



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E041 OF 2021

-BETWEEN-

PRATIK MANSUKHLAL MALDE.....1ST PETITIONER

ANIL KUMAR VIRPAR MALDE.....2ND PETITIONER

-VERSUS-

THE KENYA REVENUE AUTHORITY.....RESPONDENT

-AND-

RAHAB MWIHAKI KAROKI.....INTERESTED PARTY

RULING NO. 1

Introduction:

1. The power of, and the manner in which, the Kenya Revenue Authority, the Respondent herein, issues *Departure Prohibition Orders* (hereinafter referred to as '*the DPOs*') under Section 45 of the Tax Procedures Act, No. 29 of 2015 of the Laws of Kenya (hereinafter referred to as '*the Tax Act*') is challenged in this Petition.
2. In the meantime, the Petitioners, against whom DPOs were issued, seek conservatory orders in terms of the application by way of an Amended Notice of Motion dated 16th February, 2021.
3. This ruling is, hence, on the said application.
4. It also imperative to mention that the proceedings herein had initially been instituted against three Respondents being the Kenya Revenue Authority, the Director of Immigration Services and Registration of Persons and the Honourable Attorney General respectively. However, on 26th January, 2021, the parties agreed to dispense with the participation of the Director of Immigration Services and Registration of Persons and the Honourable Attorney General. The proceedings, henceforth, are against Kenya Revenue Authority.

The Application:

5. The orders sought in the application are as follows: -

- a. A conservatory order do issue compelling the 1st Respondent to lift, remove and/or cancel the Departure Prohibition Orders issued on 14th January 2021 and/or any or further restriction against the Petitioners/Applicants movement in and out of the country pending the hearing and determination of the Petition;
- b. A conservatory order do issue prohibiting and/or restraining the 1st Respondent, its officials, employees, servants and/or agents or anybody working under or for them 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 pending the hearing and determination of the Petition;

c. The Honourable Court be pleased to issue a temporary order directing the 2nd Respondent to release to the 1st Petitioner/Applicant Kenyan Passport No. CK2[...] and held and detained by the 2nd Respondent and/or its officials, servants, employees and/or agents pending hearing and determination of the Petition. (SPENT SINCE PASSPORT HAS BEEN RELEASED)

6. The application is supported by two Affidavits each sworn by the Petitioners herein on 4th February, 2021. The Petitioners also filed written submissions and a List of Authorities.

7. In opposition to the application, the Respondent filed a Notice of Preliminary Objection dated 11th February, 2021, Grounds of Opposition and a Replying Affidavit sworn by one *Mercy Mutisya* on 26th February, 2021.

Issues for determination and analysis:

52. I have carefully considered the application, the response thereto, the parties' submissions and the decisions referred to. I, hereby, discern the following areas of discussions: -

- i. The Preliminary objection;
- ii. The nature of conservatory orders;
- iii. The guiding principles in conservatory applications; and
- iv. The applicability of the principles to the applications.

8. I will deal with the above sequentially.

The Preliminary objection:

9. The Preliminary Objection is tailored as under: -

This Honourable Court lacks jurisdiction to hear the Petition by dint of Section 52 of the Tax Procedures Act, Section 12 of the Tax Appeals Tribunal Act, Section 7 of the Fair Administrative Action Act, Section 9(2) of the Fair Administrative Act, and Article 159(2)(a) of the Constitution of Kenya.

10. The Respondent holds to the objection. The Respondent contends that no Court proceedings ought to issue in instances where there are defined alternative ways of dealing with a dispute. In this case, the Respondent cites Section 45(6) and (7) of the Act and argues that the Petitioners were to, in the first instance, challenge the DPOs through the Commissioner and if still dissatisfied to appeal before the Tax Appeal Tribunal (hereinafter referred to as '*the Tribunal*'). Since the Petitioners failed to do so, it is submitted that the Court is not seized of any jurisdiction over the matter.

11. The decisions in *Speaker of National Assembly vs. James Njenga Karume (1992) eKLR (2008) 1KLR 428*, *Republic v. Kenya Revenue Authority & Another ex parte Sylvia Kaimuri & 2 Others (2019) eKLR* were relied on in support of the submission.

12. The Petitioners are opposed to the objection. They submit that the gist of the Petition is not the amount of tax assessed by the Commissioner, but that the Petition questions the manner in which the DPOs were issued. The Petitioners contend that, in the course of issuance of the DPOs, the Respondent infringed their rights and fundamental freedoms. Such include the right to movement (Article 39(2), right to human dignity (Article 28), right to equality before the law and freedom from discrimination (Article 27), the right to a fair administrative action (Article 47) and the right to protection of their economic interests (Article 46(1)(c) of the Constitution.

13. It is argued that Articles 22, 23 and 165(3) of the Constitution guarantees protection in instances of infringement of such rights and fundamental freedoms.

14. The Petitioners further argued that according to Section 3 of the Tax Appeals Tribunal Act and Rule 2 of the Tax Appeal Tribunal (Procedure) Rules 2016 the issues to be contested before the Commissioner and the Tribunal are *tax decisions* which comprises of decisions relating to tax assessments, determination of the amount that will become taxable to the tax payer, self-assessment of taxes, refund decisions, demands for refunds among others. However, the Petitioners posit that the issues in this Petition have nothing to do with tax decisions made by the Commissioner and the Tribunal, but the manner in which the DPOs were issued.

It is vehemently contended that this Court has the requisite jurisdiction over the matter and that the objection be dismissed with costs.

16. Since the objection is raised by way of a preliminary objection, I will briefly look at the law on the subject. I recently did so in *Nairobi High Court Constitutional Petition No. E260 of 2021 Borniface Akusala & Another vs. Law Society of Kenya & 12 Others* (unreported) and since I still hold that position, I will reiterate what I stated in that decision, and as under: -

13. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

14. The foregoing nature of preliminary objections was discussed in **Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd**, (1969) E.A. 696 page 700 when the Court observed as follows: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

15. In Civil Suit No. 85 of 1992, **Oraro vs. Mbaja** [2005] 1 KLR 141, **Ojwang J**, as he then was, cited with approval the position in **Mukisa Biscuit -vs- West End Distributors** (supra) and stated as follows on the operation of preliminary objection: -

.... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

16. In **Omondi -vs- National Bank of Kenya Ltd & Others** {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.

17. The question whether jurisdiction is a point of law was set out clearly by the Supreme Court in Petition No. 7 of 2013 **Mary Wambui Munene v. Peter Gichuki Kingara and Six Others**, [2014] eKLR, when the Learned Judges stated that 'jurisdiction is a pure question of law' *and should be resolved on priority basis*'.

18. The Preliminary objection in this matter is capable of extinguishing the entire proceedings. The objection rests purely on points of law and does not call for any evidence in its determination.

19. It is, therefore, this Court's finding that the Preliminary Objection passes the propriety test and the objection is for consideration.

20. It is settled that parties must exhaust any alternative dispute resolution mechanism before embarking on a Court process. That is the exhaustion doctrine. Once again, I dealt with the matter in *Petition No. E260 of 2021 Borniface Akusala & Another vs. Law Society of Kenya & 12 Others* case (supra) and do hereunder reiterate what I stated therein: -

25. The doctrine of exhaustion in Kenya traces its origin from Article 159(2)(c) of the Constitution which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-

(a)...

(b)...

(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

26. Clause 3 is on traditional dispute resolution mechanisms.

27. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)** (2020) eKLR. The Court stated as follows:

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in **R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR**, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in **Speaker of National Assembly v Karume [1992] KLR 21** in the following oft-repeated words:

43. Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

44. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is **Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR**, where the Court of Appeal stated that:

It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

28. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra)*, after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case (supra)*, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR*.

62. In the instant case, the Petitioners allege violation of their fundamental rights. **Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.**

29. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in *Mombasa Civil Appeal No. 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others [2019] eKLR held as follows: -*

The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in *Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere “bootstraps.” We have keenly addressed our minds to the learned Judges’ decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

30. Further, in Civil Appeal 158 of 2017, **Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another** [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546* to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

31. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the Constitution. (See **Royal Media Services Ltd. -vs- Attorney General & 6 Others** (2015) eKLR among others).

32. Returning to the case at hand, I have patiently considered the provisions of Section 52 of the Tax Procedures Act, Section 12 of the Tax Appeals Tribunal Act, Sections 7 and 9(2) of the Fair Administrative Act and Article 159(2)(a) of the Constitution of Kenya which are the basis of the objection. As correctly submitted by the Petitioners, the Act, the Tax Appeal Tribunal (Procedure) Rules 2016 and the Tribunal deal with tax decisions. The Rules clearly define *tax decisions*. Such decisions do not include any aspects of infringement of rights and fundamental freedoms and the interpretation of the Constitution.

33. The Petition before Court challenges the manner in which the DPOs were issued, but from a constitutional perspective. The Petition alleges abuse of discretion by the Respondent where arbitrariness, malice, capriciousness and disrespect of the Constitution and the Rules of natural justice are raised which allegedly adversely affect the rights and fundamental freedoms of the Petitioners. The High Court, therefore, has exclusive jurisdiction under Article 165(3) of the Constitution to interrogate the issues raised. In such instances the jurisdiction of the Respondent created under the Act cannot apply.

34. As rightly so stated by the Court of Appeal in **Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another** case (supra) ‘... the Court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.’

35. This Court is, hence, satisfied that the Petition primarily seeks to enforce fundamental rights and freedoms and it is not demonstrated that the claimed constitutional violations are mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court.

36. The Petition is, therefore, not barred by the doctrine of exhaustion and the objection is overruled.

The nature of conservatory orders:

37. In **Civil Application No. 5 of 2014 Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others** (2014) eKLR, the Supreme Court discussed, at paragraph 86, the nature of conservatory orders as follows: -

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the Applicant’s case for orders of stay.

38. The Court in **Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro’ next friend and mother (HW) [2016] eKLR** defined a conservatory order as follows: -

5. A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.

39. In **Judicial Service Commission vs. Speaker of the National Assembly & Another** [2013] eKLR the Court had the following to say about

the nature of conservatory orders: -

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

40. Conservatory orders are, therefore, aimed at preserving the substratum of the matter pending the determination of the main issues in dispute.

41. Given the interlocutory nature of conservatory orders, it is argued, that there is need for a Court to exercise caution when dealing with any request for such prayers. I agree with that proposition for the reason that matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.

42. The foregoing was fittingly captured by **Ibrahim, J** (as he then was) in **Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR**. The Learned Judge, correctly so, stated as follows: -

The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.

43. The decisions in **Centre for Rights Education and Awareness (CREAW) & 7 Others v. Attorney General (2011) eKLR**, **Platinum Distillers Limited vs. Kenya Revenue Authority (2019) eKLR** and **Kenya Association of Manufacturers & 2 Others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR** also variously vouch for the cautionary approach.

44. A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.

The guiding principles in conservatory applications:

45. The principles for consideration by a Court in exercising its discretion on whether to grant conservatory orders have been developed by Courts over time. They are now well settled.

46. The *locus classicus* is the Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others** case (supra) where at paragraph 86 stated the Court stated as follows: -

[86] Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

47. In **Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR**, the Court summarized the principles for grant of conservatory orders as: -

i. The need for the applicant to demonstrate an arguable *prima facie* case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.

ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

iii. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

v. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

48. In **Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR** the Court summarized three main principles for consideration on whether to grant conservatory orders as follows: -

(a) An applicant must demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered

nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

49. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality of statutes, whether the Applicant is guilty of laches, the doctrine of proportionality, among many others.

The applicability of the principles to the application:

i. A prima-facie case:

50. A prima facie case was defined in *Mrao vs. First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 to mean: -

... In a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.

52. In a ruling rendered on 8th February, 2021 in *David Ndi & others v Attorney General & others* [2021] eKLR, the Court had the following to say about a *prima-facie* case: -

45. The first issue for determination in matters of this nature, is whether a *prima facie* case has been established and a *prima facie* case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and in this case, arguable constitutional issues.

53. What constitutes a *prima-facie* case was further dealt with by the Court of Appeal in *Mirugi Kariuki -vs- Attorney General* Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a *prima facie* case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. **Without a rebuttal to these allegations**, this appellant certainly disclosed a *prima-facie* case. For that, he should have been granted leave to apply for the orders sought. (emphasis added).

54. In *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, the Court while expounding on what a *prima-facie* case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

55. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 *Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another* (2015) eKLR while dealing with what a *prima facie* case is, made reference to Lord Diplock in *American Cyanamid vs. Ethicon Limited* (1975) AC 396, when the Judge stated thus: -

If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.

56. In sum, therefore, in determining whether a matter discloses a *prima-facie* case, a Court must look at the case as a whole. It must weigh, *albeit* preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law. In so doing, a Constitutional Court must be guided by Articles 22 (1) and 258(1) of the Constitution which provisions are on the right to institute Court proceedings whenever a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened or the when the Constitution has been contravened, or is threatened with contravention.

57. The Petitioners' case is that their right to movement (Article 39(2), right to human dignity (Article 28), right to equality before the law and freedom from discrimination (Article 27), the right to a fair administrative action (Article 47) and the right to protection of their economic interests (Article 46(1)(c) which are guaranteed under the Constitution are infringed in the manner in which the DPOs were issued. The Petitioners have categorically stated that the current proceedings are not challenging the tax assessment by the Commissioner and the decision of the Tribunal. In other words, save for the manner in which the DPOs were issued, the Petitioners, at least in these proceedings, are not challenging the taxes as ordered to be due and payable.

58. The Petitioners contend that as a result of the currency of the DPOs, they are unable to travel out of the country where their other family members and other business interests are. They contend that they are not flight risks as they have their homes in Kenya and that they have heavily and substantially invested *inter alia* in real estate.

59. It is further the Petitioners' case that despite the foregoing, the Respondent is well aware of the fact that the Petitioners are no longer Directors of and are not in any way whatsoever concerned with the affairs of Family Signature Limited, the basis of the tax assessments, courtesy of a Settlement Agreement entered between the former Directors of Family Signature Limited and the Interested Party in these proceedings. It is contended that the Respondent has, in previous Court proceedings demonstrated such knowledge and that the action of issuing the DPOs against the Petitioners can only be arbitrary, capricious and in bad faith.

60. The Petitioners have referred to *Brian Wasiche Waluchio vs. Kenya Revenue Authority & Another (2020) eKLR*, *Seyyed Hassan Dashti Khavidaki vs. Kenya Revenue Authority & Another (2018) eKLR* and *Kevin K. Mwiti vs. Kenya School of Law & Others (2015) eKLR* in support of their submissions.

61. To the contrary, the Respondent posits that the Respondent investigated the matter and is in possession of evidence to the effect that the Petitioners are the current Directors and shareholders of Family Signature Limited. The Respondent further posits that as such the alleged Settlement Agreement does not absolve any of the Petitioners from the tax liability hence the issuance of the DPOs. According to the Respondent, the Petition is only meant to frustrate the Respondent from recovering taxes which are due and payable by the Petitioners as Directors and shareholders of Family Signature Limited.

62. In its submissions, the Respondent has delved into the merits of the Petition and made substantive submissions as to why the DPOs ought to be sustained. As pointed out hereinabove, this Court, at this point in time, will not address itself to the issues which are the preserve of the main hearing.

63. Going by the definition and consideration of a *prima facie* case, and the pleadings on record, I have no difficulty in finding that, indeed, the Petition is not frivolous as it raises constitutional issues worth consideration.

(ii) Whether the Petitioners will suffer prejudice and the cases rendered nugatory unless the conservatory orders are granted:

64. The *Black's Law Dictionary 10th Edition Thomson Reuters* at page 1370 defines '**prejudice**' as follows: -

Damage or detriment to one's legal rights or claims.

65. Will the parties herein, therefore, suffer any damage or detriment if the conservatory orders are not granted? Generally, any contravention or threat to contravention of the Constitution or any infringement or threatened infringement of rights and fundamental freedoms in the Bill of Rights is an affront to the people of Kenya. That is the clear purport of the Preamble and Chapter 1 of the Constitution.

66. Courts must, in dealing with Petitions brought under the various provisions of the Constitution, be careful in determining the prejudice at least at the preliminary stages. I say so because, at such stages of the proceedings, the provisions of the Constitution alleged to have been infringed or threatened with infringement are yet to be subjected to legal scrutiny. Therefore, the damage or threat thereof to the rights and fundamental freedoms or to the Constitution must be so real that the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent. In the words of the Learned Judge in *Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR*: -

To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

67. The Petitioners dispute the issuance of the DPOs mainly on the basis of the Settlement Agreement with the Interested Party herein. The Respondent, on its part, takes very great exception to the Settlement Agreement. The agreement is, hence, hotly contested.

68. The Petitioners admit that they were the initial Directors and shareholders of the Family Signature Limited. They, however, contend that their directorship and shareholding was rescinded upon the execution of the Agreement. There is no averment that the agreement was registered. Instead, the Petitioners contend that it was the responsibility of the Interested Party to ensure that the agreement was duly effected. Further, the Interested Party herein has so far not accepted any tax liability on the basis of the settlement agreement.

69. This Court is aware of Section 45 of the Act. The provision defines whoever has a tax liability. Given the state of affairs in this matter, there is need for the issues relating to the Settlement Agreement to be fully determined at the hearing of the Petition before any meaningful reliance may be attached thereto.

70. Speaking of evidential proof, the Court of Appeal in *Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR* stated as follows: -

35. In the instant case, the trial judge made a finding that there was no threat of violation of the applicant's fundamental rights and freedoms. We remind ourselves that the trial judge made this finding in an interlocutory application. **In our view, whether there is a threatened violation is a matter of fact to be ascertained in a full hearing of the Petition.**

71. In the meantime, there is a decision by the Commissioner which decision was sustained by the Tribunal. The matter is pending the determination of an appeal before the High Court. This Court has not been made aware of the status of the appeal and whether there are any kind of orders in place. The Respondent aver that it issued the DPOs on the basis of the judgment of the Tribunal, which judgment is yet to be set-aside or stayed. When the foregoing is weighed against the Petitioners' allegations of infringement of rights and fundamental freedoms, *albeit* on a *prima-facie* basis, and the fact that the Interested Party is yet to admit any tax liability on behalf of Family Signature

Limited, this Court is not convinced that the Petitioners stand to suffer any prejudice which is irreparable, if the orders are not granted.

72. This Court also takes note that unlike in the various cases which the Petitioners relied on where some of the claimants were holed up in hotel rooms, the Petitioners herein have homes in Kenya with other vast business interests.

73. Having said so, I now find and hold that the Petitioners have, at the moment, failed to demonstrate the prejudice they are likely to suffer if the application is not allowed.

(iii) Public interest:

74. 'Public interest' is defined by the *Black's Law Dictionary 10th Edition* at page 1425 as: -

The general welfare of a populace considered as warranting recognition and protection. Something in which the public as a whole has stake especially in something that justifies government regulation.

75. Generally speaking, laws are passed to govern the people. As such, the laws are always presumed to be constitutional until the contrary is proved. There is also a duty on every person to comply with the law. In a matter of this nature, a Court must, among others, consider the principle of proportionality. As was stated by **Ojwang, Ag. J** (as he then was) in *Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589* the Court, in responding to prayers, should always opt for the lower rather than the higher risk of injustice.

76. In this case, it is alleged that the Petitioners were accorded a hearing before the Commissioner and also before the Tribunal prior to a determination of the tax liability of Family Signature Limited. The Petitioners, however, have not contended that if they satisfy the tax liability against Family Signature Limited and the Petition is eventually successful, they will not be able to recover what they would have paid either from the Respondent or the Interested Party. And, as earlier stated, the Petitioners' reliance on the settlement agreement is hotly contested and yet to be settled at the main hearing more so given the muteness on the part of the Interested Party.

77. Having considered the relevant legal principles, and the exceptional circumstances in this matter, this Court finds that public interest tilts in favour of the Respondent. It is in public interest that the orders sought are not issued, at least, in the meantime.

Conclusion and Disposition:

78. The above analysis yields that the Petitioners have not, as yet, successfully laid a basis for the grant of the orders sought in the application.

79. That being the case, the application is unsuccessful. However, given the nature of the Petition herein, there is need for its expeditious disposal.

80. In the end, the following orders hereby issue: -

- a. **The Preliminary objection dated 11th February, 2021 is hereby dismissed.**
- b. **The Amended Notice of Motion dated 16th February, 2021 is hereby dismissed with costs.**
- c. **The Petitioners shall extract and serve a copy of the orders arising from this ruling upon the Interested Party within 10 days.**
- d. **Once served, the Interested Party shall have 14 days within which to file and serve any response to the Petition.**
- e. **The Petition shall be heard by way of reliance on the Affidavit evidence and written submissions.**
- f. **To that end, the Petitioners shall file and serve any supplementary response, if need be, together with written submissions within 14 days of (d) above.**
- g. **The Respondent and the Interested Party shall file and serve their respective written submissions within 14 days of service.**
- h. **Highlighting of submissions on a date suitable to the Court and the parties.**

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF AUGUST, 2021

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Njuru, Counsel for the Petitioners.

Miss. Onyango, Counsel for the Respondent.

No appearance for the Interested Party.

Elizabeth Wambui – Court Assistant.