



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.45 OF 2020

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 THE TAX PROCEDURES ACT (No.29 of 2015)

AND

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

AND

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

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The Notice of Motion dated 13th February 2020 was on the same day certified urgent and Applicant directed to serve the Respondents.
2. The Applicant seeks prayer 2 of the Notice of Motion; thus a conservatory order do issue suspending the Departure prohibition order issued against the petitioner on 6th September 2019 pending hearing and determination of the application herein.
3. The Respondents are opposed to granting prayer No. 2 and have filed Replying affidavit dated 20th February 2020.
4. The application is based on the grounds that the 1st Respondent's Commissioner for investigation and enforcement barred the Applicant from travelling out of country from 6th September 2019 with no sufficient justification notwithstanding that the Applicant has business in East Africa region. That the investigation are said to be complete on part of the petitioner.
5. From the counsel rival submissions the tax due and payable by the Applicant is yet to be determined and no demand has been issued for the payable tax. It is contended from the aforesaid the Respondents' action to issue Departure Prohibition order (**DPO**) violates section 45 of the Tax Procedure Act 2015 in that there are no reasonable grounds shown that the petitioner is likely to leave Kenya or is a flight risk. It is further urged the **DPO** violates the section for its failure to state the amount of tax that is payable.

6. The petitioner further contended the Respondents have violated Article 47(1) and (2) of the constitution and Fair Administrative Action Act by failing to respond to the petitioner's letter notwithstanding that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

7. The 1st Respondent urge under section 45 of the Tax Procedure Act 2015, it talks of tax that is payable and will be payable admitting that they are in the process of assessing tax that will be payable as the investigation is still on going. It is further Respondents averment that the delay was due to failure to trace the petitioner in good time. The Respondents admit that no demand letter has been issued.

8. It urged if **DPO** is suspended the Applicant once he leaves Kenya he may not come back.

9. The Respondents under paragraph 6 admit the Applicant took over the company on 31/1/2017. It is further admitted in paragraph 13 that the Respondents are required to expedite investigation as of 11/10/2019 and return documents to the Applicant. Under paragraph 19 it is clear the Respondents issued the **DPO** instead of the demand notice.

10. At this stage the court is required to consider whether the Applicant has established a *prima facie* case to warrant granting of the conservatory orders sought pending *interpartes* hearing of the application. In the instant case there is admission that no demand notice has been issued; the tax due is yet to be known or determined; that no security has been demanded as the tax due is still unknown; that the Respondents have not demonstrated that the Applicant is a flight risk or has no known place of residence and that once the **DPO** is suspended he will run away.

11. In view of the above I find that the Applicant has demonstrated that he has a prima facie case with probability of success. I allow the application under the following terms:-

a. The Departure prohibition order issued on 6th September 2019 be and is hereby suspended pending hearing and determination of the application *interpartes*.

b. The Applicant not to leave Kenya pending *interpartes* hearing of the application without giving seven (7) days' notice to the 1st Respondent in writing indicating when he shall be out of country, to what place and for how long and furnish supportive documents.

c. Costs be in the cause.

Dated, signed and delivered at Nairobi this 25th day of February, 2020.

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J .A. MAKAU

JUDGE