



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. E009 OF 2021

IN THE MATTER OF: ARTICLES 10, 21, 22, 23, 35, 47, 48, 50, 157, 159, 165, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 28, 39, 40, 43 AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE NOTICES DATED 23RD DECEMBER, 2020 BY THE 1ST RESPONDENT TO THE DIRECTOR OF IMMIGRATION SERVICES REQUESTING THAT THE PETITIONERS BE PROHIBITED FROM LEAVING THE COUNTRY UNTIL THE COMMISSIONER REVOKES THE SAID NOTICE IN WRITING

AND

IN THE MATTER OF: THE TAX PROCEDURES ACT NO. 29 OF 2015 AS READ TOGETHER WITH THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

BETWEEN

SAQIB SHAHBAZ.....1ST PETITIONER

NAJAM AKHLAQ.....2ND PETITIONER

SHERAZ SHAHBAZ KHAN.....3RD PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE DIRECTOR OF IMMIGRATION SERVICES,

OF THE REPUBLIC OF KENYA.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The Petition

1. The Petitioners herein are Pakistan nationals, shareholders and directors of Bolpak Trading Company Limited which operates a car selling business in various parts of the country and has a branch in Mombasa. The 1st and 2nd Petitioners came into the country in the year 1996 while the 3rd Petitioner joined the company in 2013 all on a class 'G' work permit. The Petitioners state that they have been paying their relevant revenue to the government and in the last 4 years have paid tax to the tune of over Kshs 34,000,000/=. That they have further made several investments in the country including real estate and believe that they have substantially contributed to the development of the country's economy. They aver that in the year 2007 the 2nd Respondent failed to renew their work permits and only renewed the same after the court issued orders of Mandamus compelling them to do so in **Nairobi Misc. Civil Application No 561 of 2007**.

2. The Petitioners allege that in 2015 the 2nd Respondent again refused to renew their class 'G' entry permits and sought to have the Petitioners deported based on allegations of having received adverse reports on them by the police. That one of the Petitioners was arrested and was only released by court's order in **Mombasa High Court Petition No. 62 of 2016 (Consolidated with 60 & 61)**. Further, that the 2nd Respondent was ordered to re-issue the Petitioners with their work permits as the court cleared them from any wrong doings.

3. The Petitioners further allege that on 5/3/2019 they again applied for renewal of their work permits and paid the requisite fees of Kshs 10,000 each for the said renewal. However, the 2nd Respondent yet again refused to renew their work permits and did not give any reasons either orally or in writing for the said refusal. The Petitioners state that the 2nd Respondent's actions are in breach of Article 47(1) and (2) of the Constitution of Kenya 2010.

4. The Petitioners filed **Mombasa Constitutional Petition No. 25 Of 2020** seeking orders of Mandamus to compel the 2nd Respondent to issue them with class 'G' permits. The case is pending determination before court. In June 2019 the 1st Respondent summoned the Petitioners to their offices in Nairobi but did not indicate reasons for the said summons. They were asked general questions and then left to go. Further, vide letters dated 21/12/2020 and 30/12/2020 the Petitioners were again summoned by the 1st Respondent to appear before the Commissioner, Investigations and Enforcement. The Petitioners aver that it was not within their knowledge at the time they were summoned by the 1st Respondent, that vide a letter dated 23/12/2020 the 1st Respondent had directed the 2nd Respondents to prohibit the Petitioners from leaving the country due to an alleged tax liability of Kshs 106,916,815/=.

5. The Petitioners aver that no demand has been made to them over the alleged tax liability and the tax due has not been determined. The Petitioners state that they cannot be viewed as flight risks or not having a known place of abode. No reasonable grounds have been given in prohibiting them from leaving the country and they opine that the same amounts to violation of their rights, particularized as follows: -

- a. Declining to renew Petitioners' business permits
- b. Unnecessary arrests and detention of Petitioners
- c. Requiring the Petitioners to unnecessarily travel to Nairobi regularly with respect to alleged investigations on taxes.
- d. Prohibiting the Petitioners from traveling outside the country for no apparent reason.

6. The above background forms the basis of the Petition dated 25/1/2021, which is the subject of this judgement and where the Petitioners pray for the following orders;

- a. **A declaration that the prohibition of the Petitioners from leaving the country as contained in the letter dated 23rd December 2020, is in violation of articles 10, 27, 28 and 47 of the Constitution of Kenya 2010.**
- b. **An order of certiorari be issued to quash the Respondents' decision contained in the letter dated 23rd December 2020 prohibiting the Petitioners from leaving Kenya.**
- c. **A conservatory order be issued to suspend the departure prohibition contained in the letter dated 23rd December 2020.**
- d. **An order prohibiting continuance of the harassment made by the Respondents against the petitioners with respect to the alleged tax liability of Kshs 106,961,815/=.**
- e. **General and exemplary damages for violation of the Petitioners rights.**
- f. **The costs of the Petition.**

7. The Petition is supported by the annexed affidavit of **Saqib Shahbaz** sworn on 25/1/2021.

The Response

8. The 1st Respondent filed a notice of preliminary objection and grounds of opposition dated and filed on 12/2/2021 contending that this court is devoid of jurisdiction by virtue of Section 52 of the **Tax Procedures Act** and **Section 12** of the **Tax Appeals Tribunal Act** which provide that a tax dispute cannot be litigated in the form of a constitutional petition. The 1st Respondent further stated that **Sections 7 and 9(2)** of the **Fair Administrative Actions Act**, and **Article 159(2) of the Constitution** enjoins this court to support the principle of exhaustion of remedies in an administrative action, and that the Petitioners petition herein is premature.

9. The 1st Respondent also filed a replying affidavit to the Petition sworn by one **Dominic Keng'ara** and filed on 3/3/2021 deposing that the 1st Respondent's had carried out an audit which was still ongoing over the Petitioners Company. Mr. Keng'ara deposes that the audit revealed that the company did not file income tax returns for the year 2017/2018 and hence had a liability of Kshs 73,960,805/=.

10. He further deposed that the Petitioners had engaged in under declaration of VAT sales in the years 2014, 2015 and 2018 amounting to Kshs 216,052,191/=. According to Mr. Keng'ara the Petitioners had further engaged in declaring less amounts in PAYE and had over claimed input VAT from suppliers. That the 3rd Petitioner had filed nil income tax returns in the years 2015-2019.

11. It is Mr. Kengara's further deposition that the Petitioners were on 21/12/2020 summoned to appear in person in Nairobi to answer questions arising from the audit. That the Petitioners were issued with a departure prohibition order under Section 45 of the Tax Procedure Act as the 1st Respondent was apprehensive that the Petitioners were flight risks and would leave the country without paying taxes due.

12. The 2nd and 3rd Respondents filed a notice of appointment dated 12/2/2021 but did not file any document in response to the Petition.

Counter -Response

13. In a brief response to the averments raised in the replying affidavit of Mr. Dominic Kengara, the Petitioners filed a supplementary affidavit sworn by Saqib Shabaz on 23/3/2021. It was deponed that the tax liability allegations by the Respondents should be disregarded by this court as no documents had been annexed in support of the same. A bundle of documents was annexed to the affidavit in support of the Petitioners having filed their income tax returns for the year 2017/2018.

14. Further documents were annexed in dispute of the allegation that Bolpak Ltd had cumulative running VAT balance. An email by Sheraz Shahbaz indicating that he was a sleeping director who had never earned a salary from the company was also annexed to the affidavit. It was further refuted that Najam Akhlaq owned alien number GS1348322 as he had been working in the country using class 'G' work permits as shown by Petitioners' evidence.

Submissions

Petitioners Submissions

15. The Petitioners filed their submissions on 24/3/2021. In highlighting the said submissions before court on 29/4/2021 Mr. Gikandi learned counsel for the Petitioners referred to **Leisure Lodge Limited v Commissioner of Land [2016] eKLR** for submissions that whenever there was a violation of rights Petitioners were at liberty to access the High Court under the provisions of article 165 and hence the Petition was properly before court. Counsel submits that the tax appeals tribunal was not the right avenue for the Petitioners to ventilate their case.

16. Mr. Gikandi submitted that the Petitioners have in June 2019, February 2020, 21/12/2020 and 30/12/2020 been summoned to the 1st Respondent's office to answer to allegations of evasion of tax payment. However, even without any proof of this allegation, the 1st Respondent issued a letter to the 2nd Respondent directing them to prohibit the Petitioners from leaving the country due to an alleged tax liability of Kshs 106,916,815/=. Counsel submitted that the 1st Respondent has never disclosed to the Petitioners the reasons for the continuous summons to their offices and that they were shocked when the departure prohibition order was slapped against them. Mr. Gikandi submitted that the tax allegedly due to the 1st Respondent is yet to be determined and no demand has ever been made to the Petitioners for the payable tax. Therefore, the Preliminary Objection by the 1st Respondent has no merit as this court has the jurisdiction to determine the matter before it. Counsel submitted that the 1st Respondent was still carrying out investigations and had not made any tax decision that would initiate an appeal before the tribunal by the Petitioners. Reference on this was made to Section 3 of the Tax Procedure Act on appealable decisions.

17. Mr. Gikandi submitted that the Petitioners had not been given an opportunity to be heard before the 1st Respondent issued the departure prohibition and that the proper procedures were not followed. Therefore, the decision was illegal unfair and irrational. Counsel referred to **Republic v Secretary of The Firearms Licensing Board & 2 Others Ex parte Senator Johnson Muthama [2018] eKLR**.

18. Counsel further contended that the applicable law in the event that the Petitioners had not satisfied their tax obligations were Sections 42 and 66 of the VAT Act and Section 31 of the **Tax Procedures Act**. That the 1st Respondent ought to have first served the Petitioners with an amended assessment of taxes followed by demand notices for payment of the amended assessment. The said notices grant the Petitioners a period of not less than 30 days to effect payment. In any event, the 1st Respondent cannot purport to be investigating the taxes due from the Petitioners, and at the same time have a particular sum of taxes due before the investigations are complete. Mr. Gikandi further submitted that the conduct of the Respondents are in violation of Articles 47 and 23 of the constitution and Sections 4(3) and 11 of the Fair Administrative Action Act, and that the Petitioners' right to a fair hearing as envisaged under article 50 of the constitution was infringed because they were not informed of the charges against them and given adequate time to defend themselves.

19. Mr. Gikandi submitted that the Petitioners had legitimate expectation that the Respondents would follow due process before issuing a departure prohibition as the Petitioners had resided in the country for many years and have heavily invested in real estate amongst other developments. Counsel cited **Republic v Attorney General & Another Ex parte Waswa & 2 Others [2015] I KLR 280**, **Republic v Principal Secretary Ministry of Mining Ex Parte Airbus Helicopters Southern Africa(PTY) Ltd [2017] eKLR**, and submitted that the Petitioners have demonstrated that the Respondents have violated their rights and acted ultra vires and hence the petition herein is merited and should be allowed by the court.

1st Respondent's Submissions

20. The 1st Respondent's submissions were filed in court on 19/3/2021. Mr. John Marigi learned counsel submitted that the court had to first deal with the issue of jurisdiction before anything else as was decided in the cases of **Owners of Motor Vessel Lilian S V Caltex Oil Kenya Ltd [1989] KLR**.

21. According to Mr. Marigi, the Petitioners are challenging a decision arising from the Tax Procedures Act, and that no provision of the said Act allocates the High Court the jurisdiction to deal with decisions arising from it. Counsel submitted that the Petitioners ignored the laid down procedures and jumped ship by filing the present petition. Counsel submitted that before a party applies for judicial review they must demonstrate that they have exhausted all internal mechanisms for challenging such a decision. See **Registered Trustees Kenya Railways**

Staff Retirement Benefits Scheme v Chairman Rent Restriction Tribunal & 99 Others [2018].

22. Mr. Marigi submitted that the prohibition order against the Petitioners was legitimately issued under the Tax Procedures Act. That Section 45 gives the commissioner the power to order departure prohibitions if they have grounds to believe that a person may leave Kenya without paying tax. Therefore, the Commissioner cannot be faulted for issuing the order.

2nd and 3rd Respondents Submissions

23. Mr. Makuto, learned counsel for the 2nd and 3rd Respondents intimated to court on 24th March 2021 that they would not be putting in any submissions with regard to the petition.

The Determination

24. Upon considering the petition, affidavits in support and in opposition, Grounds of Opposition, the Preliminary Objection and the submissions I consider the following issues necessary for determination;

a. Whether or not the departure prohibition decision was an appealable tax decision.

b. Whether or not the Petitioners constitutional rights have been violated.

Whether or not the departure prohibition decision was an appealable tax decision.

25. The Petitioners state that sometime in June 2019 they were summoned to the 1st Respondent's offices in Mombasa to answer to allegations of tax related offences. That they were asked general questions and then left to leave, and later summoned again to the 1st Respondent's offices in February 2020 where they were shown bank statements and records for their company's tax payments. The Petitioners were again summoned to the 1st Respondent's Commissioner, Investigations and Enforcement on 21/12/2020 and on 31/12/2020 but unknown to them the 1st Respondent had vide a letter dated 23rd December 2020 directed the 2nd Respondent to prohibit them from leaving the country due to an alleged tax liability of Kshs 106,916,815/=.

26. The Respondents on the other hand, claim that the decision to issue the prohibition order was informed by the provisions of Section 45 of the Tax Procedures Act which provides:

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.

2. The commissioner may issue a departure prohibition order in writing to the director in relation to a person to whom this section applies...

27. The **Tax Procedure Act** further gives the procedure on how a decision made under **Section 45** of the said act may be challenged. It provides under **Section 52**;

1. Any person who is dissatisfied with an appealable decision may appeal the decision to the tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, no 40 2013.

28. From the foregoing it is clear that the decision by the 1st Respondent is an appealable one. However, the Petitioner's case is that they were never informed by the 1st Respondent on the contents of the letter dated 23/12/2020 which formed the basis of the departure prohibition. The 1st Respondent has indicated that the Petitioners have a tax liability amounting to Kshs 106,916,815/=. However, they are yet to issue the Petitioners with any tax demand and demand notices over the said liability. The Petitioners were not given any opportunity to defend themselves on the allegations of the tax offences and the possibility of them being flight risks. The Petitioners have tendered before this Court evidence in support of the fact that they own and have a fixed place of abode within Kizingo in Mombasa County, a fact that has not been challenged or disputed by the Respondents. Since the tax due has not been ascertained, and since amended tax assessments have not been served upon the petitioners, no demand has been made to the Petitioners to pay the said sum and the "*not less than 30 days period*" was never accorded to them to respond to the tax demand notices. Hence there is no decision that has been made by the 1st Respondent that could warrant the Petitioners to appeal the same at the tribunal. From this finding the Petitioners have the right to file this Petition before this Court. That answers the question on jurisdiction. In **Car Importers Association of Kenya v Kenya Revenue Authority & 3 others [2019] eKLR** this court stated:

"It is trite law that any taxation regime must be clear and unambiguous. Where there are any inconsistencies or grey areas, the interpretation which the Court must adopt is that one which favours the tax payer. This is what is called "strict interpretation" of tax statute. The intention is to shield a tax payer from unclear or unclarified demands for tax."

On Whether or not the Petitioners constitutional rights have been violated.

29. Section 4(3) of the Fair Administrative Actions Act provides for fair administrative action in the following terms;

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 review or internal appeal against an administrative decision where applicable**
- d. A statement of reason pursuant to section 6**
- e. Notice of the right to legal representation where applicable**
- f. Notice of the right to cross examination where applicable**
- g. Information, material and evidence to be relied upon in making the decision or taking the administrative action.**

30. The Respondents have not furnished this Court with the findings of their investigations. No complaint has been brought forth either orally or in writing against the Petitioners to explain the basis of the said investigations. Indeed, there is no evidence of demand for alleged taxes due. The Respondents actions have clearly affected the Petitioners liberty as they have been treated inhumanly and have been caused to suffer untold mental anguish and torture especially with the unlawful detention at some point in time.

31. The Respondents actions amounts to violation of the Petitioners fundamental rights. In **Christian Juma Wabwire v Attorney General [2019] eKLR, the Judge relied on the decision in Lt. Col Peter Ngari Kagume and 7 others v AG, Constitutional Application No. 128 of 2006** where it was held that: -

“23. [I]t is incumbent upon the Petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true but the Court is enjoined by law to go by the evidence on record. The Petitioners’ allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the Court is dead to speculation and imaginations and must be guided by evidence of probative value. When the Court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation...”

32. I am satisfied that enough evidence has been presented before this Court by the Petitioners in support of several violations of their rights by the Respondents. There is evidence that every time the Petitioners seek to renew their licences they have to go to court and secure a court order. The Petitioners are in court virtually every year. This is a serious indictment of the 1st Respondent and its responsible officers. In as much as the decision of the Respondents herein is appealable to the Tax Appeals Tribunal, there must first be a lawful demand of taxes due served upon the Petitioners, and their response to the same heard. It is evident that in this case, provisions of Article 47 of the Constitution have been breached. The same provides that:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

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.

Parliament shall enact legislation to give effect to the right in clause (1) and that legislation shall—

- i. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**
- ii. Promote efficient administration.”**

33. The Petitioners have claimed for general and exemplary damages from the Respondents. However, no evidence has been placed before this court to show liquidated losses that have been incurred as a result of the violation of the said rights. However, as for general damages, this Court is not restricted, and can assess the amount of general damages once proof of a protected right is made. It is the finding of this Court that the Petition herein has been proved on a balance of probability, and that it meets the threshold for the grant of the rest of the orders sought. For that reason, the petition is allowed as follows;

- a. A declaration is hereby made that the prohibition of the Petitioners from leaving the country as contained in the letter dated 23rd December 2020, is in violation of articles 10, 27, 28 and 47 of the Constitution of Kenya 2010.**
- b. An order of certiorari is hereby issued quashing the Respondents’ decision contained in the letter dated 23rd December 2020 prohibiting the Petitioners from leaving Kenya.**

c. A conservatory order is hereby issued suspending the departure prohibition contained in the letter dated 23rd December 2020.

d. An order is hereby made prohibiting the continuance of the harassment made by the Respondents against the Petitioners with respect to the alleged tax liability of Kshs 106,961,815/=.

e. General damages of Kshs. 100,000/= is given to each of the Petitioners herein on account of violation of their rights as stated above.

f. Costs shall be for the Petitioners

It is ordered accordingly.

DATED, SIGNED & DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Gikandi for Petitioners

Mr. Marigi for KRA

Mr. Makuto for Hon. AG

Ms. Peris Court Assistant