



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTION AND HUMAN RIGHTS DIVISION**

**PETITION NO 398 OF 2018**

**SEYED HASSAN DASHTI KHAVIDAKI .....PETITIONER**

**VERSUS**

**THE KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. In a petition dated 13<sup>th</sup> November 2018, *Seyed Hassan Dashti Khavidaki*, the petitioner, filed a petition challenging certain actions by *Kenya Revenue Authority*, the 1<sup>st</sup> respondent contending that they violate his fundamental rights and freedoms. Simultaneous with the petition, the petitioner took out a motion on notice of even date seeking orders against the 1<sup>st</sup> respondent to have the 1<sup>st</sup> respondent release the petitioner's *Passport No E40006288*, a conservatory order prohibiting or restraining the 1<sup>st</sup> respondent or its servants from commencing any civil or criminal processes, arresting, questioning or threatening the applicant with respect to tax questions owed by *Farah International FZE Limited*, pending the hearing and determination of the petition. The motion, taken under urgency, was brought under Articles 22 and 23 of the constitution and is supported by the petitioner's affidavit sworn on the same day.

2. The grounds upon which the application is premised as can be discerned from the affidavit and the face of the motion, are that the petitioner is a non-citizen who travels a lot across East Africa while representing interests of *Farah International FZE Ltd* and despite this fact, the 1<sup>st</sup> respondent issued a Departure Prohibition Order (*DPO*) against him thus prohibiting the petitioner from travelling out of the country because of tax investigations relating to some Kshs188,373, 324 which is said to be owed by *Farah International FZE Limited*.

3. That the petitioner who was at the time the *DPO* was issued out of the country, decided to travel into the country to sort out the issue of tax but on landing at JKIA, he was accosted by the 1<sup>st</sup> respondent's officers who confiscated his *Passport No E40006288* and was promptly issued with a *DPO*. The petitioner deposes that he is neither director; shareholder nor manager of *Farah International FZE Ltd*. He states that although he had limited association with the company which is said to have a tax dispute with the 1<sup>st</sup> respondent, he did not derive any financial benefit from that company.

4. According to the petitioner, *Farah International FZE Ltd* has instructed a tax consultant to deal with the tax issue and the consultant has duly filed an objection to the tax demand. It is the petitioner's case that a *DPO* can only be issued against a director, shareholder or controlling member of the company as is clear from section 18 as read with section 45 of the Tax Procedures Act, 2015 and that the petitioner is not one of those persons. He contends that the *DPO* was issued maliciously to force him help the 1<sup>st</sup> respondent get to the directors of the company an action, he contends, violates his fundamental rights and freedoms. The petitioner deposes that he has been confined to the hotel and that he cannot step out or move without his passport, thus he has been forced into solitary confinement which amounts to unlawful confinement.

5. The respondents though directed to file a response to the application within a specified time due to the urgency of the matter, did not do so. The 1<sup>st</sup> respondent argued the application orally raising points of law.

**Submissions**

6. During the hearing of the application, *Prof. Ojienda*, learned Senior Counsel for the petitioner, submitted that the 1<sup>st</sup> respondent's action violated sections 18 and 45 of the Tax Procedures Act in that although the petitioner is not a director, shareholder or controlling member of the company, the 1<sup>st</sup> respondent nonetheless, seized the petitioner's *Passport* which amounted to curtailing his right to movement thus a violation of Article 39 of the constitution. According to learned Senior Counsel, the 1<sup>st</sup> respondent is violating rights of a person who is not an official of the company. He contended that the company has disputed the tax demand and filed an objection hence the issue of tax is not

settled and for that reason, the 1<sup>st</sup> respondent is acting illegally in subjecting the petitioner into confinement given that he cannot move around without his passport coupled with the issuance of the **DPO**.

7. He argued that the 1<sup>st</sup> respondent's action further violated the petitioner's right to dignity in that he has been forced into confinement and further that he was not subjected to fair administrative action as required by Article 47(1) of the constitution. According to learned senior counsel, the petitioner's Passport was seized upon landing at the JKIA thus he was not subjected to any known procedural fairness which is a violation of the petitioner's rights under Article 47 as read with the Fair Administrative Action Act. He urged the court to allow the application and grant conservatory orders sought pending the hearing and determination of this petition.

8. **Mr. George Ochieng**, learned counsel for the 1<sup>st</sup> respondent submits in opposition to the application for conservatory orders, that taxation is an obligation imposed by Articles 201, 209 and 210 of the constitution and that tax obligation is a shared responsibility. Learned counsel contends that the petitioner's right under Articles 39 and 47 is not superior to Articles 201, 209 and 210 of the constitution.

9. Learned counsel argues that the company owes tax and that the petitioner is the local representative of **Farah International FZE Limited** given that directors and shareholders of the company are non-citizens. He contends, therefore, that there is no one to be held responsible for the company except the petitioner. **Mr. Ochieng** further contends that a **DPO** is one of the methods of enforcement allowed by section 45 of the Act and that a **DPO** can be issued when there are reasonable grounds to believe that a person can leave the country without paying tax. Although **Mr. Ochieng** concedes that a company operates through directors, he argues that where directors are not in the country the law (section 45(4) allows a **DPO** to be issued against an authorized officers, and in this case, the authorized officer is the petitioner.

10. Learned counsel goes on to contend that if the petitioner's Passport is released and the **DPO** suspended, the petitioner is likely to leave the country. He argues that Article 24(1) of the constitution allows limitation of rights where there is a legitimate purpose. He contends that there is such purpose in this case and urges the court to dismiss the application.

### **Determination**

11. I have considered the application and submissions by counsel for both parties. The issue before this court at the moment is whether, the court should intervene and grant the orders sought namely; suspend the **DPO** issued against the petitioner and order release of his passport pending the hearing and determination of this petition.

12. The petitioner is a non-citizen. He is in the country on a work permit. He says he was representing the company alleged to have an issue with the 1<sup>st</sup> respondent over tax. His Passport was confiscated upon his arrival at the JKIA and a **DPO** promptly issued against. He contends that these two actions have led to his confinement at a Nairobi hotel since he can neither travel nor walk about without his passport. He also states that he cannot even transact any business without the Passport. In the petitioner's view, this amounts to unlawful confinement and a violation of his fundamental right of movement guaranteed under Article 39 of the constitution. The petitioner further contends he is not a controlling officer of the company or a shareholder in terms of section 45 as read with section 18 of the Tax Procedures Act.

13. The 1<sup>st</sup> respondent on its part contends that it acted within the constitution and the law since tax payment is a constitutional obligation and that the law allows it to take the actions it took against the petitioner. The 1<sup>st</sup> respondent also argues that the petitioner's right of movement is not absolute and according to the 1<sup>st</sup> respondent, the petitioner, being the representative of the company, he is the right person against whom the **DPO** could be issued and that the seizure of his Passport was intended to prevent him from leaving the county before the issue of tax was resolved.

14. I have considered the oral arguments in support of and against the application. The application before court is for conservatory orders. At this point, the court is not being called upon to go into the merits of the petition and render a conclusive and definitive determination. What the court is required to do at this stage is to consider whether the petitioner has satisfied the parameters for granting conservatory orders. That is; consider whether the petitioner has raised sufficient grounds that would make this court intervene and grant the conservatory orders sought.

15. The grounds upon which conservatory orders can be granted are well settled in this country. Decisions from the High Court through to the Supreme Court support this fact. A conservatory order is granted when an applicant succeeds to show to the satisfaction of the court that he has an arguable case and that if conservatory orders are not granted, he will continue to suffer prejudice and or that violation of his rights and fundamental freedoms will continue. In other words, an applicant must establish a prima facie case for the court to intervene. A prima facie case does not mean the case will eventually succeed at the end of the trial. The applicant is only required to show that there are triable constitutional issues in his case.

16. In the case of **Kevin K Mwiti & others v Kenya School of Law & others**, [2015] eKLR the court considered an application for conservatory orders and stated that the court must consider whether an applicant has established a prima facie case and in the view of the court;

**“A prima facie case... is not a case which must succeed at the hearing of the main case, but must be a case that is not frivolous. The petitioners has to show that he has a case which discloses arguable issues and in this case, arguable constitutional issues, but the court should not at this stage make definitive findings either of fact or law as that is the province of the court that will intimately hear the petition.”**

17. In **Kenya Association of Manufactures & 2 others v Cabinet Secretary Ministry of Environment and Natural Resources & 3 others** [2017]eKLR the court again observed that;

**“In an application for a conservatory order the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court that will bear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order”**

18. In the case of *Centre for Rights, Education and Awareness (CREAW) & 7 others v The Hon. Attorney General*, (Nairobi HC Pet. No 16 of 2011, *Musinga J*(as he then was) stated;

**“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”**

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

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

20. And in *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR the Court expressed itself thus;

**“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”**

21. The Supreme Court reinforced the above views in *Gitirau Peter Munya v Dickson Mwenda Kithinji and 2 others* [2014] eKLR stating that;

**“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success’ in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”**

22. Applying the above principles to the present application, the petitioner’s main concern is that his Passport has been seized in a manner that violates his fundamental rights and continued withholding it has immobilized his right to movement. He argues that he has been forced to stay in a hotel since he cannot venture outside without the passport thus violating his right to dignity. The petitioner further contends that he cannot transact any business without the passport thus violating his right to economic freedom under Article 38.

23. The right to movement is one of the fundamental rights in the Bill of Rights and to that extent; there is a question whether someone can be confined in a hotel room and unable to venture out for fear of arrest for lack of travel documents. I have perused the *DPO* dated 23<sup>rd</sup> October 2018. It does not state for how long it is to remain in force, which means it unclear for what period the petitioner will remain confined, unable to move or transact any business. It is therefore not clear how the petitioner meets his basic needs and whether this is not a violation of the right to one’s dignity, a constitutional issue that has been raised and is to be considered at the trial.

24. Secondly, the petitioner contends that he is not a director or controlling shareholder of the company and that he derived no financial benefit from the company. However, according to the *DPO*, the petitioner is named as the country director of the company. The respondent has therefore argued that the petitioner is the authorized official of the company and the right person against whom the *DPO* could be issued and his passport confiscated. It is evident from these contestations that the petitioner’s true relationship with the company is not clear since the documents attached to the application do not show him one of the directors or controlling members of the company against whom a tax demand has been made.

25. Thirdly, the petitioner has argued that his right to fair administrative action guaranteed under Article 47(1) of the constitution has been violated. The petitioner contends that he was not given an opportunity to know why his Passport was being confiscated and was not subjected to any procedural fairness. The petitioner has further argued that the company has objected to the tax demand notice which means the issue has to follow the due process. The 1<sup>st</sup> respondent has yet to respond to this constitutional challenge. Further, objection to tax demand notice means it has to go through the process. This being a legal process that has several stages it may take a while to resolve should the dispute escalate and go all the way to the courts. It is therefore unclear how long the dispute will take to resolve. It must also be clear that mere tax demand notice may not necessarily mean tax is due. It is subject to confirmation once the dispute is heard and when that happens in not clear

26. It is therefore important to bear in mind that in considering whether or not to grant a conservatory order, the court should always opt for the lower risk as opposed to the higher of injustice. Applying this principle in Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589, Ojwang, J (as he then was) stated that;

**“Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant”.**(emphasis)

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

28. Consequently, the application dated 13<sup>th</sup> November 2018 is allowed as follows;

- 1. A conservatory order is hereby issued suspending the Departure Prohibition Order issued against the petitioner on 23<sup>rd</sup> October 2018, pending the hearing and determination of this petition.**
- 2. An order is hereby issued directing the 1<sup>st</sup> respondent to release the petitioner’s Passport No. E40006288, pending the hearing and determination of this petition.**
- 3. This petition be fast tracked and heard without delay.**
- 4. Costs to abide by the result of the main petition.**

**Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of November 2018**

**E C MWITA**

**JUDGE**