



**Kamau & 33 others v Commissioner General and another & another (Petition E161 of 2022)  
[2025] KEHC 9039 (KLR) (Constitutional and Human Rights) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9039 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E161 OF 2022  
LN MUGAMBI, J  
JUNE 26, 2025**

**BETWEEN**

**FAITH KAMAU & 33 OTHERS & 33 OTHERS & 33 OTHERS ..... PETITIONER**

**AND**

**COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 12<sup>th</sup> April 2022 is supported by the affidavit of the 18<sup>th</sup> Petitioner, Mary Wangui Mwangi of similar date and a further affidavit dated 22<sup>nd</sup> May 2022.
2. The Petition majorly challenges the 1<sup>st</sup> Respondent's decision dated 17<sup>th</sup> July 2020 to apply excise duty on the Petitioners' water refilling businesses.
3. According to the Petitioners, the 1<sup>st</sup> Respondent's decision is arbitrarily in that it unlawfully expands the meaning of manufactured excisable goods beyond what is contemplated by the *Excise Duty Act*. As a result, the Petitioners argue that the 1<sup>st</sup> Respondent's action is in violation of their rights under Article 10, 27, 47, 201 (b)(i) and 210 (1) of *the Constitution*.
4. Accordingly, the Petitioners seek the following remedies against the 1<sup>st</sup> Respondent:
  - i. A declaration that the Public Notice issued on 17<sup>th</sup> July 2020 by the 1<sup>st</sup> Respondent is illegal, unlawful unconstitutional and contravenes the provisions of Article 10, 27, 47, 201 (b)(i) and 210 (1) of *the Constitution* and as such null and void ab initio.



- ii. A declaration that the 1<sup>st</sup> Respondent classifying water refilling as manufacturing subject to the imposition of Excise Duty under Section 5 of the *Excise Duty Act* is unlawful and contravenes the provisions of Article 201 (b)(i) and 210 (1) of *the Constitution* and as such null and void ab initio.
- iii. A declaration that the subsequent actions by the 1<sup>st</sup> Respondent in imposing the requirement of an excise license on water refillers is in contravention of Section 15 of the *Excise Duty Act* and the provisions of Article 201 (b)(i) and 210 (1) of *the Constitution* and as such null and void ab initio.
- iv. A declaration that the Petitioners constitutional rights of having their property not arbitrary seized as guaranteed under Article 31 (b) and 40 of *the Constitution* has been violated and infringed by the 1<sup>st</sup> Respondent.
- v. Reinstitution of the water tanks, water refilling machines and any other asset that the 1<sup>st</sup> Respondent has unlawfully seized in the enforcement of the impugned and unlawful Public Notice of 17<sup>th</sup> July 2020.
- vi. General damages for illegal seizure, closing of the Petitioners shops and unlawful imposition of excise duty and fines on the Petitioners.
- vii. An order of prohibition be issued restraining the 1<sup>st</sup> Respondent whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the implementation, further implementation, administration, application and/or enforcement of the Public Notice issued on 17<sup>th</sup> July 2020 by imposing fines, seizing water refillers assets or requiring water refillers to obtain an excise license to operate a water refill shop.
- viii. The costs consequent upon this Petition be provided for.
- ix. Any other remedy or such other orders as this Court may deem just and expedient in the circumstances to remedy the violation of the Petitioners fundamental constitutional rights and freedoms.

### **Petitioners' Case**

5. The Petitioners stated that they engage in the business of procuring/buying purified water from water purification companies and selling/vending that water to their customers via a water -ATM machines. To get the service, customers are usually required to go with their own water bottles or containers for refilling from the water ATM machine and are billed according to the number of litres of water sold.
6. The Petitioners put it clearly that they do not undertake the purification process. They explained that instead water purification companies using their water bowsers transfer the purified water into their tanks from which they would now sell the water to the individual customers through the water ATMs'.
7. The Petitioners maintained that they are not involved in the process of manufacturing or purification of the water and thus do not fall under Section 2 of the *Excise Duty Act*.
8. The Petitioners complained that the 1<sup>st</sup> Respondent in a public notice dated 17<sup>th</sup> July 2020 announced as follows:

Excise Duty On Water Refill

Public Notices 17/07/2020



Kenya Revenue Authority (KRA) has noted cases of persons engaging in the business of water refilling who are not licensed and who are not charging and remitting excise duty as required by the law.

KRA wishes to remind all persons who are engaged in the business of bottling (including through refilling) or packaging water that they are required to obtain an excise license from KRA and also charge and remit excise duty as required by the law.

Further, they are also reminded that they are required to affix excise stamps on each bottle that has been refilled or packaged.

It is important to note that, it is an offence to manufacture excisable goods without an excise license and it is also an offense to be found in possession of, purchase or offer for sale excisable goods that have been manufactured by unlicensed persons and on which excise stamps have not been affixed or on which counterfeit stamps have been affixed.

9. It is stated that the 1<sup>st</sup> Respondent then proceeded to levy and impose fines on water refilling vendors on the basis that they manufacture water and so should obtain an excise license.
10. The Petitioners contend that the 1<sup>st</sup> Respondent in doing so expanded the meaning of the word ‘manufacturer’ to include water vendors/retailers.
11. The Petitioners depone that the 1<sup>st</sup> Respondent further sealed and locked their retail stores and seized their tanks and refilling machines until the excise license is procured.
12. The Petitioners maintain that they are not subject to the Excise Duty Act since they are not manufacturers within the meaning of Section 5. According to them, imposition of the excise duty violates their right under Article 210 of the Constitution because:
  - a) they do not manufacture water but buy already purified water.
  - b) they do not bottle or package water as defined in the First Schedule of the Excise Duty Act.
13. In this regard, the Petitioners contend that the 1<sup>st</sup> Respondent has indiscriminately arrogated unto itself legislative mandate to unconstitutionally alter the meaning of word ‘manufacture’ under the Excise Duty Act.
14. In addition, the Petitioners contend that imposition of the excise duty discriminates against their business contrary to Article 27 of the Constitution. This is because imposing an excise duty of Kshs. 5.47 which is more than the cost of purchasing and reselling the water, is prejudicial to the Petitioners economic rights and a punitive tax regime.
15. In like manner, the Petitioners contend that the 1<sup>st</sup> Respondent’s actions also violated their rights under Article 10, 40, 47 and 201(b)(i) of the Constitution. The Petitioners thus urge this Court to find that the impugned decision by the 1<sup>st</sup> Respondent to be unlawful and unconstitutional.

### **1<sup>st</sup> Respondent’s Case**

16. In response to the Petitioners’ case, the 1<sup>st</sup> Respondent filed grounds of opposition dated 12<sup>th</sup> May 2022 and a Replying Affidavit by its officer, Susan Kairu sworn on 23<sup>rd</sup> May 2022 and 20<sup>th</sup> July 2022.
17. The grounds of opposition are on the basis that:
  - i. The process undertaken by the Petitioners is considered manufacturing under the Section 2 of the Excise Duty Act, No. 23 of 2015.



- ii. Levying of excise duty is pursuant to *Excise Duty Act* enacted by the Parliament.
  - iii. Before any taxes can be levied, Parliament has to approve and the same has been approved.
  - iv. It will create unfair competition to people already paying excise duty.
  - v. The Public Notice is therefore not unconstitutional and the prayers being sought by the Petitioners cannot and ought not be granted by the Court.
18. The 1<sup>st</sup> Respondent through Susan Kairu deponed that in June 2021, the 7<sup>th</sup>, 13<sup>th</sup>, 17<sup>th</sup>, 24<sup>th</sup>, 26<sup>th</sup>, 33<sup>rd</sup> and 34<sup>th</sup> Petitioners were issued with a notice of offence as they did not have an excise license and excise stamp on their goods. It is claimed that these Petitioners admitted to the offence and sought to have the matter resolved under Section 109 of the *Tax Procedures Act* wherein any order issued by the 1<sup>st</sup> Respondent is final.
19. Consequently, the Petitioners filled Form C under the Section 109 thus admitting the offences under Section 28, 40 and 41 of the *Excise Duty Act*. The 1<sup>st</sup> Respondent thereafter made an Order for settlement and compounded the offence as required. Subsequently in effect, the Petitioners were also issued with seizure notices in enforcement of the relevant provisions of the Act.
20. It is noted that these facts were not disclosed by the Petitioners in the instant Petition thus they are guilty of material non-disclosure. The Petition is therefore argued to have been brought in bad faith.
21. It was contended that Section 2 of the *Excise Duty Act* indicate excisable goods as listed in the First Schedule and it includes manufactured water that is bottled or packaged. She asserted that the Petitioners water businesses carry out water refiling which falls under this scope.
22. She stresses that the 1<sup>st</sup> Respondent cannot therefore exempt the Petitioners in this regard while the rest of businesses in this line are subjected to excise duty. She depones that the Petitioners are required to obtain an excise license under Section 15(1) (a) of the *Excise Duty Act*.
23. It is argued that contrary to the Petitioners' belief, the impugned notice did not introduce excise duty, only made aware that water refillers and packaged refills are required to comply with the *Excise Duty Act* which has always been in force and thus compliance was required. It is noted that the Petitioners have not challenged its provisions or whether the same was subjected to public participation.
24. While the Petitioners claim that they only refill water in customers bottles, she avers that the *Excise Duty Act* does not specify who should provide the packaging. Moreover, the Petitioners allegations of the duty being prejudicial is deemed to be illogical as excise duty is a consumption tax passed on to the customer not the business owner. In light of the foregoing averments, she maintains that the 1<sup>st</sup> Respondent's actions were in line with the law and equally did not violate the Petitioners' rights.
25. Furthermore, it is asserted that the instant suit is a tax dispute and hence the appropriate forum to determine the dispute is the Tax Appeals Tribunal as empowered under the *Tax Appeals Tribunal Act*. Considering this, she emphasizes that the Petitioners failed to exhaust this mechanism as is required under Section 9(3) of the Fair Administrative Actions Act.

## **2<sup>nd</sup> Respondent's Case**

26. In response to the Petition, the 2<sup>nd</sup> Respondent filed Grounds of Opposition dated 25<sup>th</sup> April 2022 on the basis that:
- i. The Notice of Motion has not met the judicially set threshold for the grant of the conservatory orders sought. This is so because:



- a. The Applicants have not demonstrated that they have a prima facie case with any chances of success;
  - b. The Applicants have no locus standi to institute the present proceedings;
  - c. The Applicants have failed to demonstrate how the grant of the orders sought would promote constitutional values and principles;
  - d. The Applicants have not demonstrated that the public interest tilts in their favour by the grant of the orders sought.
- ii. The Petitioners have misconstrued and misapplied the respective and specific constitutional and statutory mandates of the Respondents herein for reasons that, inter alia:
    - a. By virtue of Article 209 (1) of *the Constitution*, only the National Government may impose income tax, value added tax, custom duties and other duties on import and export goods, and excise tax.
    - b. They do not comprehend and appreciate the role of Parliament to enact legislation imposing tax or licensing fee pursuant to Article 10 of *the Constitution*.
    - c. They do not comprehend and appreciate the statutory and legal mandate of the National Treasury and Kenya revenue Authority under the various enabling and applicable statutes.
  - iii. The Petitioners have not rebutted the general presumption of constitutionality that is enjoyed by the impugned notice which draws from the powers donated by the *Excise Duty Act*, 2015 as amended by Section 32 of the Finance Act.
  - iv. The impugned notice, Notice Number 17/07/2020 was issued strictly in accordance with the applicable laws and *the Constitution*.
  - v. Suspending and/or temporarily barring the implementation of the impugned notice at an interlocutory stage would be tantamount to undoing the legislative will of the people through Parliament in exercise of its delegated sovereign power.
  - vi. The meaning and purport of the nature of the works undertaken by the Petitioners falls squarely within the ambit of the definition of the word "manufacture" under Section 2 of the *Excise Duty Act*, 2015 and that of the Black Laws Dictionary.
  - vii. Pursuant to Sections 15, 16 and 17 of the *Excise Duty Act*, 2015, the Kenya Revenue Authority has the requisite mandate to licence manufacturers and any other persons dealing in excisable goods.
  - viii. It is a well settled judicial principle of law that difficulty in complying with a particular law does not render such a law unconstitutional.
  - ix. The actions of the Respondents being complained of by the Petitioners do not constitute a breach of any of their rights and/or fundamental freedoms under *the Constitution* or any other law.
  - x. The current Petition has not been pleaded with specific particularity. It certainly falls short of the threshold as was set out in the case of Anarita Karimi Njeru and Mumo Matemu. It should be struck out in limine.



- xi. The reliefs sought by the Petitioners are unjustified, the same are ambiguous and cannot be lawfully explained. It is impracticable for the Petitioner to urge this Court to permanently bar the Respondents from implementing a lawfully enacted legislation. Such a prayer is unconstitutional.
- xii. The application and Petition are speculative and repulsive to the constitutional ideals of good governance, effective and efficient administration of justice as well as service delivery to the members of the public by the Respondents herein.
- xiii. The orders sought by the Petitioners/ Applicants, if granted, would stand to hamper the constitutional and statutory mandate of the Respondents herein and this Court should strongly guard against issuance of the same.
- xiv. The 2<sup>nd</sup> Respondent posits that the Petition and accompanying Application as filed lacks merit, is an abuse of this Court's process and the same should be dismissed with costs.

### **Petitioners' Submissions**

- 27. MMW Advocates LLP for the Petitioners filed submissions dated 21<sup>st</sup> September 2022. Counsel identified the issues for determination as: whether this Court has jurisdiction to determine the question of unconstitutionality of the impugned notice, whether the 1<sup>st</sup> Respondent can expand the provisions of a Statute and whether the impugned notice in varying the *Excise Duty Act* is unconstitutional.
- 28. On the first issue, relying in Article 165(3) of *the Constitution*, Counsel submitted that this Court is the one vested with the jurisdiction to determine whether a right or fundamental freedom has been violated and to hear any question on whether any law or any action is inconsistent with *the Constitution*, not the Tax Appeal Tribunal as advanced by the 1<sup>st</sup> Respondent. According to Counsel the dispute before this Court is not a tax assessment dispute which is classified as a tax decision but a question of constitutionality of the 1st Respondent's action.
- 29. Reliance was placed in *Keroche Industries Limited V Kenya Revenue Authority & 5 Others* [2007] eKLR where it was held that:

“The Respondents argument that the applicant should not have come to court before exhausting the internal objection arrangements in respect of each tax regime should also be considered from the standpoint of the rule of law...the right of access to court is a fundamental principle and cannot be taken away except in exceptional cases. It is the basis of an orderly society and the rule of law. The rule of law is the cog upon which all the provisions of *the Constitution* turn...I hold that the public bodies decisions and activities should always turn on this cog as well, failing which the courts are entitled to intervene where this is overlooked...While this court has due deference to the Tribunals, the applicant in this matter had a genuine apprehension that the Respondents were bent to take drastic actions against it, in a manner contrary to the applicable law and they were just about to abuse their powers. These are certainly not issues the Tribunals would have had the competence or jurisdiction to deal with, determine or give relief. I reject the argument that the applicant came to the court prematurely. It was under a threat which only this court could prevent or avert. It is for the courts of law to define the limits of their competence. Even in the field of tax law judicial issues cannot be left to the tax bureaucrats. If the courts were to do this, it would be serious abdication of their core role or duty.”



30. Turning to the second issue, Counsel submitted that answering this issue requires application of the canons of statutory interpretation. In Counsel's view, Section 5 of the [Excise Duty Act](#) provides that excise duty is to be imposed on excisable goods manufactured in Kenya by a licensed manufacturer. Counsel reading these provisions alongside Section 2 interpreted that an excisable good must be one that is manufactured in Kenya; by a business that undertakes the function of manufacturing and that water is an excisable good only when manufactured in Kenya and bottled or similarly packaged. Counsel argued in view of this that the Petitioners are not manufacturers so as to fit within the meaning of this provision. He equally stressed that manufacturing entails refining a raw material and converting it into a product that is ready for consumption which the Petitioners do not do.
31. Reliance was placed in *Union Of India V. Delhi Cloth & General Mills Co. LTD. 1977 (1) ELT J199* where it was held that:
- “the word manufacture when used as a verb is generally understood to mean as bringing into existence a new substance and not merely to produce some change in the substance. ...
- “Manufacture implies a change, but every change is not manufacture and yet change of an article is the result of treatment, labour and manipulation. But something is necessary and there must be Transformation; A New and Different Article must emerge having a distinctive name and character or use”.
32. In light of this, Counsel submitted that the 1<sup>st</sup> Respondent in this matter cannot attempt to alter the language of the Act so as to impose an additional tax on the Petitioners. Consequently, Counsel submitted that the action by the 1<sup>st</sup> Respondent was an expansion of Section 2, 5 and 15 of the Act. Reliance was placed in *Keroche Industries Limited (supra)* where it was held that:
- “...You cannot strain the language of the Act ... in order to impose additional tax on a taxpayer as the Respondents have purported to do. It is clearly not permitted by the Act or any law including the principles of construction set out in extenso in this judgment. You cannot tax by inference or analogy. Any attempt to do so perpetrates an illegality; it is arbitrary and oppressive.”
33. Like dependence was placed in *Commissioner of Domestic Taxes v Brookhouse Schools Limited [2021] eKLR*.
34. In light of the foregoing, Counsel submitted in the next issue that the impugned Notice was in violation of Articles 1, 2, 10, 40, 47, 209 and 210 of [the Constitution](#) as the 1<sup>st</sup> Respondent expanded its mandate and the ambit reach of the [Excise Duty Act](#) which is illegal. Reliance was placed in *Real Deals Limited & 3 Others v Kenya National Highways Authority & Another & another [2015] eKLR* where it was held that:
- “Where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies...the Courts must ...be vigilant to see that the said bodies exercise those powers in accordance with the law. ...and act within their lawful authority and an act, ... The tribunals or boards ...must not misdirect itself in fact or law. ... it must operate within the law and exercise only those powers which are donated to it by the law or the legal instrument creating it.



In my view, the failure to adhere and observe the express provisions of a statute or legislative Instrument by which an authority exercises jurisdiction to make a decision would render the decision illegal and illegality is one of the grounds upon which the Court is entitled to quash a decision.

To purport to create a parallel authority when there is no express legal instrument justifying such a creation can only lead to confusion and overlapping of such roles. ...their duty must be undertaken within the law and within the statutory mandate and without trespassing to areas reserved for other state organs.

In my view the Respondents cannot be allowed to usurp the mandate and powers reserved to another state organ under the guise of collecting revenue for the country.”

35. Comparable dependence was placed in Robert N. Gakuru & others v Kiambu County Government & 3 others [2014] eKLR, Republic v Cabinet Secretary for Transport & Infrastructure Principle Secretary & 5 others ex parte Kenya Country Bus Owners Association & 8 others [2014] eKLR and Republic v Kenya Revenue Authority ex parte Amsco Kenya Limited [2014] eKLR.

### 1<sup>st</sup> Respondent's Submissions

36. On 3<sup>rd</sup> August 2022, the 1<sup>st</sup> Respondent's Counsel, Megan Muthoni filed submissions and underscored the issues for discussion as follows: whether the 1<sup>st</sup> Respondent relied on the public notice dated 17<sup>th</sup> July 2020 to charge excise duty, whether the 1<sup>st</sup> Respondent failed to follow the Law and acted outside its mandate and whether the Petitioners exhausted the alternative remedy provide by Law before seeking the Court's intervention.
37. On the first issue, Counsel submitted that the impugned Public Notice was not utilized to impose the excise duty but to make the public aware of the already existing tax in relation to excisable goods and the need to be compliant with the provisions of the *Excise Duty Act*. As such, Counsel submitted that the 1<sup>st</sup> Respondent in issuing the Notice was under a legal obligation to enforce these provisions of the law. In this case, it was noted that the Petitioners' business being manufacturing water and bottling it, it is an excisable good as provided in the First Schedule of the *Excise Duty Act*.
38. Reliance was placed Nairobi High Court Petition No.9 of 2018: in George Lesaloi Selelo vs Commissioner General KRA, CS National Treasury & 2 Others where it was held that:

“The obligation to pay tax is thus constitutional and is not open to this court to look into or question the wisdom of the legislation behind the taxation is within the ambit of Articles 209 and 210 of *the Constitution* ... ”

The Court in Nairobi High Court Petition No.302 of 2019: in KAPA Oil vs CS National Treasury & 2 Others held that:

“ ... in accordance with the doctrine of separation of powers, the court cannot in my view be invited to dictate on the Respondents on how to carry out their mandate as by doing so would go beyond its judicial role. So I find to the extent the prayers in the Petition and the petition invite the court to issue directives to the Respondents, the same offends the doctrine of separation of powers and it cannot be entertained at all...”

39. On the second issue, Counsel submitted that water refillers who package their water in bowsers or vending machines fall under the ambit of goods specified in the First Schedule of the *Excise Duty Act*. Accordingly, it was argued that the 1<sup>st</sup> Respondent cannot segment one category of taxpayers being the



Petitioners while discriminating other taxpayers by declaring the Petitioners exempt from paying this tax. Moreover, it was argued that this Section does not differentiate between who brings the packaging as implied by the Petitioners.

40. Consequently, it was stressed that the Petitioners are required to obtain an excise license under Section 15(1)(a) of the Excise Duty Act which the 1<sup>st</sup> Respondent lawfully sought to enforce.

41. To buttress this issue, Counsel cited the case of Union of India v Delhi Cloth & General Mills Co. Ltd 1977 where it was held that:

“Manufacture implies change, but every change is not manufacture and yet change of an article is the result of treatment, labour and manipulation. But something is necessary and there must be transformation; a new and different article must emerge having a distinctive name and character or use.”

42. Additional dependence was placed in Bombay High Court in Electronics Ltd V CCE 1994 (71).

43. On the final issue, Counsel submitted that the Petition is offensive to the doctrine of exhaustion as the Petitioner failed to invoke the provisions of the Tax Appeals Tribunal Act before filing this suit. Counsel submitted that Section 12 of the Tax Appeals Tribunal Act provides that any person who disputes the decision of the 1<sup>st</sup> Respondent in any matter arising under the provisions of any Tax Law may subject to the provisions of the relevant tax law upon giving notice in writing to the Commissioner appeal to the Tribunal.

44. Reliance was placed in Constitutional Petition Number. 359 of 2013-Diana Kethi Kilonzo vs. IEBC & 2 Others where it was held that:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them.”

45. Like dependence was placed in Republic v Kenya Power & Lighting Company LTD & Another [2013] eKLR and Republic v Public Procurement Administrative Review Board & Another Ex parte Gibb Africa Ltd & Another [2012] eKLR.

46. On this premise, Counsel submitted that the Petitioners were not entitled to the reliefs sought as they had failed to demonstrate that the 1<sup>st</sup> Respondent acted unlawfully or the impugned decision was irrational and unreasonable. Additionally, Counsel submitted that the Petitioners had admitted to the offences under Section 28,40 and 41, executed Form C51 under Section 109 of the Tax Procedures Act and an order issued in that regard by the 1<sup>st</sup> Respondent. As such Counsel stressed that the Petitioners are barred from seeking this Court’s intervention in view of Section 109(3) of the Tax Procedures Act.

## **2<sup>nd</sup> Respondent’s Submissions**

47. The 2<sup>nd</sup> Respondent’s submissions are not in the Court file or Court Online Platform (CTS).

## **Analysis and Determination**

48. It is my considered take that the issues that arise for determination in this matter are as follows:

- i. Whether this Court has jurisdiction to entertain this Petition.



- ii. Whether the 1<sup>st</sup> Respondent's Public Notice dated 17<sup>th</sup> July, 2020 requiring water refillers to pay excise duty contravenes Sections 2, 5 & 15 of the Excise Duty Act and Article 10, 27, 201 (b) (i) and 210 (1) of the Constitution.
- iii. Whether the Petitioners are entitled to the reliefs sought.

**Whether this Court has jurisdiction to entertain this Petition.**

49. Jurisdiction refers to the legal competence of the Court to hear and determine a dispute before it. Jurisdiction is vested upon the Court by the Constitution or legislation that defines the limits within the Court must operate. The Court has no power to act beyond or expand the scope of its jurisdiction.

50. In *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others* [2022] KEHC 26937 (KLR), the Court citing with approval a Court appeal decision explained the concept of jurisdiction as follows:

“36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...”

51. The Supreme Court, speaking on jurisdiction in the Matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR) affirmed as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.”

52. The High Court has expansive jurisdiction under Article 165(3) of the Constitution but that jurisdiction does not operate in a vacuum. It is exercised in the context of a legal system that has other mechanisms that complement each other which include alternative forms of disputes resolution that Courts are required to promote under Article 159 (2) (c) of the Constitution. Court's have thus held that where legislation provides a procedure of redressing a dispute; such procedure ought to be



pursued first prior approaching the Court for a remedy. In *Benson Ambuti Ambega & 2 Others v Kibos Distillers Limited* (2020) eKLR; the Court held thus:

“... a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institution and mechanism...”

53. It has been held severally that a party is required to exhaust all alternative dispute resolution mechanisms before filing a matter in Court as a matter of law. The Court in *John Githui v Trustees, Nakuru Golf Club* [2019] KEHC 5523 (KLR) noted as follows:

“25. There is no doubt that the doctrine of exhaustion of local remedies is one of esteemed juridical ancestry in Kenya. In *Republic v IEBC Ex Parte NASA-Kenya & 6 Others* [2017] eKLR, the Court – a three-judge bench -- described our jurisprudential policy on the doctrine of exhaustion which the Respondents raised in a bid to preliminarily swat away the Applicants’ suit in the following words:

This doctrine [of exhaustion] is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:-

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

While this case was decided before *the Constitution* of Kenya, 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others* [2015] eKLR, where the Court of Appeal stated that:-

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”



54. The Supreme Court in *Waity v Independent Electoral & Boundaries Commission & 3 others* [2019] KESC 54 (KLR) on this principle noted as follows:

“(63) Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others*; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

55. It was the 1<sup>st</sup> Respondent’s contention that the matter before the Court is in the nature of a tax dispute hence is a matter which in the first instance is within the competence of the Tax Appeals Tribunal and not this Court. It was argued by the 1<sup>st</sup> Respondent that a Party aggrieved by the decision of the Commissioner is required to issue an objection notice and if still not satisfied with the decision, proceed ventilate its grievances to the Tax Appeals Tribunal. The 1<sup>st</sup> Respondent asserted that it duly issued notices of the offence to some of the Petitioners, namely: 7<sup>th</sup>, 13<sup>th</sup>, 17<sup>th</sup>, 24<sup>th</sup>, 26<sup>th</sup>, 33<sup>rd</sup> & 34<sup>th</sup> whereby the Petitioners admitted to the offences under Section 28, 40 and 41 and executed Form C51 under Section 109 of the *Tax Procedures Act* and an order was issued in that regard by the 1<sup>st</sup> Respondent. It was thus argued that the Petitioners cannot thus seek this Court’s intervention in view of Section 109(3) of the *Tax Procedures Act*.

56. The Petitioners on the other hand argued that the dispute relates to the legality and/or constitutionality of the 1<sup>st</sup> Respondent’s decision on 17<sup>th</sup> July, 2020 that unlawfully imposed excise duty on Petitioners beyond the scope contemplated by the *Excise Duty Act* insisting that the dispute is not about the assessment of tax liability but a constitutional challenge on the 1<sup>st</sup> Respondent’s action of issuing the said notice, a matter that is outside the scope of the Tax Appeals Tribunal to determine.

57. The dispute before this Court in my humble view revolves around the question of whether the 1<sup>st</sup> Respondent acted within its mandate under *Excise Duty Act* in reaching the decision that applied the provisions of the *Excise Duty Act* on water refillers. That to me is the gravamen of this Petition. The question therefore is whether the nature of the dispute is a constitutional question beyond the competence of the Tax Appeals Tribunal to determine or not?

58. The Tax Appeals Tribunal is established under Section 3 of the *Tax Appeals Tribunal Act*. It provides:

‘There is established a Tribunal to be known as the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner.’



59. Section 12 of the Act further states that:

Appeals to the Tribunal

A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal,

Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

60. In the present Petition; it was disclosed by the 1<sup>st</sup> Respondent that some of the Petitioners, namely; 7<sup>th</sup>, 13<sup>th</sup>, 17<sup>th</sup>, 24<sup>th</sup>, 26<sup>th</sup>, 33<sup>rd</sup> & 34<sup>th</sup> Petitioners had engaged the 1<sup>st</sup> Respondent on the matter of the dispute pursuant to Section 109 of *Tax Procedures Act* before filing the Petition but did not disclose this fact to the Court. That was not denied.
61. The main issue here is whether water vended through water ATM machines by water refillers should attract excise duty. The Petitioners argue that it is not contemplated as it does not fall within the meaning of ‘manufacturing as defined under Section 2 the *Excise Duty Act*.’ The 1<sup>st</sup> Respondent on the other hand maintains it is covered hence the circular of 17<sup>th</sup> July, 2020 which merely directed the Petitioners to comply and pay the excise duty.
62. It is thus manifest that the dispute before this Court is on the interpretation of the applicable provisions of the statute regarding whether excise duty can be applied to water vended through the water ATM machines. The 1<sup>st</sup> Respondent made a decision asserting that provisions of the Act extend to such water vendors on 17<sup>th</sup> July, 2020, but the petitioners dispute the correctness of the said decision.
63. This is thus a dispute arising from to ‘a decision by the Commissioner on a matter under the provisions of any tax law’ which I am persuaded is within the competence of the Tax Appeals Tribunal pursuant to Section 12 of the Tax Appeals Tribunal’s Act.
64. The decision of the Tribunal may take any of the following forms specified in the Act at Section 29 (2):
- The Tribunal shall make a decision in writing or through electronic means—
- (a) affirming the decision under review;
  - (b) varying the decision under review; or
  - (c) setting aside the decision under review and either—
    - (i) making a decision in substitution for the decision so set aside; or
    - (ii) referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal.
65. Under Section 32 (1); A party to proceedings before the Tribunal may within thirty days after being notified of the decision or within such further period as the High Court may grant; appeal to the High Court.
66. This Petition thus offends the doctrine of exhaustion of remedies. It is camouflaged as a Constitution Petition but the primary issue is a challenge on the decision of the Commissioner on a tax dispute arising from the interpretation of the provisions of the *Excise Duty Act* which is a matter that ought to be decided by the Tribunal in the first instance and only find its way to the High Court by way of



an Appeal. As was held in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR;

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

67. This being a jurisdictional question, I need not consider any other issue in this Petition. I must down my tools at this juncture. The inescapable conclusion therefore is that the Petition is struck out with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> JUNE, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

