



**Bare v Kenya Revenue Authority & another (Constitutional Petition 45 of 2020)
[2021] KEHC 458 (KLR) (Constitutional and Human Rights) (25 February 2021) (Judgment)**

Hassan Adan Bare v Kenya Revenue Authority & another [2021] eKLR

Neutral citation: [2021] KEHC 458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 45 OF 2020**

JA MAKAU, J

FEBRUARY 25, 2021

**IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 35, 39, 40,43,
47 159(2)(D) & 165 OF THE CONSTITUTION OF KENYA 2010**

AND IN THE MATTER OF TAX PROCEDURES ACT (NO. 29 OF 2015)

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT (NO. 4 OF 2015)

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 28,
39, 40, 43 & 47 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

HASSAN ADAN BARE PETITIONER

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

Legal requirements relating to the contents of a departure prohibition order

Reported by Beryl Ikamari

Statutes - interpretation of statutory provisions - legal requirements relating to the contents of a departure prohibition order - whether a departure prohibition order, that failed to state the amount of tax payable and the address of the affected person, was valid - Tax Procedures Act, No 29 of 2015, section 45(2).



Constitutional Law - *fundamental rights and freedoms - right to fair administrative action - whether issuance of a departure prohibition order, without giving the affected party prior and adequate reasons and an opportunity to be heard, was a violation of the right to fair administrative action - Constitution of Kenya, 2010, article 47.*

Constitutional Law - *fundamental rights and freedoms - economic rights and freedom of movement - whether issuance of an allegedly invalid departure prohibition order occasioned violations of the affected person's economic rights and right to freedom of movement - Constitution of Kenya 2010, article 39.*

Brief facts

The 1st respondent obtained court orders and search warrants in Milimani Chief Magistrate's Court being Misc. Criminal Application Numbers 3438 and 3439 both of 2019 in order to carry out a search at the premises of City Gas East Africa Limited. The search was conducted and various items and documents were seized as a result. On the basis of the court orders and a letter from the 1st respondent's Commissioner in Charge of Investigations and Enforcement asking the Director of Immigration to bar the 1st respondent from leaving Kenya during the investigation period, a departure prohibition order was issued against the petitioner.

At the conclusion of the investigations the departure prohibition order was not lifted, it continued in force. Further, as would be expected at the conclusion of investigations, the 1st respondent's office did not return the goods seized during the search. The petitioner claimed that failure to allow him to travel negatively impacted on his business and denied him an opportunity to earn his livelihood. The petitioner's truck was involved in an accident in Arusha, Tanzania and his request to the 1st respondent's Commissioner for Investigations and Enforcement to be allowed to travel to Arusha remained unanswered. The petitioner filed a petition to challenge the constitutionality of the departure prohibition order while alleging that it violated his economic rights as well as his right to freedom of movement.

Issues

- i. What were the legal requirements to be met for the issuance of a valid departure prohibition order?
- ii. Whether the issuance of a departure prohibition order, without giving prior and adequate reasons and an opportunity to be heard to the affected person, was a violation of the right to fair administrative action.
- iii. Whether the issuance of a departure prohibition order, that did not comply with legal requirements as to content, was a violation of the affected person's economic rights and freedom of movement.

Held

1. The requirements relating to a departure prohibition order were set out in section 45 of the Tax Procedures Act. They were the name and address of the person affected by the order and the amount of tax that was payable or would become payable by that person or the company in which the person was a controlling member or tax representative. Those requirements were mandatory. In the departure prohibition order issued against the petitioner, the petitioner's address was missing and also the amount of tax payable was not set out.
2. Where the tax debt was established and disclosed, there was no problem in issuing a departure prohibition order but where it was not disclosed, the 1st respondent could not act arbitrarily and issue a departure prohibition order.
3. Although section 45(6) of the Tax Procedures Act provided that a departure prohibition order would remain in force until it was revoked by the Commissioner, that order should not be a blanket ban on a person from travelling out of Kenya, especially where the tax debt remained undisclosed to the party affected by the departure prohibition order.
4. The petitioner became a Director of City Gas East Africa Limited on January 31, 2017 and the tax obligation in question went as far back as the year 2010. It was unfair for the 1st respondent to blame the petitioner for the period he was not in charge of City Gas East Africa Limited.
5. The departure prohibition order was fatally defective as it failed to comply with explicit key statutory requirements set out in section 45(2) of the Tax Procedures Act.



6. Section 45 of the Tax Procedures Act was applicable when the Commissioner had reasonable grounds to believe that a person could leave Kenya without paying a tax that was or would become payable by the person or by a company in which the person was a controlling member. The author of the departure prohibition order did not disclose or demonstrate that he believed that the petitioner would leave Kenya without paying tax. It was wrong for a departure prohibition order to be issued to anyone on mere suspicion that the person owed some tax that was not determinable.
7. Article 47 of the Constitution guaranteed the petitioner the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. Further, the Fair Administrative Action Act provided details as to the steps that the 1st respondent ought to have taken before issuing the departure prohibition order. Under section 4(3)(a) and 4(3)(b) of the Fair Administrative Action Act, the 1st respondent ought to have given the petitioner prior and adequate reasons for the proposed administrative action as well as an opportunity to be heard and make representations in that regard. Those provisions were flouted with impunity by the 1st respondent.
8. The petitioner wrote to the 1st respondent requesting for permission to travel to Arusha as his truck had been involved in a road traffic accident in Tanzania. The 1st respondent's Commissioner for Investigations and Enforcement did not respond to the letter. There was no justification for not allowing the petitioner to travel to Arusha, Tanzania.
9. Section 51 of the Tax Procedures Act demonstrated that a decision about the tax obligation had to have been made first by the 1st respondent and if a taxpayer was not satisfied he was required to lodge an objection against such a decision within 30 days. Without dealing with the issue of the tax that was payable, it was premature to issue the departure prohibition order.
10. Article 39 of the Constitution guaranteed the right to freedom of movement including the right to leave and enter Kenya. A decision to limit the petitioner's movement had to be based on sufficient grounds and not mere suspicion.
11. In issuing the departure prohibition order, 1st respondent violated the petitioner's economic rights as well as his right to freedom of movement.

Petition allowed.

Orders

- i. *A declaration that the departure prohibition order dated September 5, 2019 and issued against the petitioner on September 6, 2019, was unconstitutional and thus null and void.*
- ii. *A declaration that the actions by the 1st respondent violated the petitioner's constitutional rights as well as his right to freedom of movement.*
- iii. *The Director of Immigration was prohibited from enforcing the departure prohibition order dated October 5, 2019 and issued against the petitioner on September 6, 2019.*
- iv. *The petitioner was awarded general damages of Kshs. 3,000,000/= for violation of his constitutional rights.*
- v. *Costs of the petition to the petitioner against the 1st respondent.*

Citations

Cases

Kenya

1. *Amin, Abdi Gedi v Kenya Revenue Authority & 3 others* Judicial Review 60 of 2019; [2020] KEHC 5073 (KLR) - (Explained)
2. *Export Trading Company v Kenya Revenue Authority* Petition 148 of 2013; [2019] KEHC 10935 (KLR) - (Explained)
3. *Judicial Service Commission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)



Statutes

Kenya

1. Constitution of Kenya article 24(1); 47(1) - (Interpreted)
2. Fair Administrative Action Act (cap 7L) section 4(3)(a)(b)- (Interpreted)
3. Tax Procedures Act (cap 469B) sections 45(2)(a)(b)(3)(7); 51; 52 - (Interpreted)

Advocates

None mentioned

JUDGMENT

Petition

1. The petitioner through a petition dated February 13, 2020 supported by supporting affidavit of even date seek the following reliefs:-
 - a) A declaration that the Departure Prohibition Order issued against the petitioner on September 6, 2019 is unconstitutional and thus null and void.
 - b) A declaration that the actions by the 1st respondent violated the petitioner's economic rights as well as his right to freedom of movement.
 - c) The Director of Immigration be prohibited from enforcing the Departure Prohibition Order issued against the petitioner on September 6, 2019.
 - d) General damages
 - e) Costs of the suit.
 - f) Any other or further orders that the honourable court may deem fit to grant.

Petitioner's Case

2. The petitioner urge that on September 4, 2019, the Kenya Revenue Authority (1st respondent) filed two miscellaneous applications at the Milimani Chief Magistrate's Court being Misc. Criminal Application Numbers 3438 and 3439 both of 2019. The purpose of the applications was to secure orders to carry out a search at the premises of City Gas East Africa Limited. The 1st respondent obtained the orders sought from Court and search warrants were issued on September 4, 2019. Armed with the orders issued on September 4, 2019, the 1st respondent's agents seized various items and documents from the premises of City Gas East Africa Limited.
3. On the basis of the *ex parte* orders obtained against City Gas East Africa Limited one Mr DKS Yego, the 1st respondent's Commissioner in charge of investigations and Enforcement, wrote to the Director of Immigration instructing him to bar the petitioner from leaving the country in the course of investigations that the 1st respondent was carrying out. Despite concluding its investigations, the 1st respondent did not issue instructions to the Director of Immigration for the removal of the petitioner from the list of persons prohibited from leaving the country.



4. It is the petitioner's case that the prohibition order dated September 5, 2019 (HAB 3) reads in part that:-

“We are in the process of investigating fraudulent activities of this company geared towards tax evasion...Though Mr Hassan Adan Bare is a Kenyan national, in the course of our investigations we shall summon him for interrogation and to record a statement regarding his company. This is therefore to request that since investigations are still ongoing, the said Mr Hassan Adan Bare whose particulars are as follows be prohibited from leaving the country unless the commissioner revokes this notice in writing.”

5. The petitioner state that the officers from the 1st respondent's office did not return the goods carted away from the premises of City Gas East Africa Limited as would have been expected either if such items were not relevant to the investigations or that once the investigations had been concluded. A letter dated October 25, 2019 by the petitioner to the 1st respondent did not elicit any response. This is similarly the case with the letter dated November 4, 2019. It is clear City Gas East Africa Limited is licensed to import, export and sell in bulk liquefied petroleum gas. This is demonstrated by a copy of the licence issued by the Energy and petroleum Regulatory Commission marked as “HAB 6” in the petitioner's affidavit in support of the petition. The petitioner contends that failure by the 1st respondent to grant him permission to make a trip to Arusha negatively impacted upon his business denying him an opportunity to earn his livelihood.
6. It is petitioner's position that the 1st respondent was duty bound to respond to the letters sent to it and supply him with written reason for the issuance of the departure prohibition order. It was wrong for the 1st respondent to continue having the departure prohibition order in force even after completing its investigations. The petitioner is a Kenyan who has heavily invested in the country, a fact that is admitted by the 1st respondent and he would have no reason to travel out of the country and fail to return. In any event the 1st respondent had no justification to have the departure prohibition order remain in place once the investigations were complete.

The 1st Respondent's Case

7. The 1st respondent is opposed to the petitioner's petition and in doing so filed a replying affidavit by Fredrick Akhonya, an Assistant manager in the 1st respondent sworn on February 20, 2020.
8. It is deponed by Mr Fredrick Akhonya, in his affidavit under paragraph 2 that he is well versed with the issue in this matter. The deponent sets out the genesis of the petitioner's troubles under paragraph 4 of the 1st respondents' replying affidavit which refers to an intelligence report which allegedly led to the affairs of City Gas East Africa Limited being investigated.

The 2nd Respondent's Response

9. The 2nd respondent did not file any response nor did it participate in these proceedings.

Analysis and Determination

10. Upon consideration of the petition, the 1st respondent's replying affidavit, parties rival submissions, the following issues arise for consideration:-
- a) Whether the Departure Prohibition order dated September 5, 2019 is valid?



- b) Whether requirements of section 45(1) of *Tax Procedures Act* were met before the Departure Prohibition order was issued?
- c) Whether the 1st respondent flouted the provisions of articles 47 of the *Constitution of Kenya, 2010*?
- d) What orders should the honourable court make?

A. Whether the departure prohibition order dated September 5, 2019 is valid?

11. The 1st respondent herein contend that the Departure Prohibition orders are covered under section 45 of the *Tax Procedures Act, 2015*. The petitioner similarly concedes the requirements of a Departure Prohibition order are set out in section 45 of the *Tax Procedure Act*. Section 45(2)(3) of the *Tax Procedures Act* provides that:-

“The Commissioner may issue a departure prohibition order, in writing, to the Director in relation to a person to who 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.”

“45(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.”

12. I note that a copy of the Prohibition Order is annexed to the affidavit in reply by the 1st respondent and marked as “FA 10”. It is clear that the Departure Prohibition Order issued by the 1st respondent omitted the two critical requirements as mandatorily provided under section 45(2)(a) & (b) of the *Tax Procedures Act*. The petitioner’s address is missing and most importantly, the amount of tax that was payable had not been set out. The drafters of the *Tax Procedures Act* must have been alive to the fact that the 1st respondent would be tempted to abuse its powers under the Act and the reason why certain mandatory recruitments were provided for with respect to a Departure Prohibition Order. The impugned departure prohibition order, is fatally defective for want of compliance with key statutory requirements as set out under section 45(a) and (b) of the *Tax Procedure Act* and it should be declared as such.

13. Perusal of the paragraph 19 of the affidavit of the 1st respondent reveals that it is deponed that:-

“In light of the magnanimity of the taxes facing the applicant for the period he was a director of City Gas East Africa Limited, the 1st respondent deemed it fit to secure his personal attendance for interrogation and to record a statement by issuing a Departure Prohibition Order dated September 5, 2019...”

14. It is of great interest to note that if the 1st respondent was already aware of the tax due from the petitioner, there can be no explanation as to why the order did not comply with the provision of section 45(2)(b) of the *Tax Procedures Act*.

15. It is clear from the aforesaid order, that the impugned Prohibition Order was open ended. What does this portray save that the 1st respondent’s Commissioner could choose not to even revoke the Departure Prohibition Order? I do not find any good reason why the 1st respondent urges it has power under



law to stop a tax payer from leaving the country if they owe a tax debt without disclosing the tax debt to the affected party. Where the tax debt is established and disclosed there is no problem in issuing Departure Prohibition Order, but where it is not disclosed the 1st respondent cannot act arbitrary by issuing Departure Prohibition Order, where the tax debt is undisclosed or undetermined. If such powers are not checked this would amount to confining the Petitioner in the country and will result to him being unable to attend to his business interest spanning in the African Region or elsewhere.

16. I find that in as much as section 45(6) of the [Tax Procedures Act](#) provides that a Departure Prohibition Order shall remain in force until it is revoked by the Commissioner, the same cannot and should not be a blanket ban on a person from travelling out of the country, and more specifically where the tax debt remains undisclosed to the party affected by the Departure Prohibition Order.
17. Considering the Departure Prohibition Order against the petitioner herein, it means that the petitioner would not be able to comply with subsection (7) of the Act even if he wanted to since the Prohibition Order was issued before any assessment on tax liability had been ascertained. It is contended that the petitioner became a director of City Gas East Africa Limited on January 31, 2017. The tax obligations in question go as far back as the year 2010. It is unfair for the 1st respondent to seek to place blame on the petitioner for the period he was not in charge of City Gas East Africa Limited.
18. In view of the aforesaid I find that the Departure Prohibition Order dated September 5, 2019 and issued on September 6, 2019 fatally defective for failure to comply with explicit key statutory requirements as set out under section 45(2) of the [Tax Procedures Act, 2015](#) and that it is as such invalid.

B. Whether requirements of section 45(1) of [Tax Procedures Act](#) were met before the departure prohibition order was issued?

19. Section 45 of the [Tax Procedures Act](#) states that 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; and
 - b) a tax that is or will become payable by a company in which the person is a controlling member.”
20. The Departure Prohibition Order clearly provides that under 45(2) of the Act that 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 controlling member.”
21. The Departure Prohibition Order issued herein provides that
 - “ the aforesaid person is a director of City Gas Limited and is also doing business as an individual, and is suspected not to be declaring correct income for tax purposes.”

The author of the departure prohibition order Mr DKS Yego, did not disclose nor demonstrate by way of affidavit or otherwise why he believed that the petitioner would leave country without paying tax. In the instant petition it has not been shown nor demonstrated as at the time the impugned order was issued, what amount of tax was due and payable from the petitioner or the City Gas East Africa Limited as at September 5, 2019 when the impugned order was issued. It is further noted that at any



rate, the Departure Prohibition Order refers to a different entity, thus, City Gas Limited in which the petitioner's interest has not been demonstrated and in which the petitioner contend he has no interest in.

22. I find from clear provisions of *Tax Procedures Act, 2015* before a Departure Prohibition Order can issue, that the amount of tax payable or likely to be payable must be determinable. I find that is not the case in this matter. I find that it is wrong, unjustifiable and contrary to the law for Departure Prohibition Order to be issued to anyone on mere suspicion he/she owes some tax or has a debt of tax that is not determinable.

C. Whether the 1st respondent flouted the provisions of articles 47 of the Constitution of Kenya, 2010?

23. The 1st respondent contend that the petitioner cannot be heard to argue that the respondents violated his right to fair administrative action as enshrined under article 47 of *Constitution of Kenya*. It is the 1st respondent's contention that before a Departure Prohibition Order is issued, there has to be investigations on tax evasion and reasonable grounds believed by the 1st respondent that a tax payer may not pay tax.

Section 45 of the *Tax Procedure Act* clearly states that the Departure Prohibition Order is issued where the Commissioner reasonably believes that the tax payer may leave the country before payment of the tax due.

24. The 1st respondent further argue that section 45(7)(b) of the *Tax Procedures Act, 2015* protects the petitioner's fair administration rights. It is stated that this sub-section gives the petitioner's the chance to deliberate with the Commissioner and be given a fair hearing. It ensures that the petitioner is heard. It is urged that a Departure Prohibition Order is therefore not a permanent order that lifting cannot be considered by the Commissioner, which I find to be the actual position.
25. The respondent further contend that the petitioner's allegations that the 1st respondent violated his right to fair administrative action, is not correct. It is urged that the petitioner was given an opportunity to be heard at the criminal case and indeed the petitioner was in attendance and made his submissions and that the process did not take an unreasonable amount of time.
26. The petitioner contend that even if the ground upon which the 1st respondent relied on were genuine, it is bound by provisions of article 47 of the *Constitution*. Article 47 of the *Constitution* guarantees the petitioner the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) of the *Constitution* further provides that 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. Article 47 of the *Constitution* has been implemented in the *Fair Administrative Action Act* (No 4 of 2015). The *Fair Administrative Action Act* is detailed as to the steps that the 1st respondent ought to have taken before the Departure Prohibition Order was issued. Under section 4(3)(a) & (b), of the Act. It is explicit that Mr DKS Yego ought to have given the petitioner prior and adequate reasons for the proposed administrative action as well as an opportunity to be heard and to make representation in that regard. In this case, the clear and unequivocal provisions of the *Constitution* under article 47 as well as the *Fair Administrative Action Act* were flouted with impunity by the 1st respondent.
27. The *Fair Administrative Action Act*, is explicit as to the steps that the 1st respondent ought to have taken before the Departure Prohibition Order was issued. Under section 4(3)(a) & (b), of the Act, Mr DKS Yego ought to have given the petitioner prior and adequate reasons for the proposed administrative action as well as an opportunity to be heard and to make representation in that regard. In this case, the



clear and unequivocal provisions of the Constitution as well as the Fair Administrative Action Act were flouted with impunity. The 1st respondent has demonstrated what steps it took before the Departure Prohibition Order was issued, however there is no evidence of prior and adequate reasons for proposed administrative action, nor was petitioner given an opportunity to be heard and make representation in that regard. The 1st respondent clearly flouted the Constitution and the Fair Administrative Action Act.

28. To buttress the above the petitioner sought to rely on the case of the High Court of Kenya at Nairobi Petition No 148 of 2013: Export Trading Company v Kenya Revenue Authority, the court had an opportunity to deal with the standards expected under article 47 of the Constitution and held that:-

“ 29. The main question in this petition is whether in the circumstances of this case, the respondent can be said to have acted fairly, reasonably and in an expeditious manner. I am afraid that the answer to the above question is to the negative. I say so because the respondent did not furnish this court with any satisfactory explanation as to why the post clearance audit and the subsequent demand for the alleged short levied duty was made almost 4 years after the initial assessment and payment of the duty so assessed

30. Taking a cue from the above decision, I similarly hold that in the absence of a satisfactory explanation as to why the post clearance audit and resulting demand for short levied duty was made after such a long time, such a demand can only be perceived to be irrational and not in tandem with the kind of efficiency and expediency that is envisaged under article 47(1) of the Constitution more so considering that the petitioner’s letter dated July 26, 2007 seeking the respondent’s clarification on the applicable duty rate did not elicit any response from the respondent.”

29. Looking at the 1st respondent’s affidavit at paragraph 23 it is deponed that “...contrary to the applicant’s assertion that investigations are complete, the 1st respondent confirms that investigations are still ongoing...”. This is a clear admission that from September 5, 2019 until February 20, 2020 and perhaps till now, the 1st respondent is yet to conclude its investigations against the petitioner. That cannot be considered reasonable under any circumstances.

30. Further to the above even assuring that the 1st respondent had sufficient reasons for the action taken, the Departure Prohibition Order ought to have been temporary and in the intervening period, the petitioner ought to have been given an opportunity to present his case. This is notwithstanding that such an opportunity granted to the petitioner may not have persuaded the 1st respondent to make a different decision.

31. The Court of Appeal with regards to article 47 of the Constitution in Civil Appeal No 52 of 2014 the Judicial Service Commissioner v Hon Mr Justice Mbalu Mutava & another [2015] eKLR held 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."

32. On October 25, 2019, the petitioner sought seven days from the 1st respondent to enable him travel to Arusha to handle a matter involving his truck which had been involved in a road traffic accident in the United Republic of Tanzania. The 1st respondent's Commissioner for Investigations and Enforcement did not respond to the letter (Annexed in the petitioner's affidavit of February 13, 2020 as HAB 4). There can be no justification for having failed to allow the petitioner to travel to Arusha. The 1st respondent's worry appeared to have been the fact that the petitioner would have travelled to Somalia and South Sudan, the two countries explicitly set out in the departure prohibition order.
33. In paragraph 17 of the 1st respondent's affidavit in reply, the respondent lays down what is alleged as omitted income by City Gas East Africa Limited. Paragraph 18 of the same affidavit sets out what is indicated as corporation tax due to the 1st respondent. A reading of section 51 of the [Tax Procedures Act](#) demonstrates that a decision must have been made first by the 1st respondent regarding tax obligation and if a tax payer is not satisfied he is required to lodge an objection against such a decision which must be done within 30 days. There is a clear procedure on appeals against decisions on taxes payable starting with the Tax Appeals Tribunal as provided for in section 52 of the [Tax Procedures Act](#) before escalating the issue to the High Court. This court is therefore the wrong forum for the issue of taxes owing to be considered. The 1st respondent should have dealt with the issue of the taxes before proceeding to issue the Departure Prohibition order which was premature.
34. It is now settled law on the issue of procedure to be followed when issues of taxing are involved as was enunciated in the High Court of Kenya at Mombasa Judicial Review No 60 of 2019 [Abdi Gedi Amin v Kenya Revenue Authority & others](#), [2020] eKLR where it was held that:-

“Although there is no obligation on the Commissioner to require the defaulter to appear before him, such requirement is necessary in a matter like this one where no notice either under section 29 or 31 was given to the *ex parte* applicant. Further, the *ex parte* applicant was denied a chance to appeal the assessed tax under section 51 of [Tax Procedures Act](#). The *ex parte* applicant was charged 24 days before a demand for tax was made. There is no doubt in my mind that the *ex parte* applicant's right to fair administrative action was breached. He was not given any reasons for the proposed charges as envisaged in article 47(1)(2)...”
35. In the instant petition it is clear that the decision to issue Departure Prohibition Order against the petitioner was made before the 1st respondent determined whether there was any tax due from him and if so how much. It would have been prudent for the 1st respondent to have followed and exhausted the mechanisms set out in the [Tax Procedures Act](#) before the Departure Prohibition Order was issued without according the petitioner an opportunity to be heard.
36. Article 39 of the [Constitution of Kenya](#) guarantees the petitioner's right to freedom of movement, including the right to leave and get into the country. It is evident from the Prohibition Order that the petitioner is a Kenyan national and there is no suggestion that he has acquired or intends to acquire citizenship of any other country. The apprehension that the petitioner may go to certain jurisdictions and fail to come back have no basis bearing in mind that it is admitted that City Gas East Africa Limited in which he is a director has assets in the country. A decision to limit the petitioner's movement needed to be based on sufficient grounds and not mere speculation as is the case in this petition.
37. The 1st respondent on that issue aver that the Government may generally sharply restrict the freedom of movement of persons who have been convicted of crimes, most conspicuously in the context of



- imprisonment. The 1st respondent further contend that restrictions may also be placed on convicted criminals who are on probation. It also states that persons who have been charged with crimes and have been released on bail may also be prohibited from traveling and that a material witness may also be denied the right to travel.
38. This court is alive of the fact that Governments sometimes also restrict access to disaster-stricken areas, or to places where public health threats exists, or where an individual presents a health threat due to infection with a contagious disease, the government may quarantine that person, restricting their movement for the safety of others however none of these conditions have been shown to apply to this petition, and i find the 1st respondent's submissions as such irrelevant.
39. The 1st respondent further urge the limitation of the right can only be restricted by law as outlined in article 24 of the *Constitution of Kenya 2010*. It should be noted that both local and international human rights instruments ensure that rights are balanced and limited against other protected rights, values and communal needs such as right that can only be protected, if the government collects revenue to fund the provision and protection of those rights. The 1st respondent further contend that even where the *Constitution* protects right of movement, it is not absolute. In the instant case, the 1st respondent contend that the Commissioner was within his right to issue the Departure Prohibition Order to restrict the movement rights of the petitioner or in any case any person with a tax liability.
40. The 1st respondent sought to rely on article 24 of the *Constitution* on limitation of rights and fundamental freedoms. Article 24(1) of the *Constitution* provides a right of fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
41. The 1st respondent however has failed to demonstrate what provision of the law that allows and limits the petitioner's right on fundamental freedom in the Bill of Rights and that such limitation is reasonable, and justifiable in an open and democratic society based on human dignity, equality and freedom.
42. Having considered the parties pleadings, rival submissions constitutional provisions and the law relied upon by the parties, I find that the Departure Prohibition Order (DPO) issued by the 1st respondent on September 6, 2019 and dated September 5, 2019 was unconstitutional and therefore null and void. I further find the 1st respondent action violated the petitioner's economic rights as well as his right to freedom and movement. I further find the petitioner is entitled to general damages. The petitioner prays for general damages to the tune of Kshs 5,000,000. However considering the petitioner's evidence and denial of right to travel for no good reason, I am of the view that an award of Kshs 3,000,000/= for violation of constitutional rights would suffice in the circumstances.
43. The upshot is that the petitioner's petition is meritorious and I proceed to make the following orders:-
- a) A declaration be and is hereby issued that the Departure Prohibition Order (DPO) dated September 5, 2019 and issued against the petitioner on September 6, 2019, is unconstitutional and thus null and void.
 - b) A declaration be and is hereby issued that the actions by the 1st respondent violated the petitioner's constitutional rights as well as his right to freedom of movement.
 - c) The Director of Immigration be and is hereby prohibited from enforcing the Departure Prohibition Order dated October 5, 2019 and issued against the petitioner on September 6, 2019.



- d) The petitioner is awarded General damages of Kshs 3,000,000 for violation of his constitutional rights.
- e) Costs of the petition to the petitioner against the 1st respondent.

DATED AND SIGNED AT NAIROBI ON THIS 18TH DAY OF FEBRUARY, 2021.

DELIVERED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF FEBRUARY, 2021.

J. A. MAKAU

JUDGE

