

PRESS RELEASE

COURT DECLARES THE KENYA-MAURITIUS DTA UNCONSTITUTIONAL

A win for Kenyans in keeping more revenues from bilateral treaties

Nairobi March 15, 2019, The Kenya High court today declared void and unconstitutional the Double Tax Avoidance Agreement (DTAA) between Kenya and Mauritius. In reading the Judgment, **Justice W. Korir** granted Tax Justice Network Africa's (TJNA) submission by declaring void Legal Notice No. 59 of 2014 which renders the Kenya/Mauritius DTAA void and unconstitutional. The long-awaited judgement is in reference to TJNA's challenge of the constitutionality of the Kenya-Mauritius DTAA signed in May 11, 2012 on the following grounds:

- The government failed or neglected to subject the Kenya-Mauritius Double Taxation Avoidance Agreement to the due ratification process in line with the Treaty Making and Ratification Act 2012 as a contravention of Articles 10 (a), (c) and (d) and 201 of the Constitution of Kenya
- That **Legal Notice Legal Notice 59 of 2014** is therefore invalid and that the Cabinet Secretary for Treasury should immediately commence the process of ratification in conformity with the provisions of the Treaty Making and Ratification Act 2012.

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. The ruling is a first step in the right direction in ensuring proper and wider stakeholder consultations on matters of national interest.*' 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.

TJNA's Policy Lead-Tax and Investments, Jared Maranga said of the ruling "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.

Double Tax Agreements have a direct bearing to the taxing rights of states. The governments should therefore put in place mechanisms to ensure effective public participation as part of the treaty ratification process."

TJNA calls on the Kenya government to revisit all other recently signed DTAs including those with UAE, Netherlands, China and South Korea and those under negotiation to ensure that they are compliant with this new ruling. The role of parliament is not only critical but also constitutionally mandatory in the treaty ratification process. We call upon the Kenyan parliament to rise us to this opportunity and play their legislative role in scrutinising future DTAs to ensure that they do not undermine domestic resource mobilisation efforts. DTAs that are not well thought out have been a subject of abuse by multinational corporations especially through treaty shopping and round tripping which impact on the revenues that countries realise out the associated investments.

"TJNA intends to ensure that all recently signed treaties and future similar tax negotiations are consistent with this ruling and are not in contravention with the laid down laws and procedures" added Mr Mosioma.

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