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Current Note

The Tax Justice Network-Africa v Cabinet Secretary for National Treasury & 2 others: a big win for tax justice activism?

I. Introduction

The Tax Justice Network-Africa v Cabinet Secretary for National Treasury, the Kenya Revenue Authority & the Attorney General (*TJN-A v KRA*)[1] concerned the constitutionality of the Double Tax Agreement signed by the Government of Kenya and the Government of Mauritius on 7 May 2012. This current note questions whether the High Court's decision, voiding the legal notice intended to bring the agreement into effect, connotes a meaningful victory for tax justice activism.

Double tax agreements signed by developing countries have become controversial. Double tax treaty-sceptics view tax treaties between developing and developed countries, or tax havens, with much suspicion. These sceptics dispute the conventional wisdom that tax treaties make developing countries more competitive and enhance their capacity to attract foreign direct investment. Instead, they argue that these treaties result in the erosion of the already limited tax bases in developing countries by significantly curtailing their taxing rights. Initially designed with the legitimate goal of tackling commercially deleterious double taxation, it is now acknowledged that double tax agreements may have become a poisoned chalice for developing countries.

TJN-A v KRA is a landmark case for several reasons. It is the first time that the constitutionality of a double tax agreement has been challenged in a Kenyan, and even an African, court. Secondly, it could be argued that the case represents the culmination of years of tax activism on the continent and marks a significant, and perhaps deliberate, shift in the strategy taken by civil society groups to challenge the international tax order. *TJN-A v KRA* is likely to be treated as a test case among civil society organisations working on tax activism; there is a strong possibility that we will begin to see comparable constitutional or legal challenges, through the judicial system, by other civil society groups across the continent. Finally, it affirms the radical opportunity that Kenya's transformative constitution provides to its citizens and civil society groups in challenging executive action in the field of tax law.

II. The facts

The Kenyan Government and the Government of Mauritius signed a Double Tax Agreement (the DTA) "with a view to affording relief from double taxation in relation to income tax and any other taxes of similar character…".[2] Article 28 of the DTA provided that "each of the

[1] *The Tax Justice Network-Africa v Cabinet Secretary for National Treasury, the Kenya Revenue Authority & the Attorney General* High Court of Kenya at Nairobi, Constitutional Petition No.494 of 2014; [2019] eKLR.
[2] Kenya-Mauritius Double Taxation Agreement, Legal Notice 59 of 2014 (the Notice), available at: *http://vivaafricallp.com/wp-content/uploads/2017/10/Kenya-Mauritius-DTA-Signed-Not-in-force.pdf* [Accessed 9 May 2019], Preamble.

Contracting Parties shall notify to the other the completion of the procedures required by its law for the entering into force of this Agreement" and that the Agreement would "enter into force on the date of the later of these notifications".[3]

On 23 May 2014, the Kenyan Cabinet Secretary for the National Treasury published Legal Notice No 59 of 2014 (the Notice)[4] purporting to bring the DTA into legal effect by exercising his powers under section 41 of the Income Tax Act 1973 (ITA CAP 470).[5] Section 41(1) ITA CAP 470 provides that:

> "The Minister may from time to time by notice declare that arrangements, specified in the notice and being arrangements that have been made with the Government of any country outside of the Republic of Kenya with a view to affording relief from double taxation in relation to income tax and any taxes of a similar character imposed by the laws of that country, shall, subject to subsection (5) but notwithstanding any other provision to the contrary in this Act or in any other written law, have effect in relation to income tax, and every such notice shall, subject to the provisions of this section, have effect according to its tenor."[6]

Section 41(4) ITA CAP 470 further provides that the Cabinet Secretary should lay a copy of the said notice, without delay, before Parliament. On 3 October 2014,[7] the Tax Justice Network-Africa (TJN-A), aggrieved by the actions of the Cabinet Secretary, filed a constitutional Petition challenging the constitutionality of the DTA, and seeking two substantive reliefs[8]:

> "a. A declaration that the failure, refusal and or neglect of the Respondents to subject the [DTA] to Ratification pursuant to the Treaty Making and Ratification Act 2012 Contravened Article 10 (a) (c) and (d) and 201 of the Constitution of Kenya.
>
> b. An order pursuant to the above declaration directing the Cabinet secretary for finance [to] immediately withdraw legal notice 59 of 2014 and commence the process of Ratification in conformity with the provisions of the Treaty making Ratification Act 2012 and report back to the Honourable Court within such period as the Honourable Court shall direct."

III. The legal issues and arguments

The main questions of law in this case can be summarised as follows:

1. Did the DTA increase the risk of revenue loss through treaty abuse and result in the limitation of Kenya's taxing rights thereby contravening the constitutional principles of public finance in Articles 10 and 201 of the Constitution of Kenya?[9]

[3] The Notice, above fn.2, Art.28(1).
[4] The Notice, above fn.2.
[5] Income Tax Act 1973 c.470 of the Laws of Kenya.
[6] ITA CAP 470 s.41(1).
[7] The procedure under the DTA Art.28 was not complete by this date and, thus, the DTA had not come into effect.
[8] *TJN-A v KRA*, above fn.1, [2019] eKLR at [1].
[9] Constitution of Kenya, 2010.

2. Are bilateral agreements different from bilateral treaties on the basis of section 3(2) and 3(4) of the Treaty Making and Ratification Act 2012; was the DTA a bilateral agreement, and distinct from bilateral treaties, and therefore not subject to the ratification procedure set out in Part III of the Treaty Making and Ratification Act 2012?
3. Was the enactment of the DTA preceded by appropriate public participation as envisaged under Article 10 of the Constitution of Kenya?

Revenue loss and limitation of taxing rights

The first legal issue for determination centred on whether the DTA contravened the constitutional principles of sustainable development and public finance in Articles 10 and 201 of the Constitution of Kenya by increasing the risk of revenue loss through treaty abuse and resulting in the limitation of Kenya's taxing rights.[10] It is peculiar that while this view was canvassed in the pleadings, and the Petitioner's submissions, the substantive reliefs sought did not make mention of the potential for revenue loss and limitation of taxation rights as grounds for nullification of the Notice.

In challenging the constitutionality of the DTA, the Petitioner relied on the Canadian decision in *R. v Big M Drug Mart Ltd*[11] in which it was held that legislation with a valid purpose, but unconstitutional effects, is unconstitutional, as is legislation with unconstitutional purposes but valid effects. The Petitioner claimed that the DTA was unconstitutional because it contravened the constitutional principles of public finance and effectively resulted in "unreasonable loss of income for the country".[12] In this regard, the Petition challenged several Articles in the DTA; this current note focuses on three core arguments.

First, the Petitioner took issue with Article 11 of the DTA which limited the source country's withholding tax rate on interest to 10 per cent while the Kenyan domestic withholding tax rate on interest is 15 per cent; and with Article 12 which limits the source country's withholding tax rate to 10 per cent while the Kenyan domestic tax rate is 20 per cent. The Petitioner contended that these provisions curtailed Kenya's tax base and limited the country's capacity to raise taxes for "sustainable economic growth and development".[13]

The Petitioner also challenged the fact that the DTA did not have a specific article permitting the Contracting States to levy withholding tax on management, technical services, and consultancy

[10] Constitution of Kenya, above fn.9, Art.201: "The following principles shall guide all aspects of public finance in the Republic—
(a) there shall be openness and accountability, including public participation in financial matters;
(b) the public finance system shall promote an equitable society, and in particular—
  (i) the burden of taxation shall be shared fairly;
  (ii) revenue raised nationally shall be shared equitably among national and county governments; and
  (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;
(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
(d) public money shall be used in a prudent and responsible way; and
(e) financial management shall be responsible, and fiscal reporting shall be clear."
[11] *R. v Big M Drug Mart Ltd* [1985] 1 SCR 295, 1985 CanLII 69 (SCC).
[12] *TJN-A v KRA*, above fn.1, [2019] eKLR at [7(d)].
[13] *TJN-A v KRA*, above fn.1, [2019] eKLR at [3(a)] and [3(b)].

fees. The Petitioner reasoned that while Kenya's domestic law permits the levying of withholding tax on fees for services provided by both residents and non-residents, the aforesaid omission meant that Kenya would only be permitted to levy withholding tax on "Mauritius-resident companies whose presence in Kenya meets the permanent establishment threshold described in Article 5" of the DTA.[14] Thus, Mauritius-resident companies providing services in Kenya could circumvent Kenyan taxation by avoiding the minimum permanent establishment requirements.

Thirdly, the Petitioner averred that the DTA undermined the re-introduction of capital gains tax in Kenya. Kenya suspended capital gains tax in 1985 and re-introduced the tax in 2015; the DTA was signed in 2012. Thus, during the negotiation of the DTA, capital gains tax was not being imposed in Kenya. Article 13(4) of the DTA provides:

> "Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3 shall be taxable only in the Contracting State of which the alienator is a resident."

The Petitioner argued that the failure to explicitly address the issue of disposal of shares in companies in the DTA opens up opportunities for abuse of Article 13(4) because it provides a route for foreign investors to "buy Kenyan companies through Mauritius holding companies and Kenya cannot tax any of the gains when they sell these business again" thus facilitating avoidance of capital gains tax in Kenya.[15] Further, Dr Hearson contends that

> "it may be possible for domestic investors to engage in 'round tripping' to achieve the same effect despite anti-abuse rules in Kenyan domestic law because the capacity of such rules to override international double taxation agreements is uncertain".[16]

To buttress the argument, the Petitioner utilised the Indian–Mauritius Double Tax Agreement,[17] which has a similar capital gains tax clause, as an example of a treaty which had been abused in this manner to the detriment of India which lost "an estimated $600 million a year in revenues as a result of tax avoidance and illicit round-tripping by Indian business people…".[18]

The Petitioner concluded that, based on the facts and the arguments, the Court ought to infer

> "that, the loss of revenue, primarily from corporations, will result in the State imposing higher and additional taxes on its citizens in order to meet its financial obligation contrary of the Constitutional principle that tax burden must be shared fairly".[19]

The Respondents' responses and submissions centred on the objective of the DTA, that is, the potential benefit of attracting increased foreign direct investment. The Respondents contended that the lower DTA withholding tax rates on interest and royalties were justified because a treaty rate that was similar to or higher than the domestic rate would defeat the objective of the DTA.

[14] M. Hearson, *Double taxation agreement between Kenya and Mauritius, Submission to the High Court of Kenya* (Expert Statement) (2015), annexed to the Petitioner's Supplementary Affidavit, available at: *https://martinhearson.files.wordpress.com/2019/03/kenya-mauritius-submission.pdf* [Accessed 9 May 2019], para.4.
[15] *TJN-A v KRA*, above fn.1, [2019] eKLR at [3(e)].
[16] Hearson, above fn.14, para.6.
[17] Indian–Mauritius Double Tax Agreement, Government Notice No.101 of 1983, available at: *www.vivaafricallp.com/wp-content/uploads/2015/09/Mauritius-India-DTA.pdf* [Accessed 9 May 2019].
[18] *TJN-A v KRA*, above fn.1, [2019] eKLR at [3(h)].
[19] *TJN-A v KRA*, above fn.1, [2019] eKLR at [15].

The Respondents also maintained that the taxation of services, management fees, and insurance commissions was adequately captured in Article 5 of the DTA and did not require specific treatment in a separate article. Further, according to the Expert Statement, the Respondents have previously suggested that Article 21 of the DTA covers management, technical services, and consultancy fees since it covers income that is not expressly mentioned in the other DTA provisions; a position that Dr Hearson maintains "is not shared by many international commentators on the legal interpretation of double taxation treaties".[20]

Regarding the capital gains DTA provision, the Respondents' justification was simply that at the time the DTA was negotiated, capital gains tax was not imposed in Kenya and that, in any event, "the advantages accruing to a non-resident pursuant to a DTA are meant to attract foreign investment thus creating employment".[21]

The "agreements v treaties" debate

The second issue for determination was whether the DTA was a bilateral treaty and whether bilateral treaties and agreements are different legal instruments with distinct ratification procedures. The determination of this issue centred on the interpretation of section 3 of the Treaty Making and Ratification Act 2012. It is imperative to set out the contentious sections of the provision, in full, in order to aid the reader in understanding the controversy between the parties:

> "3. **Application**
>
> (1) …
>
> (2) *This Act shall apply to—*
>
> (a) multilateral treaties;
>
> (b) *bilateral treaties* which deal with—
>
> (i) the security of Kenya, its sovereignty, independence, unity or territorial integrity;
>
> (ii) the rights and duties of citizens of Kenya;
>
> (iii) the status of Kenya under international law and the maintenance or support of such status;
>
> (iv) the relationship between Kenya and any international organisation or similar body; and
>
> (v) the environment and natural resources.
>
> (3) …
>
> (4) *Notwithstanding subsection (2)(b)*, the Government may enter into *bilateral agreements—*
>
> (a) necessary for matters relating to government business; or
>
> (b) relating to technical, administrative or executive matters."[22]

The Respondents claimed that, on the basis of the foregoing provisions, and the use of the term "notwithstanding" in section 3(4), bilateral treaties and bilateral agreements are different legal

[20] Hearson, above fn.14, para.5.
[21] *TJN-A v KRA*, above fn.1, [2019] eKLR at [4(g)].
[22] Treaty Making and Ratification Act 2012 s.3 (emphasis added).

instruments; that bilateral agreements are ordinary contractual arrangements that have legal effect upon signing by the representatives of the respective states while bilateral treaties come into effect upon ratification as set out in Part III of the Treaty Making and Ratification Act 2012.

The Respondents further asserted that double tax agreements are bilateral agreements falling under section 3(4) above and are, unlike bilateral treaties falling under section 3(2), not subject to ratification. Peculiarly, despite arguing that the DTA was a bilateral agreement and not a bilateral treaty, and therefore not subject to the ratification procedures under Part III of the Treaty Making and Ratification Act 2012, the Respondents adduced evidence intended to prove that the bilateral agreement was "ratified by Cabinet"[23] in accordance with the ratification procedure set out in section 4 and section 5(4) of the Treaty Making and Ratification Act 2012.

The Petitioner, on the other hand, argued that the terms "agreement" and "treaty" are interchangeable and refer to the same legal instrument; that despite the use of the word "agreement" the DTA was a bilateral treaty subject to the ratification procedure set out in Part III of the Treaty Making and Ratification Act 2012. In justification of their argument, the Petitioner stated that the OECD recognises double tax agreements as treaties governed by the Vienna Convention on the Law of Treaties,[24] and that double tax agreements are "bilateral treaties which deal with the rights and duties of citizens of Kenya" under section 3(2)(b)(ii) of the Treaty Making and Ratification Act 2012.[25]

The public participation question

The Petitioner argued that in publishing the Notice pursuant to the exercise of his powers under section 41 of the ITA CAP 470, the Cabinet Secretary ought to have read that provision together with Article 10 and Article 201 of the Constitution of Kenya which make public participation a national value and require all state organs, officers, and public officers, whenever they enact law, to ensure public participation and to ensure public participation in matters of public finance. The Petitioner also contended that the Notice ought to have complied with Part II and Part IV of the Statutory Instruments Act 2013 which mandate that Statutory Instruments are preceded by consultation and public participation, a Regulatory Impact Statement, and parliamentary approval.

In their rejoinder, the tax authority argued that the Constitution of Kenya does not expressly state how public participation should be structured and that it is left open to state organs and officers, and public officers, to determine how to meet this constitutional requirement. Further, the tax authority argued "that it is neither its role, nor within its mandate to conduct public participation and that there may be need for legislation" to guide the public participation process.[26] In their submissions, the Cabinet Secretary and the Attorney General contended that on the basis of the parameters of public participation set out in *Moses Munyendo & 908 others v Attorney General Nairobi*,[27] they had wide discretion in determining how to conduct public participation

[23] *TJN-A v KRA*, above fn.1, [2019] eKLR at [18].
[24] Vienna Convention on the Law of Treaties 1969.
[25] *TJN-A v KRA*, above fn.1, [2019] eKLR at [11].
[26] *TJN-A v KRA*, above fn.1, [2019] eKLR at [30].
[27] *Moses Munyendo & 908 others v Attorney General Nairobi* High Court of Kenya at Nairobi, Constitutional Petition No.16 of 2013; [2013] eKLR.

and that they had demonstrated that the process of the enactment of the DTA was an inclusive process because it involved representatives from the Treasury, Ministry of Foreign Affairs, the tax authority, the Kenya Investment Authority and the State Law Office.

IV. The judgment of the High Court

Did the DTA contravene the constitutional principles of sustainable development and public finance?

In four lines, without going into legal arguments, the learned judge held that there was insufficient merit in the argument that the DTA contravened the principles of public finance. In his view, the argument was unmeritorious because the Petition did not provide specific figures to prove the potential for revenue loss and specific "examples of…companies…found evading tax through roundtripping etc".[28]

Was the Legal Notice void for want of public participation?

The judge dealt with this issue in six lines. While he acknowledged that the Constitution of Kenya contains a mandatory public participation requirement in the law-making process, he agreed with the Respondents' position that it is not clear what public participation entails and that "there is need for creation of legislation to guide the process of public participation".[29] Thus, he did not find sufficient merit in the argument that the Notice ought to be nullified for want of public participation.

Was the DTA a bilateral agreement, and not a treaty? Was the Legal Notice valid?

In contrast to the way in which he dealt with the previous issues, the judge spent much of his time on this issue and gave some legal justification for his decision. The judge agreed with the Respondents' interpretation of section 3(2) and 3(4) of the Treaty Making and Ratification Act 2012 and ruled that double tax agreements are bilateral agreements governed by section 3(4), and not bilateral treaties governed by section 3(2). In his view:

> "A keen reading of section 3(4)…qualifies itself as a [special] form of agreement from what is provided for by section 3(2) (b) which are [b]ilateral treaties, due to the use of the word 'Notwithstanding' at the introduction of the provision. If the intention was for the two provisions to mean the same, then there would be no need to distinguish the two by the use of 'Treaty' and 'Agreement'."[30]

Having so found, the judge held that there was no legal basis for arguing that the Respondents ought to have subjected the DTA to the ratification procedure under Part III of the Treaty Making and Ratification Act 2012 since that procedure "applies to treaties".[31] However, the judge held that the Notice which purported to bring the DTA into effect was a Statutory Instrument and

[28] *TJN-A v KRA*, above fn.1, [2019] eKLR at [38].
[29] *TJN-A v KRA*, above fn.1, [2019] eKLR at [35].
[30] *TJN-A v KRA*, above fn.1, [2019] eKLR at [35].
[31] *TJN-A v KRA*, above fn.1, [2019] eKLR at [36].

was subject to sections 10 and 11 of the Statutory Instruments Act 2013 which required that the Notice be tabled before Parliament. The judge ruled that, as the Respondents had not shown that the Notice was tabled before Parliament in accordance with section 11 of the Statutory Instruments Act 2013, it ceased "to have effect immediately after the last day for it to be so laid…".[32]

V. Commentary

The decision in *TJN-A v KRA* is probably best described as a tremendous missed opportunity. The Court was presented with a landmark case in which the judge had the incredible opportunity to develop crucial jurisprudence and significantly advance the law governing treaty-making, public participation in tax law-making, transformative constitutional principles of tax and public finance, and judicial regulation of the executive power over taxation. With respect, the writer would suggest that the judged failed to seize this opportunity.

From a tax activism perspective, the issue regarding the potential for revenue loss and limitation of taxing rights was perhaps the most crucial issue for determination. In line with the goals of tax activism, the Petitioner's underlying intention was to utilise constitutional provisions to quash the DTA based on the conviction that double tax agreements are deeply injurious to the economic welfare and sustainable development goals of developing countries. In what may be deemed to be poor drafting of the pleadings, the Petitioner's substantive reliefs failed to capture this underlying intention; however, the issue was of such great significance to the Petitioner that they deemed it crucial to adduce expert opinion evidence in support of their position. The judge held that the arguments regarding this legal issue lacked merit and dismissed them. It is therefore astonishing to the writer that the Petitioner's press release[33] in response to the Court judgment stated as follows:

> **"COURT DECLARES THE KENYA-MAURITIUS DTA UNCONSTITUTIONAL**
>
> **A win for Kenyans in keeping more revenues from bilateral treaties**
>
> …This judgment validates our call for African countries to review all their tax treaties particularly those signed with tax havens. Evidence has shown that contrary to their objectives, these DTAs have led to double non-taxation and resulted to massive revenue leakage for African countries. The ruling further underscores our position that DTAs signed especially with tax havens have been avenues of tax avoidance practices denying African countries the much sought-after revenues to finance development.… 'This ruling affects not only the Kenya Mauritius DTA, but also has legal implications for all other treaties signed under the Constitution. It rightly pushes us to rethink the costs, benefits and motivations around signing DTAs in the first place. We should therefore set up a DTA policy framework – which sets out the basic minimums the country should consider while signing bilateral tax agreements….'"

[32] *TJN-A v KRA*, above fn.1, [2019] eKLR at [43].
[33] Tax Justice Network-Africa, press release, *Court Declares the Kenya-Mauritius DTA Unconstitutional* (Petitioner's Press Release) (15 March 2019), available at: *https://taxjusticeafrica.net/wp-content/uploads/2019/04/PRESS-RELEASE-COURT-DECLARES-KENYA-MAURITIUS-DTA-UNCONSTITUTIONAL-2.pdf* [Accessed 9 May 2019].

A plain reading of the judgment reveals that it does not have the effect that the Petitioner's press release claims that it has. The Court *did not* declare the DTA unconstitutional. The Court nullified the Notice purporting to bring the DTA into force; further, it did not do so on the basis of constitutional principles, but on the basis that the procedure followed in publishing the Notice offended the provisions of the Statutory Instruments Act 2013.

In fact, the judge found that there was no merit in the Petitioner's argument that the DTA posed a threat to Kenya's tax base and held that there was insufficient evidence upon which to nullify the DTA on this ground. It is difficult to see why the Petitioner claims that the judge's treatment of this legal issue "underscores our position that DTAs signed especially with tax havens have been avenues of tax avoidance practices denying African countries the much sought-after revenues to finance development".[34]

Having said that, and with respect, the writer would suggest that the judge's decision on the revenue loss and limitation of taxing rights question is wanting. The judge failed to make use of an excellent opportunity to set out the legal principles that courts should apply when dealing with constitutional challenges to substantive provisions in double tax agreements. Do, and should, courts have the power to question substantive provisions in such bilateral commercial arrangements on the basis of constitutional considerations? Does Kenya's radical and transformative Constitution give constitutional courts the power to question and override the executive's policy decisions regarding investment strategies and tax incentives by nullifying double tax agreements? What policy considerations should courts apply in determining the answers to these questions? If constitutional courts do have these powers, and bearing in mind the transformative nature of Kenya's Constitution, what test or tests will the court apply in determining whether a double tax agreement breaches constitutional principles of public finance and sustainable development? Where would the burden of proof lie and what standard of proof would that party be expected to meet? The failure to address these critical questions means that the judgment in *TJN-A v KRA* is of very little jurisprudential use in subsequent litigation raising similar issues.

The Petitioner's press release regarding the judge's treatment of the legal status of double tax agreements also misrepresents the finding of the Court. The press release states:

> "The Kenya High court today declared void and unconstitutional the Double Tax Avoidance Agreement (DTAA) between Kenya and Mauritius. The high court ruled that due process as laid out in the Kenya Constitution was not followed and hence the Kenya Mauritius DTA 'ceased to have effect and became void in accordance with the Kenyan law.' Mr Alvin Mosioma the Executive Director of TJNA said 'This ruling is ground breaking not just for Kenya but other African countries. We welcome this ruling as a validation of our argument that requires all DTAA's to be subject to the constitutionally required ratification process as enshrined on Articles 10 (a to c) and 201 of the Constitution of Kenya.…'"[35]

As explained above, contrary to the press release, the High Court did not declare the DTA to be void and unconstitutional—the Court nullified the Notice purporting to give the DTA legal effect on the basis of procedural irregularities and not constitutional considerations. Most importantly,

[34] Petitioner's Press Release, above fn.33.
[35] Petitioner's Press Release, above fn.33.

the judgment did not validate the Petitioner's argument that double tax agreements ought to be constitutionally ratified as the press release alleges. The judge expressly stated that double tax agreements are not treaties and do not have to be ratified.

With respect, it is suggested by the writer that the judge's decision on the legal status of double tax agreements is arcane. The judge's finding that double tax agreements are agreements and not treaties is legally inaccurate and introduces unwarranted and undesirable complexity in this area of law. It is internationally accepted that double tax agreements are treaties and are governed by the Vienna Convention on the Law of Treaties,[36] a treaty that Kenya has ratified and which forms part of Kenyan law. Article 2 of the Vienna Convention acknowledges that treaties may be called by any name; the treaty's name does not change its nature. "Thus, it does not matter that some tax treaties are called 'conventions' and others are called 'agreements'."[37] Holmes confirms that a "DTA is often referred to as a 'double tax agreement', a 'double tax treaty', a 'double tax convention' or simply a 'tax treaty'".[38] The definition of the term "tax treaty", in the *International Tax Glossary*, uses the word "agreement".[39] Thus, that the terms are interchangeable is a fact so widely accepted that it is submitted that the judge ought to have taken judicial notice of it and ruled accordingly.

The judge and the Respondents maintained that the DTA was an agreement that did not need to be ratified, but confusingly went on to argue that the agreement was appropriately "ratified by Cabinet".[40] Why did they need to state that the DTA was ratified once they had stated that it did not require ratification? Ratification is a technical term defined in the Treaty Making and Ratification Act 2012, and the Act sets out an elaborate ratification procedure. What was the legal basis for this "cabinet ratification"?

The judge's decision was influenced by the admittedly ambiguous wording of sections 3(2) and 3(4) of the Treaty Making and Ratification Act 2012. It is undeniable that the contentious provisions of this Act are problematic; double tax agreements do not fit neatly within the "types" of treaties set out in section 3(2), and yet referring to them as commercial agreements contradicts the international law position that double tax agreements are treaties. This inconsistency in the legislation is perhaps a result of poor drafting, but it is possible that the ambiguity was equally politically strategic—it would allow contentious agreements like double tax agreements to avoid the rigorous ratification procedure under the Treaty Making and Ratification Act 2012.

In dealing with the inconsistency, the judge ought to have exercised his powers of statutory interpretation in a manner that was most likely to bring clarity. Statutory interpretation "…is probably the single most important aspect of judicial work" and must, therefore, be approached with great caution.[41] Statutory interpretation exists to deal with precisely such circumstances as those in which the judge found himself: failures in the drafting process and instances of strategic

[36] B.J. Arnold, *International Tax Primer*, 3rd edn (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016), 136.
[37] Arnold, above fn.36, 137.
[38] K.J. Holmes, *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application*, 2nd revised edn (Amsterdam: IBFD, 2014), s.3.2.
[39] J. Rogers-Glabush (ed.), *International Tax Glossary*, 6th edn (Amsterdam: International Bureau of Fiscal Documentation, 2009).
[40] *TJN-A v KRA*, above fn.1, [2019] eKLR at [18].
[41] E. Bell, "Judicial Perspectives on Statutory Interpretation" (2013) 39(2) *Commonwealth Law Bulletin* 245, 245.

ambiguity.[42] In interpreting the provisions of the Treaty Making and Ratification Act 2012, the judge ought to have looked at the language in section 3(2) and 3(4) "against the backcloth of the world to which it relates".[43] Courts need to take judicial notice of the "legal…aspects of the society in which the statute is to operate".[44] In this case, the judge ought to have taken judicial notice of the universally accepted legal status of double tax treaties in order to give the statutory provisions a meaning that did not produce an arguably unreasonable and irreconcilable outcome. The judge ought to have been guided by the Vienna Convention, which forms part of Kenyan law, and leading academic texts on international tax law; courts have recognised that sometimes statutes are "so full of ambiguities, gaps and conflicts that often a judge has to reach beyond the statute to seek a solution to the problem at hand".[45]

Finally, the judge's decision on public participation is difficult to rationalise. The judge seemed to suggest that, although public participation is a mandatory constitutional requirement, he could not base his decision on this ground because there was no legislation guiding the process of public participation. With respect, the writer suggests that the judge failed to address two critical issues.

First, the judge should have begun by addressing the legal principles that ought to apply in respect of public participation in the treaty-making process. Does the mandatory constitutional requirement of public participation bind state organs and officials when they are negotiating and signing international legal instruments? Public participation is recognised as a national value and principal of governance in Article 10 of the Constitution of Kenya. Further, Article 201 of the Constitution affirms that the principle of public participation shall guide all aspects of public finance. Do these provisions mean that all bilateral and multilateral agreements into which the Government of Kenya desires to enter ought to be subjected to a public participation process before negotiation or ratification? What are the public policy considerations that ought to guide the answers to these questions? Would such a requirement enhance transparency and prudence in public finance or unreasonably inhibit the Government's ability to enter into strategic and beneficial international agreements?

Secondly, while it is true that Kenya urgently needs an overarching legislative and policy framework for public participation, it was not open to the judge to find that he could not make a definitive judgment on this issue because of the absence of legislative guidance. The High Court has held that public participation is a justiciable right and one that is enforceable immediately.[46] The Court of Appeal affirmed this view, and clarified that the principle of public participation is neither aspirational nor progressive; instead, it is a right that is immediate,

[42] Bell, above fn.41, 247–248.
[43] Bell, above fn.41, 260 citing *R. v Secretary of State for the Home Department Ex p. Daly* [2001] UKHL 26 and Lord Steyn, *Dynamic Interpretation Amidst an Orgy of Statutes* (Ottawa: The Brian Dickson Memorial Lecture, 2 October 2003).
[44] Bell, above fn.41, 261.
[45] *Public Prosecutor v Kok Wah Kuan* [2008] 3 LRC 294 at [306b].
[46] *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* High Court of Kenya at Machakos, Constitutional Petition No.305 of 2012; [2015] eKLR.

enforceable, and justiciable and failure to abide by this principle "can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate".[47]

In any event, and with respect, the judge was not entirely without guidance in determining whether the Respondents had engaged in adequate public participation. He ought to have considered the relevance of existing public participation guidelines[48] and taken into account the ample judicial precedent setting out the principles that ought to guide public participation. For example, in *Robert N. Gakuru & others v Governor Kiambu County & 3 others*, Justice Odunga articulately stated[49]:

> "In my view to huddle a few people in a 5-star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another, a one day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation."

Further, in holding that the treaty negotiation process had been an inclusive one, involving several government departments, the judge failed to reconcile his decision with the decision in *Thuku Kirori & 4 others v County Government of Murang'a* that public participation "should not be narrowly interpreted to mean engagement of a section of people purporting to be professionals" but rather it should be a public engagement for the larger public benefit.[50]

VI. Conclusion

It is astounding to this writer that in the aftermath of the decision in *TJN-A v KRA*, the Petitioner chose to wave the victory flag, rather than challenge this problematic judgment in the Court of Appeal. It is difficult to see how a judgment that nullifies a Statutory Instrument intended to bring the DTA into effect, on the basis of a procedural error, and does not nullify the DTA itself, represents a "a win for Kenyans in keeping more revenues from bilateral treaties".[51] In fact, this judgment has introduced undesirable complexity by holding that double tax agreements are not treaties, and do not have to be ratified, a position that is untenable in light of the governing international law principles. Further, the Court failed to issue a definitive, or at least an indicative judgment, on how courts should approach constitutional challenges to substantive provisions of double tax treaties; such a judgment would have been very useful in similar cases in other developing countries in the Commonwealth. Finally, the judge missed an excellent opportunity

[47] *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* Court of Appeal at Nairobi, Civil Appeal No.224 of 2017; [2017] eKLR.
[48] Ministry of Devolution and Planning and Council of Governors, *County Public Participation Guidelines* (January 2016).
[49] *Robert N. Gakuru & others v Governor Kiambu County & 3 others* High Court of Kenya at Nairobi, Constitutional Petition No.532 of 2013; [2014] eKLR.
[50] *Thuku Kirori & 4 others v County Government of Murang'a* High Court of Kenya at Murang'a, Constitutional Petition No.1 of 2014; [2014] eKLR.
[51] Petitioner's Press Release, above fn.33.

to shape the emerging jurisprudence on public participation, in so far as it applies to public finance legislation in general, and negotiation of double tax treaties in particular.

Daisy L.A. Ogembo*

Constitutionality; Developing countries; Double taxation treaties; Kenya; Potential lost revenue; Public participation; Ratification; Sustainable development

* DPhil in Law, University of Oxford.