



IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 506 OF 2013

BETWEEN

ERICSSON KENYA LIMITED PETITIONER

AND

ATTORNEY GENERAL.....1ST RESPONDENT

CABINET SECRETARY,

NATIONAL TREASURY..... 2ND RESPONDENT

COMMISSIONER OF DOMESTIC TAXES.....3RD RESPONDENT

KENYA REVENUE AUTHORITY.....4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioner is a limited liability company and is in the business of providing telecommunication equipment and services to mobile and fixed network operators. It also engages in the implementation and installation of mobile phone masts for the various telecommunication companies within and outside Kenya.

2. The 4th respondent, Kenya Revenue Authority (“KRA”), is established under the *Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)* and is the central body for the assessment of revenue, administration and collection of tax. The 3rd respondent, the Commissioner of Domestic Taxes (“the Commissioner”) is an officer of KRA and administers Value Added Tax (“VAT”) and Income tax in accordance with the applicable statutes under

general control and direction of KRA. For purposes of this judgment the respondents shall be taken to refer to the 3rd and 4th respondent unless otherwise stated.

3. The petitioner's central complaint against the respondents is that they have failed to pay VAT refunds due to it amounting to Kshs 824,350,812.00. Its case is that the failure to pay the refunds within a reasonable time violates its right to the protection of property and right to fair administrative action protected under **Articles 40** and **47** of the Constitution respectively.

4. The petitioner also impugns the *Value Added Tax Act (Act No. 35 of 2013)* ("**VAT Act, 2013**") on the grounds that it violates the provisions of **Article 27(1)** of the Constitution which entitles every person to equal protection and benefit of the law in that it fails to set time limits for the payment of VAT refunds by the respondents. The petitioner also claims that it is entitled to payment of interest on delayed refunds by respondents and failure by the Act to make provision for interest is a violation of **Articles 27(1)** and **40** of the Constitution.

5. This case concerns the *Value Added Tax Act (Chapter 476 of the Laws of Kenya)* ("**VAT Act**") which was repealed and replaced by the *VAT Act, 2013* on 16th August 2013. The rights accrued under the former statute were preserved under **section 68** of the latter statute. The petitioners VAT claims were made under *VAT Act* and unless otherwise stated it is the one referred to in these proceedings.

Petitioner's Case

6. The petitioner's case is set out in the petition dated 18th October 2013, the supporting affidavit and further affidavit of Margaret Mutisya, the petitioner's Acting Country Manager, sworn on 18th October 2013 and 14th February 2014 respectively. The petitioner also relies on written submissions dated 14th March 2014.

7. The petitioner's case is grounded on the withholding VAT system introduced in June 2004 by **section 19A** of the *VAT Act* and the enactment of *Value Added Tax (Tax Withholding) Regulations, 2004*. **Section 19A** provides as follows:

19A. (1) The Commissioner may, in accordance with the regulations, appoint a person, being a purchaser of taxable goods or services, to be a tax withholding agent for the purposes of this section.

(2) A person appointed under subsection (1) shall, on purchasing taxable goods or services, withhold the tax payable thereon and remit the same directly to the Commissioner at such times as the Commissioner may direct.

8. Prior to the amendment, the supplier of taxable supplies charged the customer VAT and the supplier would then remit the payment to the Commissioner. This system reversed the process where the Commissioner appointed any taxpayer to be a withholding VAT agent. The agent was then required to remit the output VAT charged by the suppliers directly to the Commissioner.

9. The payment of the output VAT directly to the Commissioner by the appointed withholding VAT agent denied the supplier the opportunity to deduct and/or recover the VAT incurred on their purchases or expenses upfront. VAT requires that the payments to Commissioner be the difference between the tax charged on the sales/revenue, that is the output VAT and the tax paid on the purchases and expenses that is the input VAT of a taxpayer.

10. As a result any taxpayer who dealt with an appointed withholding VAT agent would qualify to receive refunds of excess VAT from the respondents. **Section 11(2)(c)** of the **VAT Act** deals with refunds and provides as follows:

11(2) Where the amount of input tax that may be so deducted under subsection (1) exceeds the amount of output tax due, the amount of the excess shall be carried forward to the next tax period:

Provided that any such excess shall be paid to the registered person by the Commissioner where the Commissioner is satisfied that such excess arises from-

(a) making zero-rated supplies;

(b) physical capital investments where input tax deducted exceeds one million shillings;

(c) tax withheld by appointed tax withholding agents.

Provided that the investments are used in making taxable supplies.

11. The petitioner avers that it was entitled to receive and did receive refund of excess VAT from the respondents arising from its dealings in the ordinary course of business. As it exported its services to companies outside Kenya it contends that it was also entitled to refund of excess VAT in accordance with the provisions of **section 11(2)(b)** as read together with **Paragraph 1** of the **Fifth Schedule** to the *VAT Act*.

12. The petitioner avers that it applied to the Commissioner for the refund of the excess VAT between May 2010 and June 2013 as follows;

Date of submission	Amount in (Kshs)	Period covered
20/05/2010	383,555,287.00	May 2009 to March 2010
19/07/2011	54,720,010.20	April 2010 to May 2010
18/07/2011	206,249,747.80	June 2010 to May 2011
19/06/2012	179,825,767.00	July 2011 to May 2012
	824,350,812.00	Total cumulative refund claims

13. The petitioner complains that the claims remain unpaid without explanation despite the fact that it has provided withholding VAT and export records for the year 2009 to 2012. It contends that it has satisfied all the conditions set out at **section 11** of the *VAT Act*.

14. The petitioner further complains that once the applications for refunds were received, the Commissioner purported to carry out a Transfer Pricing Audit (“the Audit”). It avers that it fully co-operated including allowing the Commissioner’s auditors access to all records of withholding VAT and export of service at its offices. Once the audit was completed, the Commissioner issued notices of assessments for the period 2007 to 2009. The petitioner contested the assessments and filed *High Court Income Tax Appeal No. 8 of 2013* and an appeal to the VAT Appeals Tribunal lodged on 6th August 2013. The petitioner submits that the issues raised in those proceedings are separate from the refund claims. The petitioner accuses the respondents of raising these issues merely to defeat its claim which is now long overdue.

15. The petitioner submits that the excess VAT refund obligations under **section 17** of the *VAT Act* are separate and independent of other tax collection obligations under the *VAT Act* and the *Income Tax Act* and there is no provision for set-off or deduction or right of lien over the withheld excess VAT against other taxes. The petitioner contends that the Audit or the pendency of the appeals arising from the assessments are not considerations contemplated under the *VAT Act*. Counsel for the petitioner submits that these considerations are extraneous and irrelevant and that the obligation of the Commissioner is to effect payment as the petitioner has complied with the *Value Added Tax Regulations, 1994* by providing the specified documents including supplying an independent auditor's certificate authenticating the refund claim within the time frame provided. Counsel relied on the case of *Republic v Kenya Revenue Authority ex-parte L.A.B International Kenya Limited Mombasa HC Misc. No. 82 of 2010 [2011]eKLR* where the Court considered that the failure to pay refunds timeously was a violation of **Article 47**.

16. The petitioner submits that its refund claims have remained unpaid for a period of five years and that even though **section 11** of the *VAT Act* is silent on the time frame for settlement, **section 58** of the *Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)* is clear that, “Where not time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasions arise.” The petitioner submits that taking all facts into account the period of five years is inordinate as to amount to flagrant breach of **Article 47(1)** of the Constitution.

17. The petitioner further submits that the respondent has not furnished any written reasons or explanation for the delayed verification and processing of the refund claims contrary to **Article 47(2)** of the Constitution which provides that where a person’s fundamental right is

likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action or violation. It contends that it is now suffering loss and damage as a result of being deprived of its property. The petitioner avers that the respondents refusal to refund excess VAT is also an infringement of its right to the protection of property guaranteed under **Article 40** of the Constitution.

18. The petition has challenged the **section 17** of the *Value Added Tax Act, 2013* on the ground that it violates the equality provisions of **Article 27(1)** of the Constitution as it does not set the time frame within which the respondents should make refunds of excess VAT to a taxpayer, while all other sections of the *VAT Act, 2013* provide a time limit to when the taxpayer is expected to make payments to the respondents.

19. **Section 17(5)** of the *VAT Act, 2013* which provides for refund of excess VAT states as follows, “Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period: Provided that any such excess shall be paid to the registered person by the Commissioner where the Commissioner is satisfied that such excess arises from making zero-rated supplies.” [Emphasis added]

20. The petitioner contends that while the respondents are not limited in time in making payments, all payments made by taxpayers to the respondents are time limited under the *VAT Act, 2013* and must be paid within a specified time. The petitioner cites several examples under the Act such as **section 19** of the Act which provides that VAT shall be due and payable at the time of the supply. However, under **section 19(2)**, the tax payable may be deferred to a date not later than the 20th day of the month succeeding that in which the tax became due. Under **section 32** of the Act where tax has been refunded in error by the Commissioner, the person to whom the refund has been erroneously made shall, on demand pay the amount within 30 days of the date of service of the demand, failure to which the tax paid in error attracts interest of 2% per month or part thereof. The petitioner also refers to **sections 28** and **31** of the Act to support his argument.

21. The petitioner contends that **section 17** of the *VAT Act, 2013* violates the provisions of **Article 40 (2)** of the Constitution as it permits the state to arbitrarily deprive a person of his property or right over their property. It argues that the failure to specify the time within which

the respondents should refund excess VAT gives the respondent untrammelled discretion to determine tax refunds with the consequence that it is at the mercy of the respondents and is deprived of its right of property contrary to **Article 40(2)** of the Constitution.

22. The petitioner complains that failure by the **VAT Act, 2013** to make provision for interest on delayed payments violates **Article 27(1)** as **section 21** thereof only applies to payments of tax due and payable to the respondents by a taxpayer. **Section 21** provides as follows;

21. (1) Where any amount of tax remains unpaid after the date on which it becomes payable under section 19, an interest equal to two percent per month or part thereof of the unpaid amount shall forthwith be due and payable.

(2) Any interest charged under subsection (1) shall, for the purpose of this Act relating to the collection and recovery of tax, be deemed to be tax and any interest which remains unpaid after becoming due and payable under subsection (1) shall attract further interest equal to two per cent per month or part thereof:

Provided that the interest chargeable under this subsection shall not exceed one hundred percent of the tax originally due.

23. The petitioner submits that the only way the provision would afford equal protection and equal benefit of the law consistent with **Article 27(1)** of the Constitution is to provide that the respondent apply interest on refunds not settled within a certain specified time. The petitioner prays that the 1st and 2nd respondent be compelled to initiate amendments to the **VAT Act, 2013** for **section 21** to apply to the provisions of **section 17(5)** of the **Act** as far as refund of excess tax is concerned.

24. The petitioner argues that in the absence of a sanction against the Commissioner in **section 17**, the Commissioner may refuse to verify or pay valid claims. In other words, counsel contended, that the provision gives the Commissioner an opportunity to act capriciously. In his view, the **Act** does not provide a means to deter unlawful or unreasonable conduct which results in depriving the petitioner and other taxpayers their property.

25. In the petition dated 18th October 2013 the petitioners seek the following relief;

- a. *A Judicial Review Order of Mandamus do issue, to compel the 3rd and 4th Respondents to effect the VAT refunds due to the Petitioner now being Kshs. 824,350,812/- within 30 days of the order of this Honourable Court.*
- b. *A declaration do issue that in future the Respondents be compelled to refund excess VAT under Section 17 within a reasonable period but not later than 30 days upon application thereof.*
- c. *A declaration do issue that the Petitioner is entitled to payment of interest on all delayed payment of VAT refunds due at the rate of 2% per month compounded until payment in full is in line with democratic principles of equity and equality enshrined under Article 27 of the Constitution.*
- d. *An declaratory order do issue to compensate the Petitioner of the delayed refunds at the same rate the respondents charge tax payers in the form of interest.*
- e. *A declaration do issue that sections 17 and 21 of the VAT Act unconstitutional, null and void to the extent that they violate the Petitioners right to property guaranteed under the provisions of Article 40(1) (2) and (3) of the Constitution by not setting a time limit within which to refund the petitioner VAT claims.*
- f. *A declaration do issue that sections 17 and 21 of the VAT Act unconstitutional, null and void to the extent that they violate the Petitioners right to equality and equity of laws as guaranteed under the provisions of Article 27 of the Constitution by not applying the same interest rate applicable on delayed VAT payable to the 3rd Respondent to VAT Refunds.*
- g. *A declaration do issue that sections 17 and 21 of the VAT Act 2013 in so far as they do not set time limits of the decisions on refunds or to effect refunds are a violation of the Petitioners rights to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed under the provisions of Article 47 of the Constitution.*
- h. *Costs of the Petition be awarded to the Petitioner.*
- i. *Such further other orders be made in favour of the Petitioner as the Court may deem it.*

Respondent' Case

26. The respondents opposed the petition on the grounds set out in the replying affidavit of Martin Mugambi, a Revenue Officer, sworn on 20th January 2014. They also relied on written submissions dated 14th March 2014. The 1st and 2nd respondents filed grounds of opposition dated 13th November 2013 which mirrored the 3rd and 4th respondent's submissions.

27. The respondents do not deny that the petitioner was entitled to VAT refunds in the ordinary course of business and the petitioner applied for and was refunded it claims. Mr Mugambi avers that up to the year 2010, the petitioner's was being assessed for its Domestic Taxes (VAT & Income Tax) in the Domestic Taxes - Medium and Small Taxpayers Department. In 2010, its Domestic tax affairs were transferred to the Large Taxpayers Office for specialized attention due to the fact that its annual turnover had exceeded 600 million threshold.

28. Mr Mugambi depones that on 20th May 2009, the petitioner lodged a VAT Refund claim of KShs 558,568,417.00 for the period April 2008 - April 2009. The claim was processed and a sum of KShs 987,182.00 was disallowed. Subsequently KShs. 418,185,926.25 was refunded leaving a balance of KShs 139,395,308.75 which the petitioner elected to offset by their monthly Pay As You Earn (PAYE) liability for the months of August, September and October 2012.

29. The respondents aver that when the petitioner's tax affairs were transferred to the Large Taxpayers Office, it was subjected to a Audit towards the end of 2010 and at the beginning of 2011. While the Audit was ongoing the petitioner was informed that its VAT refunds would not be processed or paid until audit was finalized.

30. The respondents aver that the audit affected the following VAT refund claims which are claimed by the petitioners at paragraph 12 above save that the claim for KShs 179,825,767.00 for July 2011 to May 2012 was lodged on 19th June 2012 after the Audit.

31. Mr Mugambi depones that he participated in the audit and some issues came to light that led to the conclusion that the refunds were not due to the petitioner.

- It was observed that the petitioner's financial performance and results for the year 2008 and 2009 was mainly driven by losses reported in projects concerning Telkom Kenya Ltd and Econet Wireless Kenya Ltd.
- A Special Settlement Agreement (098 02 30940) of 17th July 2009 between Ericsson AB Sweden and the Petitioner established with regard to Telkom Kenya Ltd Projects wherein Ericsson AS Sweden undertook to compensate the Petitioner for extraordinary costs attributable to the performance of the service contracts with Telkom Kenya Ltd and Econet Kenya Ltd.

- Under this agreement the petitioner would invoice Ericsson AS – Sweden and not Telkom or Econet who received the services, each calendar quarter for the extraordinary costs incurred. As a result the petitioner received compensation amounting to KShs 2.4 billion incurred in the two projects, 75% of which was reported in the year of income 2009 and the balance in 2010.
- The Audit findings were communicated to the petitioner by a letter dated 4th August 2011 with the requisite assessments.

32. Since the petitioner invoiced Ericsson AB - Sweden and charged VAT at zero percent instead of the standard 16% applicable, the respondent applied the standard rate of 16% and raised a tax bill of KShs 634 million raised using market prices under **section 9** of the **VAT Act**. Aggrieved by the assessment the petitioner lodged an appeal before the VAT Appeals Tribunal on 5th August 2013.

33. The audit also revealed that the business arrangement between a non-resident related party Ericsson AB - Sweden and a resident company the Petitioner led to losses, and whereas the Petitioner was compensated for the losses by Ericsson AB - Sweden, it was not remunerated commensurate with the services and goods supplied to Telkom Kenya Ltd and Econet Wireless Kenya Ltd and therefore contrary to the arm's length principle in **section 18(3)** of the **Income Tax Act** and an income tax bill of KShs.301,949,404.00 was raised. The petitioner appealed to the Local Committee for Nairobi against the decision. The Local Committee rendered its decision on 5th June 2013 upholding the Commissioner's decision. The petitioner thereafter lodged an appeal to the High Court being **Nairobi High Court Income Tax Appeal No. 8 of 2013**.

34. In view of the pending appeal before the VAT Tribunal and the High Court, the respondents aver that the matters raised by the petitioner are now *sub-judice*. The respondents rely on several cases to support this proposition; **Fleur Investment v Permanent Secretary, Ministry of Roads and Others Nairobi Petition No. 173 of 2011[2012]eKLR**, **John Githongo and Others v Harun Mwau and Others Nairobi Petition No. 44 of 2012[2012]eKLR**.

35. The respondents submit that it is only after the two appeals are determined that they will know whether any VAT is refundable and to what extent. They also allege that the respondent by filing a multiplicity of action is intent on forum shopping in order to secure a favourable decision.

36. The respondents further contend that the petitioner's VAT refund claims have not been fully audited and processed because not all the information surrounding the claims as requested by the Commissioner has been supplied. The respondents support this position by pointing to the observation made by Income Tax Local Committee for Nairobi in its ruling of 5th June 2013 where it stated that, "*The respondent took the Committee through items occasioning losses and showed the same thought factored into the enterprise at normal market costs were nevertheless procured at exorbitant costs. Evidence of the suppliers of the items was sought by the Respondent from the Appellant to no avail. The evidence that dealings were not at arm's length was considered compelling The Respondent also noted discrepancies in some entries which though substantial, were explained away by the Appellant as errors. This left the Committee unable to accept such discrepancies as were errors. This is a pointer towards an arrangement to shift costs for tax purposes*" [Emphasis mine] Mr Mugambi further depones that as late as 5th December 2013, after the filing of the petition, the petitioner was requesting for time, up to 17th December 2013, to provide the requested documents.

37. The respondents aver that their failure to refund the petitioner the claimed VAT refunds is not without reason and has been amply demonstrated and in the circumstances there has been no violation of **Article 47** of the Constitution.

38. The respondents submit that **section 17** of the **VAT Act, 2013** does not violate **Article 27(1)** of the Constitution for failure to provide timelines for settlement of refunds. Counsel for the respondents submits that liability to pay taxes must be distinguished from the responsibility to refund tax and that it is public interest that tax debts be settled timeously. On the other hand they submit that the reason there is no timeline is that there are the technicalities involved in establishing the veracity and authenticity of a given claim and every claim is dealt with on a case to case basis. Counsel cited the case of *Metcash Trading Ltd v The Commissioner for South African Revenue Service & Minister for Finance CCT 3/00 [2001] ZACC 21* where the Constitutional Court of South Africa recognised this important principle. The respondents further rely on the case of *Kenafriic Industries Ltd v Commissioner of Domestic Taxes and Three Others Nairobi Petition No. 99 of 2011* where the court dismissed a similar argument and held that lack of a time limit for processing refunds was not a violation of the Constitution.

39. The respondents submit that **section 17** provides for the '**Deduction of input Tax**' by a registered person and that from the tenor of the section the petitioner has an opportunity to

deduct excess ‘**input tax**’ from ‘**output tax**’ and as such this provision cannot be said to be inconsistent with **Article 27(1)** of the Constitution. The respondents urge that the petitioner and respondents cannot be on an equal footing on the matters of VAT refunds. They emphatically state that a case for discrimination cannot be made out as the petitioner is comparing two unlikes in the sense that while the petitioner may claim VAT refunds, the respondents cannot. Counsel for the respondents submits that the petitioner could only plead discrimination in terms of **Article 27** of the Constitution if it could show that the Respondents have treated another taxpayer similarly situated differently and to the detriment of the petitioner.

40. The respondents maintain taxes are imposed by virtues of **Article 209** of the Constitution and that collection of the same cannot constitute arbitrary deprivation of a person's property or right over their property when enforcing taxation.

41. The respondents aver that the sanctions put in place by the *VAT Act, 2013* to compel taxpayers to declare and pay their VAT due promptly cannot be duplicated when it comes to refund of VAT. They submit that the reason the under **section 13(3)** of the *VAT Act, 2013*, a taxpayer is accorded 20 days after the month the VAT became due to pay the same to the 3rd Respondent.

42. The respondents maintain that taxes collected by and paid to the respondents are not to their personal benefit but for the benefit of the citizens of Kenya and that their action as regards the petitioner's VAT refund are based on law and actuated by good faith and fidelity to the people of Kenya to ensure that all proper taxes are certain and collected.

Determination

43. From the pleadings, depositions and arguments, three issues fall for consideration;

a. Whether failure by the respondents to pay VAT refund claims is a violation of the petitioner’s fundamental rights and freedoms.

b. Whether the *VAT Act, 2013* is unconstitutional for failing to include timelines for the refund of excess VAT.

c. Whether the *VAT Act, 2013* is unconstitutional for failing to provide for payment of interest for delayed VAT refund claims.

44. The issue of VAT refunds is not novel. As the petitioner reveals in correspondence between it and the KRA, the issue of VAT refunds has been a sour issue between the business community and KRA. Our courts have dealt with the obligation of KRA to settle such claims in a manner consistent with the dictates of **Article 47** of the Constitution. In this regard I would do no better than quote Ojwang’ J., (as he then was) in the case of *Republic v Kenya Revenue Authority ex-parte L.A.B International Kenya Limited (Supra)* where he observed that, “*In practical terms, Government has a public duty to effect change to any unprogressive arrangements, such as those that may characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of the Constitution; and in this regard, ordinary statutory arrangements cannot qualify the constitutional provisions. On this account, the respondent has no justification for failing to make VAT refunds timeously.*”

45. The issue for consideration is whether the respondent’s conduct is a violation of the right to fair administrative action protected under **Article 47** which states as follows as follows:

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Delay in Processing Petitioner’s VAT Refund Claims

46. It is not dispute that the petitioner made VAT refund claims amounting to Kshs. 824,350,812.00 in accordance with the *VAT Act*. The dispute is whether the reasons proffered by the respondents for failing to process and pay out the petitioner’s VAT refund claims pass the threshold of **Article 47(1)** of the Constitution.

47. The primary reason given by the respondents is that in the process of conducting the Audit, the Commissioner raised queries relating to certain transactions between the petitioner and Ericsson AB Sweden in relation to projects relating to Telkom Kenya and Econet

Wireless undertaken by the petitioner. After the Audit, the Commissioner issued assessments which were contested by the petitioner. The contestation by the petitioner resulted in two appeals by the petitioner; one in the VAT Appeal Tribunal and the other in the High Court. The respondents contend that until the pending appeals are resolved the refund claims cannot be settled.

48. The petitioner counters this argument by submitting that the VAT refund claims are independent and distinct and once the petitioner has lodged a claim in accordance with the *VAT Act* and regulations, the respondents have no right of set off or lien and cannot for any other reason to refuse to process and pay the claim. Its case is that the claim must be processed and paid within a reasonable time.

49. Whether the respondents acted in accordance with **Article 47** of the Constitution is a question of fact which calls for an examination of the circumstances under which the petitioner's refund claims were dealt with. The Court is not concerned with whether the petitioner is entitled to the amount but whether the process afforded was one that complied with the dictates of **Article 47** of the Constitution. In considering the circumstances, it is important to recall that the fact that a taxpayer has lodged a refund claim in accordance with the *VAT Act* and regulations does not discharge the respondents from the responsibility of examining the claim and confirming that it meets the requirements of the law. The Commissioner, when processing the claim, is not merely a conveyor belt performing a perfunctory exercise. He is required to examine and verify the claim and where irregularities, fraud or other deficiencies are discovered draw the petitioner's attention to them. The Commissioner is also entitled to call for further information, if necessary, to satisfy himself that the claim meets the legal threshold for payment. Ultimately, the Commissioner is entitled to reject a VAT refund claim by giving written reasons which would entitle the taxpayer to appeal or challenge the decision.

50. In the present case, the processing of the petitioner's claims coincided with the Audit which raised queries about the nature of the transactions that formed the basis of the refund VAT described in paragraph 31 and 32 above. According to the respondents, the impugned transactions and pending disputes have a material effect on whether refunds are due to the petitioner. The respondents point out that the petitioner's claims for refunds amount to Kshs 824,350,812.00 while the amounts in dispute as evidenced by the memorandum of appeal to the VAT Tribunal and the High Court are Kshs 800,676,452.00 and Kshs 880,785,525.00 respectively making a total of Kshs 1,681,461,977.00.

51. I have considered the facts and several facts are apparent. First, the Audit was commenced in 2010 and completed in early 2011. The petitioner's claims which I have set out in paragraph 12 above were therefore made outside the audit period. Secondly, the assessments issued were in respect of the period 2007, 2008 and 2009 which is the period prior to the time the refund claims were lodged. If I took an expansive view of the matter, the audit would only affect the first claim submitted on 20th May 2010. These facts negate the respondents' contention that the Audit, refund claims, assessments and pending appeals are intimately connected.

52. The letter dated 4th August 2011 from the Commissioner which communicated the results of the audit shows that the audit was for the period 2006 to 2009. The VAT Appeal deals with assessment arising from the Transfer Pricing Audit and the assessments were for the years 2008, 2009 and 2010 while the Income Tax Appeal to the High Court deals with assessments for years 2007, 2008 and 2009. It becomes clear that the refund claims under consideration did not form part of the claims under the Audit. In the circumstances, I am unable to find that this matter is *sub-judice* as it deals with claims outside the period of the audit, assessments and pending appeal proceedings arising from that audit. Further, the petitioner's VAT refund claims have not been determined so as to deter the court from looking into the same claims.

53. Another factor in favour of the petitioner is that the VAT and Income Tax appeals concern transactions between the petitioner and Ericsson AB Sweden in relation to Telkom Kenya and Econet Wireless projects during the year's subject to the Audit. The petitioner is a major telecommunication company and its business is not confined to Ericsson AB Sweden, it has transacted with many other companies, local and international, over the period subject of the claims. A casual examination of the documents supporting the VAT refund claims shows that the petitioner dealt with other telecommunication providers like Safaricom and Celtel, motor vehicle, mineral water, house refurbishment companies amongst others. These transactions are not implicated by the Ericsson AB Sweden relationship subject of the pending disputes. It is therefore unfair and unreasonable to "stay" the processing of the petitioner's VAT claims exclusively on the basis of transactions between Ericsson AB Sweden. The respondents have also not shown the statutory basis for "staying" consideration of the petitioner's claims pending the outcome of appeal proceedings in other forums. Although the amount of money which subject to the assessments and appeals is more than the amount that is claimed by the petitioner as refunds, it does not follow that respondents are entitled to withhold processing and payment thereof absent a lawful justification for staying, set-off or exercising a lien for future claims by the Commissioner. As I have held, the amount

which is now subject of appeals in different forums is based on the results of the Audit which pre-dates the refund claims lodged by the petitioner.

54. **Section 58** of the *Interpretation and General Provisions Act* contemplates that where a law requires something to be done, it must be done within a reasonable time. Whether the time taken for assessing and processing claims is reasonable is dependent on the circumstances of each case. The first claim that is subject to this case was submitted on 25th May 2010 though it covered the period May 2009 to March 2010. All the claims taken together have lasted for a period of about 4 years to be considered and processed. The contested claims concern the transactions between the petitioner and Ericsson AB Sweden in relation to Telkom and Econet Wireless, the other transactions that are unaffected by the pending appeals have not been resolved nor has any written reason been given as to why those claims have not been dealt with. I therefore find that the delay is unreasonable in the circumstances.

55. The other reason that the respondents assert for failing to process the refund claims is that the petitioner has not provided the information necessary for the refunds to be processed. Mr Mugambi notes, *“THAT even then, the Petitioner’s VAT Refund claim has not been fully audited and processed because not all information surrounding the claims requested by the 3rd Respondent have been supplied.”* The reference to the paucity of documentary evidence in the decision of the Local Income Tax Committee applies to matters relating to the assessments and which I have held are outside the refund claims made by the petitioner. As I have stated elsewhere in the judgment, the Commissioner is entitled to call for information from the petitioner however such a demand must not be dilatory; it must be specific and focused on resolving the refund claims under consideration.

56. Both parties cite the case of *Kenafric Industries Limited v Commissioner of Domestic Taxes and Others (Supra)* to support their respective positions. In that case the delay in payment of the refund was unexplained and in response to the claim for refund, the Commissioner issued a provisional assessment for VAT and Corporation Tax which was totally unconnected with the refund claim. The assessment was quashed as it was unreasonable in the circumstances. The court noted that, *“[52] The respondents do not state the amount due to the petitioner as VAT refund or part of it that was not affected or infected by fraudulent conduct. It is possible that the calculation of the final amount must await the final completion of the investigations in the claim. It was therefore procedurally unfair and unreasonable to make a provisional assessment to forestall the VAT refund claim by the petitioner. In fact, respondents have not stated in clear terms the reason they have not*

processed or paid the petitioner's VAT refund claims. The letter dated 17th December 2010 does not make any reference to the fact that the VAT refund claims are being investigated or cannot be paid because of investigations. I think it is proper for the petitioner to be informed of the status of VAT refund so that it can take whatever steps it deems necessary. The failure to inform the petitioner of the status of its VAT refund claims prejudices its right to seek legal relief. Fair administrative action does not condone silence as a decision."

57. Like in ***Kenaftric***, the respondents in this case have not shown that all the pending VAT refund claims by the petitioner are infected by the transactions with Ericcson AB Sweden. They have not provided any legal basis or authority for failing to process or "staying" payment of valid refund claims. As a result I find and hold that the respondents have not demonstrated any reason to avoid processing the petitioner's refund claims. Such refusal, neglect or denial to process VAT refund claims by the respondent must be, in the words of **Article 47(1)** of the Constitution, "*lawful.*"

58. In ***Kenya Data Networks Limited v Kenya Revenue Authority Nairobi Petition No. 87 of 2012 [2013]eKLR***, Mumbi Ngugi J. , observed that, "*The respondent had a duty to act on the petitioner's VAT refunds timeously. While recognising that it is mandated by statute to collect taxes, and while appreciating the pivotal role that collection of taxes plays in a country's economic development and provision of services for citizens, KRA must also be always cognizant of the possible ramifications of its actions or omissions in dealing with taxpayers, and the impact on investment, revenue collection and the general welfare of the country. While there is no statutory period within which KRA ought to make good tax refund claims, it cannot have any basis for failing to process tax refund claims several months, and in some cases several years after they were made. It is no answer to the petitioner's claim for tax refund for the respondent to demand in turn that the petitioner pays arrears of tax.*" I agree with these sentiments and in light of the facts I have outlined, I find and hold that there has been unreasonable delay in considering and dealing with the petitioner's VAT refund claims submitted on 20th May 2010, 19th July 2011, 18th July 2011 and 19th June 2012. I therefore conclude that 3rd and 4th respondents have violated **Article 47** of the Constitution.

Lack of Timelines

59. In ***Kenaftric Industries Limited v Commissioner of Domestic Taxes and Others (Supra)*** I dealt with the argument that lack of timeline rendered the refund provisions of the **VAT Act** unconstitutional. I reiterate what I stated in that case as follows; "[45] *The petitioner contends since the provision does not set out a time limit for processing the refund then it is unconstitutional as it gives the respondents unfettered authority to determine how and when*

to effect refunds. [46] It is now a well-established principle that before a court can declare statutory provisions unconstitutional, it must have reference to both the purpose and effect of the impugned provisions (See *Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)*). The purpose of **Section 24** of the **VAT Act** is to facilitate tax refunds. The petitioner in its submissions stated that, “Parliament while enacting those provisions did not expect the respondents to act the way they have done.” I do not think that the provisions in themselves can be held as unconstitutional merely on the ground that they will necessarily lead to the “undesired” effect if abused as that is not the test but rather whether the implementation to the “letter” that leads to an infringement of the Supreme law. In this regard I do not find the provisions unconstitutional.”

60. I also hold that this matter cannot be resolved by declaring the provisions for refund in the **VAT Act, 2013** unconstitutional as doing so would in fact deny the petitioner the right to a refund. **Article 47(1)** of the Constitution provides relief where administrative action is not expeditious. Furthermore, **section 58** of the *Interpretation and General Provisions Act* implies the requirement for expeditious administrative action in every statute which does not have timelines for doing any act.

Claim for interest

61. The petitioner’s entitlement to interest is founded on a breach of **Article 27(1)** of the Constitution. The petitioner is aggrieved by the fact that a taxpayer who delays in making tax payments is bound to pay interest as a result of default; the Commissioner is not bound by a similar obligation to pay the taxpayer interest on delayed refunds. **Section 21** of the **VAT Act, 2013** only applies to payments of tax due and payable to the respondents by a taxpayer.

62. The Commissioner and the ordinary taxpayer cannot stand on the same footing. The Commissioner receives tax on behalf of the State while the taxpayer pays tax. The two cannot be treated equally as they are unlike and as such there can be no discrimination.

63. I also hold that **Section 23** of **VAT Act, 2013** serves a legitimate purpose. Under **section 19(1)** of the *Act*, VAT is due and payable at the time of supply of the taxable goods or services. **Section 19(2)** affords the taxpayer an opportunity to defer payment of tax due to any date before the 20th day of the month following that in which the tax became due. It is only when the taxpayer fails to remit VAT collected to the Commissioner by the due date that the

penalties as imposed by **section 21** kick in. I also agree with the respondents that the VAT collected is not due from the taxpayer but is collected from the consumer hence there is no reason why the tax must not be remitted timeously.

64. I therefore find no merit in the argument that the failure to provide for interest for refund claims violates **Article 27(1)** of the Constitution. The *VAT Act* does not make provision for payment of interest and failure to do so does not make the *Act* unconstitutional.

Conclusion and relief

65. In respect of the three issues framed for determination I have found as follows;

- a. The 3rd and 4th respondent violated the petitioner's right to fair administrative action by failing to process and pay the petitioner's VAT refund claims within a reasonable time contrary to **Article 47(1)** of the Constitution.
- b. The *VAT Act, 2013* is not unconstitutional for failing to include timelines for the refund of excess VAT.
- c. The *VAT Act, 2013* is not unconstitutional for failing to provide for payment of interest for delayed VAT refund claims.

66. Upon finding a violation of fundamental rights and freedom, the duty of the Court under **Article 23** is to frame "*appropriate relief*" to vindicate the petitioner's rights. The court is not limited to the reliefs prayed for by the petitioner nor is the court limited to the specific relief outlined in **Article 23(3)(a)** to **(e)**. The nature of relief will depend on the facts of the case.

67. As I have found that there has been unreasonable delay in processing the petitioner's claims and an order directing the respondents to deal with the claims would be most appropriate in the circumstances. In considering the claims, the Commissioner may exclude transactions between Ericsson AB Sweden and the petitioner if such transactions will be affected by the decisions in the pending appeals otherwise, the rest of the claims must be dealt with in accordance with the law. Likewise, the petitioner has a duty to furnish specific

information requested by the Commissioner that is necessary facilitate processing of the refund claims.

Disposition

68. In light of the foregoing, I now grant the following orders;

a. A declaration that the petitioner's fundamental right to fair administrative action under **Article 47** of the Constitution has been violated by the 3rd and 4th respondents by failing to process the petitioner's VAT refund claims submitted to the 4th respondent on 20th May 2010, 19th July 2011, 18th July 2011 and 19th June 2012 within a reasonable time.

b. An order of Mandamus directed to the 3rd and 4th respondents compelling them to expeditiously and in any case within a period of not more than **sixty (60) days** from the date of this judgment to consider, process and pay out in accordance with the law, the petitioner's VAT refund claims submitted to the 4th respondent on 20th May 2010, 19th July 2011, 18th July 2011 and 19th June 2012.

c. The 3rd and 4th respondents shall pay half the costs of the petition.

DATED and DELIVERED at NAIROBI this 24th day of March 2014

D.S. MAJANJA

JUDGE

Mr Olonde instructed by Odero-Olonde and Company Advocates for the petitioner.

Mr Matuku, Advocate, instructed by the 3rd and 4th respondents.



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