REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

(CORAM: R. MWONGO, J)

CONSTITUTIONAL PETITION NO. 4 OF 2018

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

IN THE MATTER OF ARTICLES 10, 19, 22, 23, 29, 40, 47, 50, 165(2) (B) AND 209 (A) & (B) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 29 (1) (A) & (B) & 29 (2) (E) & (F) OF THE TAX PROCEDURES ACT, 2015

AND

IN THE MATTER OF SECTIONS 4, 6(1), 7(1) (A) & 2(A) (V), (B), (C), (D), (E), (F), (H), (K), (N) & 11 (1) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

ANNE WANJIKU KAHWAI .....1ST PETITIONER

BERNARD KINYUA NJOGUT/A NAIVASHA MOTHERS KITCHEN CAFÉ...2ND PETITIONER

BY

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

COMMISSIONER-GENERAL, KENYA REVENUE AUTHORITY.....2ND RESPONDENT

JUDGMENT

Background

1. The Petitioners filed this Petition after receiving from the 1st Respondent, what they refer to as a tax default assessment notice. They allege that it was issued in contravention of Section 29 (2) (e) of the Tax Procedures Act, 2015. Further they complaint that the notice did not stipulate the manner of objecting to the assessment, nor were they given opportunity to explain their portion before the assessment was issued. They claim they were harassed and threatened in respect of the demanded taxes.

2. In the Petition, the Petitioners impugn the notice and the action of the Respondents as unfair, unreasonable, un-procedural, irrational and arbitrary. They assert that the Respondents acted contrary to the interests of fair administration in violation of the constitution and the **Fair Administrative Actions Act, 2015** and also contrary to the **Tax Procedures Act, No 29 of 2015.**

3. The Petitioners seek the following reliefs in their prayers:

"(a) A declaration that the default assessment notice dated 17th April, 2008 issued to the Petitioners by the Respondents is unconstitutional, null and void having been issued in contravention of provisions of the Tax Procedures Act, Fair Administrative Action Act, 2015 and The Constitution of Kenya, 2010.

(b) An order of Certiorari do issue to remove to this court and quash the default assessment notice dated 17th April, 2018 and all consequential notices including the one dated 4th May, 2018 issued to the Petitioners by the Respondents for being unconstitutional, null and void having been issued in contravention of provisions of Tax Procedures Act, Fair Administrative Action Act, 2015 and The Constitution of Kenya, 2010.

(c) An order for compensation for violation of the Petitioners right to fair administrative action and right to human dignity.

(d) Costs of this suit together with interest thereon at court's rate.

(e) Any other or better relief deemed fit by the Honourable Court."

The Petitioner's Case

4. The Petitioners are partners in the firm of Naivasha Mother's Kitchen Cafe. The firm is registered under the Registration of Business Names Act and was issued with a certificate dated 13th October, 2010. On 3rd July, 2017, it was registered with the 1st Respondent and obtained a PIN Certificate.

5. By a letter dated 17th April 2918, the 1st Respondent wrote the Petitioner a letter titled *"Tax Demand and Notice to Appear under **Section 61** of the Tax Procedures Act 2015"*. The letter stated that the 1st Respondent had carried investigations on the Petitioners citing provisions of the **Section 5 (2) (a)** of the Kenya Revenue Authority Act Cap 409, Section 4 of the Tax Procedures Act, 2015. The demanded VAT of Kshs 1,667,056 and Income Tax of Kshs 3,125,729, all totaling Kshs 4,792,785/= from the Petitioners to appear before the Commissioner at the 1st Respondent's offices in Eldoret on 26th April, 2018. For clarification, the letter continued, the Petitioners were told to contact Charles Kimani an officer of the 1st Respondent, whose contact was indicated in the letter.

6. According to the Petitioners, they attended the meeting on 2nd May, 2018 after seeking extension of time on telephone. They delivered a letter dated 30th April, 2018 on that day. In their letter they sought to pay the VAT amount in thirty six equal instalments each of Kshs 46,307/= from May 2018, due to cash flow challenges. They sought waiver of the penalties and interest. As for the income tax demand, they stated that they had not yet filed their 2016 tax returns. Their letter containing this information is marked "Without Prejudice."

7. At the meeting of 2nd May 2018, the Petitioners allege they were not allowed to see the officer, Charles Kimani, assigned them, nor the author of the letter of demand. Instead, they were subjected to a hostile panel of five officers who threatened them with arrest and incarceration unless the taxes demanded were paid as stated.

8. Further, the officers delivered the Petitioner's proposal for instalment and counter-demanded VAT payments by three instalments of Kshs 500,000/= by 7th May 2018, Kshs 500,000/= by 10th June 2018 and Kshs 667,056/= by 9th July 2018. A letter with this fresh demand was issued to them by email on 4th May 2018.

9. Subsequently, according to the Petitioners, on 16th May, 2018, two persons who introduced themselves as CID officers from Eldoret visited the Petitioners premises and demanded to see the Petitioner. The Petitioners were not in at the time. The officers identified themselves to one of the Petitioners' staff member, and left no doubt that they intended to arrest the Petitioners.

10. The Petitioner's case rests on their submissions which I summarise in the following terms:

a. The letter of 17th April 2018 was a default tax assessment notice contravened **Section 29 (2) (e)** and **(f)** of the **Tax Procedures Act for** failure to stipulate a time period for compliance and manner of objecting thereto.

b. The default assessment notice did not avail the Petitioners an opportunity to be heard contrary to the Fair Administrative Actions Act.

c. The decisions of the Respondent in issuing the default assessment were unreasonable, arbitrary, irrational and in bad faith.

The Respondent's Case

11. The Respondents filed a Replying affidavit on 12th June, 2018. Their essential response it that the 2nd Respondent was carrying out an extensive exercise of collection and accounting of the VAT and Itax System. That the exercise unearthed on "missing trader" scheme in which invoices were raised but no goods supplied, or goods were supplied using fictitious invoices; or goods are under declared or smuggled but a tax payer ends up getting invoices to support the court; that businesses would sell invoices and issue receipts with no sales; that such invoices were sold for a fee of between 3% to 10% of the invoice amount to companies who would later claim input VAT from fictitious purchases.

12. From their investigations, the Respondent's assert, the Petitioners were found to be beneficiaries of the foregoing scheme. That the

overall scheme cost the government an amount estimated at in excess of Kshs 48 billion in revenue losses.

13. The letter to the Petitioners dated 17th April, 2018 was part of the outcome of the afore-stated investigation; that it is a normal investigation practice to inform a taxpayer of the findings and invite them to provide documents and be heard before a formal tax assessment is issued. In other words, the respondent's letter of 17th April complained of by the Petitioners is not a default tax assessment notice.

14. That the Petitioner having previously submitted self-assessment returns, the said information was used to prepare the letter issued to the Petitioners.

15. According to the Respondent, the investigation led to their inviting the Petitioners to appear before the Respondent's investigator to provide appropriate information. Thus the Respondents invited the Petitioners for a meeting on 26th April 2018 and allowed them to appear on 2nd May, 2018, as requested by them.

16. At the meeting of 2nd May 2018, the Petitioner appeared being accompanied by her accountant. That the Petitioner preset4ed a "without prejudice" letter dated 30th April 2018 in which it did not object to the payment of the taxes in thirty six (36) monthly instalments. That the Respondents did not grant the request for instalments, and instead required the Petitioners to pay the tax in three installments of Kshs 500,000/=. The Respondents generated a payslip on 4th May 2018. That upon the Petitioners' failure to make the first payment, the Respondent issued an agency notice on 24th May 2018, addressed to the Petitioners' bank.

17. In all these actions, the Respondents assert that they relied upon the **Tax Procedures Act,** and in particular: **Sections 59 (1) k), 42, and 51 (a).** They also asserted that they shall rely on **Section 80 (2**) of the **Tax Procedures Act 2015** to determine whether to make a demand for penalty on taxes, or to prosecute an offence. Further that there was no violation of **Article 47** of the **Constitution** as opportunity was availed to the Petitioners including giving them a contact person for any clarifications.

Issues for Determination

18. The issues for determination are as follows:

1. Whether the actions of the Respondents were lawful and procedural.

2. Whether the Petitioners were granted a far opportunity in accordance with the Fair Administrative Action Act.

3. Whether an order of Certiorari should issue to remove to this court and quash the Respondents notice of 17th April 2018.

4. Whether or not and if so how much compensation should be awarded to the Petitioners.

Whether the actions of the Respondents were lawful and procedural.

19. There were three significant actions identified by the Respondents that they effected and which had an effect on the Petitioners:

a. Investigations.

b. Notification letter of 17th April 2018.

c. Issuance of Agency letter.

I will deal with each aspect separately.

Investigations

20. The Petitioners submitted that they are strangers to the investigations alleged in the Respondents' response; they say they were never informed or involved in the same. There is no doubt, however, that one of the central functions of the 1st Respondent is the general administration of tax laws (**Section 4** of the **Tax Procedure Act**) and enforcing all provisions for and collecting and accounting for all revenues in accordance with the laws (**Section 5 (2) (i)** of the **Kenya Revenue Authority Act Cap 459**).

21. Indeed, **Section 4(3**) of the **Tax Procedures Act** provides that:

> **"An authorized officer shall enforce and ensure due compliance with the provisions of the tax law, and <u>shall make all due inquiries</u> in relation thereto"**

22. In my understanding, such inquiries would reasonably include having in place mechanisms for identifying, confirming and checking that tax payers are properly self-assessing and paying the appropriate taxes. In order to do this and to comply with accounting requirements, it is not unreasonable, in my view, for the Respondents to engage in investigations. There are various provisions in the Act that require self-assessment or default assessment. Assessments by the Respondent cannot, in my view, be effectively done without some form or type of investigatory engagement at different levels.

23. Are the Petitioners entitled to be involved in such investigations? I understand "investigation" to mean an inquiry into a matter, or a systematic effort to find out the truth about something; an examination of facts or information to unearth the truth. I see no reason why a statutory entity – such as the 1st Respondent, whose core mandate and function it is to assess, collect and account for income tax and enforce tax statutes – cannot fairly freely conduct investigations on a continuum with or without participation of the party investigated.

24. There is a limit to such action, however. The moment the investigator decides to utilize the investigative material or information in such a manner that a third party is likely to be affected by it, the investigator must bring such informationl to the notice of the third party. This is the essence of the constitutional requirement of fair administration. So that, in this case, the affected party was entitled to receive the appropriate and relevant critical information of the outcome from the investigation which formed the subject matter that would affect the Petitioners.

25. I believe, that, to the extent that the material that was the outcome of the investigations was contained in a letter addressed to the Petitioner, the Respondent's complied with the requirement to notify them. This takes us to the letter of notification sent to the Petitioners.

Letter of Notification

26. The Petitioners agree that the letter of notification dated 17th April, 2018 was a default tax assessment which issued pursuant to **Section 29** of the Tax Procedures Act. That, being such a notice, the Respondents failed to comply with the provisions of that section. This indeed the care of the Petitioners case. The question is what did the Respondent's said letter amount to?

27. In paragraph 12 of the Replying affidavit of Cyrell Wagunda, the Respondent refers to the letter of 17th April, 2018 as "Tax Investigator Findings". Further that the findings are done before a "formal tax assessment is issued." However, at Page 31 of their submissions, the Respondent refers to the said letter as a "tax assessment for the period April 2016 to June 2016 amounting to Shs 1,667, 056/=".

28. I think it is clear that the said letter, no matter what it is formally referred to as, is a tax "assessment". Under the Tax Procedures Act, an assessment is defined in **Section 2** as:

> **"assessment means a self-assessment, default assessment, adverse assessment, advance assessment, or amended assessment, and includes any assessment made under a tax law."**

29. The letter of 17th April, 2018 cannot therefore escape definition as an assessment. It was certainly not an "advance assessment" under **Section 30** of the Tax Procedures Act. Such an assessment concerning tax payers in circumstances under **Section 26** who are either bankrupt or under winding up, or who are reasonably suspected to be about to leave the jurisdiction, or ceased carrying on business in keys or is a tax payer who has died, during the reporting period. None of these situations apply to the Petitioners.

30. The said letter was also not an "Amendment of assessment under **Section 31** as the Commissioner was not making alterations or additions to an original assessment.

31. Having found that the said letter properly falls into the definition or a "default assessment" under **Section 29** of the Tax Procedures Act, these provisions thereof apply to it. **Section 29** states:

32. In summary, **Section 29** of the Tax Procedures Act requires that the 1st Respondent upon notifying a taxpayer of the tax assessment to comply with the following steps. Specify the amount assessed, which the Respondent did; specify the due date for payment, which the Respondent did; ensure that the due date for payment is not less than thirty days from the date of services of the notice, which the Respondent failed in; specify the manner of objecting to the assessment, which the Respondent failed to do.

33. The Respondent did not comment at all on their replying affidavit or submission on the **Section 29** complaint of the Petitioners. It is not in dispute however what actions the Respondents took and caused the Petitioner to take. It is clear, however, that the Respondents made an assessment but did not strictly complying with **Section 29 (e)** and **(f)** of the Tax Procedures Act.

34. Under **Section 29 (e)** of the Tax Procedures Act the Respondents should have availed the Petitioners no less than thirty days from the date of serving the notification, to enable the Petitioners to pay. Under **Section 29 (f)** of the Tax Procedures Act the Respondents should have notified the Petitioners of the manner of objecting to the assessment. To this extent the action of the Respondents were unlawful and un-procedural.

Whether the Petitioners were granted a fair opportunity in accordance with the Fair Administrative Actions Act on adversely affected person.

35. Under **Section 6 (1)** of the Tax Procedures Act of the Fair Administrative Actions Act:

> **"Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with Section 5."**

In my view the Tax Procedures Act was enacted purposely to ensure fair administrative procedures in relation to tax payers. The provisions of the tax laws and the Kenya Revenue Act which had been in existence prior to the promulgation of the 2010 Constitution merely provided for a hatch patch of obligation and duties as to payment and collection of taxes. The objects of the Tax Procedures Act is as stated in **Section 2** thereof as follows:

"2(i) The object and purpose of this Act is to provide uniform procedures for-

a. consistency and efficiency in the administration of tax law;

b. facilitation of tax compliance by tax payers; and

c. effective and efficient collection of tax."

36. There is no doubt that the 1st Respondent's letter of 17th April, 2018 clearly states that it is issued under **Section 61**. That Section provides as follows:-

"where the Commission is satisfied that a person has committed an offence under a Tax law, the Commissioner may, by notice in writing, require the person to appear before him."

37. That provision does not indicate what the content of the notice should be. But it may be implied to include perhaps stating the character or nature of the offence or how it is made up, and the specific notification of a timeframe for appearance before the Commissioner, including the venue and time of such appearance. A notice along these lines would be an appropriate notice under **Section 61**.

38. In my view the object of **Section 61** is to enable the Commissioner, when through investigations or other means, he or she has obtained information from which he is satisfied that a tax person has not complied with same tax law, to then refuse attendance of that person before him. Naturally, it would be expected that commissioner will lay before such person the said information, indicate the date, time and place of the proposed meeting, and ensure that such time frame is sufficient to enable the affected person to actually attend. The Commissioner in giving such notice will be aware that the person receiving the notice may be held in a national duty or engagement, or on travel abroad, or may be hospitalized and in such other circumstances that disable his or her immediate appearance before the Commissioner. So the notice must grant reasonable time. The Section cannot have been intended as a provision through which a citizen may.

39. In the present case, the notice given was served on or about 19th April 2018. It gave seven (7) days' notice for appearance on 26th April 2018. To their credit, the 1st Respondent extended the date by another six (6) days to accommodate the Petitioners. However, the notice did not only contain the required Section 61 information. It also contained the assessment under Section 29 including a seven (7) day notice for payment of the assessed tax. To that extent, the notice went beyond the Section 61 requirements and ceased to be a fair instrument of notification of appearance.

40. The 1st Respondent held the meeting with the Petitioners on 2nd May, 2018 as agreed. Again to their credit, and this is not disputed, the Respondents allowed and the Petitioners did attend the said meeting in the company of their accountant. The notice had indicated that:

"The agenda of the meeting shall be to discuss you tax matters and you may therefore be accompanied by any person(s) conversant with these matters."

To that extent, there was fair opportunity given to enable the open discussion of the Petitioners tax matters.

41. The problem arose in the fact that the notice contained a default tax assessment notice too. The default tax assessment appears to have become the central discussion point. Indeed, the Respondents admit the conflated nature of their letter of 17th April, 2018 when in paragraph 13 of their replying affidavit they state:

"13. That the Petitioners were thereafter invited to meetings and engagements pursuant to Section 59 (1) (c) of the Tax Procedures Act 2015. Part of this also involved a discussion on the way forward in terms of the taxes due to the Authority."

42. I have perused **Section 59** of the **Tax Procedures Act** which provides as follows:

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

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

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

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

43. It is patently inaccurate or misleading that the notice issued by the Respondents is sought to be categorized as a **Section 59** notice. A perusal of the letter shows that it does not make any reference to Section 59, nor is there any indication that the Petitioners were either required to produce any records for examination or furnish information relating to the tax liability specified.

44. Now, it is understandable that it may be undesirous for a tax authority to have to issue a different notice for every item requiring attention, and hold a different meeting for every such notice. If such interpretation were to be taken, the tax authority would be overwhelmed with bureau critic paperwork and meetings. It is pragmatic and however, for a Tax authority to issue several notices in one letter, each in strict compliance with the statutory provisions to enable it, so to speak, to kill many birds with one stone.

Without Prejudice letter

45. In the present case, as earlier stated, the meeting turned upon a discussion of the date for payment of the default assessment of tax for which improper notice had been issued. The Petitioners indeed carried with them to that meeting a letter marked "Without Prejudice" proposing a payment plan for the assessed tax.

46. In the event, the proposal was rejected by the Respondents, and the Petitioners now deny that the proposal was an admission of liability. They have gone so far as to state that their "without prejudice" letter cannot be used or relied upon these proceedings.

47. On the *"without prejudice"* letter, the Petitioners' position cannot be entirely upheld. It is the Petitioners who adduced the letter they seek not to be relied upon. They breached the without prejudice rule by introducing the said letter and relied on its content in the proceedings. It is the Petitioner who in Part B (x) of the Petition (Page 3) stated in respect of that letter:

> **"(x) On 2nd May, 2018 the 1st Petitioner travelled to the Respondent's offices in Eldoret and upon arrival delivered a letter dated 30th April, 2018 signed by her and her co-partner requesting to be allowed to pay VAT demanded in 36 monthly instalments while at the same time explaining their position on the income tax demanded."**

This paragraph is repeated in the Petitioner's affidavit in support of the Petition at paragraph 19 thereof.

48. The Respondents picked the cue and at paragraphs 17 and 18 in their Replying affidavit, point out that the Petitioners in their said letter did not object to the payment of the taxes and sought time to pay the demanded taxes in 36 equal instalments. That they, the Respondents, declined the offer and made a counter offer requiring payment in three installments from 7th May, 2018.

49. The Petitioners assert that the without prejudice communications cannot be relied upon, as they are privileged communication. What is the status of the without prejudice communications in this case?

50. In **Lochab Transport Ltd Vs Kenya Arab Orient Insurance Ltd [1986] eKLR**, it was held thus-

> **"..if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of that 'without prejudice' letter".**

51. In **Halsbury's Laws of England Vol. 17** at **paragraph 213**, the English Common law on the contents of "without prejudice" communications is stated as follows:

> **"The contents of a communication made "without prejudice" are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible."**

52. To the extent that the Petitioners introduced the without prejudice letter into the proceedings, and relied on the content thereof in support of their Petition, and to the extent that the Respondents equally relied on the contents of the said letter, the parties mutually waived their rights to the without prejudice communication. It is a trite principle of law that parties can mutually waive the rule on without prejudice, which is a rule of joint protection of parties' negotiations.

53. In **Rush and Tompkins Ltd V Greater London Council [1989] AC 1280 it was stated on the rule as to "without prejudice" communications that:**

> **"The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of negotiations being unsuccessful they are not to be referred to in at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. However, these cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it.... (emphasis mine).**

54. As earlier stated, and as shown in the without prejudice communication and parties' affidavits, their focus was on the payment of the default assessment of tax. In respect of such notice, there had been inadequate compliance by the Respondents and this resulted in undue and unfair pressure on the Petitioners. Although they had their accountant with them at the inadequately notified and un-procedurally convened meeting, not only did they not have notice of how to appeal the assessment, they had not been notified to avail their tax records and relevant

information with them at the meeting.

55. In all these respects, therefore, the Petitioners were placed at a distinct disadvantage and were prejudiced by the Respondents' actions. I am satisfied that the Petitioners were given the short end of the stick at the said meeting, and this was patently unfair. As such I find that there was a breach of the Fair Administrative Actions Act.

56. The Respondent sought to argue in reliance of **Anarita Karimi Njeru v R. [1979] eKLR** that the Petitioner was not pleaded with reasonable precision to enable the court to understand clearly the case as adopted in the case of **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.** In **Mumo Matemu** the court stated:-

> **"*The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:***
>
> **"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."**

57. I reject the Respondents' argument as applicable to this case. There can be no doubt that the Petitioners' petition clearly states that **Section 29** of the **Tax Procedures Act** was breached; and that they did not have a fair opportunity to contest the actions of the Respondents which affected them; and that this amounted to a violation of their constitutionally guaranteed right to fair administrative action.

58. A secondary prong of the Respondents' submission was to question whether the Petition herein was properly before this curt. Relying on the celebrated case of **The Owners of Motor Vessels "Lillian S" v Caltex Oil Kenya Ltd [1989] KLR 1**, they argued that this court had no jurisdiction in the matter and should lay down its tools. This submission was grounded on the argument that the Petitioners before going to the High Court, ought to have sought recourse in the Tax Appeals Tribunal under **Section 12** of the **Tax Appeals Tribunal Act 2013** read together with **Section 51 (a)** of the **Tax Procedures Act 2015**. I believe that the Respondent meant **Section 51(1)** of the **Tax Procedures Act.** The two provisions are as follows:-

> **"S.51(1) of the Tax Procedures Act:**
>
> **A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this Section before proceeding under any other written law."**
>
> **"S12 of the Tax Appeals Tribunal Act:**
>
> **A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period or the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal to the other party.**

59. The Respondents argument appears well founded, except that they are not entitled to blow hot and cold in the same breath. In their replying affidavit and submissions they assert that their letter of 17th April, 2018 was merely conveying the Petitioners with:

> **"……its investigations findings……[as part of] normal investigation practice where the taxpayer is informed of the findings and invited to provide documents and be heard before a formal tax assessment is issued to the tax payer**" (Paragraph 12 of Cyrell Wagunda's Affidavit).
>
> That being the position, according to the Respondents, there was in fact no formal tax assessment issued to the Petitioners which could found a "tax decision" capable of triggering an appeal under **Section 52 (1)** of the **Tax Procedures Act** and **Section 12** of the **Tax Appeals Tribunal Act.**

60. As I understand it, the scenario intended by the Respondents by their letter of 17th April 2018 was to notify the Petitioners that: following an investigation, it had been found that the Petitioners had not paid taxes of x amount (s); that the Petitioners should under **Section 61** of the **Tax Procedures Act**, appear before the Commissioner; and that under **Section 59** of the Tax Procedures Act, they should appear with such records and furnish such information in respect of the information availed as will enable the Commissioner to make an assessment or to consider the matter further. Instead, the letter turned out to be a tax assessment witha demand for payment thereof within seven (7) days to boot.

61. Accordingly, the Petitioners are entitled to challenge the actions of the Respondents on constitutional grounds of unfairness of procedure, before resorting to challenging the assessment as a tax decision. Given that the Petitioners were being afforded only seven (7) days to make a payment without due process, there was a breach of **Article 47** of the Constitution, in that their right to administrative action that is lawful reasonable and procedurally fair was expressly violated. That Article provides as follows:

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

(2) ……..”

62. On this point, I agree with the position taken by **Ngugi J** in **James Gacheru Kariuki & 22 Others v Kiambu County Assembly and 3 Others [2017] eKLR** where he stated:

> **“(32) It follows, then, that <u>when a person is aggrieved by an administrative decision, that person’s fundamental right as defined in Article 47 of the Constitution is potentially violated and that such a person may choose to bring a suit for enforcement of her fundamental rights under Article 23 of the Constitution</u>. Parliament, in giving effect to Article 47 of the Constitution has now enacted the FAAA which provides an avenue for bringing such a suit by an aggrieved party. That avenue is provided for in Section 9 of FAAA.**
>
> **(37)In these circumstances, it is evident that the constitutional petition promises better access to judicial review, and a need arises to abandon the so-called applications for judicial review simpliciter. The Constitution envisages a simple but clear petition that is un-encumbered by technicalities (such as the need to obtain the leave of the Court before filing an application, or restrictive time limits within which the substantive application can be made or judicial orders sought. For example, the need to obtain the leave of the Court arguably serves to prolong administrative injustices and prevents applicants from seeking timely remedies. In any case, the doctrines of justiciability and standing can always assist the Courts to sift deserving cases from non-deserving ones, meaning that they are not likely to be inundated with judicial review applications.”**

63. In answer to the question posed whether the Petitioners were afforded a fair opportunity to respond to a decision that materially and adversely affected them, the answer is no. They are therefore entitled to redress.

Whether an order Certiorari should issue

64. Given all that I have already said about the illegality of the procedure and process applied by the Respondents, it is clear that the notice dated 17th May 2018, and subsequent notices, are faulty, unprocedural and thus void. The court’s duty in such circumstances is not only to declare the said notice void but to call it up by way of certiorari, and to quash the same. I would quash the said notice.

65. Simply put, the effect of this, is that the Respondents have to restart the process in respect of this claim against the Petitioner.

Whether and if so how much compensation should be paid to the Petitioners on damages

66. In claiming damages f Kshs 2,000,000/=, the Petitioner relied on the cases of **Pastoli v Kabale District Local Government Council & 3 Others [2008]EA 300**, and that of **Dr. Robert K. Ayisi v Kenya Revenue Authority & Another [2018] eKLR**. In the **<u>Pastoli Case</u>** the Court of Appeal of Uganda sought to lay emphasis on the importance or significance attached to the provision bleached when it stated:

> **“In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned.**

67. In tandem with that thinking, I believe that the question of damages should be related to the seriousness and impact of the breach. In the **<u>Robert Ayisi</u> case** the violation against the Petitioner involved several egregious actions found by the court: the Petitioner’s privacy was invaded; he was arrested; he was “frog marched” in the city streets despite his pleas that he was ready to drive to the Respondent’s offices; he was imprisoned; the court found that he lost almost five years of his life without family or friends.

68. In the present case, the Petitioner alleged that five officers of the Respondent were hostile to her; that she was verbally threatened with arrest and freezing of her accounts; that her human dignity was violated. The Respondent said that the Petitioner appeared at the interview with her accountant, which involved a discussion on the way forward in terms of payment of the taxes due. They asserted that the Petitioner did not deny owing any of the amounts demanded.

69. The Petitioner did not avail any evidence in support of her allegations of mistreatment, hostility and threats by the Respondents. She did not deny in her supplementary affidavit that her accountant was present at the meeting. Instead, she complained that it would have been desirable for the Respondents to involve her auditor before slapping them with the tax demanded. It would have been expected that she would have produced an affidavit from her accountant who accompanied her to the said meeting, in support of her said allegations. I therefore do not find evidence supporting those allegations.

70. This is not to say that the Petitioner’s rights to fair administrative action were not proved or are not serious enough to warrant compensatory relief. What is clear to me is that this is a case where nominal damages are an appropriate relief. On account of the un-procedural actions of the Respondents, the Petitioner was improperly required to attend at the Respondents’ offices in Eldoret; she went with her accountant; she lost time and money; she was received subsequent notices. There is no comparison between this case and the **Robert Ayisi case**. I would assess nominal damages at 50,000/=.

Conclusion

71. In summary, I find that the Respondents were and are, entitled to carry out investigations and utilize the information obtained in the

fulfillment of their statutory mandates. Further, the Respondents were and are, entitled to inform the Petitioners of the outcome of their investigations insofar as such outcome will affect the Petitioners. This would include identifying unpaid or apparently unpaid taxes, and requiring the Petitioners, by notice to appear before the 2nd Respondent to produce records and information in respect of the tax liability or for any other purposes relating to a tax law, pursuant to sections 61 and 59 of the Tax Procedures Act,

72. The letter issued by the 1st Respondent to the Petitioners was more than a notification of investigations, and amounted to a tax default tax assessment. It did not accord with **section 29** of the **Tax Procedures Act**, and therefore it cannot stand.

73. As a consequence of the violation of the Respondent's rights to fair administrative action, they are entitled to compensatory relief. In this case, the violation was merely procedural and the allegations of mistreatment, threats of arrest and hostility remain unproved. Accordingly, only nominal damages for disruption are payable

Disposition

74. In light of all the foregoing, the Petitioners' petition succeeds, and the court issues the following orders:

75. A declaration hereby issues that the default assessment notice dated 17th April, 2018 issued to the Petitioners by the Respondents is unconstitutional, null and void and is in contravention of provisions of the Tax Procedures Act, Fair Administrative Action Act, 2015 and the Constitution of Kenya, 2010.

76. An order of Certiorari hereby issues to remove to this court and quash the default assessment notice dated 17th April, 2018 including the notice dated 4th May, 2018, issued to the Petitioners by the Respondents for being unconstitutional, null and void having been issued in contravention of provisions of the Tax Procedures Act, Fair Administrative Action Act, 2015 and the

77. Constitution of Kenya, 2010.

78. The Petitioner is awarded nominal damages of Kshs 50,000/=.

79. The Respondents shall bear the costs of the petition.

80. Orders accordingly

Dated and Delivered at Naivasha this 29th Day of May, 2019.

_____

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mburu holding brief for Gakuhi for the Petitioner

2. Chelangat for the Respondents

3. Court Clerk – Quinter Ogutu