



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 49 OF 2012**

**DOSHI IRONMONGERS LIMITED.....PETITIONER**

**VERSUS**

- 1. KENYA REVENUE AUTHORITY**
- 2. THE COMMISSIONER OF CUSTOMS SERVICES**
- 3. THE COMMISSIONER OF INVESTIGATION & ENFORCEMENT.....RESPONDENTS**

**J U D G M E N T**

1. Even though this petition was consolidated with **JR No. 98 of 2010**, which was filed for purposes of having some documents, seized from the petitioner by the Respondent, returned, part of the said documents was returned and at the request and application of the petitioner, leave was granted on the 4/10/2017 for the amendment of the petition to reflect the changed circumstances and to incorporate the dispute in JR No. 98 of 2010 into the petition. Accordingly, I consider the Judicial Review application to have been subsumed in the petition as amended in that prayer 3iv of the amended petition is the same and only substantive prayer in the JR.

2. Pursuant to that order, an amended petition was filed on the 27/10/2017. That petition is founded upon sections 75 – 80 of the Repealed Constitution of Kenya, the Kenya Revenue Authority Act, 1995, VAT Act, East Africa Community Customs Management Act, Tax Procedures Act No. 29 of 2015 as well as the Access Information Act 2016.

3. The petition therefore seeks that the petitioner be granted a raft of orders being: -

a. A declaration that the Petitioner's right to fair administrative action as guaranteed by Article 47 of the Constitution of Kenya has been and/or will be infringed by the proposed actions to audit/test compliance by of the Respondents in the light of the pending determination of High Court Misc. Application No. 98 of 2010 of the consequent constitutional application therein.

b. A declaration that the Petitioner's right to fair hearing to have a dispute that should be resolved by the application of the law and decided in a fair hearing before a Court of Law, as guaranteed by Article 50(i) of the Constitution of Kenya has been and/or will be infringed by permitting the Respondents to rein to carry out further audits/compliance checks upon the Petitioner prior to the hearing and determination of High Court Misc. Application No. 98 of 2010 and the Constitutional application thereunder.

- c. A declaration that the Petitioner's right to information and means to access justice and defend itself/herself in a fair trial as safeguarded under Articles 35, 48 as read together with Article 50 of the Constitution of Kenya have been and/or will be infringed by the actions of the Respondents to carry out further audits/checks upon the Petitioner prior to the determination of the High Court Misc. Appln. No. 98 of 2010 [Mombasa].
- d. A declaration that the refusal or failure on the part of the Respondents to release and return to the Petitioner the remainder of the seized documents, files, software, books, materials, computers and equipment violates Articles 35,47, 48 and 50 of the Constitution thus rendering the Tax Demand Notices Ref: KRA/CUS/MIB/INV/2/2007 dated 30<sup>th</sup> May, 2007 and 26<sup>th</sup> June, 2007, Ref: KRA/1006/14 dated 8<sup>th</sup> November,2007, 10<sup>th</sup> July, 2008, 16<sup>th</sup> July, 2008, 18<sup>th</sup> August, 2010 and the Notices under Section 42 of the Tax Procedure's Act, 2015 dated April 28, 2016 invalid, a nullity and unclaimable/unpayable.
- e. A declaration that the Tax Demand Subject of Notices Ref: KRA/CUS/MIB/INV/2/2007 dated 30<sup>th</sup> May, 2007, 26<sup>th</sup> June, 2007 and Ref:KRA/1006/14 dated 8<sup>th</sup> November, 2007, 10<sup>th</sup> and 16<sup>th</sup> July, 2008, 18<sup>th</sup> August, 2010 and the Notices under Section 42 of the Tax Procedure's Act, 2015 dated April 28,2016 are invalid, a nullity and unclaimable/unpayable on account of the Respondents' violation/infringement of the Petitioner's rights under Articles 35, 47, 48 and 50 of the Constitution.
- f. That by way of Judicial Review an Order of PROHIBITION to issue to prohibit the Respondents their officers, agents, servants,authority and/or any other body appointed for that purpose from executing, pursuing, considering, issuing, action upon and/or in any other manner whatsoever or howsoever from effecting and/or demanding local taxes, to wit, Income Tax and Value Added Tax as set out in their letter dated 18<sup>th</sup> August, 2010 for the recovery of these alleged taxes totaling the alleged sum of Kshs.2,363,606,424.69or any part thereof.
- g. That by way of Judicial Review an Order of PROHIBITION to issue prohibiting the Respondents, their officers, agents, servants, authority and/or other body constituted/appointed for that purpose and/or acting on behalf of the Respondent for that purpose and/or acting on behalf of the Respondents for that purpose from proceeding with any threatened demand and enforcement action against the Applicant for the alleged sum of Kshs. 2,363,606,424.69 or any part thereof, allegedly due to the Respondents.
- h. That by way of Judicial Review an Order of PROHIBITION toIssue prohibiting the Respondents, their officers, agents servants, body and/ or authority, including the Kenya Police from arresting, threatening to arrest the Applicant's Directors namely, ASHOK DOSHI and AMIT DOSHI and or their employees with regard to the alleged assessed taxes of Kshs. 2,363,606,424.69 allegedly owed to the Respondents.
- i. That by way of Judicial Review an Order of MANDAMUS to Issue to compel the RESPONDENTS to release/return the Applicant's records, documents, files, computers, software and everything the Respondents seized and detained on or about the 26<sup>th</sup> March,2007 and March, 2003.
- j. An order of Judicial Review do issue to prohibit the Respondents, their agents, servants, officers and/or body/authority appointed for that purpose from executing, pursing, acting upon or in any manner whatsoever effecting the audit/checks contemplated in the Respondents letter dated 11<sup>th</sup> October, 2011 and 18<sup>th</sup> April, 2012.
- k. An order of certiorari do issue removing to the High Court for the purpose of being quashed the Respondent's letter dated 11<sup>th</sup> October, 2011 and 18<sup>th</sup> April, 2012.
- l. Damages for the violation/infringement of the Petitioner's constitutional rights.

m. The Honourable Court to issue such orders and give such directions as it may deem fit and necessary to meet the ends of justice.

n. The costs of the Petition be awarded to the Petitioner.

4. The basis of the claim, as disclosed in the petition, the Affidavits in support thereof, the supplementary affidavit both sworn by one Ashok Doshi, a director of the petitioner, and yet another Affidavit by one George Mokwa, who states he is an auditor and tax agent of 15 years standing, is that the Respondents in carrying out their statutory mandate under the Revenue statutes have acted with oppression, illegality, unreasonableness and violation of the basic expectations that a public body will comply with the law and act within the prescribed mandate.

The chronicles of the events is quite long but the summary is that in the cause of carrying out their mandate, the Respondents carried out several raids and seizures upon the petitioner's premises during which raids, they carted away files, computers, equipment, software materials and books of accounts on the allegations that the petitioner had been engaged in tax evasion by diverting transit goods into the domestic market and that the material seized evidenced such evasion.

6. The specific grievances were that during the months of March and April 2007, the respondents, without any warrants, court order or notice, visited the petitioner's premises where it operated bonded warehouse No. 204 and carted away all the materials they considered evidenced tax evasion, without leaving any copies behind and contrary to the applicable statutory dictates. It is then averred that the respondents followed the seizure with a tax assessment and demand for Kshs. 124,720,037/= on account of diverted exports into the local market. Simultaneously with the demand, the respondents seized and locked under seal the petitioners bonded warehouse No. 204; retained and refused to cancel some seven (7) insurance bonds in favour of the petitioner in various sums but aggregating into some 276,000,000/= or thereabouts and also refused to renew the petitioners license to operate the bonded warehouse.

7. Faced with what it considered unfairness and arbitrariness, the petitioner moved the court in Nairobi Misc. Application No. 192 of 2008 seeking mandamus to compel opening and removal of the seals from the bonded warehouse and Nbi Misc No. 1244 of 2007 seeking certiorari to quash the decision refusing to renew the clearing license. The respondent in opposing the three suits took the position that the documents and materials seized were converted with the demand for 124,720,037/= that Misc. No. 1062/2007 and 1243 of 2007 were closely related but agreed to issue the license subject matter of Misc. No. 1244 of 2007.

8. While the question of the demanded tax was still pending in court as aforesaid, the petitioner complains that the respondents by several letters, variously referenced and dated, demanded from the petitioner various sums totaling Kshs. 2,363,606,424.69 and 73,282,781/= for taxes on account of diverted imports and domestic taxes respectively. All the demands were responded to and contested by Ms. Strategic Tax Services. By this time, however, the respondent had by a letter dated 8/3/2010 absolved the petitioner from liability to pay the demanded sum subject of Misc. Application No. 1062 of 2008.

9. The petitioner then complained that despite the absolution and cancellation of bonds intended and purposed to secure the taxes the respondents continue to persist with their demand for taxes allegedly grounded on the same facts, a conduct the petition considers, capricious, arbitrary, unreasonable oppressive and *ultra vires* and that the Respondent continues in such persistence and in demanding audits notwithstanding the fact that they continue to hold the books they seized and used. On the basis that the respondent continues to hold the books and equipment which hold the information on payable taxes, the petitioner contends that the respondents have, in issuing notices for audit, negated and acted contrary to the constitutional principles embodied in articles 47 and 50 of the constitution and thus demonstrated unreasonableness in that there cannot be a fair and genuine audit prior to and before the materials are returned.

10. It was added that having stayed with the books and materials for a period in excess of ten (10) years, it was unreasonable and contrary to the principle of legitimate expectation by the Petitioner that no

meaningful and fair investigation could ensue further and that those actions by the Respondent wholly affront the right to fair administrative action and the right to access the information. The fact that in JR No. 98 of 2010 a consent was recorded for the return of all the materials and books seized was underscored it being pointed out that the order is yet to be fully complied with and that only a small fraction of the items were returned and that therefore, the petitioner has been disabled in its ability to respond to the demand and the ensuing dispute and thus denied its right under article 48 of the constitution. The complaints are reiterated with an assertion that the petitioner's rights under various articles in the bill of rights, in particular article 35, 47, 48 and 50, have been violated and continue to be threatened with further violation.

11. The petition was supported by the Affidavits of one Ashok Doshi sworn on 8/5/2012 and filed with the original petition, other Affidavits sworn in related Judicial Review Applications, supplementary Affidavit by the same deponent sworn on 27/10/2017, further Affidavit sworn on 12/3/2018 and yet another sworn by one George Mkua Obira sworn on the same date. The subsequent Affidavit underscore the fact that with the entire corpus of documentation taken away the petitioner is unable to respond to the tax demand nor defend itself before any tribunal empowered to resolve tax disputes.

12. The petition was opposed and resisted by the 1<sup>st</sup> Respondent by the Affidavits of Doreen Mbingu sworn on 11/2/2011 and that by Cyrell Waigunda on 6/7/2012. The two Affidavits were filed in response to the Judicial Review and the initial petition respectively. After the petition was amended the Respondents filed three Replying Affidavits sworn by Justus Musau Kiuvu, Nelly Kasiso Ngovi and Fridah Gakii Mwangera and filed on the 26/2/2018. The three deponents introduce themselves as officers of the 1<sup>st</sup> Respondent and deployed in the investigations and Enforcement department hence conversant with the facts of the case. In those Affidavits the earlier Affidavits sworn in the judicial review case were annexed.

13. The position taken by Mr. Justus Musau Kiuvu, the manager of the department, is that indeed raids were carried out at the petitioner's premises on the 23/3/2007 and again in early April 2007 but asserts that the raids were legally carried out pursuant to the provisions of section 56(1) of the Income Tax Act, Sections 30 & 31 of the VAT Act and Section 157 of the East African Community Customs Management Act which permit the 1<sup>st</sup> respondent to demand and take into its possession any documents necessary for the commissioners examination and determination of a tax payer's due taxes. The legal provisions were said to permit the respondent to demand from any person documents, to enter such person's premises without warrants and demand documents, take possessions thereof including locking up the premises and therefore in doing what it has been faulted for, the officers of the first Respondent were within the law.

14. Any violation of the petitioner's rights was denied and that the assessments and tax demands made were equally lawful and not amenable to being faulted. The Manager confirmed having been personally involved in the process of reviewing, tracing and return of the seized goods and well versed with the assessment of Kshs. 2,363,606,424.69 and that the majority of the seized documents have been returned and inventories made and that the returned documents were sufficient for the petitioner to defend itself against the assessment.

15. He took the view that it was the duty of the petitioner to point out which of the unreturned documents were more important to it but there had been failure of such pointing out. The deponent emphasized his expertise in tax investigations and assessment and demonstrated that the assessment was done under three tax heads and that the same was never arbitrary but rather based on the documents seized and that there had been under declaration of the due taxes. He then concluded that based on legal advice the dispute here was largely a tax dispute, and not a constitutional one, that is to be dealt with by the Tax Appeals Tribunal and not a constitutional court hence the court should decline to assume jurisdiction before parties observe the doctrine of exhaustion. Violation of rights or any law were denied and a plea made that no materials had been availed to merit the petition being allowed and that the petition was only good for dismissal. As said before that Affidavit exhibited previous Affidavits filed in related matters and the inventory of the returned documents.

16. The second Replying Affidavit by Mr. Nelly Kasiso Ngovi, an Investigating Officer, who took part in

tracing and retrieving the subject documents but not in their seizure. She confirmed that there was indeed a seizure on the 23/3/2007 and an inventory prepared which was duly signed by the Respondents officers as well as the petitioner and his auditors. To the deponent the reason for seizure was to investigate a suspicion of due taxes not paid by the petitioner and that part of the documents were returned to the respondent on or about 14/02/2014 and an inventory thereof prepared and signed by all concerned. That however, there was challenge in tracing and recovering all the documents belonging to the petitioner but a huge number was handed over to the petitioner on 25/7/2017 when an inventory was made out of the returned and unreturned documents. To the deponent there was partial return of the document and therefore partial compliance with the consent recorded for the return.

17. The third Affidavit was sworn by one Fridah Gakii Mwangera, an Assistant Manager in the department of Investigations and Enforcement and whose duty was to supervise the tracing and retrieving of the subject documents. He reiterates that the purpose of the seizure of the documents on 23/3/2007 was for purposes of investigating a suspected failure by the petitioner to pay taxes due. She reiterated the return of some of the documents in February 2014 and again exhibited the inventories as exhibited by Nelly Ngovi to whom the task of tracing and retrieving the documents was delegated.

18. I appreciate the totality of the Respondents position to be that the raids took place, documents and materials were seized and carted away on account of being relevant for determining if any due taxes had in fact been paid and that by using such documents the assessment subject of this matter was made. That the same were done in accordance with the law and not in breach thereof as asserted by the Petitioner. It is also contended that indeed some documents and materials have not been returned to date as the respondent is of the view that such documents are not relevant or important for the purposes of assessing the tax due and neither for the petitioner's preparation to answer or challenge the assessment.

19. The matter was heard, with parties relying on the documents filed, written submissions filed which were highlighted by oral submissions thereon. Having benefited from reading the several Affidavits filed and the documents exhibited therein, and even considering the volumes of documents filed and the time the matter has taken in court without much movement, I consider the dispute to be fairly straight forward and to seek the determination of the following questions: -

- a) Whether a constitutional question has been established?
- b) Whether the petitioner is entitled to an order for the release of all the documents, files, computer hard and software?
- c) Whether the seizure of the items was in compliance with the tax statutes the 1<sup>st</sup> Respondent is mandated to administer and enforce?
- d) Whether the petitioner has had any of his constitutional rights infringed or violated by the respondent?
- e) Is the petitioner entitled to the declarations and judicial review orders sought or any of them?
- f) Is the petitioner entitled to any damages as claimed and at all?
- g) What orders should be made as to costs?

20. In this judgment I shall analyse the evidence globally hoping to answer all the questions together. I adopt such an approach from the standpoint and appreciation that the prayers are indeed intertwined and interrelated so that a determination of the central question of any of the alleged right would have a bearing on the rest of the prayers.

21. There is however the question of competence of the petition raised by the respondents to the effect that there is no constitutional issue raised, which I consider to be a threshold question which calls for determination preliminarily and beforehand. The law as I understand it is that not every violation qualifies

for litigation as a constitutional question. Where for example the violation amount to no more than an ordinary contractual obligation or just reveals a tortious conduct it would be inappropriate to approach a constitutional court rather than the usual civil courts. For a matter to warrant being litigated as a constitutional question it must allege and demonstrate prima facie a violation of a specific provision of the constitution or a specific right in the bill of rights. I may add that even where there be a violation of a right founded in an ordinary cause of action in tort or contract, it may in most cases be more appropriate to litigate the issue as a civil claim rather than a constitutional question provided there can be obtained in such a cause adequate and efficacious remedies. The clearest of the quote I have come across in this regard are the words of *Lord Diplock* in the case of *Harrikissoon V Attorney General of Trinidad and Tobago* [1980]AC 265 where he decried the tendency of people rushing to institute constitutional petitions alleging violation of fundamental freedoms where there was none, stating;

***“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court...if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”***  
*(emphasis)*

22. Those word have been reiterated recently by Chacha Mwita J in **Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 others [2018] eKLR** when he underscored the gravity to be assigned to constitutional litigation in the following word; -

**“I must also point out that it is not every disapproval of actions or decisions of public bodies that should lead to filing constitutional petitions alleging violation of fundamental rights and freedoms. There must be a real infringement, denial of rights or threat to violation that calls for interpretation of the constitution vis a vis the rights infringed or threatened. It is not every disagreement that must find its way to the constitutional court”.**

23. Before me the petitioner alleges that, being a taxpayer, its documents, equipment and other items with evidence on its tax compliance were collected for purposes of investigating compliance with Revenue Statutes, are yet to be returned despite court orders entered by consent and yet the respondent continues to push for recovery of the taxes assessed based on such documents thus denying the petitioner the facilities and ability to question the assessment. To this court the questions raised are indeed weighty and could not be adequate litigated otherwise than as a constitutional question. I thus find that the petition is not frivolous or mere tenuous but that it is properly founded and lodged.

24. As said before, the facts of the case as narrated by the petitioner are not materially disputed by the respondents. The point of departure is whether in doing what the respondents assert was done pursuant to its statutory mandate, the law was complied with or in the alternative breached. In coming to this observation I take note that the fact of seizure is admitted unequivocally by the Respondent. The fact that the materials taken were necessary to help the respondent in execution of its mandate is also an admitted fact. It is also admitted that parties agreed before court, and a consent recorded on 8/6/2017, for the release of the materials within 35 days from that date, but only partial release was made. That by the time the matter next came back to court, the return had not been effected.

25. On 14/7/2017, there had not been compliance and the respondents counsel then reported to the court that **all the documents and materials had been traced and found and the respondent was ready and willing to hand the same over.** As a consequence of such an assurance, the matter was once again

adjourned and on the 25/7/2017, there was a handing over exercise by which parties prepared two inventories; one for returned documents and another for the documents yet to be returned. Those inventories are common to the parties and are exhibited in the Affidavits filed by both. What one gets from the two lists is that indeed an agreed number or quantity of the material are yet to be released to the petitioner. In the supplementary Affidavit sworn by Ashok Doshi sworn and filed in court on the 27<sup>th</sup> October 2017 there is an analysis of the document to the effect that of the 1,707 pieces of documents and materials collected only 320 had been returned leaving 1,387 unreturned and thus representing 18.75% returned and 82.25% as pending return.

26. I am not prepared, at this juncture, to delve into the question of quantity and quality in terms of evidentiary value of the materials yet to be handed over but it is imperative to note that parties recorded a consent in court for the release of the materials. I consider such a consent to not only be a contract but also a court order which remains undisturbed to date. Being a contract, parties are bound by their bargain and it is not part of the court's duty to interfere in such bargains unless a vitiating factor be disclosed and proved<sup>[1]</sup>. The fact remains that the order continues to exist it having not been reviewed nor is there any demonstrated justification for the failure to comply with its terms. This court is of the learning that for the rule of law and the administration of justice to be dignified and respected as is expected in a democratic and civilized society, court orders and decisions must be complied with by all and sundry and when there is justification for inability to comply, it is the obligation of the litigant bearing the duty to comply to approach the court and seek to be excused from compliance. In the absence of such justifiable cause, the Respondent is not at liberty to ignore and rubbish a court order, more so one given by agreement of parties and which agreement it actively participated in entering. I therefore do find that every known notion of justice and due process within the rule of law demand that the documents and materials which are outstanding return be returned to the petitioner.

27. The petitioner's claim is that pending such return it stands incapacitated in enjoying its right to fair hearing as guaranteed under Article 47 and 50 of the Constitution as far as the assessment and tax demands are concerned. Pending that return, I am not in doubt that the petitioner's right to information and fair administrative action have been, continues to be violated and is threatened with continued violation in the future unless a stop is put in place by the court.

28. In coming to this conclusion I have given due regard to the respondent's position that the unreturned material is not relevant nor material to the petitioner for purposes of answering to the assessment and tax demands. I consider that position to be self-defeating in that the revenue statutes which empower the respondent to seize materials do circumscribe the purpose and object of such seizure. That I get from the plain words of the statutes being sections 30 and 31 of the Value Added Tax Act; section 56 of the Income Tax Act as well as sections 159(2) and 235 of the East African Community Customs Management Act all underscore the fact that a proper or authorised officer may only demand and take possession of materials as may be relevant to reveal full information on tax liability and compliance with revenue collection statutes. The Value Added Tax Act in particular, imposes the duty on such authorised office to have reasonable ground to believe that the document demanded or seized has evidence of commission of an offence under the Act. Those Revenue Statutes also impose a duty on the respondent to avail to the owner of the seized documents certified copies thereof, in cases where the Respondent cannot return the documents. Under Section 60, Tax procedure Act, a duty is imposed for the return of seized documents and materials within 6 months from the date of their seizure. Nowhere in all the relevant statutes is it provided that the seizure results in loss of ownership rights by the taxpayer, neither is it provided that the respondent acquires any proprietary interests in the seized materials.

29. Having admitted the seizure one cannot deem the material immaterial or irrelevant unless one be convinced that in taking the material away, the authorised office had no reasonable ground to believe in their relevance and therefore acted irrationally, capriciously or just whimsically. This court has no reason to believe that the office was being whimsical. Accordingly, I reiterate that the materials taken away were relevant for the investigation and execution of the Respondents mandate and that, being so relevant to the respondent, they are equally relevant to the petitioner for the purposes of resolution of any tax dispute including any contestation over the assessed and demanded tax.

30. I make this determination based on two other reasons which I consider compelling. The first is that the law under the East African Community Customs Management Act, VAT Act and Income Tax Act only permit the seizure of materials to facilitate the respondent in its mandate. There is nothing in the provisions cited by the respondent to suggest or imply that the respondent can forfeit and appropriate for itself, and for good, the documents even if the same were to be evidence of tax evasion or indeed the commission of any other criminal offence. More compelling is the fact that parties recorded a consent before me for the return of the records. It cannot now be said that even the court order was in vain.

31. The second is that the observation is made giving regard to the respondent's position as deponed by Doreen Mbigi in her Replying Affidavit at paragraph 53 where she asserts that if "*the documents are released to the petitioner then investigations and recovery of the tax could be prejudiced*". It is of note that Affidavit was sworn and filed in court during the year 2011, some four years after the materials were seized and many more years before some of the materials were returned in 2014 and the subsequent consent order made in 2017. One would wonder the magically demonic evidence in the retained documents which would prejudice investigations more than ten years after those investigations began. The court takes the view that expeditious execution of public duty is now an indispensable norm and that a period spanning more than ten years can never be deemed reasonable for the purpose of conducting investigation. To the contrary I do find that it is inordinately too long and that the conduct by the 1<sup>st</sup> respondent and its officers, in handling this matter all through, suggest an undeclared desire not to seek recovery of any due taxes. It is one of those situations where a public officer or office abdicates public duty and when taken to court as it is bound to be, leaves it to court to make a decision, which decision in those circumstances, may not appear to be in public interest. That decision in the eyes of the public gives the perception that the fault lies with the court rather than the public body that abdicated its duty. Here we have respondents clothed with clear obligations by relevant statutes, but is yet to carry out its mandate 10 years after initiating a process to recover tax which it deemed was due from a taxpayer. Further yet, that body in its actions contravenes the very statutes enacted to guide its processes, which results in serious violations of the rights of a citizen. The court will not hesitate to call out such conduct, and to point its finger at the public body or officer and inform them that it is in error and that error merits censure.

32. The concern that the release of the documents will prejudice investigations cannot be valid in that the Authority has always had the option to make and retain copies in a legal way, but it did not have the option of forfeiture or just confiscating the documents and materials for good. However, even if that position was supported by the law, it would still not be a valid position today but must be taken to have been spent the moment parties agreed to have the documents released. In fact, the Replying Affidavits of Doreen Mbigi, Justus Musau Kiuvu and Abdilatif Ali Hassan repeatedly stress the fact that the law identifies the sole purpose of seizing the documents as investigations.

33. The petitioner in its complaints invokes the provision of Articles 35, 40, 47, and 50 of the Constitution. I find that of importance in these proceedings is the provisions of Article 40;

***Protection of Right to Property***

***(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –***

***(a) of any description***

***(b) in any part of Kenya***

***(2) Parliament shall not enact a law that permits the state or any person-***

***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description(Emphasis)***

34. The respondents have not told the court that the seized material do not belong to the petitioner, neither has it been said that the petitioner has no disclosed interest in that material. Rather, it is in fact admitted

that all the material seized belong to the petitioner. In refusing to return it, the respondent is acting in violation of the cited Article of the Constitution, as it amounts to deprivation of property unlawfully. The respondents have not shown the court any provision of the Revenue Statutes that allow the Ist Respondent to appropriate to itself seized material in the circumstances as asserted by the respondents. Were such a provision to exist it would so exist in contravention of Article 40 (2)(b) of the Constitution and would to that effect be null.

35. The other complaint as I appreciate it, is one brought under Articles 47 and 50 of the Constitution. The petitioner asserts that its right to fair administrative action and the right to a fair hearing have been violated, and are threatened with continued violation by the respondents. I have to agree with the petitioner. As I have stated elsewhere, the Tax Demand by the respondents were based, reportedly, on assessments done using the seized documents and materials. It logically follows that for the petitioner to defend itself in any proceedings it will require those very same documents and materials, and without them, its capacity to mount a competent defense is compromised, thus denying it a fair hearing.

36. There is yet another contention by the respondents that the petition was provoked by the Notice of Intention to Audit dated 11.10.2012 for which reason it is asserted that the document detained are of no relevance. Having had the chance to read the notice of 11.10.2012 in line with the previous demands and assessments, I see a logical sequence of correspondence between the parties that show me that there is no clear distinction between the period the audit is intended and that whose documents were seized. The working for the Tax obligation of **Kshs.2,363,606,424.69** dated 16.7 2008 is clear that the relevant tax period was between 2001 and 2007. That is the period whose books of accounts and related material and equipment were taken away and yet to be returned.

37. I have found that the documents are relevant for any just resolution of the dispute between the parties and therefore am not convinced that it would be just to allow the respondent to push with their demand while it continues to hold the documents that may be of assistance to the petitioner in the audits. I take the view that the proceedings before the Tax Appeals Tribunal are judicial in nature and that the disputes the Tribunal handles are those designed to be resolved by application of the Revenue Statutes and before such a tribunal every citizen is entitled to have all the facilities and materials necessary for his side of the case. In that regard and as I have stated above, any defense as can be mounted by the petitioner before that Tribunal will be severely impaired were the petitioner to be forced to so defend itself in the circumstances as suggested by the Respondent. To do that would be to bless the otherwise unacceptable conduct by a public office and its officers, and to aid it in the violation of the rights of a citizen.

38. I am therefore guided by the facts availed to reach the conclusion that the petitioner has demonstrated past violation as well as threat to future violation of its rights under Articles 35, 47, 48 and 50 and that for that reason of violation, it is entitled to reliefs from this court. This however does not amount to a prohibition against the respondents from ever collecting the tax due from the petitioner. That statutory mandate must be executed but done in compliance with the statutes and the constitution. If today the respondent deems it right to return the outstanding books and materials the petitioner will be obligated to answer any queries raised and assessment of tax demanded. For avoidance of doubt, nothing in this judgment should be deemed to hinder the respondents mandate to engage with the tax payer for the period outside that of which documents were taken and such engagement must remain within the law.

39. On general damages, the finding that the various rights of the applicant have been violated and threatened with continued violation leave me with no room but to consider an award of damages in addition to the declarations made. In this case I consider the violation wanton and wholly capable of mitigation in the past but the respondent chose not to. Having said so, it is the measure of such damages that has caused me anxiety. Anxiety because of two things. The first is the appreciation that a constitutional remedy goal is not compensatory but the vindication of a violated right and to avoid further violation<sup>[2]</sup>. Secondly, I am hesitant to believe that the Kenya Revenue Authority Board and the commissioner General are all aware that documents that were all available on the 14.07.2017 and were due for release to the tax payer are yet to be released in full so that I award damages as a way of showing disapproval of the misconduct by the Authority. On that basis I award to the petitioner the sum of Kenya Shillings Two Million as damages for violation by the respondent.

## **Rendition**

40. I find the petitioner's case well merited and grant to it the following orders: -

***a. An order of mandamus directed at the respondents and compelling them to return and release to the petitioner all records, documents, files, computers, software and everything the respondent seized and detained from the petitioner's premises between march 2003 and 26.03.2007.***

***b. A declaration that the Petitioner's right to fair administrative action as guaranteed by Article 47, right to a fair hearing guaranteed by article 50[1], right to information guaranteed by article 48 as read with 50 of the constitution have been and will continue to be violated and infringed by any audit/ test compliance by the respondents unless all the material seized from the petitioner's premises and subject to the litigation in JR 89 of 2010 are release.***

***c. A declaration that the Tax Demand Subject of Notices Ref:***

***KRA/CUS/MIB/INV/2/2007 dated 30<sup>th</sup> May, 2007, 26<sup>th</sup> June, 2007 and Ref:KRA/1006/14 dated 8<sup>th</sup> November, 2007, 10<sup>th</sup> and 16<sup>th</sup> July, 2008, 18<sup>th</sup> August, 2010 and the Notices under Section 42 of the Tax Procedure's Act, 2015 dated April 28,2016 cannot be legally enforced against the petition unless and until all the materials subject to the order of mandamus issued herein shall have been released.***

***d. By way of Judicial Review an Order of PROHIBITION to issue to prohibit the Respondents their officers, agents, servants, authority and/or any other body appointed for that purpose from executing, pursuing, considering, issuing, action upon and/or in any other manner whatsoever or howsoever from demanding and or enforcing any demand, in anyway and manner including arrest of the petitioner's directors for Income Tax and Value Added Tax as set out in their letter dated 18<sup>th</sup> August, 2010 for the recovery of the alleged taxes totaling the alleged sum of Kshs.2,363,606,424.69or any part thereof unless and until the order of mandamus issued herein shall have been complied with.***

***e. Only If the respondent shall not have released the records in terms of the order of mandamus issued herein, and upon the lapse of 60 days from today, an order of certiorari do issue removing into the High Court, for the purpose of being quashed, the Respondent's letter dated 11<sup>th</sup> October, 2011 and 18<sup>th</sup> April, 2012.***

***f. Kshs 2,000,000 being damages for the violation/infringement of the Petitioner's constitutional rights.***

***g. For reasons that I have found the conduct of the respondent as far as the release of the records are concerned, I award the costs of the Petition to the Petitioner.***

**Dated, signed and delivered at Mombasa this 25th day of September, 2020.**

**P.J.O. OTIENO**

**JUDGE**

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**[1]** National Bank of Kenya Ltd vs Pipe Plastic Smkolit (K) Ltd [2001] eKLR

**[2]** Gitobu Imanyara & 2 others v Attorney General [2016] eKLR