



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
PETITION NO. 54 OF 2011

SAMURA ENGINEERING LIMITED.....1ST PETITIONER
PINNACLE DEVELOPMENT LIMITED.....2ND PETITIONER
ODYSSEY HOTELS LIMITED.....3RD PETITIONER
PRODIGY PROPERTY LIMITED.....4TH PETITIONER
GARDEN CITY LIMITED.....5TH PETITIONER
SPARTAN INVESTMENT LIMITED.....6TH PETITIONER
SAVANNAH FARMS LIMITED.....7TH PETITIONER
LA QUINTA LIMITED.....8TH PETITIONER
MUNGAI NGARUIYA.....9TH PETITIONER
NG'ANG'A NGARUIYA.....10TH PETITIONER
ELIZABETH NGARUIYA.....11TH PETITIONER

AND
KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th petitioners are limited liability companies incorporated in Kenya. The 9th, 10th and 11th petitioners are the companies' directors. They all bring this petition against the Kenya Revenue Authority, a statutory corporation established under the ***Kenya Revenue Authority Act (Cap 469 of the Laws of Kenya)***, which is the central body for the assessment and collection of revenue, for the administration and enforcement of law relating to revenue and for connected purposes.

2. This case concerns the exercise of the statutory powers of search and seizure exercised by officers of the Kenya Revenue Authority in execution its statutory mandate and whether exercise thereof violated the petitioners' rights and fundamental freedoms.

The Petitioners' Case

3. The 1st petitioner was contracted by the respondent to instal security equipment on its premises. After completion of the contract works, the respondent refused to pay arguing that the work was not done in accordance with the terms and conditions of the contract.

4. A dispute was declared and referred to a single arbitrator, Engineer P. T. Gichuhi, for determination. On 12th February 2011, the arbitrator notified the parties that the award was ready and would be delivered on payment of his professional fees.

5. On 2nd February 2011, ten days before the notification of the award by the arbitrator, the respondent, through its officers and in the company of police men raided the petitioners' offices at the Bounty Hotel and Industrial Area and carried away the petitioners' vital documents, equipment and personal items without prior notice.

6. Before the carrying out the search and seizure, the respondent's officers ordered the petitioners employees to stand and move away from their working desks. The officers demanded and were given PIN numbers of all the computers seized. An inventory was prepared for some of the the documents seized but others were not listed as the officers were in such a hurry that they forgot to open the big boxes which they carried away.

7. According to the 11th petitioner, who is the 9th petitioner's wife, the respondent's team was very menacing. She avers that she was singled out for humiliation and harassment for reasons unknown to her.

8. The petitioners aver that the documents which were not listed in the inventory included the following;

- (a) The 9th petitioner's will which was in one of the cabinets.
- (b) Sale agreements entered between the 4th petitioner and prospective buyers of properties developed by the said company.
- (c) Files containing medical records.
- (d) SACCO files.
- (e) Personal diaries.
- (f) Past and present court case files.
- (g) Arbitration files (including the one where the respondent was a party).
- (h) School records for the 9th petitioner's children.
- (i) Hospital and health insurance documents for the 9th petitioner and his family.
- (j) Many other personal documents.

9. The 1st petitioner avers that it wrote several letters dated 3rd February 2011, 7th February 2011, 7th March 2011 and 14th March 2011 requesting return of documents and equipment seized and which were required to facilitate the operations of the petitioner companies. According to the petitioners, the

respondent still has custody of the documents.

10. After the search and seizure, the 1st petitioner received a letter dated 4th March 2011 from the respondent being a notice made under **section 56 (1)** of the **Income Tax Act, (Cap 470)** and **section 30A** of the **Value Added Tax Act (Cap 476)**. The notice required the recipient to provide the respondent with details of all foreign bank accounts held by the directors and/or any company employees. On 5th March 2011, the 9th petitioner replied to the notice denying that the petitioner companies and their employees held foreign bank accounts save that the 9th petitioner held an inactive bank account in the UK.

11. The petitioners' aver that since the time the offices were raided, the petitioners' businesses were adversely affected by the unlawful and malicious actions of the respondent. The petitioners operations were greatly affected in the following ways:-

(a) Seizure of a criminal case file where the 1st petitioner had lodged a complaint against a person who bought goods from it using a fake order and issued a fake cheque. The case was coming up for hearing on 21st March 2011 but could not proceed owing to the fact that all the documents in support of the charge were taken away by the respondent.

(b) Seizure of the Arbitration files containing all the documents used in the arbitration between the 1st petitioner and the respondent. The 1st petitioner avers that the taking of the files unduly prejudiced it particularly given that further proceedings were contemplated after the award.

(c) Seizure of the documents pertaining to sale of properties by the 4th petitioner may expose it to litigation from potential buyers. The completion time for these transactions may be greatly affected thereby resulting to unwarranted litigation. In addition, the 4th petitioner had borrowed Kshs. 350,000,000 from Co-operative Bank which it intended to pay using proceeds from the sale of properties the subject matter of the said sale agreements. As a result of the seizure of the documents the 4th petitioner is unable to sell the said properties and service the loan.

(d) Seizure of the 9th petitioner's medical records, will and other private documents will have an impact on his family's general welfare including health and education.

(e) The petitioners were unable to prepare the final annual accounts for statutory purposes.

(f) Seizure of computers paralysed the petitioners' system in the sense that the accounts department could not issue statements to the customers especially in the hotel department. Bookings could not be made owing to confiscation of the booking books. In additions all other operation books were taken away greatly interfered with the smooth running of the hotel.

(g) Further, the operations of the petitioners were disorganised and income lost, the net result would be the inescapable loss of employment thereby affecting families and the customers in general.

12. The petitioners also aver that the manner in which the raid was executed violated their constitutional rights provided for under **Article 10** and **19** of the Constitution to the extent that the respondent did not take into account the principles of governance as regards preservation of human dignity, equity and promotion of social justice. The petitioners also contend that the respondent actions failed to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in violation of **Article 21** of the Constitution of Kenya.

13. The 9th petitioner also avers that the respondent's action of seizing his documents including personal documents such as medical records, hospital and health insurance records, will, diaries and agreements infringed his right of privacy enshrined under **Article 31**. In addition seizure of the documents, equipment and other items infringed on the petitioners right to property contrary to **Article 40** of the Constitution.

14. The petitioners further aver that respondent's actions to seize the court cases file and arbitration documents where they are parties infringes their right to a fair hearing under **Article 50** of the Constitution.

15. The petitioners further contend that the respondent has acted in a manner which is contrary to the purpose and objects of the Constitution particularly that it has acted in a manner which is disrespectful towards petitioners, their families and employees contrary to the provisions of **Article 73** of the Constitution.

16. The petitioners now seek the following reliefs in their petition dated 29th March 2011;

*(a) A declaration that the petitioners rights and freedoms under **Articles 10, 19, 21, 29, 31, 40, 47 and 73** of the Constitution of Kenya have been violated.*

(b) A declaration that the respondent's raid and seizure of the Petitioners' documents and equipments was done with an improper motive and that the use of force was disproportionate.

(c) A declaration that the petitioners are entitled to compensation for the infringement of the aforesaid rights.

(d) An inquiry be conducted on the amount of compensation payable as a result of violation of the petitioners' rights.

(e) An order of permanent injunction to restrain the respondent of itself or through its servants and agents from carrying out another raid, seizing any other document and doing any other thing which is prejudicial to the petitioners.

(f) A mandatory injunction directed to the respondent to order it to release all documents seized from the petitioners' premises in violation of their constitutional rights.

(g) Costs of the suit.

17. Apart from the petition, the petitioner relied on the supporting affidavit of Mungai Ngaruiya sworn on 29th March 2011, a further affidavit sworn on 24th May 2011 and a further supplementary affidavit sworn on 20th February 2012.

18. Mr Macharia, counsel representing the petitioners, stated that there were two issues for determination by the court. The first one was whether the respondent violated the constitutional rights of the petitioners and if so, what are the consequences of the violations. The issue of costs was a consequence of the two findings.

19. Apart from reiterating the contents of the petition, Mr Macharia submitted that it was common ground that on the 2nd February 2011, the respondent carried out a raid led by Ms Doreen Mbingi, the deponent of the replying affidavit. On that day, the respondents' team carried away documents and computers and in doing so, the respondent had to comply with **Articles 20, 21 and 31** of the Constitution as these impose fundamental duties on the respondent.

20. Counsel asserted that the petitioners had a right to privacy which had been breached in several respects. There is a 7 year limitation on collection of tax yet documents going back to thirty years were collected. The 9th petitioner's will, which is not relevant to the collection of taxes, was taken away as were his medical records and those of his children. Correspondence between some of the petitioners and their lawyers, including that in respect of the dispute between the 1st petitioner and the respondent, was taken away. Counsel submitted that the respondent actions were not only prejudicial but also wrong and abuse of the authority. According to the petitioners' a proper inventory of documents was not done.

21. Counsel contends that **Articles 40, 47 and 50** were infringed by the respondent's actions. The petitioners submit that they ought to have been given a demand of the documents that they had required and as no basis for the belief that an offence has been committed then the court should find that the respondent's action lacked a legal basis. The principle of proportionality is apposite in this regard.

22. Counsel drew the court's attention to Mr Ngaruiya's further affidavit sworn on 24th May 2011 setting out the tax status of the petitioner companies. As regards the 1st petitioner, it had been filing income tax, PAYE and VAT returns since incorporation and a tax compliance certificate issued on 30th March 2011. Counsel maintained that the petitioner companies have tax compliance certificates which are not issued as a matter of course. The 2nd petitioner denied that it was involved in any development scheme called Naiposha Holiday homes, a fact which the respondent indeed admitted was a mistake. The 3rd petitioner had also undergone a tax compliance check which was done in 2010 and was issued with an unqualified tax compliance certificate a year before the raid. As regards the allegation that the 1st petitioner had foreign exchange accounts, it was admitted that due to the nature of its regional business it was obliged to hold a foreign exchange account and in any case it was not illegal for a company to hold such an account.

23. All these facts, counsel contended showed that there was no reasonable basis for the respondent's action. It was counsel's submission that the petitioners before the court had cooperated with the respondent in the past and the respondent's conduct in carrying out the search would have been unnecessary had notice been given.

24. Mr Macharia maintained that the respondent action was also contrary to statute. Under **section 119** of the **Income Tax Act**, a warrant must be obtained to seize documents. **Section 120(1)** of the **Income Tax Act** only allows the respondent to take away extracts of copies of books required and not all books and documents taken away were required. Thus, counsel asserted that what the respondent did was utterly disproportionate. It was harassment, intimidation and abuse of power. Furthermore, the actions were not done in a dignified manner consistent with the values of the Constitution. It was counsel's view that even had the petitioners been requested to produce the books and they refused they would have committed an offence under **section 30** of the **Value Added Tax Act** which the respondent's would have enforced.

25. Counsel for the petitioner emphasised that the actions of the petitioner had to be reasonable in all circumstances. The powers granted to the respondent had to be conducted in light of **Article 24**. There must be a relationship between the limitation and purpose which embodies the principle of proportionality and the law was to be construed to avoid a "disproportionate counter mischief" which is what happened when the respondent purported to invoke its powers.

26. As a result of the violation of their rights, the petitioner seek damages. Mr Macharia contended that the court should order an inquiry as to compensation. He referred to the case of **Intoil Limited & Another v PS Ministry of Energy & Others Nairobi Petition No. 156 of 2006 (Unreported)** where the court held that in a constitutional petition the court may permit the parties to lead oral evidence. The petitioners' lost business as a result of the respondent's actions. Counsel contended that these proceedings are under **Article 22** of the Constitution therefore an alternative remedy is not applicable and there is no other remedy has been shown for this breach.

27. Counsel urged the court to allow the petition.

The Respondent's Case

28. The respondent has opposed the petition by way of the replying affidavit of Ms Doreen Mbingi sworn on 2nd June 2011 and a further affidavit sworn on 3rd August 2011. Written submissions dated 17th February 2012 were filed on the respondent's behalf. Ms Mwaniki, who appeared on the respondent's behalf relied on the written submissions and these depositions.

29. Ms Mwaniki submitted that **Article 209** of the Constitution makes provision for imposition of taxes

and the body established by statute to execute this mandate is the Kenya Revenue Authority. It administers provisions of written laws including the *Income Tax Act* and the *Value Added Tax Act*. Counsel submitted that **section 7** of the **Sixth Schedule** to the Constitution saves all laws in force with necessary modifications.

30. Ms Mwaniki emphasised that the respondent's actions in this case were guided by **section 31(1)** of the *Value Added Tax Act* and **section 56** and **120** of the *Income Tax Act*. **Section 31(1)** allows the respondent to enter without warrant any premises while **section 31(1)(b)** entitles the Commissioner to take possession of books and accounts if there is reasonable ground for belief that an offence has been committed. In counsel's view the circumstances of the current case entitled the respondent to act the way it did.

31. On examination of the material seized, additional tax was found due and the petitioner given opportunity to discuss the matter. The petitioner has not taken steps to discuss these audit findings and that issue is still pending.

32. The respondent avers that there has been no breach of the petitioner's rights and the rights and freedoms are not absolute and may be limited in certain instances and provided in **Article 24**. Counsel submitted that assessment and demand of tax is protected by the Constitution and is done through Acts of Parliament. Counsel maintained that the search, seizure and demand of taxes was done in accordance with the legislation.

33. As regards the investigation subject of these proceedings, the respondent avers that its decision was informed by a business intelligence report that the petitioners and their directors were not remitting appropriate taxes. Although the business intelligence report was not annexed to the affidavit, according to the replying affidavit of Ms Doreen Mbingi, the report disclosed the following:

(a) The 1st petitioner last filed annual returns in 2003 and VAT returns in October 2006 of which nil returns were filed between years 2000 – 2006. No PAYE returns have been filed.

(b) The 2nd petitioner is in the business of real estate development since 1995. It has been found to be under-declaring income for tax purposes. As the material time it was undertaking construction of 30 units under the name of Naiposha Holiday Homes in Naivasha each costing Kshs. 18 million.

(c) Although the 3rd petitioner had been declaring income, the same was found to be too low.

(d) The 4th, 5th, 6th and 8th petitioners are registered companies duly conducting business but have not been filing returns.

(e) The 7th petitioner does not file returns for income tax and but has been filing the VAT returns.

(h) The 9th, 10th and 11th petitioners are directors of the 1st to 8th petitioners and are closely associated with the petitioners.

34. After the raid was carried out, the parties began a series of correspondence. In order to obtain full information on the trading and income status of the petitioners, the respondent pursuant to its powers and by a letter dated 4th March 2010 sought to be provided with details of any foreign accounts held by the petitioners and or their associates as employees.

35. In response to the letter, the 9th petitioner admitted to participating in foreign exchange trading online. The respondent's replying affidavit annexed copies of cheque leaves in respect of foreign currency accounts held by some of the petitioners that were seized in the raid.

36. According to Ms Mbingi, the discovery of the foreign currency accounts and the admission by the 9th petitioner was an indication that there were certain income generating activities of the petitioners that

the respondent may not have been aware of and which the petitioners may not have been making disclosure of in the routine compliance and audit checks.

37. The respondent also avers that though the petitioners were issued with compliance certificates and subjected to tax audits, such compliance and audit checks are conducted based on the information submitted by the tax payer at the time of the audit and on the basis of documents and information provided thus the respondent could not establish the existence of activities aimed at tax evasion.

38. The respondent also avers that the conduct of compliance and audit checks is not a bar to the carrying out of further investigation into the affairs of a tax payer especially where information of tax evasion is provided. The respondent categorically denies that the raid and seizure have no relation to the arbitration proceedings between the 1st petitioner and the respondent.

39. In response to the petitioners' argument that the respondent should have issued a notice before conducting the raid, the respondent contends that in view of the circumstances under which the raid herein was conducted no notice would have been given nor would the investigators have had time to sift through the huge mass of documentation to determine what would have been relevant for the purpose of the investigation.

40. Ms Mbingi depones that from her experience as a tax investigator she is aware that tax evaders go to great lengths to conceal documents and information that may aid in tax investigations hence the need to seize everything found and meticulously sort it out. The respondent maintains that the process of sorting the documents was continuous and several documents have since been released to the petitioners.

41. Counsel for the respondent also relied on the cases of *Anarita K Njeru v Republic (No. 1) [1979] KLR, Meme v R [2004] 1 KLR 637* and *Kerosi Ondieki v The Public Service Commission & Others Nairobi Petition No. 45 of 2011 (Unreported)* for the principle that the petitioners had to show the particular provision of the Constitution that has been infringed and how it has been infringed. In this respect, counsel submitted that the petitioners have failed to satisfy the test provided in these cases. She contended that this was not a fit case for this court and there was nothing unconstitutional in the statutory provisions as all legislation must be presumed to be constitutional and the petitioner has not shown otherwise.

42. Ms Mwaniki also submitted that there were alternative remedies for the petitioners. According to her **Article 47** guarantees a right to fair administrative action which provides for a remedy by way of judicial review to challenge unfair administrative action. Pursuant to **section 7** of the **Sixth Schedule**, this jurisdiction exists under the **Law Reform Act (Cap 26)** and **Order 53** of the **Civil Procedure Rules**. Counsel added that the law governing disputes relating to tax audits, investigation, verification and demand has provided dispute resolution mechanism in the event a party is dissatisfied with the decision. Counsel emphasised that taxation is a technical and complex area and the tribunals established to deal with tax issues have persons who are with experts in the various areas of taxation hence **Article 159(2)** imposes on the court authority to encourage alternative dispute resolution.

43. On the whole counsel submitted that this is not a proper case for the invocation of constitutional relief. Counsel referred to the cases of *Alphonse Mwangemi Munga & 10 Others v African Safari Club Nairobi Petition No. 564 of 2004 (Unreported)* and *Harrikisson v Attorney General of Trinidad and Tobago [1980] AC 265* for the proposition that where there is an avenue for relief under statutes which are open and available, the High Court should not be burdened with matters that are not fit for determination under **Article 22** of the Constitution where alternative means of redress are available.

44. According to counsel for the respondent, the petition does not raise any constitutional issues, the petitioners have failed to demonstrate the nature and breach of fundamental rights and there is an alternative dispute resolution mechanism to deal with the dispute between the parties. Counsel contended that compensation cannot be awarded as petitioner has not established any wrong committed nor losses incurred in the matter.

Jurisdiction to enforce of fundamental rights and freedoms

45. Before I proceed to consider the particular issues of breach of the petitioner's fundamental rights and freedoms, I would like to deal with some preliminary issues raised by the petitioners and respondent in their submissions particularly as concerns the extent of the court's jurisdiction to deal with matters of fundamental rights and freedoms.

46. The proceedings before the court are essentially for the enforcement of fundamental rights and freedoms protected by the Constitution provided under **Article 22** and **23** of the Constitution. The purpose of the procedure enacted in **Article 22** of the Constitution is to enforce specific fundamental rights and freedoms of the individual guaranteed under the Bill of Rights set out in **Part 2 of Chapter 4** of the Constitution.

47. Since enforcement of the Bill of Rights is a special jurisdiction, it is therefore an incident of this jurisdiction that a party who invokes this special **Article 22** jurisdiction has a duty to set out clearly the sections or provisions it is claimed have been infringed or violated and show how these sections are infringed in relation to him or her. This principle has been established in a long line of cases since *Anarita K Njeru v Republic (Supra)*. (See also *Meme v R (Supra)* and more recently in respect of the Constitution, *Kerosi Ondieki v The Public Service Commission & Others Nairobi Petition No. 45 of 2011 (Unreported)*).

48. Mr Macharia, in his oral submissions, took the view that this principle and the cases that enunciate it were rendered obsolete by the enactment of the Constitution. In the case *Joseph Kimani Mwai v Town Clerk Kangema Nairobi Petition No. 1039 of 2007 (Unreported)* the court considered the rationale for this requirement and observed that, “[21] *The reason for this requirement is twofold; first the respondent must be in a position to know the case to be met so as to prepare and respond to the allegations appropriately. Secondly, the jurisdiction granted by section 84 of the Constitution is a special jurisdiction to enforce specific rights which are defined by each section of the bill of rights. It is not a general jurisdiction to enforce all rights known to man but specific rights defined and protected by the Constitution. It is not sufficient to rely on a broad notion of unconstitutionality but rather point to a specific provision of the constitution that has been abridged. [22] Unfortunately, the petition does not set out specific provisions of the Constitution infringed. It is true that the submissions point to specific provisions but it is the pleadings that enable the party to respond to specific allegations. [23] I hold the view that unless specific provisions are cited or pleaded with sufficient particularity, the respondent, who is being accused of violation, may not be able to furnish evidence or bring facts which bring it within the specific exceptions, provisos or limitation. The nature extent of particularity must depend on each case but it must nevertheless enable the court identify the violation and enable the respondent defend himself.*” I hold that these reasons apply with equal force to the Constitution and to proceedings under **Article 22** of the Constitution.

49. The respondent has taken the view that the facts do not disclose a constitutional matter and therefore this matter should be dismissed. I think this is the wrong approach to the exercise of this court's jurisdiction under **Article 22**. The duty of the court is to determine, on the facts as pleaded and presented, whether or not there has been a violation of the petitioner's rights. It is not to decide whether, in fact, there is another suitable remedy or whether the matter could have been resolved in another forum or whether the matter is merely a civil matter.

50. In the case of *Rashid Odhiambo Aloggoh & 245 Others v Haco Industries Ltd Nairobi Civil Appeal No. 110 of 2001 (Unreported)* the Court of Appeal stated that it was the duty of the court to consider the allegations set out in the pleadings and depositions and decide whether they constitute a breach of fundamental rights and freedoms. In that case, the High Court had struck out the petition lodged by the claimants on the basis that it was essentially an employment claim. The Court of Appeal reinstated the matter and held that the duty of the court in considering an application under **section 84** of the former Constitution is to determine whether or not there is a violation of fundamental rights and freedoms and not whether a matter is contractual or otherwise.

51. Thus following the *Rashid Allogoh Case*, the question for consideration in this petition brought under **Article 22** of the Constitution is not whether another remedy exists under statute but whether a violation or infringement of the petitioners' fundamental rights under the Constitution are disclosed.

52. While I endorse the sentiments expressed in the case of *Harrikissoon v The Attorney General of Trinidad & Tobago (Supra)* and *Alphonse Mwangemi Munga & 10 others v African Safari Club (Supra)* regarding the abuse of the procedure for determination constitutional claims, the principle stated therein cannot be used as a basis for denying a petitioner free and unhindered access to relief provided by **Article 22** of the Constitution.

53. The right of access provided under **Article 22** and **23** is independent and constitutionally guaranteed and cannot be made subservient to an alternative remedy. The Constitution is the supreme law of the land and the provisions of **Article 22** and **23** are not subject to any other alternative remedies existing in law. Once the court comes to the conclusion that there has been an infringement of a fundamental right and freedoms, it is by virtue of the **Article 23** entitled to frame any remedy that will ameliorate the wrong done to the petitioner.

54. I am also satisfied that neither the Value Added Tax Appeals Tribunal established under **section 32** of the *Value Added Tax Act* nor the Local Committee and the Tribunal the established under **sections 82** and **83** of the *Income Tax Act* respectively have jurisdiction to deal with the violations of fundamental rights and freedoms protected under the Constitution which are a preserve of the High Court under the Constitution.

55. For the High Court to deny itself jurisdiction under **Article 22** and **23** to grant an effective remedy would be to diminish the efficacy of the bill of rights. This is not to say that the court may not consider alternative means of dispute settlement or existing statutory provisions to frame an appropriate remedy but this must be done in a manner that underpins the teeth contained in the enforcement provisions of the bill of rights.

56. My duty therefore is to determine whether the applicant's rights under bill of rights have been violated and if so whether the petitioner is entitled to the relief sought in the petition.

Breach of the Petitioners Fundamental Rights and Freedoms

57. It is important to note that reference to the preliminary matters or general provisions relating to the Bill of Rights set out in **Part 1** of **Chapter 4** apply to the interpretation of the Bill of Rights. Similarly the values set of in **Article 10(2)** are by virtue of **Article 10(1)** applicable to the court in handling the task of applying and interpreting the Constitution. The Court is also required to apply the provisions of **Article 259** of the Constitution. **Article 259(1)** provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. I am alive to these principles and cases that enunciate them (See *Centre for Rights and Awareness & Others v Attorney General Nairobi Petition No. 16 of 2011 (Unreported)* and *Harun Mwau v The Attorney General & Others Nairobi Petition No. 146 of 2011 (Unreported)*).

58. I wish to emphasise that Kenya Revenue Authority as the State agency charged with the collection of taxes is bound by the provisions of the Bill of Rights to the fullest extent in the manner in which it administers the laws concerning the collection of taxes. The values contained in **Article 10** must all all times permeate its functions and activities which it is mandated to carry out of by statute.

59. Having read the petition, affidavits in support and the replying affidavits, the written submissions and heard the parties, the question for consideration is whether the following the petitioner's rights and fundamental freedoms guaranteed under **Articles 10, 19, 21, 29, 31, 40, 47** and **73** of the Constitution of Kenya have been violated as claimed in prayer (a) of the petition.

60. The purpose of **Article 22** is to enforce the fundamental rights set out in part 2 of Chapter Four of

the Bill of Rights, that is, the rights enumerated at **Articles 26 to 51**. **Article 10** sets out the national values and principles of governance. These values and principles do not give rise to justiciable rights separate from the bill of rights but apply to all State organs, State officers, public officers and all persons whenever any of them applies or interprets this constitution, enacts, applies or interprets any law, or makes or implements policy decisions. These values are the interstitial fluid by which the bill of rights is nourished.

61. Similarly, **Article 19** is a general provision which sets out the place and purpose of the Bill of Rights and the principles set out therein together with all the general provisions contained in **Part 1** of the **Bill of Rights** are employed by the court in the task of interpreting and enforcing the **Bill of Rights**.

62. I shall therefore examine the allegations made by the petitioners in light of the specific provisions of the bill of rights which have been pleaded namely; **Articles 29, 31, 40, 47 and 50** of the Constitution.

Freedom and Security of the Person – Article 29

63. **Article 29** provides as follows;

29. Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) subjected to any form of violence from either public or private sources;

(d) subjected to torture in any manner, whether physical or psychological;

(e) subjected to corporal punishment; or

(f) treated or punished in a cruel, inhuman or degrading manner.

64. The purpose of **Article 29** is to protect the physical and psychological integrity of the person. Neither the pleadings nor depositions show or demonstrate how this right was breached. There is neither allegation nor evidence that the 9th to 11th petitioners were arbitrarily deprived of their freedom, detained without trial, subjected to violence, torture corporal punishment or treated or punished in a cruel inhuman or degrading manner. I therefore find that the petitioners' rights under **Article 29** were not breached.

Infringement of the Right to Privacy

65. **Article 31** of the Constitution provides as follows;

31. Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

66. The right to privacy enshrined in our Constitution includes the right to not to have one's person or home searched, one's property searched or possessions seized. Since searches infringe the right to

privacy, they must be conducted in terms of legislation which must comply with the provisions of **Article 24**. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains of ordinary citizens is one of the features that distinguish a democracy from a police state. (See *Mistry v Interim National Medical and Dental Council & Others* CCT 13/1997 [1998] ZACC 10 at para. 25 per Sachs J.).

67. Counsel for the petitioners did not address the court on the nature, extent and content of the right of privacy protected by **Article 31**. The petitioner did not contend that the relevant provisions of the *Kenya Revenue Authority Act*, *Income Tax Act* and the *Value Added Tax Act* were unconstitutional as such this judgment is not about the constitutionality of the provisions of the Acts. Both the petitioner and the respondent argued the case on the basis of the statutory legality of the respondent's conduct. I will therefore confine my inquiry as to the propriety of the search which the respondent contends was conducted within the scope of the governing legislation.

68. The 1st to 8th petitioners case concern's the seizure of their business documents and while the 9th petitioner's personal documents like medical records, hospital and health insurance records, will and diaries were taken in violation of the right of privacy enshrined in **Article 31**.

69. These laws in so far as they permit invasion of privacy must be justified under the limitation clause contained in **Article 24** of the Constitution. The petitioners' complaint was that the respondent's conduct was contrary to the statutes and therefore unconstitutional to the extent that it contravened the statutes themselves. I shall now proceed to review the law permitting of the search and seizure under which the respondent claims authority for its action.

70. The *Income Tax Act*, sections 119 and 120 provide for the power to search and seize and to inspect books. These sections provide as follows;

119.(1) *If an officer of the rank of Principal Revenue Officer or above authorized by the Commissioner to inquire into the affairs under this Act of a person satisfies a magistrate that the person has committed, or is reasonably suspected of committing, an offence under this Act, the magistrate may by warrant authorize the officer to exercise all or any of the following powers -*

(a) *to enter any premises between sunrise and sunset to search for money, documents or other articles relevant to the inquiry;*

(b) *to open, or remove from the premises and open, any container, box or package in which it is suspected that money, documents or relevant articles are contained;*

(c) *to seize money, documents or relevant articles which may be necessary for the inquiry or for the purpose of civil or criminal proceedings and to retain them for as long as they are so required:*

Provided that -

(i) *in the case of documents held by a banker the powers of the officer under this section shall be limited to making copies or extracts therefrom;*

(ii) *signed receipts of the documents and the relevant articles seized shall be provided to the suspected person.*

(2) *In the exercise of powers authorized by warrant under subsection(1), the officers shall require a police officer to be present during the exercise thereof and a police officer so required shall comply with that requirement.*

(3) *For the purposes of subsection (1), the magistrate may require the officer or any other person to give such evidence on oath as may be necessary to satisfy him that the person whose affairs are the subject of inquiry has committed, or is reasonably suspected of committing, the offence concerned.*

Power to inspect books and documents.

120(1) Notwithstanding anything to the contrary in any provision or rule of law, an officer authorized by the Commissioner to inquire into the affairs of a person for any of the purposes of this Act shall at all time have full and free access to all lands, buildings, and places, and all books and documents, whether in the custody or control of a public officer, or of a body corporate or of any other person whatever, for the purpose of inspecting books and documents or for any other purpose he may consider relevant to the inquiry, and may make extracts from or copies of those books or documents.

(2)An officer acting under subsection (1) may require the owner or Manager of a property or business, or a person employed in connection with that property or business, or any other person, to give him all reasonable assistance and to answer all proper questions relating to the inquiry, either orally or in writing and for that purpose may require the owner or manager, or in the case of a company an officer of the company, or any other person, to attend at the premises with him. [Emphasis mine]

71. The provisions of the **Value Added Tax Act** regarding inspection search and seizure are provided for under **section 31** as follows;

31. (1) An authorized officer may, at all reasonable times, enter without warrant any premises upon which any person carries on business, or in which he has reasonable grounds to believe that a person is carrying on business, in order to ascertain whether this Act is being complied with (whether on the part of the occupier of the premises or any other person) and on entry he may -

(a) require the production of, and may examine, mark and take copies of, any record, book, account or other document kept on the premises relating, or appearing to relate, to the provision of any taxable supply;

(b) take possession of and remove any record, book, account or other document which he has reasonable ground for suspecting to be, or to contain, evidence of the commission of any offence under this Act;

(c) require the occupier of the premises or any person employed therein to answer questions relating to any record, book, account or other document, or to any entry therein, and to render such explanations, and give such information, in respect of the business concerned as the authorized officer may require for the exercise of his functions under this Act;

(d) require any safe, container, envelope or other receptacle in the establishment to be opened;

(e) at the risk and expense of the occupier of the premises, open and examine any package found therein;

(f) take and retain without payment such reasonable samples of any goods as he may think necessary for the exercise of his functions under this Act.

72. Under the provisions of the **Income Tax Act** cited above, the power to search and seize must be on the basis of a warrant issued by the court which must be satisfied that an offence has been committed or a person is reasonably suspected of committing an offence. While the power to inspect books and documents under **section 120(1)** allows the Commissioner and person authorised by him to access books and documents and allows the person so authorised to make extracts from or copies of those books.

73. The search and seizure complained of by the petitioners could not have been under the **Income Tax Act** as no warrant of search was obtained and the Act does not permit carrying away of books but only of extracts of those books and documents. Thus the acts of the respondent must be determined in light of the provisions of the **Value Added Tax Act**.

74. **Section 31(1)** of the **Value Added Tax Act** permits warrantless entry into a person's premises on

the basis of reasonable grounds established that the Act is not being complied with. Under **section 31(2)**, the Commissioner is only entitled to take possession and remove any record, books of accounts or other documents when he has reasonable ground for suspecting they contain evidence of the commission of any offence under the Act.

75. As a warrantless search and seizure cannot be challenged before it is conducted, the party affected is entitled to challenge the action afterwards and the court is entitled to declare the exercise invalid. The court's duty in such a case is to assess objectively whether on the evidence present, there were reasonable grounds established to conduct a warrantless search in light of the petitioner's rights to privacy. This inquiry is to be conducted on the basis of the facts as they existed when the raid was carried out on 2nd February 2011.

76. The replying affidavit of Ms Doreen Mbingi sworn on 2nd June 2011 alluded to a business intelligence report which formed the basis of the search and seizure. What was disclosed to the court were certain salient facts and conclusions which I have set out at paragraph 31 above. Since a warrantless search and seizure is a limitation to the right of privacy, the facts forming the basis of the suspicion must be laid before the court for it to conduct an independent assessment to determine whether the acts are reasonable and justifiable in the open and democratic society based on human dignity, equality and freedom as provided in **Article 24**. The burden to establish that the conduct complained of meets the standards established by **Article 24** is borne by the party justifying the limitation, that is the respondent in this case.

77. Payment of taxes is the obligation of every citizen. It is a means by which we all support the state and its function for our own welfare. Tax evasion is a cancer that undermines the State and the constitutional structure thus law enforcement and tax collection agencies must have the tools that can effectively deal with this vice. The obligation of the State, through the respondent, to collect taxes by law must be balanced with that of the individual right to privacy and dignity and in balancing these rights, the State must justify its actions. By placing the values of rule of law, good governance, transparency and accountability at the centre of the Constitution, we must now embrace the culture of justification which requires that every official act must find its locus in the law and underpinning in the Constitution

78. The respondent has not placed before the court material, which was available to it on 2nd February 2012, upon which the court may make its own assessment and conclusions to determine whether the action it took was reasonable. In the circumstances, I must therefore conclude that there was no reasonable basis upon which a warrantless search and seizure was effected. It therefore follows that the search and seizure contravened the provisions of **Article 31** of the Constitution.

79. There is also no material before the court to demonstrate that the petitioners' property seized was reasonably suspected to contain evidence of commission of an offence under the Act. There is also no evidence before this court to show some items and documents like the will, medical records, school reports, correspondence with lawyers and doctors fell within the terms of **section 31(1)(b)** of the **Value Added Tax**. No justification has been shown why these items were taken yet they are very personal documents. Seizure of such documents, particularly those that do not have a demonstrable relationship with the collection tax cannot be supported either by the Act or the Constitution. In this respect therefore, the acts of the respondent contravened **Article 31** of the Constitution.

80. What is more troubling is the statement by Ms Mbingi at paragraph 18 of the Replying Affidavit that, *'Further, from my experience as a tax investigator I am aware that tax evaders go to great lengths to conceal documents and information that may aid in tax investigations hence the need to seize everything found and meticulously sort it out.'* Firstly, this is troubling because there was no evidence from which this court could reasonably conclude that the petitioners were tax evaders. Secondly, the law does not permit the respondent to seize everything found on the premises. The duty cast upon respondent is to identify at the premises those items that are reasonably connected to commission of an offence under the Act. Thirdly, I am concerned that the respondent did even attempt to identify any specific offence under the Act that it suspected that the petitioners' were suspected of committing. To allow this course suggested by the respondent is to invite a police state.

81. Even if I were to conduct an evaluation of evidence provided after the search, the benefit of hindsight does little for the respondent's case. There is no evidence that the petitioners were involved in any activity that would be indicative of tax evasion to the extent that would entitle the respondent to conduct a warrantless search and seizure. I do not find any evidence of deliberate concealing of information or active destruction of documents. In fact, the history between the petitioners and the respondent is one of constant engagement which negatives any intention to evade payment of tax.

82. The respondent has argued that it has called upon the petitioners' to collect some of the documents that it had seized. During the proceedings, a consent order was recorded on 13th April 2011 where it was agreed that, "*the respondent to make available copies of relevant documents which were taken from the petitioners within 7 days from today.*" The fact that documents were released during the proceedings does not affect the legality or otherwise of the search and seizure. It would only be relevant to my consideration of the relief.

83. In summary, I find that no material has been placed before this court by the respondent to show, that it was entitled to conduct a warrantless search of the petitioners' premises and seize of their property. I hold that warrantless search and seize of the petitioners property without a reasonable belief that the documents taken contain evidence of commission of any offence under the Act is a breach of the petitioners' right to privacy guaranteed under **Article 31**.

Infringement of the Right to Property

84. As I have found that the seizure of the petitioners' property was unconstitutional, it is unnecessary to carry out an inquiry whether **Article 40** was breached. Moreover, the pleadings and affidavits do not set out or demonstrate how **Article 40** was infringed or violated.

Right to Fair Hearing and Fair Administrative Action.

85. In the case of *Dry Associates Ltd v Capital Markets Authority & Another Nairobi Petition No. 328 of 2011 (Unreported)*, the Court observed that, '*[62] Article 47 and 50(1) protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. Article 50(1) applies to a court, impartial tribunal or a body established to resolve a dispute while Article 47 applies administrative action generally. Article 50(1) deals with matters of a civil nature while the rest of the Article deals with criminal trials. Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.*'

86. Paragraph 21 of the petition states that "*the petitioners further aver that respondents' actions to seize court cases files and arbitration documents where it is a party infringes on the right to a fair hearing.*" According to the 1st petitioner one of its cases namely; *HCCC No. 694 of 2009 Milimani Samura Engineering v Kenya Tea Development Authority Limited*, was adjourned on 6th April 2011 when it came up for hearing.

87. No evidence has been presented to show whether these suits or cases have been dismissed or are still pending or cannot be prosecuted by reason of the respondent's acts. I am thus unable to discern how the petitioners' rights to a fair hearing in this or any other case were infringed.

88. Similarly, **Article 47** is pleaded in prayer (a) of the petition but the petitioners do not set out how **Article 47** has been infringed by the respondent in the body of the petition or the supporting depositions. In the circumstances, I do not find any breach of **Articles 47** and **50** of the Constitution by the respondent.

Remedies

89. **Article 23(2)** vests in the High Court the discretion to award relief, including the reliefs of the

nature set out in the Article in order to vindicate the violation of the Bill of Rights. The High Court is granted wide latitude to frame appropriate relief according to the circumstances of each case.

90. The petitioner's have prayed for declarations, damages and incidental relief. I have already found the respondent liable for violating the petitioners' rights. A declaration to that effect will articulate the fact of infringement but this alone will not soothe the petitioners' whose rights have been violated. An award of compensation would go some way to giving full and tangible effect to the Bill of Rights.

91. The petitioner's pray that this court should conduct an inquiry of damages due for the violation. Counsel submitted that I should adjourn the matter and take oral evidence to determine the compensation due to the petitioners.

92. On the date of the hearing a supplementary affidavit sworn by the 9th February 2012 by the 9th petitioner was filed on behalf of the petitioners which stated as follows;

2. THAT the raid was carried out by the Respondent did lead to considerable loss and damage in the business carried out by the petitioners.

3. THAT the Respondent has not returned all the documents it and property it took from the Petitioner's premises, the Petitioners have endeavoured to set out the extent of special damages in the bundle of documents annexed hereto and marked as "MN1."

4. THAT the quantification of losses was not possible before now since the petitioners required their documents to be returned so as to reach a fairly accurate assessment of the loss and damage, I crave for leave of this court to allow me to amend the petition so as to plead the special damages as set out above.

93. While I take the view that this court has wide jurisdiction in the award of relief and discretion in the manner it conducts its proceedings, the course proposed by the petitioners is rejected. It is the duty of the petitioners to bring forth their whole case for determination unless there are exceptional circumstances that require that the case be bifurcated into a liability and damages phase. In any event no such direction was sought prior to the hearing of the petition.

94. Furthermore, the facts upon which the claim for compensation was made are well known to the petitioners and could have been brought by way of affidavit before the hearing. Such facts as would have formed the basis for an award of compensation are set out in paragraph 10 of this judgment. For example at paragraph 10(c) above, the 4th petitioner claims that it has been unable to sell certain properties as a result of seizure of its documents. Nothing would have been easier than for it to furnish the evidence of any aborted sales and quantify such loss.

95. I find that it would not be in the interest of justice to allow the proposed amendment of the petition this late in the proceedings. It would be prejudicial to the respondent who would be denied the opportunity to examine the evidence and defend itself accordingly.

96. Whether or not to grant compensation is a matter for the discretion of the court under **Article 23(2)**, the main consideration for the court in awarding relief is whether the right violated or infringed has been vindicated by the nature of the relief granted. A party who seeks compensation as part of the relief under **Article 23(2)** has the burden of proving the nature of and extent of the compensation in so far as it relates to the breach alleged.

97. The supplementary affidavit, whose contents I have set out at paragraph 92 above, filed on behalf of the petitioners to support its case for compensation constitutes a mass of evidence which does not show the causal link between the constitutional breach and the loss sustained by the petitioners. A party who seeks compensation apart from particularising the loss must demonstrate that the loss is directly related to the breach. This court deprecates the practice where parties merely dump documents by way of an affidavit that does not explain or set out the tenor and effect of each of the documents attached to it. The court is not clear what the bundle of documents marked as "MN 1" is about and it shall not subject the

respondent to this agony.

98. I am however convinced that this is case which a mere declaration will not suffice, it must be followed an award of damages which will reflect the fact that the Court's view that wanton violation of privacy is not acceptable. The parties did not furnish the court with any indicators of damages awarded by the courts in similar cases or provide any guidance to assist the court.

99. Though the 1st to the 8th petitioners are separate companies, they have common directorship. No effort was made in the petition to separate the violation in respect of each company and it appears that correspondence relating to the search and seizure was done through the 1st petitioner by the 9th petitioner. It was therefore not clear how each of the companies was effected by the violation of their rights. Therefore doing the best I can in the circumstances, I award the the 1st to 8th petitioners jointly a sum of **Kshs. 800,000.00** for the breach of **Article 31(a)** and **(b)** of the Constitution.

100.As regards the 9th Petitioner, I take into account that the purpose of the right to privacy is to protect human dignity which is itself a right protected under **Article 28**. The taking of his personal documents including his will, medical records and those of his children, school documents and other documents which had nothing to do with tax affairs were taken is really an attack on the inner sanctum of a person. In the circumstances I award him **Kshs. 1,200,000.00** as damages for breach of **Article 31**.

101.The 11th petitioner as the wife of the 9th respondent's had her right to privacy breached by the respondent taking her medical records and those of her children and taking into account the circumstances I therefore make an award of **Kshs. 600,000.00**.

102. As regards the 10th petitioner, the pleadings do not disclose which of his rights were violated and how those rights were violated quite apart from the fact that he was a director of the company. I am therefore constrained to dismiss his claim but with no order as to costs.

103.The respondent has had the petitioners' documents and equipment in its possession since 2nd February 2011. The logical consequence of my finding is that all the documents and equipment in the respondent's possession must be released to them. I so order.

Disposition

104. Taking into account all the facts and the circumstances of this case and the findings I have made I now enter judgment as follows;

a) I declare that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th petitioners' rights to privacy protected under **Article 31(a)** and **(b)** of the Constitution were violated by the respondent's search and seizure of their property on 2nd February 2011.

b) I declare that the 9th and 11th petitioners' rights to privacy protected under **Article 31** of the Constitution were violated by the respondent's search and seizure of their property on 2nd February 2011.

c) I award damages to the petitioners as follows;

(a) **Kshs. 800,000.00** jointly to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th petitioner,

(b) **Kshs. 1,200,000.00** to the 9th petitioner.

(c) **Kshs. 600,000.00** to the 11th petitioner.

d) I direct the respondent to release to the petitioners all the documents and equipment in its possession seized from the petitioners' premises within **fourteen (14) days** from the date hereof in default

the petitioners shall be at liberty to apply for further orders.

e) The respondent shall pay the costs of this suit.

f) The 10th petitioner's suit is dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 9th day of March 2012

D. S. MAJANJA
JUDGE

Mr T. Macharia instructed by Mbugwa, Atudo & Macharia Advocates for the petitioner

Ms W. Mwaniki instructed by the Kenya Revenue Authority for the respondent.