that the 1st appellant has been for many years recognized as one of the leading manufacturers of pharmaceutical medicine in Kenya; that between 1988 and August 2013, by the provisions of **Section 8 (2)** of the VAT Act, and the Schedules thereto, the 1st appellant was exempted from payment of VAT on raw and packaging materials imported in connection with the manufacture of medicine in Kenya. However, in 2013, the 1st respondent enacted **Section 7** of the VAT Act of 2013, which repealed the provisions of the VAT Act on exemption of payments of VAT on the raw and packaging materials. It claimed that having enjoyed both the customs duty and VAT exemptions over the years those exemptions constituted a right to property within the meaning of

Article 40 (1) of the Constitution and accordingly it could not be deprived of them by the State without payment of investor compensation for the loss suffered as a result of that deprivation.

They insisted that following the removal of the VAT on raw and packaging materials, the 1st appellant had, since 1st September, 2013 paid to the 3rd respondent between Kshs.700,000/= and Kshs.1,000,000/= on VAT as a result of which it has been compelled to increase the prices of its medicines by 20% because they had become less competitive in the Kenyan market; that its production capacity had dropped from 100% to 40%, in turn affecting its monthly sales. It was therefore apprehensive that with that trend its operations would grind to a halt by mid- 2014; that by imposing on the local pharmaceutical companies VAT on the raw and packaging materials the health security of Kenyans would be undermined.

The appellants contended further that the VAT Act of 2013 was passed in contravention of the guiding principles set out under **Article 201** of the Constitution, to the effect that the public finance system should promote an equitable society and ensure that the burden of taxation is shared fairly; that while the VAT Act exempted foreign manufacturers of medicine from payment of VAT no such exemption was extended to local manufacturers in the same business, in breach of **Article 27** of the Constitution which forbids against discrimination; that the Government created an expectation that investors in the pharmaceutical manufacturing industry will always be exempted from payment of customs duty and VAT and to remove that exemption abruptly is unfair and unlawful; and that the respondents were estopped from denying the 1st appellant the enjoyment of the exemption from payment of VAT on all raw and packaging materials imported between January 2008 and August 2013.

The Attorney General, sued as the second respondent, did not file any answer to the petition. We shall revert to this failure later in the judgment.

The 1st and 3rd Respondents jointly filed replying affidavits sworn by Martin K'Otieno, a Senior Revenue Officer in the Customs Services Department and Grace Okuku, a Revenue Officer in the same department. They explained that the dispute leading to the filing of the petition was precipitated by a post-clearance audit carried out on the import operations of the 1st appellant for the five (5)- year period between January 2008 and November 2013. The exercise established that during the period, the 1st appellant imported raw and packaging materials for the manufacture of medicaments, declaring the same as exempt from VAT while in fact the import attracted VAT at the rate of 16% translating to Kshs. 43,579,769/= for the period under review; that in compliance with Regulation 7(6) of the VAT Regulations, 1994, the import VAT arrears due from the 1st appellant were demanded.

The respondents further explained that VAT on imported goods and supplies were collected under **Section 9 (1) (c)** of the VAT Act and **Section 6 (5)** of the East African Community Customs Management Act; that prior to the period under review it was collected under the Customs and Excise Act; that VAT on imports would be collected by the 3rd respondent at the port of importation together with duty of customs; that under **Section 57** of the VAT Act, imported goods were liable to VAT, whether those goods were liable to any customs duty or not; and that the determination of the value of VAT to be charged upon imported goods was ascertained in accordance with **Section 9 (1) (c)** and **(d)** of the VAT Act.

On the basis of the foregoing arguments the respondents maintained that the demanded tax of Kshs. 43,579,769/= from the 1st appellant was raised lawfully; that the relevant provisions of the repealed Act, were saved by **Section 68 (1)** of the VAT Act, 2013 to remain in force for the purpose of assessment and collection of any tax and the recovery of any penalty payable but outstanding under the Act at the date of the repeal; that in any case the tax arrears of Kshs. 43,579,769/- demanded from the 1st appellant were not founded on the VAT Act of 2013 but related to the period preceding its enactment and before the repeal of the VAT Act and as a result the claim was saved and secured.

The respondents were categorical that raw and packaging materials for manufacture of medicaments have never been exempt from import VAT whether under the repealed VAT Act or the VAT Act, 2013; that it was only between 1995 and 2000 that such raw materials attracted import VAT at zero-rate (0%),

as opposed to exemption; that the incentive was removed by the Finance Act No. 6 of 31st December, 2001, amending the Eighth Schedule to the repealed VAT Act, by deleting Part B, item 22 and making “**raw materials for manufacture of medicaments**” subject to VAT with effect from 15th June 2001. It follows, according to the respondents, that from 15th June 2001 to the time the VAT Act, was repealed in September 2013, the 1st appellant was liable to pay VAT on its imported raw and packaging materials at 16%; that the distinction between exemption from import VAT and VAT at 0% rate notwithstanding the raw and packaging materials for manufacture of medicaments were never exempt from VAT neither were they zero-rated; that, in those circumstances the 1st appellant could not benefit from the doctrine of estoppel, which in any case cannot apply against the Government as was held in the case of **Commissioner of Customs and Others v Amit Ashok Doshi and 2 Others**, Msa Civil Appeal No. 157 of 2007; and in the same breath the appellants could not assert any legitimate expectation or belief that the 1st appellant would continue enjoying VAT exemption on raw and packaging materials, since there was no representation, or a promise, or assurance that import VAT would not be charged on their imports or that the VAT Act would never be repealed or amended. After all there was no law that exempted the 1st appellant from VAT. The truth, according to them was that the VAT Act, 2013 reduced the listed goods and services that were zero-rated or exempted from VAT by which, in their interpretation the Legislature’s intention was to increase revenue for the Government, a noble policy which the appellants and the general public ought to have embraced; that courts are ill equipped to formulate tax policies, a province of the legislative branch of Government; and that it would offend the spirit of the Constitution to legislate for exemption of VAT or to zero-rate VAT for the appellants’ imports. The 2013 statute, for those reasons, could not constitute an arbitrary deprivation of the right to property contrary to **Article 40** of the Constitution as claimed.

The Respondents however conceded that the 1st appellant enjoyed exemption from import duty of customs, as opposed to VAT, on its imports of raw and packaging materials for the manufacture of medicaments under the Customs and Excise Act, and now under the East Africa Customs Management Act. The respondents explained the distinction between import duty of customs as a levy imposed on selected imported goods under the East African Community Customs Management Act, before they are allowed to enter Kenya and VAT which is a domestic tax charged on selected goods and services at every point up to the final consumer. The East African Community Customs Management Act and the VAT Act, as separate tax regimes, impose duty of customs and VAT, respectively.

The respondents, for these reasons insisted that not only was the 1st appellant’s claim of Kshs.17,770,540/= in VAT refunds for the period January 2012 to August 2013 misplaced, it was based on the misunderstanding of the law.

At the beginning of this judgment we alluded to the fact that the 2nd respondent, the Attorney General, neither filed any response to the petition nor made any arguments before the court below, as a result of which the appellants claimed before the court below that they were entitled to a default judgment as against the 2nd respondent. In this appeal, however, the 2nd respondent filed a one-page submissions!

The learned Judge (Lenaola, J - as he then was) considered the petition and the rival submissions by the parties and found, with regard to the last issue that the 1st and 3rd respondents having put up a strong challenge to the petition, he was bound to consider the petition on its merits in the context of the entire case based on the totality of the evidence; and that to isolate the 2nd respondent and enter judgment against him would be unjust and prejudicial to the case of the 1st and 3rd respondents.

Turning to substance of the petition, the learned Judge was of the view that although the appellants sought numerous prayers, the gravamen was only whether or not the imposition of VAT on raw and packing materials for purposes of manufacturing medicine by the 1st appellant was lawful; and that all the other issues, including alleged violation of the appellants rights under **Articles 19, 27, 40** and **47** of the Constitution, rotated around that single question.

Having expressed the belief that his role was confined to that solitary question, the learned Judge asked

the all-important question; whether, prior to the enactment of the VAT Act, 2013, the 1st appellant was exempted from payment of VAT for raw and packaging materials for medicaments, and as a corollary to that, whether **Section 7** of the VAT Act, 2013, was enacted in violation of the Constitution by purporting to remove exemption on import VAT; whether the said exemption constituted property; and whether the 2013 enactment had the effect of taking away the right to property which had accrued to the appellants.

To those questions, the learned Judge agreed with the position held by the respondents and came to the ultimate conclusion that for the period under review, between January 2008 and November 2013, the 1st appellant was neither exempted from paying VAT under the 2nd and 3rd Schedules nor was it a privileged person under Part A of the Eighth Schedule or were the goods it imported listed as zero-rated under Part B of the Eighth Schedule to the repealed VAT Act; that, although there was evidence suggesting that there was legal basis for VAT exemptions during the material time, there was no evidence that those legal provisions applied to the kind of goods the 1st appellant imported. Instead the learned Judge was convinced that the post-clearance audit established that during the period in question, the 1st appellant had been declaring imports of its raw material as VAT exempt without basis.

Drawing a parallel, the learned Judge noted that, with the enactment of the Value Added Tax (Amendment) Act No.7 of 2014, the law today is different from the law during period under consideration. By **Section 2 (v)** thereof the following pharmaceutical raw materials are, upon meeting certain conditions exempted.

Inputs or raw materials (either produced locally or imported) supplied to pharmaceutical manufactures in Kenya for manufacturing of medicaments, as approved from time to time by the Cabinet Secretary for National Treasury in consultation with the Cabinet Secretary responsible for health.

The learned Judge concluded the judgment as he ultimately determined the dispute before him with the following statement;

....having held that there was no right to VAT exemption as

contended by the Petitioners, no constitutional rights can accrue either and I do not see any reason to determine all the above issues. Had I however found otherwise, then there would have been value in doing so.....

.....Inspite of my holding as above, there was an issue that disturbed me throughout the consideration of this matter. Why did it take the 3rd Respondent such a long time to discover that import VAT was not being paid by the 1st Petitioner? It will be noted that he only sought a desk audit for 5 years because Section 135(3) of the East African Community Customs Management Act, 2004 states as follows;

„The proper officer shall not make any demand after five years from the date of the short levy or erroneous refund, as the case may be, unless the short levy or erroneous refund had been caused by fraud on the part of the person who would have paid the amount short levied or to whom the refund was erroneously made, as the case may be.?

It is obvious from the documents placed before me that in fact the 1st Petitioner had not paid import VAT since Item 26 of Part B to the Third Schedule was introduced in 1995. There is no evidence that the 1st Petitioner fraudulently acted not to pay the tax and it may well have acted in error and a misapprehension of the law but why did the 3rd Respondent act as he did? The hardship caused to the 1st Petitioner is obviously heavy but the remedies sought cannot assuage its pain. In saying so, I am aware of a similar situation in Commissioner of Customs & Others vs Amit Shok Doshi (supra) where the Court of Appeal approved the following statement by Georges CJ in Tarmal Industries Ltd vs Commissioner of Customs and Excise [1968] E.A. 471.....

....the sum demanded of the 1st Petitioner is indeed high and no

business entity, however successful, will find it easy to pay. If so, let parties negotiate a less stressful approach to the issue including seeking waivers and payments by instalments.

As for the Petition before me, I have said why it cannot succeed. It is hereby dismissed and as for costs..... Let each party therefore bear its own costs?.

The appellants have been aggrieved by the dismissal of the petition and now bring this appeal, once more, on a whooping 41 grounds of appeal which were however condensed in the written submissions and argued broadly in nine (9) clusters, which we further summarize as follows. As we did with the prayers in the petition we must remind counsel of the need to comply with the rules of this Court in formulating grounds of appeal. **Rule 86** of the Court of Appeal Rules direct that the grounds should be concise, without repetition, argument or narrative. This court has on numerous occasions reminded practitioners of the need for focus and brevity, warning that unduly wordy and expansive grounds of appeal serve only to obfuscate the issues. See **Nancy Kahoya Amadiva v Expert Credit Limited & Another**, Civil Appeal No. 133 of 2006.

To the substance of the appeal, the appellants have complained through their written submissions that the learned Judge failed to analyze the evidence before him and ignored the fact that by removing exemption on import VAT on the raw and packaging material, the VAT Act, 2013 deprived the appellants of a property it had enjoyed under **Article 40** over the years; and that by re-introducing exemption on such goods in the VAT (Amendment) Act, 2014 the State in fact recognized the fact that the earlier exemption constituted property which had been improperly and arbitrarily taken away by VAT Act, 2013; that it was erroneous for the learned Judge to ignore the persuasive decisions of the European Court of Human Rights on the concept of “property” and as a result arrived at a mistaken decision that the VAT Act, 2013 was not *ultra vires* **Article 40 (3)**; that instead the learned Judge adopted a narrow concept and definition of “property”; that the impugned judgment did not consider **Article 47** of the Constitution on fair administrative action; that the learned Judge in error did not find that the VAT Act, 2013 discriminated against the appellants as well as other local pharmaceutical manufacturers in Kenya by requiring them to pay VAT on imported raw and packaging material, while exempting foreign manufacturers of those items; that the court below ought, in the circumstances of the case, to have found that there was estoppel, the law having previously exempted the appellants from payment of VAT, the State could not take away that benefit by a subsequent enactment; and finally that, although it was shown that the guarantee to the highest attainable standard of health under **Article 43** was infringed, the court below ignored that fact.

In opposing the appeal the respondents submitted that the appeal lacks merit and ought to be dismissed with costs for the reasons that during the period in question the 1st appellant never paid VAT on its pharmaceutical raw material imports, and that it was never exempted by any law from doing so; that in fact under **section 9 (1) (c) and (d)** of the VAT Act, 2013 the 1st appellant was required to pay for such goods; that it was clear from the post-clearance audit that the 1st appellant owed the 1st respondent, in VAT arrears Kshs 43,579,768/=; that the exemption the appellants were relying on was issued in 1995 in Kenya gazette notice number 343 of 19th October, 1995 and was only in respect of duty under the Customs and Excise Act and not in respect of import VAT; that tax policies keep changing depending on the Government's economic and fiscal goals hence it cannot be argued that merely because the VAT (Amendment) Act, 2014 today exempts pharmaceutical manufacturers from VAT on imported or local raw materials that, that in itself was an admission that VAT under the VAT Act, 2013 was in error; that although tax is a burden, an exemption from it is not property; that discrimination, as defined and understood in law, allegedly committed against the appellants in favour of foreign manufacturers, was not proved; and that the exemption of foreign manufacturers was informed by the Government's policy to encourage and increase direct foreign investment in the country.

On the demand that default judgment ought to have been entered against the 2nd respondent, it was contended that from the position advanced in the case by the 1st and 3rd respondents, no useful purpose would be served by a default judgment, since the 2nd respondent was only joined in the suit as the

principal advisor to the Government. On the argument that the 1st appellant was not heard before the demand notice was issued, it was argued that there was no requirement for a notice before demanding the VAT that was due and owing since VAT was a „self-declared? tax, triggered by the importer. As such a demand letter from the collector was sufficient.

Finally the respondents submitted that concepts like estoppel and legitimate expectation cannot be raised against clear provisions of the law and the fact that the respondents took long to demand from the appellants VAT did not amount to acquiescence nor did it preclude them from making a demand, so long as it was done within five (5) years of the tax falling due.

Our duty on first appeal has been stated nearly in every appeal that has come before this Court and is summarized by this oft-cited passage from the opinion of Sir Clement de Lestang V-P in **Selle & another v Associated Motor Boat Company Ltd & others** (1968) E.A.123:

I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always In particular this

court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (ABDUL HAMEED SAIF V. ALI MOHAMED SHOLAN (1955), 22 E.A.C.A. 270).?

Our duty in line with the foregoing is to re-evaluate the evidence that was presented before the learned Judge, on the basis of which he arrived at the impugned judgment. We are to re-assess that evidence and arrive at our own independent conclusion.

According to the learned Judge, the only question raised in the dispute was whether or not the imposition of import VAT on raw and packing materials for purposes of manufacturing medicine by the 1st appellant was lawful. We ourselves think that the questions were, first whether the 1st appellant was exempted from the application of the law requiring payment of VAT on its imports, and secondly, whether by the enactment of VAT Act, 2013 and the demand to the 1st appellant to pay Kshs. 43,579,768/= in import VAT arrears amounted to violation of its right to property.

The complaint about the learned Judge's failure to enter judgment against the 2nd respondent is not as central as the two questions we have identified. For the reason that it is an easier question, we shall dispose it right away. We have said earlier that although the 2nd respondent did not participate in the proceedings before the court below, it has filed in this appeal a one page submissions, essentially arguing that the office of the Attorney General was not responsible for the enactment of the VAT Act, 2013; and that the imposition of tax cannot amount to arbitrary deprivation of property. As the principal legal adviser to the Government, by **Article 156** of the Constitution the Attorney General represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. **Section 12** of the Government Proceedings Act, also confirms this by stating that;

12 (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.

In all civil proceedings by or against the Government, the courts , have power to make all such orders as they would make in proceedings between subjects *inter se*. The amended petition in its introduction described the capacity in which all the parties except the Attorney General, were sued, though named as

the 2nd respondent. The prayers against the 2nd respondent (erroneously described as 1st respondent) are so closely intertwined with those against the 1st and 3rd respondents that we do not see how a default judgment would be entered against one in isolation of the other two. We reiterate that the 2nd respondent was joined in the matter on behalf of the national Government. But of greater significance is the fact that the petition was brought pursuant to the enforcement provisions of the Bill of Rights under **Article 22** which are governed by special rules made under **Sub-Article (3)**. In accordance with that Article, Legal Notice No.117, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, (the Mutunga Rules) were promulgated. Under those rules, where a petition has been served upon the Attorney General, within 14 days of such service he must respond to the petition by way of a replying affidavit. The consequences of failure to reply or reply within the stipulated period is spelt out in Rule 16 as follows;

16. (1) If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent's absence.

There is no doubt therefore that in the enforcement of constitutional rights and fundamental freedoms, the rules do not provide for default or interlocutory judgment as does the Civil Procedure Rules. Instead encourages determination of any violation or threatened violation on merit through a hearing irrespective of the form it takes.

We turn to the substantive grounds. The appellants' case can be summarized thus. That over the years, since the 1960s, as a financial incentive to local pharmaceutical manufacturers, the Government of Kenya granted exemption from payment of customs duty and import VAT on imported raw and packaging material. Specific to this dispute the appellants argued that they have enjoyed this incentive since 1988. Through these incentives, the appellants contended, that the Government created a legitimate expectation that they would have a secure investment in the pharmaceutical industry in Kenya. But through the VAT Act, 2013 the Government purported to withdraw those incentives by requiring local pharmaceutical manufacturers to pay import VAT for the raw material they required for the manufacture of medicaments; that in the result, the Government was estopped from demanding any arrears from the 1st appellant for the period 1st January, 2008 and August, 2013; that in reliance on the exemption the appellants invested in a medicine manufacturing factory believing that they would continue to enjoy the incentive; that **Article 47 (1)**, which requires the Government to take administrative action which is lawful, reasonable and procedurally fair was also infringed; and that demanding import VAT five years after it is alleged to have fallen due, was neither reasonable nor fair.

The burden of proving, on a preponderance of evidence, the existence of these facts rested on the appellants. To demonstrate that it enjoyed the exemption, the 1st respondent cited **section 8 (2)** of the VAT Act and the Fifth Schedules (Part B), both of which deal with zero-rating. **Section 8(2)** stated that;

8 (2). (2) A supply or importation of goods is zero-rated by virtue of this section if the goods are of the description for the time being specified in the Fifth Schedule or Part A and Part B of the Eighth Schedule or the supply is of a description so specified."

Sub-section 1 of section 8 describes zero-rating as;

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then no tax shall be charged on the supply, but it shall, in all other respects, be treated as a taxable supply and accordingly the rate at which tax is treated as charged on the supply shall be nil?
(Our emphasis).

The zero-rating would only apply;

(3) if the goods or services are of the description for the time being specified in Part A of the Fifth Schedule or imported or purchased by persons specified in Part C of the Eighth Schedule. (our emphasis)

It is clear to us, on the plain reading of these provisions and from the concession by the respondents, that when these provisions were in force, though the goods in law attracted tax, in terms of **section 8 (1)** aforesaid, the 1st appellant was not required to pay import VAT since the goods were among those zero-rated for the period between 1995 and 2000. The Eighth Schedule Part B item 22 indeed specified for the zero-rating “*raw materials for manufacture of medicaments*”. There was evidence that this incentive was removed in 2001 by the enactment of the **Finance Act No. 6** of 31st December, 2001 which deleted Part B item 22 thus making “*raw materials for the manufacturing of medicaments*” subject to import VAT with effect from 15th June, 2001. From this date on until 2013, raw and packaging materials for this purpose ceased to be zero-rated but were subject to payment of VAT at the rate of 16%, or any other rate determined by the relevant body. Any VAT refunds, therefore, made to any pharmaceutical manufacturer in respect of these items during that period, if at all were in error and were, for that reason recoverable.

Having thus come to the conclusion, just like the learned Judge, that the 1st appellant was not entitled to an exemption or zero-rating on its imported raw materials from the year 2000, the next question is with regard to the demand issued to it for payment of Kshs.121,660,538/=, which, as we have indicated earlier was subsequently corrected and reduced to Kshs.43,579,768/= in unpaid import VAT for the period between January, 2008 and 2013. The basis of this demand, to our mind is **section 68** of the transitional and saving provision of the 2013 Act which stipulates that;

(1) The Value Added Tax Act (Cap. 476) is repealed.

(2) Notwithstanding the repeal of the Value Added Tax Act, the provisions of that Act shall remain in full force and effect for the purposes of the assessment and collection of any tax and the recovery of any penalty, payable under the Act and outstanding at the date upon which such repeal becomes effective?.(Our emphasis)

Furthermore **section 135 (1)** of the East African Community Customs Management Act, 2004 mandated the respondents, where any duty was short levied or erroneously refunded, to demand payment or a refund, as the case may be, from the person who should have paid the amount or to whom a refund was erroneously made. Such a person is required to pay the amount due upon receipt of the demand. The amount due is deemed to be due on the date on which the demand note is served upon him or her. The demand note must be followed by payment within thirty days of the date of such service, failing which a further duty of a sum equal to five percent of the amount demanded would be due and payable by that person by way of a penalty and a subsequent penalty. But no such demand may be made after five years from the date of the short levy or erroneous refund, as the case may be, unless the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made, as the case may be.

Having laid the basis for the demand we turn to the question whether that demand amounted to a deprivation of an accrued right to property; a deprivation that threatened the very existence of the 1st appellant and the entire pharmaceutical manufacturing industry in the country that had relied on the exemption in their businesses of manufacturing of human medicines. The appellants have also argued that the demand for payment of Kshs. 43,579,768/= in VAT arrears was unconstitutional, null and void as it offended the appellants' legitimate expectation; and that the State was estopped from going back on the assurance that the appellants would continue to enjoy the exemption; that the appellants' right to equality and freedom from discrimination under **Article 27**, the right to fair administrative action guaranteed by **Article 47**, and the principles and framework of public finance provided for in **Article 201** were infringed.

Even as we consider these issues, our earlier determination that the appellants were not entitled to any exemption during the period under consideration must be borne in mind. The resolution of this aspect of the appeal depends on the construction and meaning of the concept of “property” as a constitutional right. The Right to property is guaranteed by **Article 40** and “property” is defined in **Article 260**. We reproduce in pertinent parts of the two provisions here below;

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is

(c) carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.....

Property, on the other hand is defined to include;

260..... any vested or contingent right to, or interest in or arising from-

(a) land, or permanent fixtures on, or improvements to, land; (b) goods or personal property;

(b) intellectual property; or

(c) money, choses in action or negotiable instruments?

(Emphasis).

Property in the context of the Constitution therefore takes many forms. We have been urged in this appeal to find that the trial court erred in failing to recognize that the exemption from payment of tax that the 1st appellant had enjoyed over the years constituted property; and that the rendering idle of the 1st appellant's factory due to the effects of the „reintroduction? of import VAT amounted to arbitrary deprivation of property in breach of **Article 40**. Counsel on both sides relied on numerous but useful foreign as well as local authorities to persuade us on this point. We have definitely considered those authorities in arriving at our ultimate determination even if we have not specifically cited all of them in this judgment. In considering authorities from foreign jurisdictions, bear in mind this caution by the Supreme Court in S. C. Pet. No.13A Consolidated with Nos. 14 & 15 of 2013, **Judges & Magistrates Vetting Board & 2 Others v The Centre for Human Rights and Rights and Democracy & 11 Others**.

[218] Although certain jurisdictions, such as India and Germany, have perceived judicial review as an immutable structure of their Constitutions, these jurisdictions do not have Constitutions that are as unique as Kenya's. We must ask whether the foreign jurisdictions

we seek reliance upon, have Constitutions and, if they do, whether these Constitutions have provisions akin to Articles 1, 23, 159 and 259 which emphasize the sovereignty of the people; or whether they have principles and values, like the ones found in Article 10, which apply to the interpretation and application of the Constitution; or whether they have legislation similar to our Supreme Court Act, which introduces Kenya's historical context into the interpretation of the Constitution. If the answers to these questions are in the negative, then the common law doctrines found in other jurisdictions, foreign cases and foreign constitutions, must be interpreted in such a manner as to reflect our modern Constitution, and our unique conditions and needs.?(per Mutunga C.J).

We cannot deny but, with respect agree with the holding by the European Court of Human Rights in **Intersplav v Ukraine** (2007, Application No. 803/02) that a refund of VAT would amount to an entitlement, the arbitrary deprivation of which would amount to a violation of right to property. In our view the clear distinction is that what the 1st appellant enjoyed up to 2000 was a tax incentive, enjoyed subject to the Constitution and the law. 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. We reiterate that the benefit the 1st appellant claims to have been entitled to was terminated in the year 2000. There has been no dispensation since then until 2014 with the passage of VAT (Amendment) Act, 2014. The appellants have failed to demonstrate to us that they enjoyed any exemption or zero-rating on their imports after this period.

The argument that the 2014 amendment to the VAT Act was a corrective measure informed by the realization by the State that the 2013 Act took away proprietary rights of the local pharmaceutical manufacturers, is short of truth and is fallacious. The truth of the matter is that one of the characteristics of a tax system is flexibility; one which easily responds to changes in the economy and the Government's economic and fiscal goals. We believe that there were fiscal conditions prevailing in 2014 and the changing circumstances that necessitated those amendments of 2014. One such obvious circumstance, in our view was the Constitution of Kenya, 2010 where, for example **Article 201** enjoins the Government in matters of public finance, to, among other considerations, promote an equitable society by fair sharing of the burden of taxation. If indeed, as argued by the appellants, the amendments were introduced to right a wrong committed against pharmaceutical manufacturers by the 2013 Act, nothing could have been easier than to provide for a relief in those amendments in the form of a refund to correct those so-called wrongs.

In that sense and in the circumstances of this appeal, we, with respect agree with the learned Judge that a dispensation extended in form of exemption or zero-rating in tax "for the time being" cannot constitute a justiciable right. If It is subsequently taken away. The complaint raised in the petition, in that sense, did not meet the constitutional muster of the concept or definition of "property" under **Articles 40** and **260**. The decision in **Intersplav v Ukraine** (supra) dealt with the question of tax refund, in which case the claimants were merely seeking to be paid back by the their Government what it had (wrongfully) received from them . A debt owed to them; a chose in action, as opposed to a situation like ours where the appellants themselves owed the State tax in arrears.

The appellants made two closely linked arguments to which we now turn, even though we have determined the question of appellants' alleged violation of the right to property. The first argument was that, the State was estopped from enacting a law whose effect was to remove the import VAT exemption. Although the appellants themselves have, correctly conceded in their submissions that there cannot be an estoppel against a statute, they maintained, again quite correctly, that, in terms of **Article 2 (4)** of the Constitution no law can be passed in contravention of the Constitution. In **Henry Muthee Kathurima v Commissioner of Lands & Another**, Civil Appeal No. 8 of 2014 the Court reiterated what, in our view is a settled principle that;

....estoppel cannot be used to circumvent Constitutional provisions and estoppel cannot

override express statutory procedures; there can be no estoppel against a statute. (See Tarmal Industries Ltd. – v- Commissioner of Customs & Excise, (1968) E. A. 471; see also Maritime Electric Co. Ltd. v General Dairies Ltd. (1937) 1 All ER 748).

The appellants also submitted that by requiring them to pay Kshs. 43,579,768/= in tax arrears, and to continue to pay import VAT going forward, after not paying VAT for over 23 years offended their legitimate expectation that the *status quo* would remain constant. The combined effect of the decisions in, **Keroche Industries Ltd v Commissioner General of Kenya Revenue Authority & Others (2007) KLR 240** and **Communication Commission of Kenya & 5 others v Royal Media Services & 5 others, S. C. Petition Nos. 14, 14 A, 14 B and 14 C of 2014** in a series of others, is that before a person can rely on the doctrine of legitimate expectation, that person must demonstrate that there was an express, clear and unambiguous promise; that the promise was not kept; that as a result, the decision made in breach of that promise affected him by depriving him of some benefit or advantage which either;

(i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or

(ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

The expectation must itself be legitimate, reasonable and not contrary to the express provisions of the law.

We can only add to this, what HWR Wade & C. F. Forsyth in their well- known text, ***Administrative Law***, 10th Edn (2009) p. 449, said on this point; that,

?It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law.?

These strictures were not met in the petition. For example there was no promise or assurance by the State to the 1st appellant that VAT would not be adjusted. Whatever exemption the 1st appellant enjoyed, it was expressly for the time being in terms of **Sections 8 (1) (2) & (3)** of the VAT Act. No such a promise could be made in view of the opinion we have earlier expressed regarding the dynamics of tax law. And if the 1st appellant nursed such an expectation then it was not only mistaken but also unreasonable since the legislative authority resides in the Parliament, and so long as that mandate is discharged in accordance with the Constitution, it cannot be challenged.

For these reasons the reliefs of *certiorari*, mandamus or prohibition were not available to the appellants.

We think we have demonstrated that this appeal lacks merit and is for dismissal. We uphold the determination of the trial court and dismiss the appeal with costs. It is so ordered.

Dated and delivered at Nairobi this 10th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

K.M'INOTI

.....

JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR