



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 156 OF 2017**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Petitioner, Okiya Omtatah Okoiti, describes himself as a public-spirited individual and human rights defender. The 1<sup>st</sup> Respondent is the Honourable Attorney General who is being sued in his capacity as the legal adviser and representative of the Government of Kenya. The 2<sup>nd</sup> Respondent is the Kenya Revenue Authority (KRA) which is established under the Kenya Revenue Authority Act, 1995 and is the central body for the assessment and collection of revenue. It is also responsible for the administration and enforcement of the laws relating to revenue.

2. Through his petition dated 12<sup>th</sup> April, 2017, the Petitioner expresses his apprehension concerning sections 57, 58(2), 59 and 99 of the Tax Procedures Act No. 29 of 2015 (hereinafter alternatively referred to as the Act or the TPA). He alleges that the provisions gives the 2<sup>nd</sup> Respondent's Commissioner-General (the Commissioner) and his or her authorised officers rogue and sweeping powers allowing them to act *ultra vires* and inconsistently with Articles 1, 2, 3 (1), 24, 31 (c), 47 and 50 (2) of the Constitution.

3. The Petitioner alleges that Section 59 of the Act infringes on the right to privacy as protected under Article 31(c) of the Constitution. He further asserts that sections 57, 58(2) and 99 reinforce the rogue powers assigned to the Commissioner under Section 59.

4. It is averred that powers which essentially allow the 2<sup>nd</sup> Respondent to breach the right to privacy, and to exercise intrusive and oppressive powers, must be exercised with the supervision of a court of competent jurisdiction. It is further expressed that the above powers cannot be exercised by third parties as tax matters are exclusively between the taxpayer and the 2<sup>nd</sup> Respondent. Further, that even where it is necessary to involve a third party, the 2<sup>nd</sup> Respondent must obtain warrants from a competent court permitting it to do so.

5. The Petitioner claims that Section 59 of the Act is unconstitutional as it seeks to limit the enjoyment of rights and fundamental freedoms enshrined in Article 31(c) but fails to meet the threshold set in Article 24 of the Constitution for doing so.

6. The Petitioner also contends that sections 57 and 58(2) of the Act are contrary to Articles 49(1)(a)(ii) & (iii), (b) & (d) and 50(2)(i) & (l) of the Constitution on the right to remain silent and to refuse to give self-incriminating evidence; and that they fail to meet the threshold for limiting fundamental rights and freedoms in compliance with Article 24 of the Constitution.

7. It is additionally averred that Section 99 of the Act is unconstitutional and therefore null and void as it seeks to penalise uncooperative persons who fail to comply with Section 59.

8. It is also the Petitioner's case that the impugned provisions are in contravention of Article 259(1) of the Constitution as they defeat the purposes, values and principles of the Constitution by giving the 2<sup>nd</sup> Respondent rogue powers; and the impugned provisions further violate Article 47 of the Constitution by "*purporting to sanction administrative action that is NOT expeditious, efficient, lawful and reasonable and procedurally fair.*"

9. The Petitioner consequently prays for the following reliefs:-

i. A declaration that sections 57, 58(2), 59 and 99 of the Tax Procedures Act No. 29 of 2015 are unconstitutional and therefore, null

and void.

ii. An Order quashing sections 57, 58(2), 59 and 99 of the Tax Procedures Act No. 29 of 2015 for being unconstitutional and, therefore, null and void.

iii. An Order that the costs of this suit be provided for.

iv. Any other relief the court may deem just to grant.

10. The petition is supported by the affidavit of the Petitioner sworn on the date of the petition, and in which he avers that if the impugned sections of the Act are not declared null and void and thereby quashed, it would result in a “collapse of due process, and with it law and order” where the operations of the 2<sup>nd</sup> Respondent are concerned. This averment is supported by reference to the events alleged to have taken place on 14<sup>th</sup> March, 2017 where the 2<sup>nd</sup> Respondent’s alleged rogue powers under sections 59(1) and 99 of the Act were put to use against the Hon. Ali Hassan Joho, the Mombasa County Governor.

11. By way of a notice of motion application dated 12<sup>th</sup> April, 2017 the Petitioner sought the following orders:-

a) That this application be certified as urgent and for it to be heard forthwith, and in priority to any other matter herein.

b) That consequent to the grant of the prayer above the Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

c) That the costs of this application be provided for.

12. The application is based on the same grounds provided for in the petition and supporting affidavit as well as the averment *inter alia* that the 2<sup>nd</sup> Respondent has lost its independence and engages in politically motivated intimidation and harassment of individuals and civil society, using the rogue powers donated to it vide the impugned sections. The said statement is again based on the events of 14<sup>th</sup> March, 2017 in which the 2<sup>nd</sup> Respondent purportedly invoked its powers under sections 59(1) and 99 of the Act in writing a letter to Diamond Trust Bank (DTB) asking for information in respect of the Mombasa County Governor Hassan Ali Joho as allegedly directed by the President of the Republic of Kenya.

13. Furthermore, he avers that the matter is urgent as it is in the public interest since the right to privacy is enshrined in the Bill of Rights in the Constitution, and the respondents will not suffer any prejudice of the matter is certified as urgent.

14. The application is supported by a supporting affidavit sworn by the Petitioner on the date of the application in which he repeats and reiterates the contents of the application as well as the affidavit in support of the petition.

15. He deposes that unless the matter is certified as urgent, he and the people of Kenya will suffer great loss and damage as the violation of rights and fundamental freedoms under the Constitution will not stop.

16. The Petitioner further asserts that it is the duty of the High Court to promote and safeguard the rule of law and by determining this matter it would ensure that the laws and the Constitution are protected.

17. The 1<sup>st</sup> Respondent opposed the application by way of grounds of opposition filed on 30<sup>th</sup> July, 2018. In summary, the 1<sup>st</sup> Respondent contends that the Petitioner has failed to demonstrate how the impugned sections are unconstitutional or infringe the Constitution in any way. The 1<sup>st</sup> Respondent urges the court to strike out the petition.

18. The 2<sup>nd</sup> Respondent’s opposition to the petition and the notice of motion application is found in the replying affidavit dated 19<sup>th</sup> July, 2018 and sworn by Mr. Maurice A. Okelo who works with the 2<sup>nd</sup> Respondent in the Domestic Taxes Department.

19. Mr Okelo avers that Section 59 of the Act is not unconstitutional as alleged by the Petitioner, and that the powers granted therein are necessary for the 2<sup>nd</sup> Respondent to obtain all essential information in order to make a fair decision on the tax liability of taxpayers. Additionally, it is deposed that the same provision does not limit the enjoyment of the rights and fundamental freedoms provided under the Constitution, nor does it infringe on Article 31(c) of the Constitution as it does not interfere with family or private affairs of the person and only seeks information on tax related issues.

20. On the allegation that the impugned law is unconstitutional as it allows the 2<sup>nd</sup> Respondent to involve third parties in seeking information on a taxpayer, the 2<sup>nd</sup> Respondent contends that the provision is not unconstitutional as it only relates to tax issues, and may be necessary in certain situations where it is the only way in which the 2<sup>nd</sup> Respondent can reach a fair and just decision.

21. It is further contended that Article 57 of the Act which deals with the admissibility of evidence in connection with documents collected by the 2<sup>nd</sup> Respondent is not unconstitutional as the admissibility of the evidence is subject to the decision of the court in criminal and civil proceedings.

22. Mr Okelo avers that in relation to the actions taken under sections 57 and 58 of the Act, the 2<sup>nd</sup> Respondent usually informs and or notifies the taxpayer of an assessment arising from the information obtained and therefore it cannot be said that the actions are contrary to

Articles 49(1)(a)(ii) & (iii), (b) & (d) and 50(2)(i) & (l) of the Constitution.

23. According to Mr Okelo the impugned provisions are necessary for the 2<sup>nd</sup> Respondent to conduct compliance checks and audits as part of its core function, and in doing so if there exists any limitation to a taxpayer's right to privacy the same is done in line with Article 24 of the Constitution. Furthermore, the impugned sections are essential for the 2<sup>nd</sup> Respondent to effectively conduct its mandate in line with Article 210 of the Constitution and cannot be said to interfere with the right to privacy as per Article 31(c) as the right is not absolute.

24. Mr Okelo deposes that the 2<sup>nd</sup> Respondent is not politically motivated and does not harass individuals or civil society, and whatever action is taken against any taxpayer is done within the confines of the Constitution.

25. It is averred that the Act was enacted with public participation as in line with Article 118(1)(a) and (b) of the Constitution. Further, that all statutes carry with them the presumption of constitutionality and therefore it is for the Petitioner to prove how the Act contravenes the Constitution.

26. The 2<sup>nd</sup> Respondent alleges that if the impugned sections are to be nullified it would render it incapable of performing compliance checks and audits and therefore unable to enforce tax collection which it is obligated to do under Article 209 of the Constitution.

27. It is the 2<sup>nd</sup> Respondent's averment that not only did the Petitioner fail to lobby the members of Parliament against passing the sections, but he has also failed to demonstrate how the impugned sections are unconstitutional. Therefore, the court is urged to dismiss the petition with costs.

28. The Petitioner filed his written submissions on 20<sup>th</sup> December, 2018, in which he proposes that the singular issue for determination is whether sections 57, 58(2), 59 and 99 of the TPA are unconstitutional and, therefore, invalid, null and void.

29. The Petitioner commences his submissions by re-iterating the contents of his petition. He relies on the case of **United States v Butler, 56 Sup. Ct. 312, 318 (1936)** where it was held by the Supreme Court of the United States of America, that the Constitution is the supreme law of the land and by virtue of that, all other legislation must conform with the Constitution and the principles laid down in it. Further, that where a statute is challenged as being in contravention of the Constitution, the judiciary must look at the provision of the Constitution invoked besides the statute challenged and determine whether the "*latter squares up with the former.*"

30. Further reliance is placed on the case of **Dr. Christopher Ndarathi Murungaru vs. AG and another, Civil Application No. Nai. 43 of 2006 (24/2006)** in which the Court of Appeal posited on the supremacy of the Constitution as a reflection of the "*supreme public interest*" which must be upheld by the courts.

31. On the issue of costs the Petitioner restates the well know principle that costs should follow the event. He prays that the court allows the petition and orders the respondents to bear the costs. This position is supported by the case of **Erick Okeyo v County Government of Kisumu & 2 others [2014] eKLR** where costs were ordered to be paid to the petitioner by virtue of bringing the matter to the public's attention.

32. The Petitioner further submits that costs should not be awarded to the respondents even in the event that he is not successful by virtue of the Biowatch principle enunciated by Justice Sachs in the South African case of **Biowatch Trust v Registrar Genetic Resources and others (CCT 80/2008) [2009] ZACC** that unsuccessful litigants should be shielded from the obligation of paying costs to the State in order to prevent the chilling effect that adverse orders for payment of costs might have on litigants seeking to assert constitutional rights. This, it was stated, is done to encourage litigants to continue to vindicate their rights against the government so long as they do so in a manner which is not frivolous or vexatious.

33. The 1<sup>st</sup> Respondent filed submissions dated 21<sup>st</sup> February, 2019. On whether the impugned provisions of the TPA are unconstitutional, the 1<sup>st</sup> Respondent submits that it is the mandate of the 2<sup>nd</sup> Respondent to assess and collect revenue and to administer and enforce the laws relating to revenue. In line with this mandate, the impugned sections gives the 2<sup>nd</sup> Respondent the authority to obtain the necessary information to carry out its mandate in relation to tax liability. It is therefore submitted that the Petitioner's arguments are misconceived and erroneous and should be dismissed.

34. The 1<sup>st</sup> Respondent urges that the Petitioner has failed to show how the impugned sections violate the right to privacy as the information obtained by the 2<sup>nd</sup> Respondent is essential to ensure that all taxpayers have met their tax liabilities and that in any event the tax information does not relate to the taxpayers' families or private affairs.

35. The court is urged to be guided by the decision in **Robert Alai v The Hon. Attorney General & another [2017] eKLR** where it was stated *inter alia* that:-

**"When the constitutionality of a statute or provision of a statute is called to question, the court is under obligation to employ the constitutional mirror laying the impugned legislation or provision alongside the Article(s) of the constitution and determine whether it meets the constitutional test..."**

36. Further reliance was placed on the case of **Communications Commission of Kenya & others v Royal Media Services Ltd & others Petition No. 14 of 2014** where the Court held that an aggrieved party must show a link between themselves, the alleged infringed provisions of the Constitution and the manifestation of contravention or infringement. It is therefore the 1<sup>st</sup> Respondent's position that the Petitioner has failed to prove the existence of a constitutional grievance which requires constitutional determination.

37. On the issue of costs payable, the 1<sup>st</sup> Respondent submits that the court has discretion to award costs as was determined in the case of **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR**. Furthermore, the 1<sup>st</sup> Respondent contends that the Petitioner has failed to make out a case to support the averment that there has been a violation of Article 31 of the Constitution. It is submitted that the Petitioner only seeks to serve his own interest through this petition and the court should be guided by the decision in **Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR** where it was held that where a person seeks to institute a claim in the public's interest for the violation of the Constitution, the same must be done based on a legitimate, bona fide and genuine claim.

38. The 2<sup>nd</sup> Respondent filed submissions dated 2<sup>nd</sup> July, 2019 and identified various issues which all boil down to question as to whether the impugned provisions violates the Constitution and are hence null and void.

39. On the claim that the impugned provisions of the TPA violates the right to privacy, the 2<sup>nd</sup> Respondent submits that the right is not absolute and can be limited. Reliance was placed on the case of **Ethics and Anti-Corruption Commission v Bob Kephwas Otieno & another t/a Nyangume Enterprise [2017] eKLR** where it was held that the operative word in Article 31 is "unnecessarily" meaning that where it is necessary, an intrusion into the privacy of an individual is permissible. Further reference was made to the case of **Transport and Allied Workers Union v Societe Internationale De Tele Communication Aeronautiques (Sita) [2016] eKLR** where it was stated that certain constitutional rights including those provided under Article 31 are not absolute and can be limited by virtue of Article 24.

40. The 2<sup>nd</sup> Respondent avers that in this particular case, the intrusion permitted by the impugned provisions is necessary as it "*enables the Taxing Authority to have the necessary documents, information and records*" to enable them to verify tax returns and process tax refund claims. Further, that the said information is not private as between the taxpayer and the taxing authority but is only private between the taxpayer and another person.

41. Still urging that the impugned provisions do not violate the right to privacy, the 2<sup>nd</sup> Respondent relies on the "required records" doctrine developed in the case of **Shapiro v United States, 335 U.S. 1 (1948)** to submit that an individual cannot invoke the right to remain silent or to refuse to give self-incriminating evidence as the documents required are necessary to ascertain the individual's true tax position.

42. The 2<sup>nd</sup> Respondent further claims that the information collected under the impugned provisions is at the assessment stage, audit stage, and investigative stage and therefore there is no accused or arrested person to warrant invoking Articles 49 and 50(2) of the Constitution. Therefore the sections do not breach the rights of accused persons as they don't relate to accused persons, but to taxpayers who are under audit and investigation.

43. Furthermore, it is submitted that Section 56 of the Act places a burden of proof on the taxpayers to establish that the assessment by KRA is incorrect after their documents have been reviewed. Reliance was placed on the South African case of **Metcash Trading Limited v The Commissioner for South African Revenue Service and another, CCT 3/2000** in support of the proposition that the burden of proving that a tax assessment by the tax collector is wrong belonged to the merchant.

44. On the Petitioner's assertion that the impugned provisions of the TPA violates the constitutional requirements for fair administrative action, the 2<sup>nd</sup> Respondent submits that the legislative process is not an administrative process to be subjected to Article 47 of the Constitution. However, the 2<sup>nd</sup> Respondent acknowledges the importance of the right to fair administrative action as a constitutional right that is integral to any administrative body's actions. This position is supported by the dictums in the cases of **Judicial Service Commission vs Mbalu Mutava & another [2015] eKLR**; **President of the Republic of South Africa and others v South African Rugby Union and others (CCT16/98) 2000 (1) SA 1; Baker v Canada (Minister of Citizenship & Immigration) 2. S.C.R. 817 6; Kenya National Highways Authority v PPP Petitioner Committee & 2 others [2018] eKLR**; and **Geothermal Development Company Limited v Attorney General & 3 others [2013] eKLR**.

45. The 2<sup>nd</sup> Respondent nevertheless submits that the impugned provisions meet the requirements for fair administrative action by affording taxpayers who will be affected by the administrative process an opportunity to have their position considered before the decision is made. This is done by requiring the taxpayers to submit documents and information to justify the tax position that they wish to be adopted. Additionally, it is submitted that the provisions in Act reinforce Article 47 of the Constitution.

46. It is further claimed that the Petitioner has failed to sufficiently show which particular administrative action has been undertaken by the 2<sup>nd</sup> Respondent in a manner which is unconstitutional, beyond a bundle of newspaper cuttings which the 2<sup>nd</sup> Respondent alleges are sensationalist. Moreover, it is submitted that newspapers cannot be accepted as having any evidential value as was decided in the cases of **Wamwere v Attorney General [2004] eKLR** and **Kenya Small Scale Farmers Forum v Cabinet Ministry of Education, Science and Technology & 5 others [2015] eKLR**.

47. In response to the Petitioner's assertion that the impugned provisions violates the proportionality test in Article 24 of the Constitution, the 2<sup>nd</sup> Respondent submits that the limitations set under the impugned provisions must be regarded as exceptions in order to preserve the greater good of the society and are beneficial to the legitimate taxpayer. This statement is supported by reference to the case of **Kenya National Commission on Human Rights & another v Attorney General & 3 others [2017] eKLR** where it was held that "**if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough.**" The 2<sup>nd</sup> Respondent urges that the impugned provisions meet the exception threshold provided in Article 24 and are therefore not unconstitutional.

48. It is additionally submitted that the rights that the Petitioner claims to have been infringed are all limitable as they do not fall within the ambit of the Article 25 non-derogable rights.

49. As to whether the impugned provisions violate Article 259 of the Constitution, it is submitted that the sections were made in line with the Constitution and in particular Article 201(b)(ii).

50. It is further submitted that the powers given to the 2<sup>nd</sup> Respondent under the impugned provisions are necessary for it to fulfil its mandate in ensuring the accuracy of the information provided under the self-assessment regime; and that the principles under Article 10 of the Constitution are complied with.

51. Finally, on the issue of costs the court is urged not to award the Petitioner costs. It is urged that the Petitioner is not acting on behalf of the public but is in fact acting on his own behalf. Further, that the real protector of the public's interest being the 2<sup>nd</sup> Respondent should be awarded costs in this matter. The 2<sup>nd</sup> Respondent relies on the decisions in **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR** and **Okiya Omtatah Okoiti v Communications Authority of Kenya & 14 others [2015] eKLR**.

52. In summary, the 2<sup>nd</sup> Respondent submits that sections 57, 58(2), 59 and 99 of the TPA are necessary for the performance of its mandate and ensures that the burden of taxation is shared fairly; that the limitation on the fundamental rights placed by the sections are proportional and meet the requirements of Article 24 of the Constitution; and that the impugned sections do not violate Articles 31(c), 47, 49, 50 and 259 of the Constitution. The court is therefore urged to find that the petition lacks merit and dismiss it with costs to the respondents.

53. A perusal of the pleadings and the submissions of the parties shows that the main issue for the determination of this court is whether sections 57, 58(2), 59 & 99 of the TPA are unconstitutional for violating Articles 31(c), 47, 50 (2) (i) & (l) and 259 (1) of the Constitution. The question of costs in respect of the proceedings will also have to be decided.

54. It is important to reproduce the impugned provisions for purposes of record. Section 57 of the TPA states:-

**“Admissibility of evidence**

**Notwithstanding anything to the contrary in any other written law—**

**(a) a document, or copy of or extract from a document, relating to the affairs of any person which has been seized or obtained by an authorised officer under section 59 or section 60 as the case may be; or**

**(b) a statement made by a person relating to his affairs is made to an authorised officer in accordance with the provisions of this Act; shall, if relevant, be admissible in civil or criminal proceedings under this Act to which that person is a party.”**

55. Section 58(2) of the TPA provides that:-

**“(2) An officer acting under subsection (1) may require the owner or employee, or a representative of the owner of the business, to give him all assistance and to answer all questions relating to the inquiry.”**

56. On its part Section 59 of the TPA states as follows:-

**“59. Production of records**

**(1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—**

**(a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;**

**(b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or**

**(c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.**

**(2) If the person required to produce documents under subsection (1)(a) is a financial institution—**

**(a) the documents shall not, while they are being examined, be removed from the premises of the financial institution or other premises at which they are produced;**

**(b) the Commissioner or authorised officer carrying out the examination may make copies of such documents for the purposes of any report relating to the examination; and**

**(c) the confidentiality of the information obtained in the course of the examination by the Commissioner or authorised officer shall be maintained and the information shall be used solely for the purposes of the tax laws.**

**(3) The Commissioner or authorised officer may require that the information referred to in subsection (1) be—**

(a) given on oath, verbally or in writing, and, for that purpose, the Commissioner or authorised officer may administer the oath; or

(b) verified by a statutory declaration or in any other manner that the Commissioner may prescribe.

(4) This section shall have effect despite—

(a) any law relating to privilege or the public interest with respect to the giving of information or the production of any documents (including in electronic format); or

(b) any contractual duty of confidentiality.”

57. Section 99 is a punishment provision and it provides that:-

**“Offences relating to enforcement powers**

(1) A person commits an offence when that person—

(a) fails to provide information or produce any document for examination as required by the Commissioner under section 59(1)(a) or (b);

(b) fails to appear before the Commissioner as required under section 59(1)(c); or

(c) fails to answer any question put to the person by the Commissioner or authorised officer in accordance with section 59(1)(c).

(2) A person commits an offence when the person, without reasonable excuse, fails to provide reasonable facilities and assistance as required by section 60(3)(d), (e), and (f), and (6).”

58. Before getting into the nitty-gritty of the various rights which are alleged to have been infringed by the impugned provisions, it is important to restate one of the principles that guide the courts in determining whether an Act of Parliament or a provision thereof is constitutional or not. This is the principle of the presumption of constitutionality of statutes. In line with the principle, there exists a rebuttable presumption that a piece of legislation is constitutional until it is proven otherwise. It is the duty of the person who alleges that an Act of Parliament or a provision thereof is unconstitutional to prove that the impugned law is in fact unconstitutional.

59. According to Section 2 of the TPA, the object and purpose of the Act is to provide uniform procedures for:-

**“(a) consistency and efficiency in the administration of tax laws;**

**(b) facilitation of tax compliance by taxpayers; and**

**(c) effective and efficient collection of tax.”**

60. Section 4 of the Act lays out the functions and powers of the Commissioner of KRA as:-

**“(a) the control and collection taxes;**

**(b) accounting for collected taxes; and**

**(c) subject to the direction and control of the Cabinet Secretary, for the general administrative of tax laws.”**

61. From the above it is therefore safe to say that the mandate of the KRA and its Commissioner are expansive within the realm of tax collection in order to ensure that all taxpayers comply with tax collection and tax return requirements.

62. The Petitioner contends that the impugned provisions seek to limit the enjoyment of the right to privacy by granting intrusive powers to the KRA’s Commissioner and third parties without obtaining warrants from a competent court permitting them to do so.

63. In reply the respondents submit that the right to privacy is not absolute and may be limited in certain circumstances. Their case is that the limitation of the right is necessary for the 2<sup>nd</sup> Respondent to successfully perform its duties. Furthermore, it is claimed that the intrusion to the right to privacy does not involve family or private affairs of the person and only seeks tax related information. On the mandate granted to the Commissioner to get information from third parties, it is submitted that the involvement of these third parties may be necessary in order to reach a just decision and is therefore necessary.

64. Article 31 of the Constitution outlines the right to privacy as follows:-

**“31. Every person has the right to privacy, which includes the right not to have—**

**(a) their person, home or property searched;**

**(b) their possessions seized;**

**(c) information relating to their family or private affairs unnecessarily required or revealed; or**

**(d) the privacy of their communications infringed.”**

65. Kenya is a signatory of the International Covenant on Civil and Political Rights (ICCPR) which at Article 17(1) states that:-

**“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”**

66. The Human Rights Committee’s General Comment on Article 17 (1988) states *inter alia*:-

**“3. The term “unlawful” means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.**

**4. The expression “arbitrary interference” is also relevant to the protection of the right provided for in article 17. In the Committee’s view the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”**

67. The right to privacy is therefore an integral concept in a democratic society. The right can however be limited so long as the limitation is within the bounds of existing law and it is done in a manner which is not arbitrary. The respondents are correct that the right to privacy is not an Article 25 right. The right can therefore be limited by the law. Where it is alleged that a constitutional right or fundamental freedom has been infringed it is important to establish whether that infringement is justified in line with Article 24(1) of the Constitution which states that:-

**“(1) A right or 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, taking into account all relevant factors, including—**

**(a) the nature of the right or fundamental freedom;**

**(b) the importance of the purpose of the limitation;**

**(c) the nature and extent of the limitation;**

**(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”**

68. In *R v Oakes* [1986] 1 SCR 103 the Supreme Court of Canada posited that a limitation to a right or freedom must be for “*an objective related to concerns which are pressing and substantial in a free and democratic society*” and it must be shown “*that the means chosen are reasonable and demonstrably justified.*” The Court held that “*the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom.*”

69. The Court then went ahead and set the proportionality test as follows:-

**“This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.”**

70. The 2<sup>nd</sup> Respondent claims that the information and documentation sought to be collected using the powers granted under the Act are necessary for it to meet its mandate in ensuring compliance with tax laws by taxpayers. It is argued that given the nature of the self-assessment regime adopted in Kenya, there would be no other way for the KRA to confirm the accuracy of the filed returns submitted by taxpayers without reviewing all information available to them.

71. It is obvious why the government collects taxes and why it is important that all taxpayers comply with tax laws. There is therefore a sufficient and substantial reason for the limitation of the right, as it is the KRA's mandate to ensure that all citizens abide by the laws relating to taxes and where they fail to do so they are properly brought to justice with sufficient evidence to support the allegation.

72. The next point to consider is whether the impugned provisions pass the proportionality test. It ought to be remembered that there is need to balance the interests of an individual with those of the society at large. The Petitioner argues that the powers granted to the Commissioner are excessive and arbitrary, and that the same powers have been granted to third parties without requiring them to obtain a warrant from a court.

73. In interpreting an Act of Parliament the document must be read as a whole in order to understand the lawmaker's intention. The provisions which the Petitioner claims are unconstitutional should be read alongside the other provisions of the TPA. For example Section 60(1) & (2) states that:-

**“(1) The Commissioner or an authorised officer shall, with a warrant, have full and free access to any building, place, property, documents, or data storage device for the purposes of administering a tax law.**

**(2) The Commissioner or an authorised officer may secure the building, place, property, documents, or data storage device to which access is sought under subsection (1) before obtaining a warrant.”**

74. The Petitioner's argument that the Commissioner can exercise the powers granted by the impugned sections without a warrant does not stand in light of this provision as it is obvious that the Commissioner and the authorized officers must comply with the provisions of Section 60 before doing some of the things the Petitioner is complaining of. The alleged intrusive and oppressive powers given to the Commissioner are thus blunted and muted by this provision.

75. Tax collection is grounded on constitutional provisions. The tax collector must be facilitated by the laws to achieve this mandate. I indeed agree with the Petitioner that the laws that facilitate KRA in the execution of its work should comply with the Constitution. I am not, however, convinced that the Petitioner has demonstrated that the powers granted to the Commissioner by the impugned provisions are unreasonable and unjustified in a democratic society.

76. The third component of the test is the effect of the measure on the right and freedoms it limits. If the effects are exceptionally severe on the individual's or group's rights then the measure cannot be justified by the purposes it is intended to serve.

77. In my view the effect of the limitation of the right to privacy is minimal as the right is only limited in relation to the tax information of the individual. The limitation does not affect the right to privacy in respect of any other information relating to the individual's family or private affairs. In any case, the powers granted to the Commissioner are only meant to be engaged where there is doubt about the veracity of an individual's tax assessment.

78. It is also important to note that the KRA is sworn to confidentiality by Section 6 of the TPA. The provision requires the KRA to ensure that any documents or information obtained by the Commissioner or authorized officer in the course of duty shall be confidential. The information or documents may however be disclosed in the administration of a tax law to a variety of stakeholders who have the authority to deal with such information or documents such as the Auditor-General in the exercise of his/her official duties.

79. I therefore concur with the respondents in this case that the right to privacy can be limited within the law and that in this case the limitation of the right is done with the aim of protecting the public's interest over the interests of individuals who wish to circumvent the law for their own gain. The coercive powers granted to the KRA by the challenged provisions are aimed at achieving a legitimate purpose. If the Commissioner or his authorized officers acts arbitrarily in the process of exercising those powers, then recourse can be had to the courts by any person aggrieved by the actions of the 2<sup>nd</sup> Respondent's officers.

80. The right to a fair trial and particularly the right of an accused person to remain silent and not testify during proceedings; and the right of an accused person to refuse to give self-incriminating evidence are rights which, according to Article 25 of the Constitution, cannot be limited.

81. The right not to incriminate oneself is also well established under international law as evidenced by its inclusion in Article 14(3) of the ICCPR which states that in the determination of a criminal charge against an individual, the individual shall be entitled to certain minimum guarantees including the right not to be compelled to testify or to confess guilt.

82. The Petitioner in this case argues that the above rights are in danger of being infringed by the exercise of the powers of the 2<sup>nd</sup> Respondent under the impugned provisions.

83. The 2<sup>nd</sup> Respondent retorts that the information sought and the actions to be administered by the KRA by way of compelling a taxpayer and or a person in possession of the said information are well within the bounds of the “*required records doctrine*” as established in **Shapiro (supra)**. The 2<sup>nd</sup> Respondent further argues that the taxpayer at the point at which this information would be collected is not an accused person, as they would be under investigation and audit but would not have been officially accused of any crime, and therefore Article 50(2) cannot apply to them.

84. This begs the question as to who an accused person is. The 10<sup>th</sup> Edition of Black's Law Dictionary at page 26 defines an accused as “*someone who has been blamed for wrongdoing; esp., a person who has been arrested and brought before a magistrate or a person who has been formally charged with a crime (as by indictment or information).*” The definition should be kept in mind when considering the rights under Article 50(2) of the Constitution.

85. The European Court of Human Rights (ECHR) in the case of **Saunders v United Kingdom 19187/91 [1996]** had an extensive discourse on the rights to silence and not to incriminate oneself. It posited that:-

**“[68] [...] The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention (art. 6-2).**

**69. The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing.”**

86. The case reinforces the principle that the right of an accused person to remain silent and by extension not to incriminate oneself is integral to a well-functioning and fair trial process and the justice system at large. A person who is compelled to disclose information which may be incriminating generally may plead and exercise their right to silence. However, the ECHR laid out an important exception to this rule. It is stated that the right not to incriminate oneself does not extend to circumstances where the prosecution uses material which was obtained from the accused through the use of compulsory powers and the evidence has an existence independent of the suspect's will such as documents acquired with a warrant.

87. As already observed, most of the powers granted to the Commissioner may not be exercisable without a warrant being first obtained. I also hold the view that any evidence obtained in exercise of the powers granted to the Commissioner will be subject to challenge in a criminal trial and the trial court will be entitled to determine the admissibility of such evidence. Further, the exception established in the **Saunders case** may also be applicable in such circumstances.

88. The 2<sup>nd</sup> Respondent also pointed to the “*required records doctrine*” established in **Shapiro** (supra). The doctrine essentially allows the government to “**require individuals to keep the kinds of records it most wants to subpoena and to claim that these "required records" are not privileged, thereby circumventing constitutional limitations on compulsory record-keeping and production of documents.**” In other words the doctrine allows the government to acquire certain private documents from individuals by claiming that the same cannot be protected under privilege as they are required by the government entity for a given purpose. In the said case the records required to be kept were those relating to the price, sale and delivery of goods. In the case before me the required information is that relating to tax liability. The principle is in my view therefore applicable to the circumstances of this case.

89. In ‘**The Required Records Doctrine: Its Lessons for Privilege against Self-Incrimination,**’ (1986) 53 **The University of Chicago Law Review**, Stephen A. Saltzburg opines that the required records doctrine is a form of government regulation imposed as a condition to doing business. He argues that by enforcing these measures the government can regulate a range of activities especially those focusing on ordinary commercial exchange. Therefore the keeping of records and production of the same is simply a burden of engaging in a particular activity regulated by that authority.

90. He further posits that this system of required records is essential as it “*puts pressure on people to conform their behavior to legal requirements.*” It is important to note that the Supreme Court of the United States in **Shapiro**, did not find that this pressure violated the right against self-incrimination.

91. According to Saltzburg, another argument in favor of the doctrine is that the privilege against self-incrimination is “*not intended to make it easier for people to commit criminal acts.*” Furthermore, “*a person who does commit a criminal act and who intends to rely on the privilege is not entitled to a special exemption from duties imposed by law on the public generally or on non-criminals within the regulated class.*”

92. From the above arguments I find myself convinced by the decision in the case of **Shapiro** (supra) and the analysis by Saltzburg that the privilege not to incriminate oneself cannot be used to get away with a crime nor can it be used to make oneself immune to a duty imposed on all other citizens, especially those who abide by the law. It is on the taxpayers to do their part in properly abiding by the tax law so as to not arouse the suspicions of the KRA who has the mandate to engage with them on the accuracy of their tax compliance.

93. I therefore find that the impugned provisions do not infringe on the rights under Article 50 (2) of the Constitution; being the right to silence and the right not to incriminate oneself.

94. The Petitioner claims that the impugned provisions further violate Article 47 on fair administrative action as they purport to sanction administrative action which is not expeditious, efficient, lawful and reasonable and procedurally fair.

95. The 2<sup>nd</sup> Respondent contends that fair administrative action does not apply to the legislative process; however even if it did, it submits that where an individual may be affected by the administrative action of the KRA he or she has an opportunity to have their position considered before the decision is made. In other words, the taxpayer has a right to be heard before an administrative action is made.

96. Article 47 of the Constitution of Kenya provides *inter alia*:-

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

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

97. I must begin by rejecting the 2<sup>nd</sup> Respondent’s diversionary assertion that fair administrative action does not apply to the legislative process. The Petitioner is not contesting the process by which the legislation was passed but rather the contents of the legislation regarding possible administrative actions which the KRA is mandated to carry out.

98. Pursuant to that statement, I will now focus on the contents of the impugned provisions in the context of the alleged violation of the right to fair administrative action as protected by Article 47 of the Constitution. I have closely studied the contents of the TPA and in particular sections 49 to 57 which provides for the notification by the Commissioner to the taxpayer of his refusal of an application under a tax law and a statement of reasons for the decision. Taxpayers are given an opportunity to object to a tax decision and appeal, an appealable decision, to the Tax Appeals Tribunal, the High Court and ultimately the Court of Appeal.

99. Once again I observe that a section or sections of a law should not be read in isolation of the other provisions of that law. The impugned provisions are only meant to enforce the tax laws after a taxpayer fails to self-assess for tax purposes or once it is evident that a taxpayer is dishonest. The Act as a whole has safeguards that ensures that the taxpayers receive fair administrative action from the tax collector whenever the need arises to put a particular taxpayer through the administrative process.

100. I therefore find that the impugned provisions do not violate the right to fair administrative action as the TPA incorporates provisions which are in line with the requirements of Article 47 of the Constitution and the Fair Administrative Actions Act, 2015.

101. Furthermore, I concur with the 1<sup>st</sup> Respondent that the Petitioner has not met the threshold of proof required in the well-known case of **Anarita Karimi Njeru v AG [1979] eKLR**. I am not convinced that the Petitioner has argued with reasonable precision how the impugned provisions, or the Act for that matter, violate the right to fair administrative action.

102. On the argument that the impugned provisions are unconstitutional for violating Article 259(1) of the Constitution, the Petitioner submits that the provisions gives the 2<sup>nd</sup> Respondent rogue powers which defeat the purposes, values and principles of the Constitution. The 2<sup>nd</sup> Respondent has submitted that the impugned provisions are in line with Article 259.

103. The Petitioner has not argued beyond the statement highlighted above as to how the impugned provisions have violated the Constitution. As already established, where a legislative provision is challenged for infringing the Constitution, the presumption of constitutionality is maintained unless the party alleging its unconstitutionality can prove otherwise.

104. The Petitioner appears to hint that the Commissioner has exercised his powers in a rogue manner by referring to newspaper cuttings as evidencing the allegation. Without saying much, I must agree with the 2<sup>nd</sup> Respondent that newspaper cuttings do not have any evidential value. As was decided in the Court of Appeal case of **Independent Electoral Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya and 6 others [2017] eKLR**, statements contained in a newspaper amounts to hearsay evidence and therefore inadmissible without formal proof by the maker of the statement before the court.

105. Having considered all the arguments raised by the Petitioner in support of the petition, I arrive at the inevitable conclusion that the instant petition is without merit. The petition therefore fails and the same is dismissed.

106. It is an established principle of law that costs follow the event. However, the court retains the discretion in deciding the issue of the award of costs. This discretion must be exercised judiciously and must not be exercised arbitrarily. It should also be exercised in accordance with reason and justice. This being a constitutional petition, and there being no evidence that the petition is malicious or was brought with a view to wasting the court’s time, I direct each party to meet own costs of the petition.

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of February, 2020.**

**W. Korir,**

**Judge of the High Court**