

# CASESDIGEST

ISSUE 4 | June 2021

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**Decisions on  
KRA cases**



**KENYA REVENUE  
AUTHORITY**

*Tulipe Ushuru, Tujitegemee!*



**A publication of the  
Kenya Revenue Authority**

**Vision**

A Globally Trusted Revenue Agency Facilitating Tax and Customs Compliance

**Mission**

Building Trust through Facilitation so as to foster Compliance with Tax and Customs Legislation

**Values**

Trustworthy, Ethical, Competent, Helpful

## **Forward**

Kenya Revenue Authority is the Government Agency established through the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya with the role of collecting revenue and enforcing tax laws. We are pleased to publish the fourth edition of the Kenya Revenue Authority (KRA) Cases Digest.

The doctrine of legitimate expectation was first developed in English law as a ground of judicial review in administrative law to protect a procedural or substantive interest when a public authority deviates from a representation made to a person. This publication highlights the key principles of the doctrine.

The courts have recognized both procedural and substantive legitimate expectations. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure to arrive at a decision, while a substantive legitimate expectation arises where an authority makes a lawful representation that an individual will receive or continue to receive some kind of substantive benefit. In determining a claim for an alleged breach of a legitimate expectation, a court will deliberate over three key considerations: i.e. whether a legitimate expectation has arisen; whether it would be unlawful for the authority to frustrate such an expectation; and if it is found that the authority has done so, what remedies are available to the aggrieved person.

This case digest is relevant to legal practitioners as reference point as precedent, scholars as a reference tool for training and reading, KRA staff and all persons as a guide on decisions relating to the tax matters.

I wish to thank the editorial and design team for the concerted efforts made towards this publication.

**C.S. Paul M. Matuku**

**Commissioner, Legal Services and Board Coordination**

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# Executive Summary

This volume features cases on claims of legitimate expectation and conditions under which the doctrine applies. It highlights the interpretation of tax law by the courts on the provisions relating to legitimate expectation.

In *Nairobi Civil Appeal No. 58 of 2015: Kenya Revenue Authority & Commissioner of Domestic Taxes v Republic (Ex parte) Kenya Nut Company Limited*, the Court of Appeal held that legitimate expectation can only operate within the confined of the law and it can only be legitimate if founded in the law. It cannot, however be relied on to shield a person from paying tax. Even though a public body can create legitimate expectation, there has to be an express, clear and unambiguous promise given by a public authority, the expectation itself has to be reasonable, the representation has to be one that the decision-maker was competent to make.

In *Civil Appeal No. 24 of 2018; Kenya Revenue Authority & 2 others vs Darasa Investments Limited* [2018] eKLR, the Court held that legitimate expectation refers to the principle of good administration or administrative fairness. If a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way it has regularly acted in the past, then, the public authority should not without an overriding reason in the public interest, renege from that representation and unilaterally cancel the expectation of the person.

In *Judicial Review Application No 346 of 2019; Vivo Energy Kenya Limited vs Commissioner of Customs & Border Control, Kenya Revenue Authority & another* [2020] eKL the Court cited with approval the decision in *Darasa Investments Ltd's Case* and held that a careful reflection upon the parties' arguments it was found that there indeed existed a legitimate expectation on the part of the Applicant that the 1st Respondent would not collect taxes that had been successfully objected to by the Applicant.

The Court in *Civil Appeal No. 180 of 2019; Export Trading Company vs Kenya Revenue Authority* [2018] eKLR held that It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence.

In *Civil Appeal No 134 of 2015; Five Forty Aviation Limited vs Kenya Revenue Authority & 3 others* [2017] eKLR. It was held that upon involving the Appellant in reforming the charges and upon adoption of the recommendations, the Appellant had an expectation that it would not be condemned to pay charges under the repealed Legal Notice.

In *Civil Appeal No 11 of 2018; Pevans East Africa Limited & another vs Chairman Betting Control and Licensing Board & 7 others* [2017] eKLR, it was held that a legitimate expectation cannot be an expectation against the clear provisions of a statute. A decision maker cannot be expected to act against the clear provisions of a statute as that would be illegal and a violation of the principle of the rule of law. As legislation that was lawfully enacted, the impugned legislation would override any expectation and;

finally, in *Civil Appeal No. 283 of 2014; Pharmaceutical Manufacturing (K) Co Ltd & 3 others vs Commissioner General of Kenya Revenue Authority & 2 others* [2017] eKLR the Court held that concepts like estoppel and legitimate expectation cannot be raised against clear provisions of the law. It is not enough that an expectation should exist; it must in addition be legitimate, reasonable and not contrary to the express provisions of the law.

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# A. Digest of Cases on Legitimate expectation

## 1. Nairobi Civil Appeal No. 58 of 2015: Kenya Revenue Authority & Commissioner of Domestic Taxes v Republic (Ex parte) Kenya Nut Company Limited

**Coram:** Daniel Kiio Musinga, William Ouko, Sankale ole Kantai

**Court:** Court of Appeal

**Date of Judgment:** 24<sup>th</sup> April 2020

**Section(s) of the law:** Article 47(2) of the Constitution, section 11 of the Fair Administrative Action Act, sections 10, 35, 96 of the Income Tax Act and Rule 4 of the Income Tax (Withholding Tax Rules) 2001, Order 53 of the Civil Procedure Rules, section 107(1) of the Evidence Act

**Key words and Phrases:** Legitimate expectation, reasonableness, assessment, withholding tax.

### Implications

Legitimate expectation can only operate within the confines of the law and it can only be legitimate if founded in the law. It cannot, however be relied on to shield a person from paying tax. Even though a public body can create legitimate expectation, there has to be an express, clear and unambiguous promise given by a public authority, the expectation itself has to be reasonable, the representation has to be one that the decision-maker was competent to make and there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

### Background

The Appellant carried out a tax audit on the Respondent's business between 2002 and 2005. After being given an opportunity to provide an explanation on some of the issues arising from the audit, the Respondent was ultimately informed through a letter dated on October 1, 2007 that it owed Ksh. 33,534,855 in withholding tax based on the commissions paid to their overseas selling and marketing agents. The Appellant assessed and demanded the said amount via a letter dated August 19, 2008 (assessment notice).

The Respondent objected to the assessment and insisted that no withholding tax was owed. To forestall the intended action by the Appellant, the Respondent filed in the High Court (the trial court) a judicial review application. The trial court found merit in the motion and issued an order of certiorari and quashed, among others, the decision of the Appellant contained in the letter dated August 19, 2008. The Appellant was aggrieved by the decision and appealed to the Court of Appeal on the grounds that it was the duty of the Respondent to ensure that withholding tax was deducted and remitted to the Appellants irrespective of whether the proceeds of sale were remitted to it or its agents.

## Tax Principles

*"Legitimate expectations can only operate within the confines of the law"*

*“Legitimate expectation can only operate within the law and it can only be relied on when it complies with the law. It cannot, however be relied on to shield a person from paying tax”*

*Court of Appeal of Kenya*

Further, the Appellant urged the court to find that the High Court erred when it found that there was no provision in the Income Tax Act that justified the levying of penalties and interests.

## Issues for determination

- a) *Who was obliged to deduct and remit withholding tax from a foreign entity trading with a Kenyan entity?*
- b) *Whether Kenya Revenue Authority and the Commissioner of Domestic Taxes had jurisdiction to assess withholding tax where payment was made at the source to a foreign entity.*
- c) *What amount of penalties and interest would be charged on failure to deduct or remit withholding tax?*
- d) *The Respondent had accused the Appellants of breaching the Respondent's legitimate expectation that no withholding tax was expected to be collected by it from foreign traders after it was disclosed that payment had been made at source.*

## Decision of the Court

The Court held that legitimate expectation can only operate within the law and it can only be relied on when it complies with the law. It cannot, however be relied on to shield a person from paying tax. The Court took the position held in the *Communications Commission of Kenya & 5 others V. Royal Media Services Limited & 5 others [2014] eKLR*, where the Supreme Court, after acknowledging that a public body can create legitimate expectation, qualified the statement.

The Court stated that for legitimate expectation to arise, there must be an express, clear and unambiguous promise given by a public authority; that the expectation itself must be reasonable; that the representation must be one that the decision-maker was competent to make; and that there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

[\*\*Read the full judgment here\*\*](#)

**Coram:** Alnashir R.M. Visram, Martha K. Koome, Wanjiru Karanja

**Court:** Court of Appeal sitting at Malindi

**Date of judgement:** 11<sup>th</sup> April 2018

**Sections of the Law:** Article 47 of the Constitution, Section 7 & 11 Fair Administration Actions Act, 2015, Sections 229, 230 of the EACCMA as read with Sections 2 & 12 of the Tax Appeals Act, 2013.

**Key words and Phrases:** legitimate expectation, administrative fairness,

*Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way it has regularly acted in the past, then, prima facie, the public authority should not without an overriding reason in the public interest, renege from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue.*

## Implications of the judgment

Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not without an overriding reason in the public interest, renege from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue. This is of particular importance if an individual has acted on the representation to his or her detriment".

## Background

The Cabinet Secretary of the National Treasury through Gazette Notice No 4536 dated May 12, 2017 gave notice of a general exemption of duty on sugar imported between May 12, 2017 and August 31, 2017. Pursuant to the said waiver, the Respondent imported 40,000 tonnes of brown sugar from Brazil, which was loaded in a vessel known as Anangel Sun( the vessel) on July 15, 2017 destined for arrival at a Port in Mombasa, Kenya on or about August 28, 2017.

However, bad weather conditions on the high seas coupled with the fact that the vessel could not berth at the Mombasa Port due to its sheer size, the projected date of arrival was not met. The vessel proceeded to its next destination, Dubai, where the sugar consignment was offloaded and transshipped.

The Cabinet Secretary for National Treasury vide Gazette Notice No. 9802 amended the first notice to the effect that only the consignments which were shipped before the expiry date in the Gazette Notice 4536 would benefit from the extension of the said Gazette Notice.

*The 2nd Appellant vide a letter dated November 22, 2017 declined to exempt the Respondent's consignment from payment of duty as provided under Gazette Notice No 4536 and as subsequently amended by Gazette Notice No 9801.*

*The 2nd Appellant claimed that the consignment did not meet the conditions of the Gazette Notices because of inconsistencies relating to the date of loading, place of inspection, certificate of origin and change of ownership.*

Thereafter, the Respondent's consignment was transshipped from Dubai to Mombasa aboard a vessel known as MV Iron Lady. The consignment arrived at Mombasa between October 28, 2017 and October 30, 2017. The 2nd Appellant vide a letter dated November 22, 2017 declined to exempt the Respondent's consignment from payment of duty as provided under Gazette Notice No 4536 and as subsequently amended by Gazette Notice No 9801. The 2nd Appellant claimed that the consignment did not meet the conditions of the Gazette Notices because of inconsistencies relating to the date of loading, place of inspection, certificate of origin and change of ownership.

Aggrieved by the aforesaid orders, the Appellants appealed against the entire ruling, raising 7 grounds of appeal which we paraphrase as; the learned Judge was faulted for, finding the court had jurisdiction to entertain the proceedings despite the fact that the Respondent had not exhausted the available alternative remedies; sitting on appeal of the Appellants decision; finding the Appellants had not given reasons for their decision in the letter dated 22nd November, 2017; shifting the burden of proof to the Appellants; finding the Respondent was subjected to discrimination; finding the Appellants decision was unreasonable and finally, for finding that the Respondent was entitled to exemption of duty on account of legitimate expectation. The Trial Court, after hearing the matter, issued orders in favour of the Respondent prompting the Appellants to file the instant Appeal.

## Issues

- a) Whether judicial review orders can be issued on disputed facts underlying a dispute.
- b) What were the circumstances in which the Court of Appeal could interfere with the discretion of the High Court to issue judicial review orders?
- c) Whether availability of an alternative remedy was a bar to judicial review proceedings.

## Decision of the Court

### **A. Whether judicial review orders can be issued on disputed facts underlying a dispute**

Initially, the scope of judicial review and the remedies that could issue thereunder were set out in the Law Reform Act and Order 53 of the Civil Procedure Rules.

## *Developments in Judicial Review*

*There has been developments in judicial review. Judicial review is no longer a strict administrative law remedy as was the case in the past where administrative law remedies were fundamental. The remedies that could issue have since been expanded from the traditional remedies to declarations, damages and injunctions as set out under section 11 of the Fair Administrative Action Act*

There has been developments in judicial review. Judicial review is no longer a strict administrative law remedy as was the case in the past where administrative law remedies were fundamental. The right to fair administrative action, the right to written reasons, for adverse administrative action and the right to judicial review of administrative action were enshrined in the Constitution as fundamental rights and freedoms to be enjoyed by every person. The remedies that could issue have since been expanded from the traditional remedies to declarations, damages and injunctions as set out under section 11 of the Fair Administrative Action Act.

Judicial review orders were discretionary in nature and whenever the Court was called upon to interfere with the exercise of judicial discretion, as in the instant case, it ought not to interfere with the exercise of such discretion unless it was satisfied that the Trial Court misdirected itself in some matter and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the Trial Court was wrong in the exercise of discretion and occasioned injustice.

Jurisdiction was what clothed a court with the authority to entertain a matter before it and issue appropriate orders. A court either had jurisdiction or it did not have jurisdiction. Following the amendment of the initial Gazette Notice, the Respondent was required to establish that the consignment was loaded onto a vessel destined to a port in Kenya within the exemption period. That was to be done through the requisite shipping documents submitted by the Respondent to the Appellants.

As the 2nd Appellant found that the Respondent had not established that the consignment had been shipped within the exemption period the issue of legitimate expectation could not arise. The promise made to the general public was that they had to import sugar and provide proof that the consignment of sugar was loaded in a vessel for a port in Kenya within the dates of May 12, to August 31, 2017. In the event that the 2nd Appellant found the Respondent did not provide clear evidence of the time of loading, there was no legitimate expectation.

The Appellants examined the shipping documents which were handed in by the Respondent to determine whether the consignment was loaded onto a vessel destined to a port in Kenya within the exemption period. Albeit the explanation tendered, the 2nd Appellant was not satisfied that the inconsistencies had been adequately addressed and communicated as much to the Respondent by a letter dated November 22, 2017 which was the subject of the judicial review proceedings.

*As the 2nd Appellant found that the Respondent had not established that the consignment had been shipped within the exemption period the issue of legitimate expectation could not arise. The promise made to the general public was that they had to import sugar and provide proof that the consignment of sugar was loaded in a vessel for a port in Kenya within the dates of May 12, to August 31, 2017. In the event that the 2nd Appellant found the Respondent did not provide clear evidence of the time of loading, there was no legitimate expectation*

Whether or not the decision taken by the Appellants in the letter dated November 22, 2017 was wrong or right was not an issue that fell for consideration by the Trial Court. Similarly, the Court could not delve into the same. Judicial review remedies were not available in matters where facts were disputed. The trial court acted beyond its jurisdiction.

**B. What were the circumstances in which the Court of Appeal could interfere with the discretion of the High Court to issue judicial review orders?**

The Trial Court substituted its own opinion of the matter with that of the 2nd Appellant or the administrator. It was the 2nd Appellant's mandate to clear goods according to the law and unless it was established there was a breach of the law, impropriety or unreasonableness, the Court could not substitute its own opinion with that of the mandate holder.

As the 2nd Appellant found that the Respondent had not established that the consignment had been shipped within the exemption period the issue of legitimate expectation could not arise. The promise made to the general public was that they had to import sugar and provide proof that the consignment of sugar was loaded in a vessel for a port in Kenya within the dates of May 12, to August 31, 2017. In the event that the 2nd Appellant found the Respondent did not provide clear evidence of the time of loading, there was no legitimate expectation.

There was no evidence that the Appellants subjected the Respondent to differential treatment or discrimination by allowing the consignment of sugar belonging to the other 13 companies who were subject to the amended Gazette Notice to be cleared duty free without complying with the condition attendant thereto.

Appeal was allowed.

**[Read full judgment here](#)**



### 3. Vivo Energy Kenya Limited v Commissioner of Customs & Border Control, Kenya Revenue Authority & another [2020] eKLR

**Coram:** Weldon Korir

**Date of Judgement:** 15<sup>th</sup> October 2020

**Key Sections of the law:** Article 47 of the Constitution, sections 4, 7, 8 and 11 of the Fair Administrative Action Act, Sections 37, 51(1), (2), (11) of the Tax Procedures Act, 2015,

**Key words and Phrases:** Legitimate expectation,



*Doctrine of legitimate expectation*

*If a public authority led a person to expect in the future, to act in a way either in which it had regularly acted in the past it should not, without an overriding reason in the public interest, renege from that representation*

## Implications of the judgment

Under the doctrine of legitimate expectation, if a public authority led a person or body to expect that the public authority would, in the future, continue to act in a way either in which it had regularly acted in the past or on the basis of a past promise or statement which represented how it proposed to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, renege from that representation and unilaterally cancel the expectation of the person.

## Background

The Applicant, Vivo Energy Kenya Limited, instituted judicial review proceedings against the Respondents through an originating notice of motion dated 2nd December, 2019 pursuant to sections 4, 7, 8 and 11 of the Fair Administrative Action Act, 2015 ('FAAA') and all other enabling provisions of the law. The Commissioner of Customs & Border Control, Kenya Revenue Authority was the 1st Respondent and the Cabinet Secretary, the National Treasury the 2nd Respondent. Through the said application, the Applicant sought orders:

- a) A Declaration that as a consequence of the Commissioner's failure to make a decision of the Applicant's Notice of Objection dated 8th November, 2016 (and received on 9th November, 2016) within the statutory period of 60 days, the said Notice of Objection was allowed in terms of Section 51(11) of the Tax Procedures Act, 2015.
- b) An Order of Certiorari to bring before the Honourable Court and quash the Commissioner of Customs and Border Control's decisions in respect of Excise Duty on Jet A1 fuel for local use as contained in its letters dated 24th August, 2016, 23rd November, 2016, 3rd February, 2017, 3rd October, 2019 and 24th October, 2019.

- c) An Order of Prohibition prohibiting the Commissioner of Customs and Border Control whether by itself, its authorised officers and/or agents from demanding the payment of and/or taking any enforcement action of whichever nature in respect of Excise Duty on Jet A1 fuel for local use for the period December, 2015 to August, 2016.
- d) In the alternative, an Order of Mandamus be issued against the Cabinet Secretary, the National Treasury, compelling him to approve the Kenya Revenue Authority's recommendation made on 10th February, 2017 for authorization to abandon and refrain from the recovery of the Excise Duty Tax on Jet A1 Fuel to the local aviation industry from 1st December 2015 to 31st August 2016.
- e) An Order of Mandamus be issued against the Commissioner of Customs and Border Control compelling him to refund forthwith the sum of Kshs 109,759,854.00 paid by the Applicant on 18th November, 2019 in respect of Excise Duty on Jet A1 fuel for local use for the period December, 2015 to August, 2016.
- f) A Declaration that as a consequence of the Commissioner's failure In this case the 1st Respondent demanded from the applicant Kshs. 109,759,855/= being excise duty on locally consumed Jet A1 fuel for the period of December 1, 2015 to August 31, 2016.

In this matter, the 1st Respondent demanded from the applicant Kshs. 109,759,855/= being excise duty on locally consumed Jet A1 fuel for the period of December 1, 2015 to August 31, 2016. The 1st Respondent sent another demand letter on October 25, 2016 for the same tax but for an increased amount of Kshs. 127,183,364/=. In response, the applicant lodged a notice of objection dated November 8, 2016 to which the 1st Respondent did not respond within the statutory 60 days allowed for the making of the response.

Consequently, the applicant argued that the failure to make a response meant that under section 51(11) of the Tax Procedures Act, the response was allowed and it was not obliged to pay the demanded tax. Later, on October 3, 2019 and October 24, 2019, the 1st Respondent made demands for the payment of the same tax but for a varied amount of Kshs. 109, 759, 855/=.The applicant contended that it had legitimate expectation that the tax would not be payable until September 2018 as the Kenya Revenue Authority's system explicitly recognized that no excise duty was payable

#### *Response;-*

*In response, the applicant lodged a notice of objection dated November 8, 2016 to which the 1st Respondent did not respond within the statutory 60 days allowed for the making of the response.*

*Consequently, the applicant argued that the failure to make a response meant that under section 51(11) of the Tax Procedures Act, the response was allowed and it was not obliged to pay the demanded tax.*

The Respondents raised a challenge stating that the court lacked jurisdiction to hear and determine the matter and also stated that the matter had been overtaken by events as the applicant had already paid for the tax. They added that an order of prohibition could not be issued to stop what had already been done.

## Issues for Determination

- a) Whether the Court has jurisdiction to hear and determine this matter;
- b) The effect of the 1st Respondent's failure to timeously consider the Applicant's objection to the tax demand;
- c) Whether the Respondents acted irrationally, unreasonably and contrary to the Applicant's rights under Article 47 of the Constitution;
- d) Whether the Respondents acted contrary to the Applicant's legitimate expectation; and Whether the Applicant is entitled to the reliefs sought. Whether the High Court had jurisdiction to hear and determine a matter wherein a notice of objection against demands made for tax had not elicited a response from the Commissioner within the requisite statutory period.

## Determination

As regards the issue of breach of legitimate expectation, the court cited the decision of the Court of Appeal in *Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR* where the said court at paragraph 52 explained what is meant by legitimate expectation as follows:

"Legitimate expectation refers to the principle of good administration or administrative fairness that, if a public authority leads a person or body to expect that the public authority will, in the future, continue to act in a way either in which it has regularly (or even always) acted in the past or on the basis of a past promise or statement which represents how it proposes to act, then, prima facie, the public authority should not, without an overriding reason in the public interest, renege from that representation and unilaterally cancel the expectation of the person or body that the state of affairs will continue..."

A careful reflection upon the parties' arguments it was found that there indeed existed a legitimate expectation on the part of the Applicant that the 1st Respondent would not collect taxes that had been successfully objected to by the Applicant.

A careful reflection upon the parties' arguments it was found that there indeed existed a legitimate expectation on the part of the Applicant that the 1st Respondent would not collect taxes that had been successfully objected to by the Applicant.

The expectation was firmed up by the fact that the 1st Respondent undertook not to collect the taxes prior to the decision of the 2nd Respondent on the request by the 1st Respondent that it be allowed to write off the taxes.

The 1st Respondent failed to put in place a proper system for the Applicant and other oil marketers to collect the excise tax from their customers during the relevant period and also cleared the excise duty returns without the remittance of the excise duty for the period in question. This would create in the mind of any ordinary person the impression that the duty which was to be collected during the relevant period would not be collected at all. The 1st Respondent had created in the mind of any reasonable person that it would not continue to demand the excise duty awaiting the waiver of the same by the 2nd Respondent.

The 1<sup>st</sup> Respondent through its past actions and statements had created a legitimate expectation that it would not seek excise duty for a particular period as it was impossible to recover the tax. The 1st Respondent's demand for excise duty in respect of the period in question violated the Applicant's legitimate expectation.

The applicant had a legitimate expectation that the 1st Respondent would not collect taxes that had successfully been objected to by the applicant. Additionally, there were recommendations that demands for the tax would not be made. There was no system put in place for the collection of the tax and that created an impression that the tax would not be collected at all.

The demand for the tax was a violation of the applicant's legitimate expectation.

The Application was allowed.

The applicant had a legitimate expectation that the 1st Respondent would not collect taxes that had successfully been objected to by the applicant.

Additionally, there were recommendations that demands for the tax would not be made. There was no system put in place for the collection of the tax and that created an impression that the tax would not be collected at all.

[\*\*Read the full judgment here\*\*](#)

### **Constitutional Requirements**

*Granted, it is possible to have technological and human errors. It is unfair and unreasonable to demand shortfall of duty four (4) years down the line. It does not absolve the Authority from its duty of acting in a fair efficient, expeditious, lawful, reasonable and with procedural fairness as dictated by Article 47 of the Constitution.*

**Coram:** Wilfrida Adhiambo Okwany

**Date of delivery of Judgment:** 9<sup>th</sup> January 2019

**Key Articles/Sections of the law:** Article 47 of the Constitution, Section 135 of the EACCMA, 2004

**Key Words and Phrases:**

### **Implications**

Granted, it is possible to have technological and human errors. It is unfair and unreasonable to demand shortfall of duty four (4) years down the line. It does not absolve the Authority from its duty of acting in a fair efficient, expeditious, lawful, reasonable and with procedural fairness as dictated by Article 47 of the Constitution.

### **Background**

In 2008 and 2009, the petitioner imported rice from Burma, Vietnam and Thailand and the Respondent imposed an import duty of 35% which the petitioner paid in full. The Respondent alleged that the correct import duty ought to have been 75% and not 35% and that there had been a system and human error in the imposition of import duty. In a letter dated February 27, 2013, the Respondent demanded payment of additional taxes related to rice imports amounting to Kshs. 378,016,680/-.

On or about July 2005, pursuant to the provisions of the East African Community Customs Management Act (EACCMA), 2004, the East African Community (EAC) promulgated the Common External Tariff (CET) which set the import duty rate for rice imported from regions outside the EAC at 75%. The Respondent implemented those rates for a short time but reduced them from 75% to 35% for all rice imported from outside the EAC regardless of origin. For Pakistani rice, the Council of Ministers of the EAC issued Legal Notice No. 1 of 2005 on December 15, 2005 which stayed the application of the CET rate of 75%. When two years lapsed, the Council of Ministers of the EAC issued Legal Notice No. EAC/10/2007 on June 18, 2007, suspending the applicability of 75% rate on Pakistani rice, for another 2 years. The Respondent continued to maintain an import duty rate of 35% for all rice regardless of the origin, until June 26, 2009 when the rate of 75% was effected in the Simba system. Importers were informed by the Respondent that only Pakistani rice imports would have an import duty rate of 35%.

On July 26, 2007, the petitioner sought clarification on the applicable rate after noting that the rate of 35% was imposed for all rice imports in the Simba system despite the passing of Legal Notice No. EAC/10/2007. There was no response to the request for clarification. After the Respondent demanded for the payment of additional taxes, the petitioner, on February 18, 2013, sought a review of the Respondent's decision for the payment of taxes under the provisions of the East African Community Customs Management Act, 2004. There was no response to the request for a review except that enforcement action was threatened with respect to the additional taxes.



## Issues for determinations

- a) Whether despite the provisions of section 135(3) of the EACCMA which allowed the Kenya Revenue Authority to demand for short levied taxes within 5 years, there was need for sufficient reasons to be provided for the making of demands for short levied taxes 4 years after the initial assessment and payment of duty.
- b) Whether the making of demands for short levied taxes 4 years after the initial assessment and payment of taxes without providing sufficient explanations, was a violation of the right to fair administrative action.
- c) Whether a taxpayer had a legitimate expectation that the duty assessed by the Kenya Revenue Authority was correct, particularly after its officers had verified entries, the applicable rate and assessed the duty as correct.
- d) Whether there was transfer of the liabilities of the said taxpayer to the applicant;
- e) Whether the facts from the observation and investigation findings of the Respondent were properly applied in arriving at the decision to proclaim against the Respondent; and
- f) Whether the Proclamation Notice was properly issued.

## **Legitimate expectation**

*It is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the Respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.*



## **Determination by the court**

As regards the issue number iii the court held that it was the Respondent's officers that verified entries and inspected consignments. Those officers could not be said to have acted as a conveyor belt performing a perfunctory exercise while being oblivious of their solemn duty to provide accurate information regarding the applicable taxation rate. Further, the Respondent abdicated its duty to taxpayers by remaining tight-lipped, even when prompted to give clarification by the petitioner on the correct applicable tax rate via a letter dated July 26, 2007, only to demand underpaid taxes several years later. The Respondent was expected to verify the entries and the duty payable before clearance of the consignments in question.

After the Respondent verified the entries in issue, the rate applicable and assessed the duty as correct, a legitimate expectation arose in favour of the petitioner. The petitioner had a legitimate expectation that the assessed duty was correct and the Respondent could not hide behind the provisions of the EACCMA and make belated demands for taxes.

The court took cue from the dictum cited in cited **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR and Republic vs. Attorney General & Another Ex Parte Waswa& 2 Others [2005] 1 KLR 280**. In the former case the Court held that:

"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the Respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

*that the principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed.*

*It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty*

In the case of *Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others* [2005] 1 KLR 280 it was held that the principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed.

It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty.

If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence.

The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent.

Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

[\*\*Read full judgment here\*\*](#)



## 5. Civil Appeal 134 of 2015: Five Forty Aviation Limited v Kenya Revenue Authority & 3 others [2017] eKLR

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**Coram:** Martha Karambu Koome, Jamila Mohammed, Fatuma sichale

**Date of Judgment:** 31<sup>st</sup> March 2017

**Sections of the Law:** Section 11(4), 13(1) Kenya Revenue Authority Act, Cap 469 Laws of Kenya

**Key words and Phrases:** Expectation, unfairness, demand and agency notices, Legal Notice No. 100 of 2011, Legal Notice No. 110 of 2012.

### Implications

The demand notice and agency notices issued after the repeal of subsidiary legislation, Legal Notice No. 100 of 2011 (*Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011*), creates an expectation that the charges and fees would be levied according to the regulations prior to the repeal or under the new regulations. Upon involving the Appellant in reforming the charges and upon adoption of the recommendations, the Appellant had an expectation that it would not be condemned to pay charges under the repealed Legal Notice. The Respondents should have balanced all aspects of unfairness to determine whether in the circumstances, by applying the rates in the revoked Legal Notice, there would be conspicuous unfairness. In the view of the Court, the Respondents did not consider the aspects of unfairness while issuing the demand and agency notices against the Appellant and for that reason the notices should have been quashed.

### Background

The Minister in charge of Civil Aviation, published Legal Notice No. 100 of 2011 whose effect was to increase Air Navigation Services charges (ANS) as from November 1, 2011. Civil aviation stakeholders complained about the increased charges and regulatory fees. In response, several stakeholders meetings were held and a ministerial committee was constituted. The result was that the ANS charges as well as regulation fees were revised.

Thereafter, the Kenya Revenue Authority issued a demand notice to the Appellant seeking ANS charges amounting to 67 million Kenya shillings. The charges were based on Legal Notice No 100 of 2011. The sums for which demand was made related to the period between November 2011 and August 2012. The Appellant lodged judicial review proceedings seeking orders of certiorari and prohibition to quash the demand letters and the agency notice issued to various banks in relation to the demand for the total sum amounting to Ksh. 101, 455, 818/= .

**The principle of a legitimate expectation to a hearing**

*It should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed.*

*It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty.*

## Courts Findings

*The High Court generally found that the Kenya Revenue Authority had not overstepped its mandate in making the demands and seeking to recover the sums allegedly due.*

*Upon involving the Appellant in reforming the charges and upon adoption of the recommendations, the court found this was an acknowledgment that gave the Appellant an expectation that it would not be condemned to pay charges under the repealed Legal Notice*

The High Court dismissed the judicial review application and found that Legal Notice No 100 of 2011 was in effect until its revocation on November 1, 2012 via Legal Notice No. 110 of 2012, Civil Aviation (Regulatory fees and charges for Air Navigation Services) Regulations, 2012 published on October 5, 2012. The High Court generally found that the Kenya Revenue Authority had not overstepped its mandate in making the demands and seeking to recover the sums allegedly due.

## Issues for determination

- i. Whether by levying charges and fees according to impugned Legal Notice No. 100 of 2011, which was effective from 19th July 2011 up to when it was revoked 5th October 2012; was the 1<sup>st</sup> Respondent unreasonable, arbitrary or irrational.
- ii. Whether, by the 2nd Respondent accepting the complaints by stakeholders, created legitimate expectation to the Appellant that charges and fees will not be levied according to the said notice.

## Determination by the Court

The parties had argued that there was no express promise given on behalf of the Respondents nor was there existence of a regular practice which the Appellant could reasonably expect to continue. In the instant appeal the court held that there were some unique features that distinguishes it from other cases, in that all the Respondents admitted there was a problem with Legal Notice No. 100 of 2011.

The 2nd Respondent could not simply look the other way and watch the Appellant suffer detriment by paying levies and charges that were found unsuitable for the aviation industry and for that matter were repealed. Since the demand notice and agency notices were issued after the repeal of Legal Notice No. 100 of 2011, the Appellant was justified to expect that the charges and fees will be levied according to the regulations prior to the Legal Notice No. 100 of 2011 or under the new regulations.

Upon involving the Appellant in reforming the charges and upon adoption of the recommendations, the court found this was an acknowledgment that gave the Appellant an expectation that it would not be condemned to pay charges under the repealed Legal Notice. It therefore behooved the Respondents to balance all aspects of unfairness to determine whether in the circumstances of the successful involvement of the Appellant in finding an amicable solution of the charges that would bring sustainability and growth in the aviation industry, overall, they should have asked themselves whether by applying the rates in the revoked Legal Notice, there would be conspicuous unfairness.

The Respondents did not consider the aspects of unfairness while issuing the demand and agency notices against the Appellant and for that reason the notices should have been quashed. As a result the court found merit in this appeal and allowed the same.

[Read the full judgment here](#)

**6. Petition 353 & 505 of 2017 (Consolidated): Pevans East Africa Limited & Bradley Limited t/a Pampazuka National Lottery v Chairman Betting Control and Licensing Board, Cabinet Secretary, Ministry of Interior, Commissioner General, Kenya Revenue Authority, Cabinet Secretary, Ministry of Finance, National Assembly, Speaker of the Senate, Attorney General, Betting and Licensing Board & National Sports Fund [2017] eKLR**

## Judgment

*A legitimate expectation cannot be an expectation against the clear provisions of a statute. A decision maker cannot be expected to act against the clear provisions of a statute as that would be illegal and a violation of the principle of the rule of law. As legislation that was lawfully enacted, the impugned legislation would override any expectation.*

**Coram:** John Mutinga Mativo

**Date of Judgment:** 28<sup>th</sup> December 2017

**Section of the law:** 29A, 44A, 55A and 59B of the Betting, Lotteries and Gaming Act and sections 29, 30, 31 and 32 of the Finance Act 2017.

**Key words and Phrases:** Legitimate expectation, constitutionality, Betting, Lotteries, Gaming

## Implications

A legitimate expectation cannot be an expectation against the clear provisions of a statute. A decision maker cannot be expected to act against the clear provisions of a statute as that would be illegal and a violation of the principle of the rule of law. As legislation that was lawfully enacted, the impugned legislation would override any expectation.

## Background

There were two petitions in Court, namely; petition numbers 353 of 2017 and 505 of 2017 and they were consolidated. The petitions challenged the constitutionality of sections 29A, 44A, 55A and 59B of the Betting, Lotteries and Gaming Act and sections 29, 30, 31 and 32 of the Finance Act 2017.

Initially, the Finance Bill for the year 2016/2017 proposed to impose 50% tax chargeable on revenue from betting, gaming, lotteries and prize competitions with the purpose of regulating and controlling betting. The purpose was to minimize or eliminate gambling amongst the youth. When the Bill was subjected to public participation, the proposed 50% tax was found to be unsuitable and the result was that it was deleted. The Bill was passed by Parliament on May 30, 2017 and presented for Presidential assent with the 50% tax omitted from it.

On the basis of the omission of the 50% tax on revenue from betting, gaming, lotteries and prize competitions, the President declined to assent to the Finance Bill 2017.



He proposed a tax rate of 35% to be imposed on revenue in the betting and gaming industry. In response, Parliament implemented the presidential directive and amended sections 29A, 44A, 55A and 59B and re-submitted the amended Finance Act 2017 for presidential assent.

### 🕒 Issue for determination

*Whether the Petitioners who were engaged in businesses in the betting, lotteries and gaming industry had a legitimate expectation that taxes would not be imposed as a deterrent against the youth involving themselves in activities in the industry.*

### 🕒 Determination by the Court

*As regards the issue of legitimate expectation, legitimate expectation would not be an expectation against the clear provisions of a statute.*

*A decision maker would not be expected to act against the clear provisions of a statute as that would be illegal and a violation of the principle of the rule of law. As legislation that was lawfully enacted, the impugned legislation would override any expectation.*

**[Read full judgement here](#)**

**7. Civil Appeal 283 of 2014: Pharmaceutical Manufacturing (K) Co Ltd, Kumar Shah, Utamchand G. Shah, Christine D' Souza v Commissioner General of Kenya Revenue Authority, Attorney General & Commissioner of Customs Services**

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. It is not enough that an expectation should exist; it must in addition be legitimate, reasonable and not contrary to the express provisions of the law

**Coram:** Milton

Stephen Asike Makhandia, William Ouko, Kathurima M'noti

**Date Delivered:** Judgment delivered on 3<sup>rd</sup> March 2017 and reasons for the judgment delivered on 10<sup>th</sup> March 2017

**Judge:** Milton Stephen Asike Makhandia, William Ouko, Kathurima M'noti

**Key Articles/Sections of the law:** Articles 19, 27, 40, 47 & 201 of the Constitution, Section 2, 7(2), 9(1)(c & (d)), 68(1) of the VAT Act, 2013, Second Schedule of VAT Act 2013, 6(5) East African Community Customs Management Act, 2004.

**Key words and Phrases:** Legitimate expectation, estoppel

## ○ Implications

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. It is not enough that an expectation should exist; it must in addition be legitimate, reasonable and not contrary to the express provisions of the law.

## ○ Background

The Commissioner of Customs Services issued a demand notice 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.

The Appellants claimed 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. Further, the Appellants' argued 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 among other claims.

The Appellants aggrieved by the dismissal brought the instant appeal complaining inter alia that that the trial court ought to have found that there was estoppel. They argued that the law having previously exempted the Appellants from payment of VAT; and that the trial court ought to have entered default judgment against the 2<sup>nd</sup> Respondent who did not file any response to the petition or made any arguments before the trial court.

### 🔍 Issues for determination by the Court.

- i. 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.
- ii. Whether the demand for payment of Kshs. 43,579,768/= in VAT arrears was unconstitutional, null and void by offending the Appellants' legitimate expectation;

### 🔍 Determination by the Court

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;

- a. 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
- b. 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. Further, 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? An expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law.

The strictures for legitimate expectation were not met in the petition. 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 against the law. If the 1<sup>st</sup> 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. The appeal lacked merit and was dismissed with costs by the Court. The Trial court's determination was upheld.

[Read the full judgment here](#)

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