



REPUBLIC OF KENYA



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Malde & another v Kenya Revenue Authority; Karoki (Interested Party)
(Constitutional Petition E041 of 2021) [2023] KEHC 1123 (KLR)
(Constitutional and Human Rights) (23 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1123 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E041 OF 2021

AC MRIMA, J

FEBRUARY 23, 2023

BETWEEN

PRATIK MANSUKHLAL MALDE 1ST PETITIONER

ANIL KUMAR VIRPAR MALDE 2ND PETITIONER

AND

KENYA REVENUE AUTHORITY RESPONDENT

AND

RAHAB MWIHAKI KAROKI INTERESTED PARTY

JUDGMENT

Background:

1. On 14th January 2020, Kenya Revenue Authority, the Respondent herein issued Departure Prohibition Orders (hereinafter referred to as ‘the DPO’) against Pratik Mansukhlal Malde and Anil Kumar Virpar Malde, the 1st and 2nd Petitioners herein respectively, effectively barring them from travelling out of the country.
2. The DPO was issued as a result of failure by the Petitioners to comply with tax demand issued by the Respondent on 15th September 2020 against Family Signature Limited (hereinafter referred to as ‘the Company’) allegedly owned and run by the Petitioners.



The Petition:

3. Through the Amended Petition dated 16th February, 2021, supported by two Affidavits of Anilkumar Virpar Malde deposed to on 4th February 2021 and three further affidavits deposed to on 16th February 2021, 22nd March 2021 and 8th October 2021, respectively, the Petitioners sought to challenge the DPO.
4. The Petitioners pleaded that as at the date of issuance of the DPO, the 1st Petitioner herein, Pratik Mansukhlal Malde, was not a Director, Shareholder, controlling member or employee of the Company.
5. As for the 2nd Petitioner, Anil Kumar Virpar Malde, it was his case that through a Settlement Agreement dated 30th April 2012, he had unconditionally transferred all his shares in the Company in favour of Rahab Mwhaki Karoki, the Interested Party herein, and to that end, executed share transfers for registration by the Interested Party.
6. The 2nd Petitioner posited that the shares included all subsisting rights, assets and existing liabilities and there was no exclusion clause in the Settlement Agreement indicating that the 2nd Petitioner would retain any liabilities after the date of transfer.
7. The Petitioners pleaded that effective 30th April 2012, the Interested Party assumed executive control of the Company despite failing to register the shares she had duly executed.
8. On the foregoing basis, the Petitioners pleaded that the tax demands and the attendant DPO against them was misplaced since the 2nd Petitioner had already transferred his shares to the Interested Party who had executive control and management of the Company.
9. The Petitioners pleaded that it was in public domain that the Interested Party was the owner and or controlling member of the Company.
10. To that end, the Petitioners referred to the newspaper article in the Business Daily of Monday 24th July, 2017 indicating the Interested Party as the owner and the fact that the tax demand was not only sent to them but also copied to the Interested Party herein.
11. The Petitioners pleaded further that despite informing the Respondent through the letter dated 16th October, 2020 that they were no longer in control of the Company, it nonetheless issued the DPO.
12. In identifying the various constitutional infractions, the Petitioners pleaded that the DPO was issued in a discriminatory manner in violation of their right under Article 27 of *the Constitution*.
13. It was their case that unequal application of the law arose from the fact that no DPO had been issued against the Interested Party or her nominee in the Company, one Antony Munywoki Kimeu.
14. It was the Petitioners' further position that their right to movement guaranteed under Article 39 of *the Constitution* had been violated by the DPO.
15. The Petitioners contended further that prohibiting them from seeing their immediate family members who reside in India and United Kingdom violated their right to dignity protected under Article 28 of *the Constitution*.
16. It was their case further that the indefinite, unlawful and unjustifiable prohibition of their movement violated their right to freedom and security of the person otherwise guaranteed under Article 29 of *the Constitution*.



17. They further claimed that their inability to pursue business interests abroad as a result of the DPO had effectively curtailed their right to economic and social freedom provided for and guaranteed under Article 38 of *the Constitution*.
18. Regarding the failure by the Respondent to be expeditious, efficient, lawful, reasonable and procedurally fair in their decision, it was the Petitioner's case that their right to fair administrative action was violated in contravention of Article 47 of *the Constitution*.
19. The Petitioners pleaded that they are not flight risk as they have permanent homes and have significantly invested in Kenya.
20. On the foregoing factual and legal backdrop, the Petitioners prayed for the following reliefs: -
 - A. declaration that the Petitioners constitutional right of freedom of movement, to equality before the law, human dignity, freedom and security of the person, fair administrative action and fair hearing as guaranteed by Article 25 (c), 27, 28, 29, 38, 39, 47 and 50 of *the Constitution* have been violated and/or threatened to be violated by the Respondent's, their agents, employees and/or servants;
 - B. This Honourable Court be pleased and do hereby grant a judicial review order of prohibition to prohibit the Respondent, its officials, employees, servants and/or agents or anybody working under or for it from commencing any tax enforcement measures, whether civil or criminal in nature, against the Petitioners with respect to any tax questions or tax due from Family Signature Limited.
 - C. A permanent injunction to restrain the Respondent, its officials, employees, servants and/or agents or anybody working under or for it from commencing any tax enforcement measures, whether civil or criminal in nature, against the Petitioners with respect to any tax questions or tax due from Family Signature Limited.
 - D. This Honourable Court be pleased and do hereby grant a judicial review order of certiorari to quash the Respondent's decision to issue a Departure Prohibition Orders against the Petitioners and the Respondent's decision to commence tax enforcement measures against the Petitioners with respect to tax due from Family Signature Limited.
 - E. Costs of this Petition;
 - F. And any other or further relief as this Honourable court may deem fit to grant

The Petitioners' submissions:

21. The Petitioners further urged their case through written submissions dated 8th October, 2021.
22. In giving a historical account of ownership of the company, it was their submission that on 21st November 2007, the 2nd Petitioner and one Antony Munywoki Kimeu, a nominee of the Interested Party, incorporated the said company.
23. That the Company owns several building in Nairobi CBD including Land Reference Numbers 209/4987 (Amber House) Mfangano Street, Land Reference Numbers 209/4367 (Formation House) Mfangano Street, Land Reference Number 209/3842 (formerly known as Quran House) and Nine Hundred and Sixteen (916) paid up shares with Lenana Forest View Limited, which company owned, land parcel number title number Dagoretti/Riruta/3484 consisting of Five (5) blocks of apartments comprising One Hundred and Four (104) units.



24. It was submitted that on 30th April, 2012, the company transferred its 50 shares to the Interested Party and her nominees and in exchange, Superiorfone Communications Limited, a company owned by the Interested Party agreed to execute a transfer of 50% proprietary interest and ownership on L.R No. 209/555 (Bektel Building) to Veepison Investments Limited a Company owned by the Petitioners.
25. It was their submission further that the company also agreed to transfer 100% ownership on L.R No. 209/4367 (Formation House) to Veepison Investments Limited.
26. It was the Petitioners' case that under clause 6 and 7 of the Settlement Agreement, shares were transferred to the Interested Party and/or her nominees on "as is as basis" including all subsisting rights, assets and existing liabilities attaching to the same as at the date of the Settlement Agreement.
27. In reference to the 1st Petitioner's Affidavit sworn on 8th September 2011, it was the Petitioners' position that even prior to execution of the Settlement Agreement, the Interested Party had been running and managing the company.
28. It was their submission that when the Respondent commenced investigations into the affairs of the Company, the Interested Party engaged, one Dr. Githae, a tax agent to assist the company.
29. The Petitioners further referred to the minutes of the meeting of 30th September, 2015, attended by the Respondent's officers, the Petitioners and the Interested Party and submitted that in the meeting, the Respondent was duly notified that the Petitioners had sold off their shares in the company.
30. To that end, it was submitted that the Respondent officers appreciated that fact and excused the Petitioners from any further involvement in the tax investigations.
31. To lend credence to the foregoing, the Petitioners submitted that the Interested Party later challenged the tax assessment made by the Respondent at the Tax Appeal Tribunal vide Tax Appeal No. 25 of 2016 and later at the High Court vide Income Tax Appeal No. 28 of 2017.
32. They stated that the judgment of the Tax Appeal Tribunal delivered on 22nd February 2017 discussed the Settlement Agreement dated 30th April 2012 in detail and is a confirmation that the Respondent was aware of its contents despite denying knowing it in their Replying Affidavit.
33. The Petitioners submitted that it is on the foregoing background that the they responded to the Respondent's tax demand indicating that it was misplaced as against them.
34. As a consequence of the foregoing, the Petitioners submitted that enforcing Section 45(4) of the [Tax Procedures Act](#), 2015, to prevent them from leaving Kenya on grounds they have tax that is payable or will become payable was unlawful.
35. In refence to section 18(4) of the [Tax Procedures Act](#), 2015, the Petitioners submitted that they were not controlling members in relation to the company.
36. The Petitioners submitted that the Respondent was exercising power in a manner that is not fair and just to the people. Support to that end was drawn from Keroche Industries Limited -vs- Kenya Revenue Authority & 5 Others [2007] 2 KLR 240 where it was observed inter-alia: -

.... A public authority must not be allowed by the Court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers.
37. Pursuant to the foregoing, the meeting of 30th September, 2015 and the minutes thereon, the Petitioners submitted that the Respondent had violated their right to legitimate expectation because



they were not liable for tax, the Respondent having knowledge that they had sold the company to the Interested Party.

38. To further assert the incidence of violation of the right to legitimate expectation, the Petitioners referred to High Court Misc. Civil Application No. 359 of 2012, Republic -vs- Kenya Revenue Authority ex parte Shake Distributors Limited where the Court quoted the scholarly works of De Smith, Woolf & Jowell, “Judicial Review of Administrative Action” 6th Edition, Sweet & Maxwell, at page 609 where it was observed: -

..... A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted.

39. On a different line of argument, the Petitioners submitted that the right to fair hearing and fair administrative action was violated when the Respondent failed to respond or render any decision on the 2nd Petitioner’s letter to the Respondent indicating that they were no longer running the company.

40. It was their case that under Section 51 of the *Tax Procedures Act*, Act No. 29 of 2015 the Commissioner is required to make a determination on an objection raised by a taxpayer within sixty (60) days in default of which the objection is treated as having been allowed.

41. In claiming that their letter dated 16th October, 2020 was clear and unambiguous, the Petitioner referred the Court to Vivo Energy Kenya Limited -vs-Commissioner of Customs & Border Control, Kenya Revenue Authority & another [2020] eKLR where it was observed: -

... In my view since there is no format for making an objection, what is required is the substance rather than the form. What the law frowns at is an objection that is framed in such an ambiguous manner as not to be certain whether the tax payer is seeking further particulars or indulgence to enable it pay the taxes demanded.

42. In submitting on the Respondents’ unequal application on the law, the Petitioners stated that no DPO was issued against the Interested Party or Antony Munywoki despite appearing on the list of directors of the Company.

43. It was the Petitioners’ case that the Respondent’s decision was arbitrary and discriminatory. Support to that end was drawn from the South African decision in S. -vs-. Makwanyane [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) where the following was said.

.... Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way.

44. The Petitioners further reiterated violation of their right to movement and the attendant violation of the right to dignity, economic and social freedom and stated that the Respondent’s conduct was unreasonable, malicious and biased.

45. To fortify the foregoing, the decision in Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR was relied upon where Wednesbury unreasonableness was discussed as follows;

84. The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be ‘objectively so devoid of any plausible justification that no reasonable body of persons



could have reached it and that the impugned decision had to be ‘verging on absurdity’ in order for it to be vitiated.

46. In urging the Court not to find fault on their part, the Petitioners submitted that the failure by the Interested Party to register transfers of shares at the Companies registry in her favour did not invalidate the Settlement Agreement.
47. It was their case that there was a clear transfer of beneficial interest in the Company to the Interested Party.
48. In the end, the Petitioners urged the Court to grant the prayers as sought in the Amended Petition with costs.

The Respondent’s case:

49. Kenya Revenue Authority opposed the Petition through the Replying Affidavit of Mercy Mutisya, its Enforcement and Debt Officer, deposed to on 26th February, 2020.
50. It was her case that in opposition to the Respondent’s additional Tax Assessment issued to on 17th December, 2016 for outstanding Corporation Tax and Withholding tax of Kshs. 196,584,686/-, the company filed an Appeal at Tax Appeals tribunal.
51. She deposed that the company was aggrieved by the decision of 22nd February, 2015 of the Tribunal, and sought to review the said decision through HCITA No. 28 of 2017.
52. She deposed that on hearing the appeal, the High Court upheld the decision of the Tax Appeals Tribunal in its judgment of 30th January, 2020 with regard to Corporation Tax of KShs.103,066,435/- and VAT amounting to Kshs.85,125,783/- totalling KShs.188,192,218/- plus penalties and interests.
53. She deposed further that in enforcing the High Court’s judgment, the Respondent issued demand letters on 19th February 2020, 6th April 2020, 7th September 2020 and 15th September 2020, to the Directors of the company who were the Petitioners herein.
54. She deposed further that after failed attempts to convene meetings with the Petitioners, the Respondent, albeit in vain, commenced enforcement measures by issuing Agency Notices on 9th October 2020 to the company’s Accounts at Equity Bank Limited, ABSA Bank Kenya Limited PLC, Chase Bank and at Cooperative Bank.
55. It was her case that it is on the foregoing basis that the DPOs were rightfully issued against the Petitioners as controlling Directors of the company at the material time.
56. It was her deposition that since Petitioners have permanent homes in Kenya, they will not incur any extra expenses nor will be prejudiced in any way until the Petition is heard and determined.
57. In reference to Section 24 of the *Companies Act*, it was her case that the Petitioners have never provided a copy of the Board’s resolution showing the alleged transfer of shares not provided any proof indicating that the alleged share transfer was agreed upon by the Directors.
58. The Respondent deposed further that the Petitioners were required to lodge amendments in the i-Tax system as provided for under Section 9 of the *Tax Procedures Act*.
59. The deponent referred to CR12 form as at 16th January 2021 which indicated that the Petitioners were controlling Directors at the time when the DPO were issued.



60. It was her case further that the 2nd Petitioner has been a Director of company controlling 50% shares thereof and still remains a Director to date. She referred Court to the DPO.
61. In the end, it was deposed that the money owed in tax is significant and penalties and interests continue to accrue and as such, the Petitioners are a flight risk who should not be allowed to leave the country.

The Submissions:

62. In its written submissions dated 26th June 2022, the Respondent stated that under Section 45 of the Tax Procedure Act it is mandated to issue DPOs restricting a tax payer from leaving Kenya.
63. In addition to the reasons aforementioned, it was the Respondent's submission that it had reasons to believe that tax was payable to it was due since Settlement Agreement evidenced by the Petitioners was not a legal document as provided for in the *Companies Act*.
64. It was submitted that under Article 9(II) of the company's Article of Association, a person wishing to transfer their shares had to give notice in writing to the Company it desires to give the shares to.
65. To that end, it was the Respondent's case that Sections 77, 81 and 140 of the *Companies Act* was not complied with, essentially making the Petitioners the controlling Directors.
66. The Respondent drew support of the foregoing position in the case of Mohammed Jelle Omar & Another -vs- Ali Sala & Another where the Court held that in absence of a resolution, minutes of directors meeting, nomination or appointment of the proxy documents, the Company had acted contrary to Clause 9 of the Article of Association and section 142 of the *Companies Act*.
67. It was hence the Respondent's case that failure by the Petitioners to follow the statutory procedure of transfer of shares did not absolve them from being liable to tax obligations.
68. In rebutting the claim of violation of the Petitioners' rights and fundamental freedoms, it was submitted that under Article 24 of *the Constitution* certain rights are not absolute.
69. To that end, it was stated that the right to movement can be curtailed within the precepts of the law.
70. It was submitted further that the Petitioners were accorded an opportunity to be heard which they failed to take advantage of and as such, the claim of violation of the right fair administrative action and fair hearing could not arise.
71. The Respondent submitted that the Petitioners were given the reasons for issuing DPO among them being; that they were directors of the Company and that the Respondent was exercising its constitutional mandate under Article 209 as read with Article 210 of *the Constitution*.
72. The Respondent, therefore, submitted that it was not arbitrary in its decision as the DPO was an inevitable result of performing a statutory function.
73. In rejecting propriety of the minutes of meeting of 30th September 2015, it was submitted that the said minutes were neither stamped nor signed by the Respondent.
74. In the end, the Respondent was of the position that the orders of prohibition, permanent injunction and certiorari remained unproved since its actions were in line with the law.



75. To support the foregoing, reference was made to the decision in Republic -vs- National Land Commission & Another Ex-Parte Farmers Choice Limited (2020) eKLR where the Court observed;

... In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality ad procedural impropriety.

76. The Respondent urged the Court to find the Petition to be without merit and to dismiss it with costs.

Analysis:

77. This Court has carefully considered the Amended Petition, the response, the parties' submissions and the decisions referred to. The matter avails two main issues for consideration. They are: -

- a. Whether the Petitioners herein were the rightful persons upon whom the DPOs ought to have been issued against.
- b. If (a) above is answered in the affirmative, whether the issuance of the DPOs violated Articles 25(c), 27, 28, 29, 38, 39, 47 and 50 of *the Constitution*.

78. I will deal with the above issues in seriatim.

a. Whether the Petitioners herein were the rightful persons upon whom the DPOs ought to have been issued against:

79. The *Kenya Revenue Authority Act*, No. 2 of 1995 (hereinafter referred to as 'the KRA Act') is an Act of Parliament to establish the Kenya Revenue Authority as a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and to provide for connected purposes.

80. The functions of the Kenya Revenue Authority (hereinafter referred to as 'the KRA') are in Section 5 of the KRA Act. There is, therefore, no doubt that the duty to assess, demand and collect taxes in Kenya is the preserve of the KRA, the Respondent herein.

81. To enable KRA undertake its solemn duty, Parliament passed the *Tax Procedures Act*, No. 29 of 2015 (hereinafter referred to as 'the TPA'). The TPA was mainly aimed at harmonising and consolidating the procedural rules for the administration of tax laws in Kenya. The TPA is the law which provides for the issuance of DPOs in Section 45 thereof.

82. Section 45 of the TPA provides as follows: -

45. Departure prohibition order:

- (1) This section applies when the Commissioner has reasonable grounds to believe that a person may leave Kenya without paying—
 - (a) a tax that is or will become payable by the person; or
 - (b) a tax that is or will become payable by a company in which the person is a controlling member or tax representative.
- (2) The Commissioner may issue a departure prohibition order, in writing, to the Director in relation to a person to whom this section applies stating—
 - (a) the name and address of the person; and



- (b) the amount of tax that is or will become payable by the person or by a company in which the person is a controlling member or tax representative.
- (3) The Commissioner shall, as soon as practicable after issuing a departure prohibition order under subsection (1), serve a copy of the order on the person named in the order.
- (4) Where the Director has been issued with an order under this section, the Director or an officer authorised by the Director, shall, so far as is permitted by any other written law or this Act, shall prevent the person named in the order from departing Kenya, including by the confiscation and retention of the person's passport, identity card, visa, or other travel document authorising the person to leave Kenya.
- (5) A person who is the subject of a departure prohibition order shall not be granted customs or immigration clearance.
- (6) A departure prohibition order shall remain in force until it is revoked by the Commissioner.
- (7) The Commissioner shall revoke a departure prohibition order if—
 - (a) the person named in the order pays in full the tax payable or that will become payable by that person or by a company in which that person is a controlling member or tax representative; or
 - (b) the person named in the order makes an arrangement satisfactory to the Commissioner for the payment of the tax that is or will become payable by that person or by a company in which that person is a controlling member or tax representative.
- (8) As soon as practicable after making a decision to revoke a departure prohibition order, the Commissioner shall notify the Director and the person named in the order.
- (9) No proceedings, criminal or civil, may be instituted or maintained against the Government, the Director, the Commissioner, an officer authorised to act under this section, or a customs, immigration, police, or any other person for anything lawfully done under this section.
- (10) In this section—
 - “company” means a company within paragraph (a) of the definition in section 3; and
 - “Director” means the Director-General of the Kenya Citizens and Foreign Nationals Management Service appointed under section 13 of the Kenyan Citizenship and Foreign Nationals Management Service Act, 2011.

83. Section 3 of the TPA defines a ‘company’ as follows: -

- (a) a company as defined in the *Companies Act* (Cap. 486) or a corporate body formed under any other written law, including a foreign law; or
- (b) an association, whether incorporated or not, formed outside Kenya that the Cabinet Secretary has, by order, declared to be a company for the purposes of this Act;



84. It is a settled fact that the company in this case was incorporated on 21st November, 2017 by the 2nd Petitioner and one Antony Munyoki Kimeu. The company was registered as No. C147805. The 1st Petitioner subsequently became a director of the company.
85. It is a further settled fact that the Respondent issued DPOs against the Petitioners on 14th January, 2020.
86. The Petitioners, however, contended that they had relinquished their directorships in the company vide a Settlement Agreement dated 30th April, 2012 out of which the Interested Party herein assumed full control of the company. The also contended that on the execution of the Settlement Agreement they also executed the necessary transfer of shares forms and handed them over to the Interested Party who was to register them accordingly. To the Petitioners, once they did all that, they freed themselves from any liability in the company and as such the issuance of the DPOs against them is unlawful.
87. The Respondent's response to the foregoing is simple. That, despite the alleged execution of the Settlement Agreement, no steps were taken to register the transfer of shares forms, no company resolution was filed signalling the change of directorship of the company and further no changes were made on the Respondent's i-Tax system.
88. Section 18 of the TPA provides for the liability for tax payable by a company. The provision defines a 'controlling member', 'member' and 'membership interest' as follows: -
- “controlling member”, in relation to a company, means a member who beneficially holds, directly or indirectly, either alone or together with a related person or persons—
- (a) fifty per cent or more of the voting rights attaching to membership interests in the company;
- (b) fifty per cent or more of the rights to dividends attaching to membership interests in the company; or
- (c) fifty per cent or more of the rights to capital attaching to membership interests in the company;
- "member", in relation to a company, means a shareholder or any other person with a membership interest in the company;
- "membership interest", in relation to a company, means a share or other ownership interest in the company;
89. It is also on record that the Petitioners jointly held over 50% of the membership interests of the company. Therefore, the Petitioners squarely fall within the description of 'controlling members' of the company.
90. Section 45 of the TPA allows the Respondent to issue a DPO against any person with a tax liability and who is likely to leave the country without first discharging the liability. In this case, it is on record that the Petitioners have diverse interests out of the country and that they usually leave the country.
91. At this point, it is imperative to say something on the Settlement Agreement. Whereas it may be true that the agreement was entered into and the share transfer forms duly signed, that alone did not discharge the Petitioners from their obligations on the company until all the necessary registrations were carried out and appropriate changes made in the i-Tax system. Alternatively, the Petitioners may



have to institute appropriate proceedings with a view of obtaining reliefs which will absolve them from the tax liability as from the time of executing the Settlement Agreement.

92. In this case, despite the alleged execution of the Settlement Agreement, there was no further compliance with various mandatory provisions of the law in order to materialize the agreement. Such include Section 24 of the Companies Act on the need to provide a company's Board Resolution showing the alleged transfer of shares, Sections 77, 81 and 140 of the Companies Act thereby essentially making the Petitioners the controlling Directors, Section 9 of the TPA on making amendments in the i-Tax system, among others.
93. The effect of the above lacuna rendered the Petitioners as amongst the Directors of the company. Therefore, subject to adherence to the Constitution and the law (which aspect will be dealt in the next issue herein), the Respondent was within its right to issue the DPOs to the Petitioners who are in fact the controlling directors of the company.
94. Having said so, this Court now answers the issue in the affirmative and proceeds to address the second issue.

b. Whether the issuance of the DPOs violated Articles 25(c), 27, 28, 29, 38, 39, 47 and 50 of the Constitution:

95. Having found that the DPOs could be rightly issued against any or both Petitioners, this issue will now interrogate the process in which the DPOs were issued with a view of ascertaining whether the Constitution and the law were complied with.
96. In doing so, this Court will each of the cited provisions of the Constitution separately.

On Articles 25(c) and 50 of the Constitution:

97. Article 25 of the Constitution provides for the rights and fundamental freedoms which cannot be limited in any manner whatsoever. Article 25(c) is on the right to a fair trial.
98. Article 50 of the Constitution provides for the components of fair hearing. Sub-article 1 thereof is the applicable part in this matter since sub-article 2 deals with criminal proceedings. Sub-article 1 states as under: -

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

99. The invocation of Articles 25(c) and 50 of the Constitution without more leaves the matter at that. The Petitioners did not demonstrate the manner in which the said articles were infringed. The invocation of the articles of the Constitution per se does not amount to infringement thereof. The requirements laid out by the Supreme Court in *Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR must be fulfilled.

On Article 27 of the Constitution:

100. The article is on the right to equality and freedom from discrimination. In this case, the Petitioners contended that they were singled out for the DPOs whereas the rest of the Directors, being the Interested Party and her nominees, were not. The Petitioners then cited the Respondent for discrimination.



101. This Court opts not to say much on this aspect. It will not even endeavour a legal discourse on discrimination. The reason is simple. Section 45 of the TPA allows the Commissioner to issue a DPO whenever there are reasonable grounds to believe that a person with a tax liability may leave Kenya without discharging the liability. The DPO is, therefore, an enforcement tool which must be exercised within such strict confines of the law. In instances where, say a company with a tax liability has 10 Directors and there is no evidence that any of the directors are likely to leave the country, then the Commissioner will be wrong in issuing a DPO to any such the directors or at all. Conversely, if there are reasonable grounds to believe that one amongst the 10 Directors (likely a controlling director) is about to leave the country in a manner that will adversely affect the discharge of the liability, then the Commissioner will be right in issuing only one DPO against that particular Director.
102. In this case, there is no evidence that the Interested Party was likely to leave the country or at all. The opposite was the case for the Petitioners. They, themselves, averred as much citing various business commitments out of the country.
103. It is, therefore, apparent that the discriminatory aspect lodged by the Petitioners does not hold. The Petitioners and the Interested Party are not at an equal footing or at all in terms of the possibility of leaving the country. The position in law that differential treatment is not discrimination as discussed at length in a Multi-Judge bench in *Petition 56, 58 & 59 of 2019 (Consolidated), Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR* squarely applies herein. (See also *Mohammed Abduba Dida v Debate Media Limited & another*).
104. It is, therefore, the Court's finding that Article 27 of *the Constitution* was not demonstrably infringed in this matter.

On Article 29 of *the Constitution*:

105. Article 29 provides for the freedom and security of a person. The provision is not a carte blanche one. It is qualified in that a restriction can be imposed as long as it is based on a justifiable cause and is not arbitrary.
106. In this case, the cause for imposition of the DPOs was to enforce tax payment. It has a sound basis and is not arbitrary. (See Court of Appeal in *Malindi Civil Appeal 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR* on arbitrariness). Further, the DPOs can be discharged immediately the Petitioners fulfil their constitutional duties of paying taxes. It is, therefore, not correct for the Petitioners to allege that the DPOs are for indefinite periods. However, that may be so if the Petitioners choose not to comply with their tax obligations.
107. The upshot is that the Petitioners have failed to demonstrate the manner in which Article 29 was infringed.

On Article 38 of *the Constitution*:

108. The contention that the Petitioners' rights to economic and social rights are infringed by the issuance of the DPOs flies in the face of the mandatory duty to pay taxes.
109. The argument fails.

On Article 47 of *the Constitution*:

110. The provision is on fair administrative actions. Article 47(1), (2) and (3) states that: -



1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a. provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration.
111. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. Section 4 thereof provides that: -
4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
 - (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
 - (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 - (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
 - (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.



- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.

112. Section 2 of the Fair Administrative Actions Act defines an ‘administrative action’, an ‘administrator’ and a ‘decision’ as follows: -

‘administrative action’ includes –

- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

“decision” means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be;

113. The Court of Appeal in Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR addressed itself to Article 47 of *the Constitution* as follows: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

114. In South Africa, the Constitutional Court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98* 2000 (1) SA 1 ring-fenced the importance of fair administrative action as a constitutional right. The Court referred to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution. The Court expressed itself as under: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards



of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

115. Article 47 of *the Constitution*, therefore, goes beyond being a mere codification of the common law principles on administrative action. Its main purpose is to ‘... regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice...’. The entrenchment of Article 47 in *the Constitution* was a deliberate move by Kenyans in demanding inter alia fairness, transparency and accountability in public administration. Public officers must, therefore, embrace the paradigm shift and engage the right gear in ensuring that the manner in which they make and execute administrative decisions complies with Article 47 of *the Constitution* and the Fair Administrative Actions Act.
116. This Court will now apply the foregoing to the facts in this case. There is evidence that the Respondent made formal tax demands to the Petitioners. The demands were followed by a meeting between the Petitioners, the Respondent and the Interested Party’s representative. One of the resolutions of the meeting was that the company was indebted to pay the then due taxes. The decision was challenged by the Interested Party as one of the Directors of the company. The Petitioners chose not to. The matter went on before the Tax Tribunal and eventually to the High Court where the tax liability on the company was affirmed.
117. The Petitioners, being the directors of the company, cannot now turn back and allege infringement of Article 47 rights. The company was fully and extensively accorded opportunities and was heard by the Respondent, the Tax Tribunal and the High Court. Subsequently, the DPOs were issued as a way of enforcing the Court judgment. On that basis, the Petitioners cannot be heard even to suggest that they expected the Respondent to notify them that it was intending to issue DPOs. Since the company was legally decreed to be liable to pay the taxes and it chose not to oblige, then the issuance of the DPOs cannot be faulted by the invocation of Article 47 of *the Constitution*.

On Article 28 of *the Constitution*:

118. The Article is on the right to inherent dignity and the right to have that dignity respected and protected. There is absolutely no iota of evidence pointing to the manner in which that the right was allegedly infringed in this case.
119. The contention fails.
120. Having considered all the alleged constitutional violations, this Court returns the verdict that none of those violations were proved. Therefore, the issuance of the DPOs against the Petitioners did not violate Articles 25(c), 27, 28, 29, 38, 39, 47 and 50 of *the Constitution*.

Disposition:

121. Drawing from the foregoing, the following final orders do hereby issue: -
 - a. The Petition is hereby dismissed.
 - b. The Petitioners shall jointly and severally bear the costs of the Petition.

Orders accordingly.

DELIVERED, DATED and SIGNED at KITALE this 23rd day of February, 2023.

A. C. MRIMA



JUDGE

Judgment virtually delivered in the presence of:

Mr. Njuru, Learned Counsels for the Petitioners.

Mr. Onyango, Learned Counsel for the Respondent.

No appearance for the Interested Party.

Regina/Chemutai – Court Assistants

