



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.467 OF 2018

**IN THE MATTER OF THE ARTICLES 2,20,21,22,23,27,28,35,39,
41,47 & 49 AND OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 45 OF THE TAX PROCEDURE ACT NO. 12 OF 2011

BETWEEN

BRIAN NASICHE WALUCHIO.....PETITIONER

-VS-

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

DIRECTOR OF IMMIGRATION SERVICES.....2ND RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner through a petition dated 20th December 2018 seeks the following reliefs:-

- a) A declaration be and is hereby issued declaring the 1st Respondent decision of refusing to and or declining to lift the Departure Prohibition Order dated 5/11/2018 violates the Petitioner's rights as enshrined under Articles 27,28,29,35,39,41,49 and 47 of the Constitution of Kenya, 2010.
- b) That an order of Mandamus be and is hereby issued compelling the 1st Respondent to lift, remove and/or cancel the Departure Prohibition Order dated 5/11/2018.
- c) That an order of Prohibition be and is hereby issued against the 1st and 2nd Respondents their agents, servants, employees and or by themselves from issuing any other subsequent Departure Prohibition Order based on the same facts in this case.
- d) That an order of Prohibition be and is hereby issued against the 1st and 2nd Respondents their agents, servants, employees or by themselves from interfering in any manner whatsoever with the Petitioner's freedom of movement in an out of the country.
- e) Costs of and incidental to these proceedings.
- f) Any other or further relief that the court may be pleased to grant.

2. The petitioner a Kenya citizen by birth and holder of ID No. [...] is also one of the Directors and Shareholders at Oxygen Eight East Africa Limited (*the company*). Between October and November 2018 the 1st Respondent had a meeting with the company on tax matters and

tax payment in regard to the company in which the 1st Respondent claimed the company owed it taxes which were allegedly in arrears and needed to be paid.

3. On 6th November 2018 after one of the many meetings, the petitioner was notified to appear for a further meeting on 8th November 2018; and notwithstanding the record showing the entire directorship of the company he was the only one singled out for such special meeting. The 1st Respondent verbally informed the petitioner together with other directors that they were at liberty to travel.

4. On 9th November 2018 the petitioner's co-director in the company and the representative of the controlling members of the company, Mr. Shane Keith Leahy passport No. LB [...] travelled out of the country and returned back without any form of restriction. It is petitioner's contention that this has been the order of the day as Mr. Shane has travelled in and out of the country without any restrictions since the matter surrounding this case commenced.

5. On 22nd November 2018 the petitioner embarked on a journey to Tanzania by air and which he did not expect to be interrupted since his co-director had a smooth travel and the 1st Respondent issued such comfort; that at 13.50 pm while at Jomo Kenyatta International Airport ready for departure, when he checked in and handed in his passport for clearance, he was pulled aside, humiliated, scorned, embarrassed and detained from 13.50 pm to 7.00 pm and informed that he was not allowed to travel due to orders from "above". He was detained at the airport and denied access to legal representation. He was detained incommunicado, without food, water, denied access to his phone, without justification and without access to legal counsel. That at around 7.00 pm he was informed that he was under arrest and simply moved from the airport to corporate Business centre where the 1st Respondent hosts the commission for Investigations and Enforcement or processing. On arrival at the 1st Respondent's premises the petitioner was released on a free personal bond with instructions to appear before commissioner at 6.30 a.m on 23rd November 2018. He appeared at 6.30 a.m on 23rd November 2018 whereupon he waited until 1.30 p.m when he was informed that he would be arraigned in court at Milimani Law courts; however he was diverted to Makadara almost in a well-orchestrated move to mislead his counsel and to jeopardise his bail application. He was charged at Makadara Law Courts together with the company in Criminal Case No. 3037 of 2018, where he was released on a cash bail of Kshs.1,000,000/- and directed to deposit the passport because the 1st Respondent had retained it in its office, thus complicating his attempt to meet the bail terms.

6. On 7th December 2018 upon application to the trial court, the petitioner was allowed to have back his passport temporarily with a view to travel and return the said passport to court on 19th December 2018. However the 1st Respondent refused to give the petitioner back his passport; forcing the court on 16th December 2018 to issue orders summoning the Investigating officer to surrender and deposit the passport in court on 19th December 2018.

7. Upon getting back the passport, the petitioner's advocates visited the offices of the 1st Respondent with a view to inform it about the order allowing the petitioner to travel. However the 1st Respondent flatly refused to lift the travel ban stating that unless the petitioner paid taxes, the criminal case ended, or he get court order to compel it, the petitioner will not leave the country.

8. On 21st December 2018, the petitioner filed the petition herein challenging the 1st Respondent's decision to issue the Departure prohibition order dated 5th November 2018.

1st Respondent's Case

9. The 1st Respondent is opposed to the petitioners petition and in doing so filed Replying affidavit dated 21st March 2019 sworn by Dominic Kengara; an officer appointed under and in accordance with section 13 of the Kenya Revenue Authority Act (Cap 469) Laws of Kenya. He avers that the 1st Respondent carried out investigations into the tax affairs of the petitioner for the period February 2018 – October 2018 to establish whether the petitioner had filed returns and paid taxes.

10. The 1st Respondent investigations revealed that the petitioner had not been filing returns as required by the law nor was he repaying taxes due from him. It was also revealed that the petitioner is a tax-payment defaulter and has vast investments in various parts of the world as listed below:-

a) *The Network Limited-Tanzania;*

b) *Berks Advisory Limited UK;*

c) *Transact property Ltd. UK;*

d) *Plot 545/3 Kawe Beach Daresaalam;*

e) *A farm in Arusha Tanzania.*

11. It was further revealed the petitioner's wife is a Tanzanian National and that they have a home in Daresaalam and a farm in Arusha. That the petitioner's former employer Oxygen 8 Company Limited wrote to the Directorate of Criminal Investigations (**DCI**) complaining that the petitioner using fraudulent means discharged property that had been charged at **CFC** Bank with the name Oxygen 8 E.A Ltd away after his termination from employment (*see KRAF (a) and (b) of the copy of the letter*). That following the aforesaid complaint, the petitioner was charged vide Criminal Case No. 3037/2018 at Chief Magistrate Court Makadara (*see KRA-2 a copy of the charge sheet*).

12. It is 1st Respondent's case that three applications have so far been made before the Chief Magistrate's Court against the petitioner and his

accomplices for recovery of assets/funds lost from Oxygen 8 E.A Ltd. It is further 1st Respondent's contention the petitioner has various motives to permanently leave the jurisdiction of Kenya and is a flight risk.

13. The 1st Respondent denies the allegation in the petition that they were asked to lift the Departure prohibition order (*see KRA-3*). That on 19/12/2018 the court order was issued that directed the 1st Respondent to return passport No.AK 0086226 to the Applicant and further directed the Applicant to return his passport to court on 8th February 2019 (*see KRA-4*). The 1st Respondent returned the said passport as directed and suspended the Departure prohibition order (**DPO**) from 24th December 2018 up to 1st April 2019 to facilitate the Applicant to travel as a sign of good will (*see KRA-5*). The petitioner is yet to return the said passport in court as directed by the court hence the 1st Respondent contend the petitioner is a flight risk.

14. It is averred by the 1st Respondent that the petitioner had been staying in Tanzania for more than 12 years during which period he has acquired property which gives reason for the 1st Respondent to be apprehensive that the petitioner may leave Kenya permanently without meeting his tax obligations. The 1st Respondent argue that the decision to prohibit the foreign travel of the petitioner is further supported by the cases facing the petitioner in multi-pronged investigation by the multi-Agency Team (**MAT**). On the affairs of the petitioner herein and his accomplices as persons of interest (*see Civil Application No.530, 531 and 532 by Asset Recovery Agency and further investigation by the Directorate of Criminal Investigations*).

15. It is further argued that the petitioner does not live permanently in Lavington in Nairobi as alleged since between the year 2016 and 2018 he was also classified as a resident of **UAE** Dubai (*see KRA-6(a) 6(b) and 6(c) documents in support*). It is further averred the petitioner is in the process of investing in United Kingdom in the name of Tran sack Limited **UK** where he is the director with interest to meet the requirement of automatic resident upon attaining an investment of Kshs.50, 000 (*see KRA-7*). That the petitioner has family ties outside the country as his daughter who is above eighteen years (18) old is a permanent residence of the United Kingdom.

16. The 1st Respondent urge that the Departure prohibition order is in respect of the petitioner as an individual and as charged in court and there was no blanket Departure prohibition order against other persons as alleged by the petitioner's. It is contended that the petitioner has not been paying any taxes and is a defaulter for which he is under investigation. He has not put in any modalities to settle the unpaid taxes as alleged and despite the Respondents demand for unpaid tax, no commitment has been demonstrated by the Applicant to pay the same. It is further averred as the petitioner has a permanent residence in Tanzania and other properties there is reasonable ground to believe that he could permanently leave Kenya without paying the taxes due and owing.

17. The 1st Respondent assert that under **section 45(6) of the Tax Procedure Act**, it is very clear, Revocation of a Departure prohibition order is at the discretion of the 1st Respondent, and the same shall remain in force unless revoked. The **Tax Procedure Act** provides:

"(6) A departure prohibition order shall remain in force until it is revoked by the Commissioner."

18. **Section 45(7) of the Tax Procedure Act** prohibit the institution of Criminal or Civil proceedings against the Government, Director, Commissioner, customs, immigration, police or any other person or officer authorised to act under the said section of the law; for act lawfully done under the impugned section of the law.

Petitioner's Response

19. The petitioner contends that what is deponed upon in the 1st Respondent's Replying affidavit is scandalous, frivolous, vexatious and complete abuse of public office. He urges that he is a Kenya citizen ID Card No. [...] (*see BW-1*). He contends no investigation has been conducted by the 1st Respondent. He avers that he has filled all his tax returns, paid all taxes due and he has been issued with a tax compliance certificate that is valid up to 10th February 2020 (*see BW-2*). He denied having ever owned property 545/3 Kawe Beach Daresaalam and a farm in Tanzania nor is he a shareholder in any company known as Bank's Advisory Limited U.K and Network Limited – Tanzania nor has he ever traded either directly or through proxies. He avers that company known as Transact Property Limited is a family owned company that is not doing any business and which is co-owned with his wife.

20. The petitioner argues being married to a foreigner does not mean he is a flight risk. He also urges that there is no company known as Oxygen 8 Company Limited anywhere in Kenya and he has never been associated with such company nor is there banking institution known to the Republic of Kenya as **CFC** Bank. He further state he is a director and shareholder of Oxygen Eight East Africa Limited and duly obligated to safeguard the interest of the company (*see annexure BW-3*).

21. The petitioner urge the charge he is facing in court have no relation with the 1st Respondent's contention in paragraph 8 but charges relate to alleged tax offences. It is further contended that upon the petitioner being charged it is only the Chief magistrate's court that can decide whether he is a flight risk or not and that upon being arrested and charged the Departure prohibition order became void as its purpose had lapsed.

22. The petitioner aver that Departure prohibition order is only applicable where taxes are owed to the 1st Respondent and contended there is no dispute regarding the same.

23. The petitioner aver the 1st Respondent has failed to produce before this court any tax Assessments, demand notices, or tax claim in whatever forms against him. The petitioner urges he has invested his entire gains in the Republic of Kenya (*see BW-5*) and has children who reside and attend school in Kenya (*BW-6*). He further argues that no single case has ever been brought against him or his family. He averred in Miscellaneous Application No. 530, 531 & 532 of 2019 he was not a party the same have been withdrawn and marked closed (*see BW-7 and BW-8*).

24. The petitioner asserts that he has paid all his taxes and indeed he is in possession of Tax Compliance Certificate and further avers that he does not have a permanent residence in Tanzania neither does he own any property thereon. The petitioner urges that there is no **section 45(7) of the Tax Procedure Act, 2015** that prohibits the institution of criminal or civil proceedings against the commissioner or authorised officer under the impugned section of the law. **Section 45(7) of the Tax Procedure Act** provides:-

"(7) The Commissioner shall revoke a departure prohibition order if—

(a) The person named in the order pays in full the tax payable or that will become payable by that person or by a company in which that person is a controlling member; or

(b) The person named in the order makes an arrangement satisfactory to the Commissioner for the payment of the tax that is or will become payable by that person or by a company in which that person is a controlling member."

Analysis and Determination

25. I have very carefully considered the pleadings herein, the petitioners written submissions, the counsel rival oral submissions and from the above the issues arising for consideration can be summed up as follows:-

a) Whether the petitioner is a tax defaulter and/or a controlling member of the company thus invoking the application of Departure prohibition order under the Tax Procedure Act?

b) Whether the 1st Respondent's decision of refusing to permanently lift the Departure prohibition order dated 5th November 2018 is in contravention/conflict with the orders of the Chief magistrate's Court at Makadara/or proceedings in the Chief magistrate's Court in Criminal Case No. 3037 of 2018 Republic vs Brian Waluchio?

c) Whether the 1st Respondent's decision of refusing to lift the Departure prohibition order dated 5th November 2018 is justified and violates the petitioner's rights under the Constitution of Kenya 2010?

d) Whether the petitioner is entitled to the orders sought in the petition?

A) Whether the petitioner is a tax defaulter and/or a controlling member of the company thus invoking the application of Departure prohibition order under the Tax Procedure Act?

26. The petitioner contention is that the DPO he seeks to challenge in the petition blames him as a director of a Company that allegedly failed to file Tax Returns. The 1st Respondent states that the DPO intention is to prohibit the foreign travel of the petitioner, which is supported by cases facing the petitioner in a multi-pronged investigation by the multi-Agency Team (MAT) on the affairs of the petitioner herein and his accomplices as persons of interest in civil application No. 530, 531 and 532 of 2019 by Asset Recovery Agency and further investigations by the Directorate of criminal investigation. It is further urged the DPO is in respect of the petitioner as an individual and as a Managing Director or CEO of the local company by virtue of provisions of the Tax Procedure Act, 2015 and as charged in court and that there is no blanket DPO against other persons as alleged by the petitioner. It is further submitted the petitioner has not been paying any taxes and is a defaulter for which he is under investigation. The 1st Respondent urges the petitioner has not put in place any modalities to settle the unpaid taxes as alleged and despite the Respondents demand for unpaid tax, no commitment has been demonstrated by the petitioner to pay the same.

27. The petitioner contention is that the 1st Respondent's case is that the DPO is against the person of the petitioner and not as a director of any company. The petitioner urges he is tax compliant having been issued with a tax compliance certificate from the 1st Respondent (BW-2). The stated certificate clearly states the Authority reserves the right to withdraw the certificate or alter the tax compliance status of the certificate if new evidence arises. It thus has a caveat. The alleged certificate is due to expire on 10/2/2020. The 1st respondent has not challenged the compliance certificate nor has it bothered to withdraw or alter the same. I find the petitioner's compliance certificate having not been challenged to be reflecting the tax status of the petitioner.

28. The 1st Respondent contention is that the petitioner has not been paying any taxes and is a defaulter for which is under investigation. The petitioner is facing the charges at Chief magistrate's Court at Makadara in Cr.Case No.3037 of 2016 for defaulting on an obligation imposed under a Tax Law C/s 97(c) as read with section 104(3) of the Tax Procedure Act No, 29 of 2015.

"Charge: Defaulting on an obligation imposed under a Tax Law Contrary to Section 97(e) as read with section 104(3) of the Tax Procedures Act No. 29 of 2015."

29. The offence which the petitioner is facing is yet to be heard and determined. Pending hearing and determination; it would be wrong for this court to delve into the matter but has to state the issue of payment of tax is pending before a competent court; which should be left to that court to determine.

30. The issue to whether investigation was carried out or not is not for this court to comment or make a decision in view of the pending Criminal Case before the Chief magistrate court, at Makadara in which the petitioner is the accused.

31. Section 45(1) (a) and (b) of the Tax Procedure Act provides thus:-

"(1) This section applies when the Commissioner has reasonable grounds to believe that a person may leave Kenya without paying—

(a) A tax that is or will become payable by the person;

(b) A tax that is or will become payable by a company in which the person is a controlling member."

32. Section 45(5) and (6) and (7) (8) the Tax Procedure Act provides:-

"(5) A person who is the subject of a departure prohibition order shall not be granted customs or immigration clearance.

(6) departure prohibition order shall remain in force until it is revoked by the Commissioner.

(7) The Commissioner shall revoke a departure prohibition order if—

(a) The person named in the order pays in full the tax payable or that will become payable by that person or by a company in which that person is a controlling member; or

(b) The person named in the order makes an arrangement satisfactory to the Commissioner for the payment of the tax that is or will become payable by that person or by a company in which that person is a controlling member.

(8) As soon as practicable after making a decision to revoke a departure prohibition order, the Commissioner shall notify the Director and the person named in the order."

33. In view of the above the burden of proof of payment of taxes lies with he who alleges. The 1st Respondent has stated the petitioner is a defaulter where the petitioner alleges he has paid taxes. The burden of proof lies with the petitioner to demonstrate he indeed paid taxes by providing evidence showing full payment. The 1st Respondent has also to produce assessments of taxes and demands and confirm non-payment.

34. The law is clear that the **DPO** shall be revoked if the conditions set out under **section 45(7) of the Tax Procedure Act** are satisfied. **Under section 45(6) of Tax Procedure Act**, the revocation of **DPO** is at the discretion of the 1st Respondent and the same is to remain in force until revoked by the 1st Respondent in accordance with the law. In the instant petition the petitioner has satisfied the conditions set out under section 45(7) of the Act. He has produced compliance certificate duly issued by the 1st Respondent and further no evidence has been availed to demonstrate he is a controlling member of the company. In view of the aforesaid, there are no basis for the **DPO** to remain in force.

B) Whether the 1st Respondent's decision of refusing to permanently lift the Departure prohibition order dated 5th November 2018 is in contravention/conflict with the orders of the Chief magistrate's Court at Makadara/or proceedings in the Chief magistrate's Court in Criminal Case No. 3037 of 2018 Republic vs Brian Waluchio?

35. The 1st Respondent issued Departure prohibition order (**DPO**) annexure (**BW-11**) on 5/11/2018 on the grounds that the petitioner, a director, was under investigation for alleged tax diversion. The **DPO** was pursuant to **section 45 of the Tax Procedure Act**.

36. It is petitioner's contention that according to annexure (**BW-3**), Oxygen Eight East Africa Limited is a subsidiary of a unite Kingdom Company that owns 80% of the company. The appointed Director of the controlling member is Mr. Shane Leahy. The Petitioner only owns 20% of the company. He is not therefore a controlling member.

37. It is further the petitioners arguments that despite not being a controlling member, and despite being a Kenya citizen with immense investment in the republic, the 1st Respondent deemed it fit to select on the Petitioner but deliberately, without any form of justification omitted to injunct Mr. Shane Leahy who is a foreigner and who represents the controlling member of the company.

38. The petitioner contention is that the purposes of **DPO** is to prevent the departure of a tax payer from the country where the commissioner reasonably believes that the person may leave the country without paying the tax payable by the tax payer or a company where the person is a controlling member; sub-section (4) authorises the Director of Immigration to confiscate the person's passport. On 23rd November 2018, the petitioner was charged together with the company at Makadara Law Court with the alleged tax offences in Criminal Case No. 3037 of 2018 **Republic vs Brian Nasiche Waluchio & Oxygen East Africa Company Ltd**.

39. It is urged that the court being satisfied that the petitioner was not a flight risk issued bail to the petitioner and asked petitioner to deposit his passport in court and he would only leave the country with the court's permission. It is urged that upon the petitioner being charged in court, the **DPO** dated 5th November 2018 issued by the 1st Respondent was void and of no legal consequence, hence the court had custody of the petitioner's passport and the same could only be released by an order of the court. It is further asserted that on 7th December 2018 the court issued orders allowing the petitioner to have his passport for purposes of travel and therefore return the passport on 19th December 2018 (*see annexure BW-10*).

40. The petitioner contend that the suspension of the **DPO** by the 1st Respondent was a confirmation that indeed the 1st Respondent believed the petitioner was not a flight risk and believed he had complied with all tax obligations.

41. It is petitioners contention that upon being charged in court, the **DPO** dated 5th November 2018 issued by the 1st Respondent was void and of no legal consequences as the court had the custody of the petitioner's passport and the same could only be released by an order of the court; that the court subsequently issued an order allowing the petitioner to travel. That on 24th December 2018 (**KRA-5**) the 1st Respondent purported to relax the **DPO** issued against the petitioner from 24th December 2018 to 1st April 2019.

42. The 1st Respondent contention is that this matter is about Oxygen Eight Africa Limited owned by parent company in **U.K**. That the directors in **U.K** realized there was gap on payment of taxes and came to **KRA** complaining of failure of the petitioner to release tax and confirmed they issued **KRA** Kshs.986, 780,227/- as per (**BW-3** annexure). It is urged that the directors were whistle blowers. It is protested the issuance of **DPO** was to prevent the petitioner from leaving the country because of the crime committed when **KRA** has not shown how the money had been paid. **Section 45 (1) (b) of the Tax Procedure Act** empowers the 1st Respondent to issue **DPO** where there are reasonable grounds to do so in which a person is a controlling member.

43. The 1st Respondent contend that it issued **DPO** within the perimeter of the law as Company/Petitioner owed tax against **KRA**, or Director or **CEO** or agent as more particularly set out in Chief magistrate Criminal Case No. 3037 of 2018; in which **U.K** based directors are witnesses. The **DPO** can be lifted where taxes are paid satisfactorily. The **DPO** was lifted on 2/5/2019.

44. The 1st Respondent contend therefore the prayers sought are spent and court cannot grant prayers 1, 2, 3 and 4 nor can court grant prayers which are not sought in the petition. It is submitted no evidence of discrimination nor breach of human dignity; and it is urged the rights claimed are not absolute and can be limited in accordance with Article 24 of the Constitution.

45. **Section 45(9) of the Tax Procedure Act** shields the 1st Respondent in that it provides:-

"(9) No proceedings, criminal or civil, may be instituted or maintained against the Government, the Director, the Commissioner, an officer authorised to act under this section, or a customs, immigration, police, or any other person for anything lawfully done under this section."

46. The 1st Respondent called the investigating officer **PW1** No. 93191 Dominic Kengara who confirmed **DPO** was issued against the petitioner on account of taxes due to be paid by himself and as Managing Director of Oxygen 8 Africa and which **DPO** was lifted on 2/5/2019 as per availed copy "**R-1**" which **PW1** drafted and gave the petitioner 2 originals, of the **DPO** which was issued under section 45 and 18 of the Tax Procedure Act. He confirmed the **DPO** lifted on 2/5/2019 has not been revoked.

47. The investigation by the 1st Respondent led to the Criminal Case No. 3037 of 2029; in which charges were read to the petitioner and plea of not guilty entered. The court granted bail terms which are still in force. The 1st Respondent lifted the **DPO** on 2/5/2019 but is yet to revoke the same. The issue pending before court is related to the question of payment of tax. The plea of not guilty having been entered the petitioner is presumed innocent till otherwise as per Article 50 2(a) of the Constitution. I find that seeking to enforce the **DPO** while the Criminal Case Number 3037 of 2018 is alive in court may be a suggestion that the petitioner is liable or guilty of tax offences until he proves to the contrary. The burden of prove in a Criminal Case is upon the prosecution to prove beyond reasonable doubt that an accused person is a tax defaulter.

48. Upon charging the petitioner, the matter shifted from precincts of the 1st Respondent to the honourable Chief Magistrate Court. It is the court that will determine whether the petitioner is a flight risk or not and further determine its bail terms.

49. I am from the above satisfied that the petitioner has demonstrated that the **DPO** dated 5th November 2018 is in contravention and/or contrary to the orders of the Chief Magistrate Court at Makadara in its Criminal Case No. 3037 of 2018 **R. vs Brian Nasiche Waluchio & Oxygen East Africa Company Limited**.

C) Whether the 1st Respondent's decision of refusing to lift the Departure prohibition order dated 5th November 2018 is justified and violates the petitioner's rights under the Constitution of Kenya 2010?

50. **Section 24(1) of the constitution** clearly provides 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 and whether there are less restrictive means to achieve the purpose."

51. It is urged to purport to issue a departure prohibition order against a person who claims to have paid all his taxes, issued with a certificate of compliance and is not controlling member of any company alleged to be in tax default is unjustified; unreasonable and therefore breach of fundamental rights and freedom, of the petitioner. It has been urged the Respondents have failed to demonstrate to this court that the so

limitation is justified.

52. **Article 20(2) (3) of the constitution** provides:-

"(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(a) Develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

53. The petitioner's main contention is that the **DPO** violates his fundamental right and continued enforcement has immobilized his right to movement. That he has been forced to stay in the country since he cannot venture outside without the lifting of the **DPO** thus violating his right to dignity. He argued he cannot transact any business without thus violating his right to economic freedom under Article 38 of the constitution.

54. In the case of **Seyed Hassan Dashti Khavidaki vs. KRA & Another (2018) eKLR** the court set to determine the effect of a **DPO** on a petition, the court said:-

"Taking the above considerations into account and the circumstances of this case juxtaposed to the fact that it is the petitioner's fundamental rights and freedoms that are at stake of being violated and continue to be violated, I am satisfied that the petitioner has demonstrated, prima facie, that continued violation of the rights and fundamental freedoms has a higher risk of injustice to warrant this court's intervention, than declining the application. It is also clear that if the court does not respond to the petitioner's plea at this stage, he will continue to suffer prejudice in that violations of his fundamental rights already occasioned will continue given that the disputed tax may take long to resolve yet the petitioner will have to remain confined and unable to exercise his right of movement."

55. I find that indeed that the right to movement is one of the fundamental rights in the Bill of rights and to that extent, there is a question whether someone can be confined in a hotel room and unable to venture out for fear of arrest for lack of travel documents. The **DPO** does not state for how long it is to remain in force; it therefore means it is unclear for what duration of period the petitioner will remain confined, unable to move or transact any business small or big. It is not clear how the petitioner herein meets his basic needs and whether this is not one of the worst violation of the right to one's dignity. The **DPO** violates the right of the petitioner as it remains unremoved whether it is lifted or not.

56. In the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & others (Eldoret Petition No. 11 of 2012)**, it was held that:-

"...Where a legal wrong or a legal injury is caused to a person or to a determinate class of person by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the young visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

57. **Article 27 of the constitution** relates to and addresses equality and freedom from discrimination. This includes full enjoyment of the rights. The state should not discriminate any individual as by doing this they will deprive the individual of this right. Article 27(1) of the constitution declares every person is equal before the law and has the right to equal protection and equal benefit of the law. The act of selecting who to apply the **DPO** on and whom not, without any justification is unequal treatment before the law, discriminatory and unconstitutional. Article 27(4) of the constitution declares that the state shall not discriminate directly or indirectly against any person on any ground including (*race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*)

58. The petitioner urges one of co-director was allowed a travel by the 1st Respondent but when it came to his turn he was prevented from travelling without any reason despite having paid his taxes. That the 1st Respondent decided to subsequently charge the petitioner. The petitioner claim he was denied food and water during his arrest and services of a counsel and was subjected to humiliation and scorned by 1st Respondent. He avers Article 35 of the constitution was violated.

59. In the case of **Cape Metropolitan Council vs Metro Inspection Services Western Cape and Others (2001) ZA SCA 56** the court state:-

"Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information..."

60. The petitioner has urged that the **DPO** was issued against him notwithstanding he had paid all taxes and had been issued with certificate of compliance and that he is not a controlling member of the company alleged to have been tax defaulter. I note this is an issue in the pending Criminal Case No. 3037 of 2018 before Chief Magistrate Court at Makadara and in which the petitioner is an accused. I find that it would be

wrong and improper for this court to pronounce itself on the pending issue and I accordingly decline the petitioner's invite and leave the matter for the trial court in the Criminal matter as it is a competent court and court that is seized of the matter. The only comment which I find relevant is that a plea has been taken and the petitioner having denied the offence and as such the matter should be left to proceed to full hearing and determination as regards whether petitioner had paid taxes due or not.

61. The petitioner in the matter is nevertheless entitled to fundamental and inalienable right to lawful and fair administrative action. In the case of **Judicial Service Commission vs Mbalu Mutava & another** which succinctly elucidated the law in cases of this nature; it held that the right to a fair administrative action under Article 47 is distinct right from the right to a fair hearing under Article 50(1) of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.

62. In the instant petition the 1st Respondent decided on the **DPO** on its own without informing the petitioner of its intention to do so. This infringed on the petitioner's rights as it was meant to embarrass, humiliate and demean the petitioner. The law is clear that the 1st Respondent had an obligation to inform the petitioner of such an order as per the provisions of section 45 of the Tax Procedure Act, 2015. Such failure to inform the petitioner of the existence of the **DPO** was against Article 47 of the constitution. I find that given the facts of this petition it is the petitioner's fundamental rights and freedom that are at the stake of being violated and continue to be violated by the 1st Respondent; and as such this warrants the court intervention. I find that the 1st Respondent decision of refusing to lift the **DPO** dated 5th November 2018 is unjustified and violates the petitioner's right under the provisions of the Constitution of Kenya.

D) Whether the petitioner is entitled to the orders sought in the petition?

63. The 1st Respondent urge in their Replying affidavit that the petitioner is not a Kenyan citizen. However the petitioner has demonstrated that he is a Kenyan through a copy of his ID card marked (**BW-1**) in his further affidavit. He has averred that he has invested in the Republic of Kenya and has a matrimonial home in Kenya (**BW-5**) a copy of title deed of the family home. The petitioner has demonstrated that he has filed tax Returns and has been issued with tax compliance certificate valid up to 10th February 2020 (**B-2**). That investigation that was conducted was against the company known as Oxygen Eight East Africa Limited where the petitioner was a director and a shareholder along with other individuals. That there is no case against the petitioner before any court by Asset Recovery. That no documents have been availed to show that petitioner has tax arrears. That the 1st Respondent is alleged to have complied with court's order that had allowed the petitioner to get his passport back and be able to travel. That the **DPO** is alleged to have been invalid the moment the petitioner was charged at Makadara Law Court. From the above I find that the petitioner has proved his case on balance of probability and deserves the orders sought in this petition.

64. I am from the facts of the petition satisfied the petitioner's petition dated 20th December 2018 is meritorious and I proceed to make the following orders:-

a) A declaration be and is HEREBY issued declaring the 1st Respondent's decision of refusing to and or declining to lift the Departure Prohibition Order (DPO) dated 5/11/2018 violates the Petitioner's rights as enshrined under Articles 27,28,29,35,39,41,49 and 47 of the Constitution of Kenya, 2010.

b) An order of mandamus be and is HEREBY issued compelling the 1st Respondent to lift, remove and/or cancel the Departure Prohibition Order (DPO) dated 5/11/2018.

c) An order of prohibition be and is HEREBY issued against the 1st and 2nd Respondents, their agents, servants, employees and or by themselves from issuing any other subsequent Departure Prohibition Order (DPO) based on the same facts in this case.

d) That an order of Prohibition be and is hereby issued against the 1st and 2nd Respondents, their agents, servants, employees or by themselves from interfering in any manner whatsoever with the Petitioner's freedom of movement in and out of the country.

e) On costs I have considered the circumstances surrounding the issuance of the DPO and the obligation placed upon the 1st Respondent and in exercise of the court's discretion on issue of costs, I direct each party to bear its own costs.

Dated, signed and delivered at Nairobi this 29th of April, 2020.

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J .A. MAKAU

JUDGE