



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NUMBER 167 OF 2018

MOHAMED ALI T/A TOP MODEL APPARELS.....	1 ST PETITIONER
MUNTA ENTERPRISES LIMITED.....	2 ND PETITIONER
VISION ADVERTISING & PRINTING CO.....	3 RD PETITIONER
AFRI FERTILIZER & FARM CHEMICALS.....	4 TH PETITIONER
ZULIA TRADING COMPANY LIMITED.....	5 TH PETITIONER
HALINTO GENERAL DISTRIBUTORS LTD.....	6 TH PETITIONER
RAHIMA TRADERS.....	7 TH PETITIONER
RAHISI CASH & CARRY TRADERS.....	8 TH PETITIONER
BAITUL INVESTMENTS.....	9 TH PETITIONER
DARWIN WHOLESALERS LIMITED.....	10 TH PETITIONER
FAMILY FASHION CLOTHING.....	11 TH PETITIONER
FAHARI HARDWARE & BUILDING WHOLESALERS.....	12 TH PETITIONER
JARINTA (K) LIMITED.....	13 TH PETITIONER
SAMBIBA DISTRIBUTORS LIMITED.....	14 TH PETITIONER
MANGUZI HARDWARE.....	15 TH PETITIONER
BRANSO DISTRIBUTORS LIMITED.....	16 TH PETITIONER
SANIKEN (K) LIMITED.....	17 TH PETITIONER
RITZ ENTERPRISES LIMITED.....	18 TH PETITIONER
KNIGHTSBRIDGE TRADING COMPANY LTD.....	19 TH PETITIONER
DOLPHIN STATIONERS LIMITED.....	20 TH PETITIONER

SAHARA IMPEX LIMITED.....	21 ST PETITIONER
MOYO IMPEX LIMITED.....	22 ND PETITIONER
COOL COLLECTIONS LIMITED.....	23 RD PETITIONER
HEET ENTERPRISES LIMITED.....	24 TH PETITIONER
KEN IRON AND STEEL LIMITED.....	25 TH PETITIONER
MUKTI LIMITED.....	26 TH PETITIONER
NISHYAM GENERAL SUPPLIES LIMITED.....	27 TH PETITIONER
JAR RAJ LTD.....	28 TH PETITIONER
MANI EMPEX LIMITED.....	29 TH PETITIONER
TIRE WORLD LIMITED.....	30 TH PETITIONER
NEW OSHWAL DISTRIBUTORS LIMITED.....	31 ST PETITIONER
TAPAS AGENCIES LIMITED.....	32 ND PETITIONER
INFOTECH MANAGEMENT SERVICES LIMITED.....	33 RD PETITIONER
PROFILE INTERNATIONAL LIMITED.....	34 TH PETITIONER
GURULINK KENYA LIMITED.....	35 TH PETITIONER
ROYAL KING KENYA LIMITED.....	36 TH PETITIONER
MICROMART DISTRIBUTION LIMITED.....	37 TH PETITIONER
MAXWELL AFRICA LIMITED.....	38 TH PETITIONER
UKWALA TRADING COMPANY LIMITED.....	39 TH PETITIONER
TROPICAL LUSH LIMITED.....	40 TH PETITIONER
KENSTA METAL & HARDWARE LIMITED.....	41 ST PETITIONER
TBS TRADING LIMITED.....	42 ND PETITIONER
KINGS TRADING COMPANY LIMITED.....	43 RD PETITIONER
LAMINCHO DISTRIBUTORS LIMITED.....	44 TH PETITIONER
NITAI LIMITED.....	45 TH PETITIONER
-VERSUS-	
KENYA REVENUE AUTHORITY.....	RESPONDENT

JUDGEMENT

1. The forty-five petitioners by way of an amended petition dated 15th October, 2018 allege that their rights and fundamental freedoms under Articles 2, 3, 10, 22, 23, 27, 28, 29, 40, 47, 232, 258 and 259 of the Constitution have been contravened by the Respondent, Kenya Revenue Authority.

2. The petitioners in their amended petition seek the following remedies from the Court:

- i. A declaration that the Respondent is in breach of the Tax Procedures Act, Article 47 of the Constitution of Kenya and that any actions flowing from the said actions are unconstitutional and void.**
- ii. A declaration that the issuance of enforcement mechanisms without according the Petitioners the rights to invoke procedures under the Tax Procedures Act offends the Petitioners' constitutional rights, is illegal and void.**
- iii. A declaration that to the extent that the Respondent has served notices upon the Petitioners and given further verbal threats about enforcement and criminal sanctions in total violation of the provisions of the Tax Procedures Act, the Petitioners' right to equal protection and equal benefit of the law as guaranteed by Article 27 of the Constitution has been violated and continues to be threatened. The said actions are unconstitutional and void.**
- iv. A declaration that to the extent that the Respondent is threatening to initiate criminal prosecutions of the Petitioners if the Petitioners insist on the Respondent's compliance with the procedures under the Tax Procedures Act, the Petitioners' rights under Articles 27, 28, 29 and 47 of the Constitution of Kenya, 2010 have been violated. The said actions are unconstitutional and void.**
- v. A declaration that to the extent that the Respondent has issued demand notices to some of the Petitioners, namely; Zulma Traders Ltd, Halinto General Distributors Ltd, Rahima Traders Ltd, Baitul Investments, Fahari Hardware Ltd, claiming to have based the said demand on an analysis of VAT returns for the period "XX", the said demand is vague, ambiguous and violates the said Petitioners' right to fair administrative action as protected by Article 47 of the Constitution. The said actions are unconstitutional and void.**
- vi. A declaration that to the extent that the Respondent has threatened to issue agency notices to the Petitioners' bankers in total violation of the Tax Procedures Act, the Petitioners' right to property under Article 40 of the Constitution has been violated. The said actions are unconstitutional and void.**
- vii. A declaration that to the extent that the Respondent has issued instructions to the immigration department to prevent the Petitioners' directors from leaving the country, the Respondent is in violation of Articles 27, 28 and 29 of the Constitution. The said actions are unconstitutional and void.**
- viii. An order of injunction restraining the Respondents from enforcing the various demands for underpaid tax issued upon the Petitioners including interference with the Petitioners' directors/owners freedom of movement, uninterrupted operation of bank accounts, and institution of criminal proceedings in relation to the subject matter in the notices issued upon the Petitioners.**
- ix. An order of injunction restraining the Respondent from enforcing the various Notice of Assessments and demands for underpaid tax issued upon the Petitioners including interference with the Petitioners' directors/owners freedom of movement, uninterrupted operation of bank accounts, clients, and institution of criminal proceedings in relation to the subject matter of the notices issued upon the Petitioners.**
- x. An order quashing all Notices issued to the Petitioners purporting to be enforcing the various Notice of Assessments and demands for underpaid tax issued upon the Petitioners including interference with the Petitioners' directors/owners freedom of movement, uninterrupted operation of bank accounts, clients, institution of criminal proceedings in relation to the subject matter of the notices issued upon the Petitioners.**
- xi. Or such other order(s) as this Honourable Court shall deem just.**

The Petitioners' Case

3. The petition is premised on the service of demand notices upon the petitioners by Kenya Revenue Authority ('KRA') on various dates between 16th April, 2018 and 19th April, 2018 for underpaid taxes. The petitioners complain that in the notices the period indicated for the unpaid taxes is 2015-2016 in some instances and in other instances that said period is ambiguously indicated as "XX". The petitioners argue that the demands violated the procedures for assessment and audit for tax purposes as laid down in the provisions of the Tax Procedures Act, 2015 ('TPA').

4. The petitioners assert that the basis for the Respondent's demands is the various tax returns wherein the petitioners have accounted for input VAT from their various suppliers. The petitioners contend that returns were made through the Respondent's iTax system, and the PINs of their various suppliers for the years in question were disclosed.

5. It is further alleged that the Respondent has intimidated, harassed and threatened the petitioners to scare them from asserting their rights and countering the allegations that the Respondent is making against them. The Respondent is also accused of having threatened to issue agency notices to the petitioners' bankers and in one case, has given instructions to the Immigration Department to prevent one of the directors of the 1st to 17th petitioners from leaving the country for specialised medical treatment in India.

6. The petitioners aver that on 14th May, 2018 the Respondent sent out new tax assessments and notices demanding the disputed taxes from them, but describing them as additional taxes. The petitioners assert that the taxes have no legal backing and are therefore unlawful, arbitrary and oppressive.

7. The petitioners contend that their right to equal protection and equal benefit of the law under Article 27 of the Constitution has been violated and continues to be threatened by the service of the notices by the Respondent and the further verbal threats received by the petitioners from the Respondent.

8. The petitioners further aver that their rights under Articles 27, 28, 29 and 47 of the Constitution have been violated by the threats by the Respondent to initiate criminal prosecutions against them if they continue to insist on the Respondent's compliance with the procedures under the TPA. Further, that Article 27 of the Constitution was violated to the extent that the Respondent issued demands before assessment as provided under the TPA. Additionally, it is asserted that Articles 27, 28 and 29 have been violated by the Respondent in issuing instructions to the Immigration Department to prevent the petitioners' directors from leaving the country.

9. The petitioners claim that Article 47 of the Constitution has been violated to the extent that the Respondent has issued demand notices to some of the petitioners claiming to have based the said demands on an analysis of VAT returns for the period "XX". They claim that the demand is vague, ambiguous and violates those petitioners' right to fair administrative action.

10. It is further the petitioners' assertion that the TPA and their right to property under Article 40 of the Constitution were violated by the Respondent's threat to issue agency notices to their bankers.

11. The petitioners contend that the Respondent has issued enforcement mechanisms against them without the process precedent to the said enforcement, and has issued demands and enforcements contemporaneously with other enforcement mechanisms and therefore undermined their right to challenge the taxes. The petitioners assert that the actions of the Respondent are unconstitutional and void as the Respondent is imposing a tax burden without legal and factual underpinnings. Further, that the Respondent has ambushed them and denied them due process. Also that the Respondent is shifting the burden of enforcement of tax obligations owed by third parties to the petitioners.

12. The petition is supported by an affidavit sworn on 16th October, 2018 by Mohammed Hussein Ali, a director of the 1st to 17th petitioners, and the affidavits of the directors of the 18th & 19th, 21st, 22nd, 23rd, 24th & 25th, 26th, 27th and 28th petitioners sworn on 30th April, 2018.

13. The petition is further supported by the affidavits of the directors of the 29th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 39th, 40th, 41st, 42nd, and 43rd petitioners sworn on 19th June, 2018. These particular petitioners claim to have followed up with the demands from KRA for the unpaid taxes and have received insufficient assistance or none at all.

The Respondent's Case

14. The Respondent filed a notice of preliminary objection dated 31st May, 2018 claiming that the petition is fatally defective and bad in law and vexatious and an abuse of the court process. It is stated that there were no resolutions of the boards of directors of the 2nd, 5th, 6th, 10th, and 13th-28th petitioners authorising the lodging of the petition.

15. The petitioners are accused of ignoring or bypassing clear and mandatory statutory provisions for the resolution of the dispute before this Court. It is therefore asserted that these proceedings are null and void, and should be struck out.

16. By way of a replying affidavit sworn by Emmy Jepkemboi on 4th June, 2018, the Respondent deposes that upon investigating a fraudulent scheme known as the 'missing trader' where taxpayers who do not make taxable supplies use fictitious tax invoices to claim input VAT, the petitioners were identified as beneficiaries of this scheme. The Respondent avers that the petitioners were served with the findings of the investigations as is the normal practice.

17. It is the Respondent's case that the petitioners were invited to provide documents and to be heard before formal tax assessments were issued to them. They were thereafter invited to meetings and engagements pursuant to Section 59(1)(c) of the TPA in order to discuss a way forward in terms of the payment of taxes due.

18. The Respondent assert that the allegations of harassment are not true as it is the normal practice for the investigators to summon persons who may assist with information to appear before the investigators to provide information that may be useful. In regard to Mr Hussein Ali, the Respondent determined that he was a flight risk as investigations found that he had no known assets which could be used to secure the outstanding taxes.

19. The Respondent states that its actions were done within the law and as a normal investigation process to, not only secure the presence of the persons of interest to the investigators, but also to secure the illegally obtained money from being placed out of the reach of investigators pending the conclusion of investigations.

20. It is contended that the petitioners have failed to demonstrate that the Respondent has not acted independently or has acted capriciously, in bad faith or has abused the legal process. Further, in response to the allegations that some of the demand letters referred to the period "XX", it is averred that the investigation period is indicated at the reference part of the letter. Moreover, that the last paragraph of the letter advises the petitioners to contact the persons whose contacts were provided therein for any clarification.

21. The Respondent asserts that this petition is premature, frivolous, vexatious and an abuse of the court process for reasons that the dispute is a tax dispute and no constitutional issues emerge from the pleadings filed; that although the Court has original jurisdiction to hear and determine this matter, the petitioners have not complied with the dispute resolution procedure set out in the TPA and the Tax Appeals Tribunal Act, 2013 ("TATA"); that the petitioners have only been issued with tax findings which they have failed to respond to or rebut after which the Respondent can issue tax assessments and tax demands; that no evidence has been tendered that the Respondent issued verbal threats; that the Respondent should be allowed to conduct its investigations; and, that due process regarding a tax dispute should be given room to take course.

22. The Respondent filed a supplementary affidavit sworn by Antony Opondo on 14th September, 2018. Mr Opondo avers that on 12th September, 2018 he received memoranda of appeal filed in the Tax Appeals Tribunal ('Tribunal') by the 5th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th and 19th petitioners challenging the assessments of taxes which is the substratum of this dispute.

23. The Respondent asserts that by filing the appeals, the petitioners have abandoned this petition and opted to follow the correct procedure for challenging a tax decision as provided under Section 51 of the TPA.

24. The Respondent therefore prays for the dismissal of the petition and the discharge of the orders of stay granted by this Court.

25. The Respondent's case is also supported by the further affidavits sworn by Ezekiel Obegi on 14th September, 2018 responding to the supporting affidavits of the various petitioners. Through the said affidavits Mr Obegi avers that tax demands were made in respect of the concerned petitioners and allowing the petition would be tantamount to fettering the mandate of the Respondent without justifiable cause.

The Petitioners' Written Submissions

26. The petitioners by way of written submissions dated 17th September, 2018, submit that because this is a tax matter, the applicable laws and procedures are within the TPA and the Income Tax Act, Cap. 470. The petitioners assert that the Respondent is bound to follow the law when carrying out its statutory obligations as determined by the courts in **Republic v Commissioner of Domestic Tax Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR; Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR; Cape Brandy Syndicate v Inland Revenue Commissioner [1921] 1 KB 64**, and **Inland Revenue Commissioners v Wolfson [1949] 1 All ER 865**.

27. The petitioners contend that they had a legitimate expectation that if the Respondent discovered that there were taxes owed or that the returns filed by the petitioners based on the self-assessment method were either incomplete, incorrect, erroneous or false, it ought to have followed the procedure under the tax statutes to either seek clarification, amend the assessments, or send additional assessments. It is submitted that the Respondent has convoluted the process and denied the petitioners an opportunity to challenge the taxes. On this issue, the petitioners rely on the decision in **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374**.

28. On the issue of fair administrative action, the petitioners submit that prior to the impugned actions of the Respondent, they had never been informed of the alleged accrued tax and had never been given an opportunity to explain their assessments. The petitioners submit that the alleged accrued tax arrears demanded by the Respondent are fictitious and baseless as no proper audits were performed in order to arrive at those figures.

29. It is further argued that according to the law, before distressing for tax arrears the Respondent ought to have issued notices of assessment of tax arrears, a breakdown of how they were accrued, the exact amount owed, the time limit for effecting payment, the consequences for failing to comply, and the opportunity provided by law to contest/appeal/object to the demand. It is the petitioners' case that they were simply issued with demands without recourse to the stated statutory procedure.

30. The petitioners contend that the Respondent failed to issue fresh assessments but instead continued to enforce demand notices that were issued in contravention of the law. It is claimed that as a result of this, the petitioners' PINs were suspended, their accounts frozen, and their freedom of movement and liberty threatened, and therefore the actions of the Respondent have damaged the petitioners' ability to run their business. The petitioners support their case by citing the decisions in **Petition No. 352 of 2012, Geothermal Development Co. Limited v The Kenya Revenue Authority, Commissioner of Domestic Taxes & others**; and **Republic v Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya LTD [2012] eKLR**.

31. On the issue of whether the Respondent can shift its burden and obligation of collecting taxes to a taxpayer, the petitioners claim that the Respondent has failed to reveal the basis of the information relied upon. The petitioners argue that where a taxpayer has not fulfilled its obligation under the tax laws, such obligation cannot be shared out or transferred to other taxpayers who may be its suppliers or customers. This is supported by reference to the case of **PZ Cussons East Africa Ltd v Kenya Revenue Authority, Nairobi HC Petition No 309 of 2012**.

The Respondent's Written Submissions

32. The Respondent filed written submissions dated 24th October, 2018. On the issue as to whether it followed the correct procedure in issuing assessments to the petitioners, the Respondent submits that it followed the procedure approved by the law. According to the Respondent, Section 4 of the TPA vests the Commissioner with immense powers in so far as enforcement for recovery of taxes is concerned. Further, that KRA followed the procedure in issuing demands in April 2018, made the additional assessments based on the returns filed by the petitioners in May 2018, and after no responses were received from the petitioners on these demands, sent further tax demands as reminders in June 2018 followed by agency notices in July 2018. It is the Respondent's case that it sent out further reminders to the petitioners in August, 2018.

33. The Respondent asserts that the impugned actions were as a result of protracted tax demands that were never responded to by the petitioners contrary to Section 51 of the TPA. It is further contended that as at the time of filing this petition, agency notices, proclamation notices and notices of distress had only been issued against the 40th and 42nd petitioners.

34. On the issue as to whether the taxes are due and payable by the petitioners, the Respondent in reliance on sections 51 and 52 of the TPA submits that the only avenue through which a determination as to whether taxes are due and payable by a taxpayer is first by lodging an objection with the Commissioner, then subsequently appealing to the Tribunal. The Respondent contend that the petitioners are asking the Court to determine whether they owe the Respondent any taxes, despite there being a laid out procedure under the tax laws for making that

determination. Reliance is placed on the decision in **Jimbise Limited & 2 others v Kenya Revenue Authority [2017] eKLR**.

35. The Respondent asserts that the petitioners admitted in their submissions that they failed to object to the assessments which is inexcusable and they should not be entertained by the Court.

36. On the question as to whether the Respondent can invoke enforcement measures simultaneously with the demands, the Respondent submits that the enforcement measures were resorted to after the assessments had been issued and various demands made which were not responded to by the petitioners. It is contended that where a taxpayer refuses to acknowledge and respond to demand letters the Commissioner may resort to enforcement measures to recover the unpaid tax.

37. It is further submitted that the tax laws, as they are today, do not bar the Commissioner from engaging all the enforcement measures simultaneously. According to the Respondent, it is not illegal to use any enforcement measure available under the law. These arguments are supported by the decisions in **Elesk & Elesk (K) Ltd v Kenya Revenue Authority & another [2018] eKLR**; and **Pankaj Vrajlal Somaia & another v Kenya Revenue Authority & 2 others [2015] eKLR**.

38. The Respondent denies the allegation that it shifted its mandate of tax collection to the petitioners, and states that the petitioners were requested to present documents supporting the purchases they allegedly made, which purchases are taxable, and which the petitioners failed to provide.

39. Finally, the Respondent urged that the petition is improperly before this Court as it is a tax dispute disguised as a constitutional petition. The Respondent submits that the petitioners are challenging tax decisions yet the procedure for such a challenge is laid down in statute.

40. It is further submitted that the petitioners have alleged violations of the Constitution but have not stated with specificity, particularity and precision how those violations occurred as required by the decision of **Anarita Karimi Njeru v The Republic (No. 1) (1976-80) KLR 1272**. Further, that in any case the enforcement of tax procedures does not amount to a violation of the Constitution. The Respondent relies on the case of **Joshpat Koli Nanok & another v Ethics and Anti-Corruption Commission [2018] eKLR**.

41. The Respondent calls the attention of the Court to the fact that some of the petitioners have opted to challenge the tax decisions in the proper forum. It is submitted that this matter is an abuse of the court process as it is in effect litigating the same issues under different guises. The Respondent relies on the decisions in **Republic v Commissioner of Domestic Taxes Ex-Parte I & M Bank Limited [2017] eKLR**; **Cut Tobacco (K) Ltd v Kenya Revenue Authority & another [2013] eKLR**; **Guango Limited v Kenya Revenue Authority & 3 others [2016] eKLR**; and **Jimbise Limited 2 others v Kenya Revenue Authority [2017] eKLR** where the courts determined that the relevant statutory bodies should first be allowed to deal with a dispute before the courts are involved in those disputes.

The Analysis

42. A perusal of the pleadings and submissions disclose the following issues for the determination of this Court:

- i. Whether this Court has jurisdiction over the instant petition;
- ii. Whether the Respondent failed to follow the proper procedure thereby violating the petitioners' right to fair administrative action;
- iii. Whether the Respondent infringed the petitioners' legitimate expectation and constitutional rights; and
- iv. Whether the petitioners are entitled to the reliefs sought.

The Jurisdiction of the Court

43. The petition herein is based on the demand notices issued by the Respondent and the subsequent enforcement measures executed in pursuit of payment of the demanded taxes. The petitioners assert that the Respondent failed to follow the laid out procedures in the TPA, as they were not afforded an opportunity to respond to allegations of tax fraud levelled against them. The Respondent, however, contends that the proper forum to hear and determine this matter is the Tribunal, as this is a tax dispute.

44. According to Article 165(3) and (6), the High Court has the jurisdiction to determine whether any right or fundamental freedom has been denied, violated, infringed or threatened. The Court also has supervisory jurisdiction over subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function.

45. According to the holding in **Republic v Secretary of the Firearms Licensing Board & 2 others Ex -parte: Senator Johnson Muthama [2018] eKLR**:

“22. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. It is notable that in the present proceedings, this Court is being asked in exercise of its supervisory jurisdiction, to review the lawfulness of the 1st Respondent’s decision.

23. For such a decision to be amenable to judicial review, it must affect an individual’s interests and should arise out of the exercise of a public function, which in essence qualify them as quasi-judicial functions. It thus goes without saying that where a public officer has been granted statutory powers, the exercise of such powers is subject to the supervisory jurisdiction of

the Court.”

46. Having regard to the arguments raised by the petitioners herein, it is evident that what is in question is not the issue of whether they should pay the taxes which are demanded by the Respondent. Their case is that the Respondent failed to follow the legal procedure as laid down in the TPA and other tax statutes. The Respondent in exercising its quasi-judicial functions is alleged to have infringed upon the rights of the petitioners and therefore the Court has jurisdiction and a constitutional obligation to determine the petitioners’ complaint. It is additionally observed that the issue of jurisdiction will be best answered once the Court delves into the merits of the case of the petitioners.

Whether the Respondent failed to follow the proper procedure thereby violating the petitioners’ right to fair administrative action

47. The Respondent sent out a combination of tax investigation findings and tax demands to the petitioners, claiming that the petitioners had benefited from the ‘missing trader’ tax avoidance scheme, and underpaid their taxes. The petitioners were required to pay the taxes within seven days with a rider that if there was no compliance, the taxes would accrue penalties and interest, and the petitioners may be found guilty of the offence under Section 93(2) of the TPA.

48. Section 31(4) of the TPA provides the circumstances under which the Commissioner may amend a taxpayer’s tax assessment as follows:

“(4) The Commissioner may amend an assessment—

(a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or

(b) in any other case, within five years of—

(i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or

(ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment.”

49. Upon carrying out the amendment, the Commissioner is required by Section 31(8) of the TPA to take the following steps:

“(8) When the Commissioner has made an amended assessment, he or she shall notify the taxpayer in writing of the amended assessment and specify—

(a) the amount assessed as tax or the deficit or excess input tax carried forward, as the case may be;

(b) any amount assessed as late payment penalty payable in respect of the tax assessed;

(c) any amount of late payment interest payable in respect of the tax assessed;

(d) the reporting period to which the assessment relates;

(e) the due date for payment of any tax, penalty or interest being a date that is not less than thirty days from the date the taxpayer received the notice; and

(f) the manner of objecting to the assessment.”

50. The Respondent was bound under the cited provisions to give the petitioners notice of the amended assessment informing them of the amount assessed as unpaid tax, the reporting period to which the amount relates, the due date for payments which should not be less than thirty days from the date that the notice was received, and the manner of objecting to the assessment. The tax investigations findings and tax demands sent to the petitioners illustrate that the Respondent did not meet any of the requirements of the TPA. Even though amended assessments were sent to some petitioners such as the 13th and 19th petitioners in May 2018, this was done after the fact and not in accordance with the laid down law.

51. Not only were the petitioners required to pay the demanded taxes within seven days, but they were not provided with any assessment of the claimed amounts or any evidence relied on by the Respondent to allow them to sufficiently object to the demands. Moreover, the Respondent failed to indicate how the petitioners may object to the demands. Although the process for objecting to a tax decision is provided in the TPA, it is an express obligation of the Respondent to indicate the procedure whenever a tax decision has been made, and this obligation cannot be circumvented.

52. On the matter of the demands in which the returns period is marked ‘XX’, the Respondent has clarified that the same was a typographical error and that the period for which the demand is made is indicated at the reference part of the letter. I therefore agree with the Respondent that the petitioners did not suffer any prejudice as a result of the error since the period for which the tax was made is clear. In any case, the demands have already been found to have been issued contrary to the law.

53. On alleged violation of the right to fair administrative action, I note that relevant provisions of Article 47 of the Constitution demand that:

“(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.”

54. Section 4(3) the Fair Administrative Action Act, 2015 (‘FAAA’) expounds on the right thus:

“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

55. A perusal of the pleadings disclose that the Respondent called in the petitioners and confronted them with the allegations that they were involved in a tax evasion scheme. Mr Mohammed Hussein Ali in the affidavit sworn on 15th October, 2018 in support of the amended petition does indeed confirm that he was summoned several times by the Respondent’s officers and confronted with allegations of tax evasion and given the opportunity to provide documents to prove otherwise. Although the director of the 1st to 17th petitioners view the summonses as harassment and intimidation, the evidence gleaned from the pleadings show that the petitioners were accorded an opportunity to dispute the allegations of tax fraud. Indeed, the Respondent has specifically denied the claim that its officers harassed the petitioners. I find nothing on record to make me doubt the Respondent’s denial.

Whether Respondent has infringed the petitioners’ legitimate expectation and constitutional rights

56. On the issue of legitimate expectation, I rely on the decision in **Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR** where it was postulated that:

“17. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a two step approach. Firstly it asks whether the administrator’s actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual’s expectation.”

57. It was also stated in the case of **Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR** that:

“55. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate “in the sense of an expectation which will be protected by law”. See R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D. This was the view adopted in Royal Media Services Limited & 2 Others vs. Attorney General & 8 others [2014] eKLR where it was held that:

‘...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.’”

58. The petitioners’ legitimate expectation is a procedural one, as they anticipated that the Respondent would follow the laid out procedures by providing them with notices of the amended assessments. The petitioners’ legitimate expectation is founded in legal procedure and not only protected by the TPA, but also the Constitution and the FAAA. I, therefore, concur with the petitioners that their legitimate expectation that the law would be adhered to was violated by the Respondent.

Other Issues

59. The petitioners assert that their rights under Articles 27, 28, 29 of the Constitution have been violated by the threats by the Respondent to initiate criminal prosecutions against them if they continue to insist on the Respondent's compliance with the procedures under the TPA; and by the issuance of instructions to the Immigration Department to prevent the petitioners' directors from leaving the country.

60. These allegations are based on the alleged verbal threats, intimidation and harassment used by the agents of the Respondent. The petitioners have failed to prove these particular allegations against the Respondent. It is therefore difficult to find in favour of the petitioners where the allegations raised have not been established, particularly where proof of certain facts or events is necessary in order to find in favour of the petitioners.

61. Furthermore, in answering the question as to whether the petitioners' rights to equality and freedom from discrimination, human dignity, property, and freedom and security of the person, I rely on the decision in **Anarita Karimi Njeru v Republic [1979] eKLR** that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

The principle was restated with approval by the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**.

62. It is my finding that the petitioners have not precisely demonstrated through substantive arguments either within their petition, affidavits or submissions, how the actions of the Respondent specifically violated the rights under Articles 26, 27, 28 and 29 of the Constitution.

63. There is also the allegation that by asking the petitioners to avail certain information in respect of certain business transactions with third parties the Respondent is shifting its tax collection responsibilities to the petitioners. The answer to this issue is found in the decision in the South African case of **Metcash Trading Limited v Commissioner for the South African Revenue Service & Another (CCT3/00) [2000] ZACC 21** where it was held that:

“A special feature of VAT relates to exports. VAT is payable only on consumption in South Africa and as a result output tax is not payable on goods sold and exported. In the arcane language of the Act, they are zero-rated. Therefore a merchant who buys and sells goods in South Africa and also sells some goods that are exported does the periodic calculation by adding up all input taxes for deduction from the sum of output taxes but, in calculating the latter, includes no output tax on the value of the exports. No output tax is payable on the exported goods but a full credit is given for the input tax. This exemption, which aims at promoting exports and enhancing their competitiveness in the world market, holds self-evident benefits for export-orientated vendors. Unfortunately those benefits not only attract honest exporters but are a notorious magnet for crooks who devise all manner of schemes to exploit the system to their advantage....

Manifestly section 31 constitutes a valuable weapon in the hands of the Commissioner. The prospect of having the Commissioner independently assess both the underlying amount and the VAT that is to be paid thereon must in itself be a powerful disincentive for recalcitrant, dishonest or otherwise remiss vendors. But the compulsive force of this mechanism of the Act goes a good deal further. The dissatisfied vendor can, by lodging an objection under section 32 of the Act and, that failing, by noting an appeal under section 33 or 33A, both compel the Commissioner to reconsider the assessment and have its correctness reconsidered afresh by an independent tribunal. But the burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self-assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand.”

[Footnotes omitted]

64. Our VAT system is not dissimilar to the South African one. In the case before this Court the Respondent has simply asked the petitioners to provide evidence in support of their tax assessments. They cannot be heard to say the Respondent is shifting its mandate of tax collection to them. The petitioners are the traders and the information sought from them is supposed to be in their possession and not the third parties they allegedly traded with.

65. There is the prayer by the petitioners that the Respondent should be stopped from instituting criminal proceedings against them. No reason was advanced in support of this prayer. It is not within the powers of this Court to stop statutory bodies from performing their lawful duties. If the Respondent's investigation discloses any criminal offence, and it is empowered to prosecute such an offence, then I see no reason why the Respondent should be stopped from discharging its lawful duties. This Court can only prohibit actions that are unconstitutional, unlawful, unreasonable, violates the rules of natural justice and anything that falls in that genre. The only reason why this petition should succeed is because of the misstep by the Respondent of issuing demands for taxes before issuing amended assessments.

Whether the petitioners are entitled to the reliefs sought

66. The petitioners have established a violation of their right to fair administrative action and breach of their legitimate expectation. In accordance to Article 23 (3) of the Constitution they are entitled to all or any of the following reliefs: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.

67. It is necessary to state, for purposes of clarity, that the Respondent is entitled to commence afresh the recovery of any tax due from any of the petitioners, subject to compliance with the laws of the land. This statement finds support in the holding in **Republic v Kenya Revenue Authority & another Ex-parte Tradewise Agencies [2013] eKLR** that:

“33. As the agency notice had already been issued and as the same has been quashed there is no longer any reason to grant the prohibition sought as the Respondent if it still intends to proceed with its claim will have to start the process afresh in accordance with the law. As was held in Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA. No. 1747 of 2004 [2006] 1 EA 47, once a quashing order is given the decision making body has to act in accordance with the law and the Court cannot make the decision for the challenged body. Since the purpose of certiorari is to bring up and quash the impugned orders, that having been done there is no necessity for an order of prohibition since there is no longer any threat present of an illegal action. See Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.”

68. From the analysis in this judgement I find the appropriate reliefs are:

(a) A declaration is issued that the Respondent is in breach of the Tax Procedures Act, 2015 and Article 47 of the Constitution, and that any actions flowing from the said actions are unconstitutional, unlawful and void.

(b) An order of certiorari is issued removing into this Court and quashing all demand notices issued to the petitioners by the Respondent in respect of the tax claims in dispute in these proceedings.

(c) The petitioners shall have the costs of the proceedings from the Respondent.

Dated, signed and delivered virtually at Nairobi this 12th day of November, 2020.

W. Korir,

Judge of the High Court