



REPUBLIC OF KENYA



**Shah & 4 others v Kenya Revenue Authority (Petition E458 of 2022)  
[2025] KEHC 855 (KLR) (Constitutional and Human Rights) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 855 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E458 OF 2022**

**LN MUGAMBI, J**

**FEBRUARY 4, 2025**

**BETWEEN**

**PARESH JM SHAH ..... 1<sup>ST</sup> PETITIONER  
HITESH JM SHAH ..... 2<sup>ND</sup> PETITIONER  
SUBHASH J NAGDA ..... 3<sup>RD</sup> PETITIONER  
ASHOKKUMAR J NAGDA ..... 4<sup>TH</sup> PETITIONER  
PEARL INDUSTRIES LIMITED ..... 5<sup>TH</sup> PETITIONER**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 26<sup>th</sup> September 2022 was amended on 2<sup>nd</sup> August 2023. The Petition is supported by the 4<sup>th</sup> Petitioner's affidavit in support.
2. The Petitioners assail the constitutionality of the Respondent's issuance of agency notices against them as directors of their Company (the 5<sup>th</sup> Respondent) and also the issuance of Departure Prohibition Order asserting that it is unlawful and in violation of their rights under Article 27, 35, 47 and 50 of *the Constitution*.
3. Accordingly, the Petitioners seek the following reliefs against the Respondent:



- i. A declaration that the conduct of the Respondent evinced by frustrating the Petitioners and refusing to supply the information requested in the letter dated 13 March 2019 contravened; Articles 35 and 47 of *the Constitution*.
- ii. An order compelling the Respondent to supply the following information to the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners:
  - a. The Investigation Report, whose findings established the existence of the "grand missing Supplier fraud" as stated in the Respondent's Notice of Assessment and the objection decision letter.
  - b. The evidence the Respondent claimed to be in its possession proved the Suppliers with whom the Petitioner transacted did not exist, did not supply goods and did issue fictitious invoices and ETR receipts for a commission as a sole preoccupation.
  - c. The evidence that supported the contention that the Suppliers were not registered for tax in Kenya.
  - d. The false statements made by the Petitioner to an authorized officer as alleged.
- iii. A declaration that the Respondent's conduct in issuing Agency Notices against the 1<sup>st</sup> to 4<sup>th</sup> Petitioners contravened among other things, Articles 27, 35, 47 and 50 of *the Constitution*.
- iv. A declaration that the Respondent contravened the Petitioner's rights to movement and fair administrative action in issuing Prohibition Orders.
- v. An order of compensation in favour of the Petitioners and to be borne by Respondent to redress the harm that the Petitioner has suffered on account of violation of their rights.
- vi. A permanent injunction against the Respondent, its officers, agents, servants, assigns, and persons under them from issuing Agency Notices against the 1<sup>st</sup> to 4<sup>th</sup> Petitioners without a court order lifting the veil of incorporation.
- vii. General and exemplary damages for the Respondent's high-handedness, harsh and unconscionable conduct.
- viii. Damages for loss of opportunities and loss of time.
- ix. The Respondent be condemned to pay the costs of this Petition on a full indemnity basis.
- x. Such other orders this Court shall deem fit in the interest of justice.

### **Petitioners' Case**

4. The 4<sup>th</sup> Petitioner depones that on 30<sup>th</sup> November 2017, the Respondent requested for supply of information concerning 9 suppliers. He notes that their suppliers' KRA PINs were forwarded along with their names as per the records as the 5<sup>th</sup> petitioner has to the Respondent.
5. Thereafter, the Respondent vide a letter dated 23<sup>rd</sup> March 2018 notified the 5<sup>th</sup> Petitioner of its investigations and issued the Notice of Assessment. The assessment was in respect of 5 new suppliers whose information the Respondent had failed get from the 5<sup>th</sup> petitioner.
6. He avers that the Respondent's investigation determined that some of the 5<sup>th</sup> Petitioner's suppliers had not supplied any goods and thus the input tax claimed from the suppliers could not be possible as there



were no supporting documents. The notice of tax assessment was of Kshs.306, 051,182 and Kshs.166, 512, 947 being corporation tax and VAT respectively.

7. The Petitioners protested the Respondent's action stating that their returns were made through the Respondent's iTax system and with the PINs for the various suppliers indicated for the years and the issue of non-registered suppliers never arose.
8. After that the Respondent on 19<sup>th</sup> April 2018, issued a Departure Prohibition Order (DPO) against the directors of the 5<sup>th</sup> Petitioner, on the basis that they had no known assets in Kenya that could secure the 5<sup>th</sup> Petitioner's taxes.
9. It is noted that the DPOs were issued before the expiry of the objection period of 30 days as provided under the [Tax Procedures Act](#), 2015. As a result of this DPO, the 2<sup>nd</sup> Petitioner was detained at Jomo Kenyatta International Airport while travelling with his family and heading for a business meeting, causing him great embarrassment.
10. The Petitioners assert that the DPOs were unlawful and capricious as they were made without following the due process. Principally, they assert that the Respondent failed to communicate the reasons for issuance of the DPOs to the Petitioners and also were not served with the DPO beforehand. Moreover, that the DPO erroneously states that the 2<sup>nd</sup> Petitioner is of Indian origin yet he was born in Kenya on 8<sup>th</sup> January 1958.
11. The 2<sup>nd</sup> Petitioner further claim that he was forced to pay Ksh.2,000,000 demanded by the Respondent's Commissioner of Investigation and Enforcement before the DPO could be lifted. He depones that this Order was finally lifted on 11<sup>th</sup> July 2018.
12. It is stated that the 5<sup>th</sup> Petitioner objected the DPOs and Notice of assessment on 23<sup>rd</sup> April 2018 and was issued with the Respondent's decision on 26<sup>th</sup> June 2018.
13. The Petitioners aver that by a letter dated 13<sup>th</sup> March 2019 they requested the Respondent for information concerning: the Investigation Report, the evidence relied upon with regards to the non-existent and unregistered suppliers and the alleged false statements made by the Petitioner. The Petitioners aver that delay in issuance of this information greatly compromised their ability to put up their defense against the assessment.
14. Aggrieved by the decision dated 26<sup>th</sup> June 2028, the Petitioners appealed the Respondent's decision at the Tax Appeals Tribunal. It is noted that at the hearing, no evidence was tabled with reference to the cited investigations. As a result, the 5<sup>th</sup> Petitioner's appeal was heard on 6<sup>th</sup> February 2020. The assessment was set aside by the Tribunal in its Judgment issued on 21<sup>st</sup> August 2020.
15. The Respondent appealed Tax Appeal the Tribunal's decision at the High Court vide Commercial and Tax Division ITA No.E086 of 2020. The Court in its Judgment dated 31<sup>st</sup> January 2022 held in favour of the Respondent and upheld its tax assessment of Kshs.472,564,129.
16. The 4<sup>th</sup> Petitioner avers that thereafter the Respondent on 2<sup>nd</sup> February 2022 issued agency Notices against the 5<sup>th</sup> Petitioner and demanded assessed taxes. Moreover, the Respondent issued new Agency Notices on 3<sup>rd</sup> February 2022 seeking the sum of Ksh.472, 564, 129 from the Petitioners in their capacity as directors.
17. The Petitioners contend that the issuance of notices against the principle of piercing of the corporate veil as no Court Order was issued to that effect. Additionally, that the Agency notice was issued against 1<sup>st</sup> and 2<sup>nd</sup> Petitioners' who are not Directors in the company.



18. The Petitioners take issue with the Respondent's actions as they contend that issuance of the DPOs was contrary to Article 39 and 47 of *the Constitution*. Likewise, the Petitioners contend that the Respondent's actions of issuing the notices of assessment and agency notices was done in breach of Article 35, 46 and 47 of *the Constitution*.
19. Similarly, issuance of the agency notices to the Petitioners in their capacity as directors is said to be offensive to Articles 27, 40, 47 and 50 of *the Constitution*.

### **Respondent's Case**

20. The Respondent did not file any response or submissions in this matter.

### **Petitioners' Submissions**

21. In support of their case, the Petitioners through CM Advocates LLP filed their amended submissions dated 2<sup>nd</sup> August 2023. The issues set out for discussion were:

“whether the Respondent's actions were in contravention of *the Constitution* and whether the 3<sup>rd</sup> and 4<sup>th</sup> Petitioners are entitled to the information sought; whether the Agency Notices issued against the 1<sup>st</sup> to 4<sup>th</sup> Petitioners infringe on their rights and whether the Petitioners have met the threshold for the grant of a permanent injunction; whether the Departure Prohibition Orders issued against the 1<sup>st</sup> to 4<sup>th</sup> Petitioners amounted to racial discrimination, contravened their right to movement and fair administrative action and whether the Petitioners are entitled to the reliefs sought.”
22. On the first issue, Counsel submitted that the Respondent's failure to issue the sought information as requested in the Petitioner's letter dated 13<sup>th</sup> March 2019 violated Article 35 and 47 of *the Constitution*. This information had been sought to enable the Petitioners mount an appropriate appeal before the Tax Appeals Tribunal. However, this was prejudiced by the Respondent's refusal. Counsel submitted that this denied the Petitioners a right to a fair hearing.
23. To buttress this point, Counsel cited the case of *Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others (10/99) [2001] ZASCA 56* as cited with approval in *Nairobi Law Monthly Company Limited - vs - Kenya Electricity Generating Company & 2 Others [2013]eKLR* where it was held that:

“Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information . . . an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.”
24. Counsel further submitted that Section 49 of the *Tax Procedures Act* makes it plain that the Respondent's Commissioner ought to issue a statement of reasons for refusal of an application under a tax law. The issuance of reasons is also submitted to be underscored under Article 47 of *the Constitution*. It was stressed thus that the Petitioners had a legitimate expectation that the Respondent would follow the set procedure under the tax laws but failed to do so.



25. Reliance was placed in *Pz Cussons East Africa Limited v Kenya Revenue Authority* [2013] eKLR where it was held that:

“therefore, find and conclude that KRA’s action of insisting on payment of additional tax assessment in the circumstances in light of claims of fraudulent agents who were not the company’s agent in terms of section 146 of EACMMA was unreasonable and unfair and in breach of the right to fair administrative action under Article 47. In the circumstances, I quash the additional excise duty and corporate tax assessments in relation to the excise tax as well carried in the letter dated 29<sup>th</sup> June 2012.”

26. Counsel on the second issue submitted that the Respondent in issuing the Agency Notices against the Petitioners in their capacity as directors was in breach of the dictates of piercing of the corporate veil. Furthermore, Counsel submitted that the taxes owed are against the 5<sup>th</sup> Respondent which is a Limited Liability Company separate and distinct from its directors.

27. Reliance was placed in *Ukwala Supermarket v Jaideep Shah & another* [2022] eKLR where it was held that:

“...there are instances when the veil of incorporation may be lifted. In such instances, the law goes behind the corporate personality to attach responsibility to the individual shareholders or directors; thereby ignoring the separate personality of the company in favor of the economic reality prevailing in the circumstance...This will be done not only where there is fraud or improper conduct but, in all cases, where the character of the company, or the nature of the persons who control it, is a relevant feature. In such cases, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual’s connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be lifted.”

28. Counsel stressed that the Respondent’s action was also in violation of the principle of natural justice as the Directors and 1<sup>st</sup> and 2<sup>nd</sup> Petitioners were being condemned unheard. In addition, it was argued that the Respondent did not show that the Directors individually owed any taxes. Counsel also rehashed that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were issued with the notices yet are not directors of the 5<sup>th</sup> Respondent. This was submitted to be in direct violation of Articles 24,25, 40 and 47 of *the Constitution* and the cardinal principle of natural justice as held in *Joyce M’kuura & 2 others v Justus Kabaya* [2010] eKLR.

29. In this regard Counsel submitted that the Petitioners had satisfied the threshold set for grant of a permanent injunction. Reliance was placed in *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018]eKLR where it was held that:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.



These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent.”

30. Submitting on the DPOs in the third issue, Counsel submitted that issuance of this Order was unlawful and against the rules of natural justice. This is because the Respondent did not issue any communication about the same to the Petitioners as required under Section 45(3) of the [Tax Procedures Act](#). The Petitioners were also not supplied with a copy of the DPO. In addition, the 2<sup>nd</sup> Petitioner was racially profiled as an Indian yet he is a Kenyan citizen by birth. Additionally, no reasons were issued to the Petitioners for issuance of this prohibition order.
31. It was further noted that the DPO was issued unlawfully as that was done before the expiry of the objection period as provided under the Tax Procedure Act, 2015. Reliance was placed in *Bare v Kenya Revenue Authority & another* [2021] KEHC 458 (KLR) where it was held that:
- “I find from clear provisions of [Tax Procedures Act](#), 2015 before a Departure Prohibition Order can issue, that the amount of tax payable or likely to be payable must be determinable. I find that is not the case in this matter. I find that it is wrong, unjustifiable and contrary to the law for Departure Prohibition Order to be issued to anyone on mere suspicion he/she owes some tax or has a debt of tax that is not determinable.”
32. In view of the foregoing, Counsel emphasized that the Petitioners were entitled to the reliefs sought. To buttress this point, Counsel cited the case of *Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others* [2019] eKLR where it was held that:
- “When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation.... An award of compensation will go some distance towards vindicating the infringed constitutional right...”
33. Like dependence was placed in *Michael Rubia v Attorney General* [2020] eKLR.

### **Analysis and Determination**

34. It is my considered view that the issues that arise for determination are:
- i. Whether the Petitioners were entitled to the information sought from the Respondent.
  - ii. Whether the Agency Notices dated 3<sup>rd</sup> February 2022 issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Petitioners were lawful.
  - iii. Whether the Departure Prohibition Orders dated 19<sup>th</sup> April 2018 issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Petitioners were lawful.
  - iv. Whether the Petitioners are entitled to the relief sought.

### **Whether the Petitioners were entitled to the information sought from the Respondent.**

35. On this issue, the Petitioner’s contention is that Respondent did not provide the information requested in the Petitioner’s letter dated 13<sup>th</sup> March 2019 hence the Respondent violated Articles 35



and 47 of the Constitution. This information had been sought to enable the Petitioners present their appeal before the Tax Appeals Tribunal which they contend the Respondent's failed to provide hence prejudiced the Petitioners right to a fair hearing at the Tax Appeals Tribunal.

36. On the outset, one would wonder why was failure to provide information never raised before the Tax Appeals Tribunal which was seized of the matter at the time?
37. Be that as it may, I will proceed to determine if this Court is properly seized of the matter of infringement of Article 35 of the Constitution allegedly perpetrated against the Petitioners by the Respondent.
38. The right of access to information is provided for under Article 35 of the Constitution. Article 35 states as follows:
  1. Every citizen has the right of access to—
    - a. information held by the State; and
    - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
  2. Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
  3. The State shall publish and publicise any important information affecting the nation.
39. This right of access to information is bolstered by the Access to Information Act No.31 of 2016. Section 4 of the Act expounds on this right as follows:

Right to information

1. Subject to this Act and any other written law, every citizen has the right of access to information held by—
    - a. the State; and
    - b. another person and where that information is required for the exercise or protection of any right or fundamental freedom.
  2. Subject to this Act, every citizen's right to access information is not affected by—
    - (a) any reason the person gives for seeking access; or
    - (b) the public entity's belief as to what are the person's reasons for seeking access.
40. The Supreme Court in *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017)* [2017] KESC 45 (KLR) (Election Petitions) (11 December 2017) (Ruling) opined on as follows:

“(13) Article 35(1)(a) and (b) of the Constitution, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd respondent. In addressing that issue, the



Court in Petition No. 479 of 2013 Rev. Timothy Njoya v. Attorney General & Another; [2014] eKLR, it was held;

“A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd Respondent. In Nairobi Law Monthly v. Kengen (supra) the Court dealt with the applicability of the right to information as follows;

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of Article 35(3) of *the Constitution* of Kenya which imposes an obligation on the state to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the state”.

- (14) This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically, procedures are provided in a law on how a person ought to access information held by another person and particularly a State organ or entity.”

41. It was further appreciated in *Muchiri v Eldoret Hospital Limited* [2022] KEHC 13365 (KLR) that:

“25. The intention in Article 35(1) was clearly to create two distinct situations with regard to the right of access to information: one in which the citizen was entitled as of right to information held by the State; the other in which a citizen could access information from another, a private person, for the exercise or promotion of another right or freedom.”

42. It must however be appreciated that under Section 7 of the *Access to Information Act*, there is a laid down statutory procedure that a Party seeking information held by the state or private body has to follow. The process is kickstarted by writing to the officer who has the custody of the information which the requester wants to gain access to.

43. If the request is refused, or the requester of information fails to receive the information, Section 14 of the Act directs that the requester has to notify Commission on Administrative Justice (CAJ) in writing requesting that it intervenes and may review of any reasons for denial of access.

44. In execution of its mandate under Section 21; the CAJ has the following powers as set out in Section 23 of the Act:

- a. In the performance of its functions under this Act, the Commission shall have the power to—
  - i. issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
  - ii. question any person in respect of any subject matter under investigation before the Commission; and



- iii. require any person to disclose any information within such person’s knowledge relevant to any investigation by the Commission.
    - b. The Commission may, if satisfied that there has been an infringement of the provisions of this Act, order—
      - i. the release of any information withheld unlawfully;
      - ii. a recommendation for the payment of compensation; or
      - iii. any other lawful remedy or redress.
    - c. A person who is not satisfied with an order made by the Commission under subsection (2) may appeal to the High Court within twenty-one days from the date the order was made.
    - d. An order of the Commission under subsection (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.
    - e. If no appeal is filed under subsection (3), the party in favour of whom the order is made by the Commission may apply ex-parte by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court to the like effect.
45. It is apparent that the Petitioners wrote to the Respondent which failed to supply them with the information they needed. They then filed this Petition. They did not seek the intervention of the Commission on Administrative Justice as outlined in the [Access to Information Act](#). The Court in *Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties)* [2021] eKLR discussing the mandate of the CAJ observed as follows:

“29. Under section 23 of the [Access to Information Act](#) No. 31 of 2016, the High Court has been established to have appellate jurisdiction. In *Savraj Singh Chana v Diamond Trust Bank (Kenya) Limited & another* [2020] eKLR, Korir J observed correctly in my view, as follows:

“It is appreciated that the cited decision does indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165(3)(b) of [the Constitution](#) to determine questions on whether a right or fundamental freedom has been<sup>47</sup> infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction in a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, that procedure should first be exhausted before the courts can be approached for resolution of that dispute. Indeed, like any other legal principle, this doctrine has exceptions. In my view, it is the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding that route. In the case before me, the Petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the constitutional jurisdiction of this Court. What it simply does is to provide the parties with a faster and



more efficient mechanism for the resolution of their disputes. The courts will step in later if any party is aggrieved by the decision of the statutory body mandated to resolve the dispute.”

46. It is apparent that the Petitioners in the instant case did not exhaust the administrative remedies provided for accessing information before instituting this Petition. Consequently, the doctrine of exhaustion of remedies applies. As was held in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR;

“... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”

**Whether the Agency Notices dated 3<sup>rd</sup> February 2022 issued against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Petitioners were lawful.**

47. The Petitioners queried the Respondent’s issuance of the Agency Notices against the 1<sup>st</sup> to 4<sup>th</sup> Petitioners in their capacity as directors of the 5<sup>th</sup> Respondent contending that there was no legal justification provided for piercing the corporate veil. It was the contention by the Petitioners that the taxes, if any, were owed by the 5<sup>th</sup> Respondent which is a Limited Liability Company separate and where distinct from its directors.
48. Section 18 of the Tax Procedure Act provides as follows:

Liability for tax payable by a company

1. Subject to subsection (2), where an arrangement has been entered into by any director, general manager, company secretary, or other senior officer or controlling member of the company with the intention or effect of rendering a company unable to satisfy a current or future tax liability under a tax law, every person who was a director or controlling member of the company when the arrangement was entered into shall be jointly and severally liable for the tax liability of the company.
2. A director, general manager, company secretary, or other senior officer or controlling member of a company shall not be liable under subsection (1) for the tax liability of the company if that director, general manager, company secretary, or other senior officer or controlling member did not derive a financial or other benefit from the arrangement and if—
  - a. the director, general manager, company secretary, or other senior officer or controlling member notified in writing the company of his or her opposition to the arrangement on becoming aware of the arrangement and notified in writing the Commissioner of the arrangement; or
  - b. at the time the arrangement was entered into, that director, general manager, company secretary, or other senior officer or controlling member was not involved in the executive



management of the company and had no knowledge of and could not reasonably have been expected to know of the arrangement.

49. Furthermore, Section 42 (1) & (2) of the Tax Procedure Act provides as follows:

Power to collect tax from person owing money to a taxpayer

1. This section applies when a taxpayer is, or will become liable to pay a tax and —
  - a. the tax is unpaid tax; or
  - b. the Commissioner has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for the payment of the tax.
2. The Commissioner may, in respect of the taxpayer and by notice in writing, require a person (referred to as the "an agent")—
  - a. who owes or may subsequently owe money to the taxpayer;
  - b. who holds or may subsequently hold money, for or on account of, the taxpayer;
  - c. who holds or may subsequently hold money on account of some other person for payment to the taxpayer; or
  - d. who has authority from some other person to pay money to the taxpayer, to pay the amount specified in the notice to the Commissioner, being an amount that shall not exceed the amount of the unpaid tax or the amount of tax that the Commissioner believes will not be paid by the taxpayer by the due date.

50. From the foregoing provisions, where there is default in payment of tax by a Company, Section 18 (2) of the Tax Procedure Act can be invoked to rope in its Directors to bear the tax liability by the company as the section extends liability to:

“any director, general manager, company secretary, or other senior officer or controlling member of the company with the intention or effect of rendering a company unable to satisfy a current or future tax liability under a tax law, every person who was a director or controlling member of the company when the arrangement was entered into shall be jointly and severally liable for the tax liability of the company”.

51. Further, it is my considered view that the issue of whether or not the Company veil can be lifted in relation to a tax dispute is not constitutional controversy but a statutory issue which to be resolved under the provisions of *Tax Procedures Act* and if not, under the principles the of Company law that provide for which the Company veil may be lifted.

52. The Petition as framed therefore offends doctrine of Constitutional avoidance which asserts that disputes or controversies that can conveniently be dealt with by any other legal basis without resorting to *the Constitution* should not be treated as Constitutional controversies.



53. In *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* (2015)eKLR the Court held as follows:

“ 11. Similarly, in *Papinder Kaur Atwal -vs- Manjit Singh Amrit Nairobi* Petition No. 236 of 2011 where after considering several authorities on the issue, Justice Lenaola remarked as follows:

“All the authorities above would point to the fact that *the constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes..... I must add the following; Our Bill of Rights is robust. It has been hailed as one of the best in any Constitution in the World. Our Courts must interpret it [with] all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.” (Emphasis added)

12. The Supreme Court of India has also held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner or as provided under statute. For instance, in *Re Application by Bahadur*[1986] LRC (Const) the Court expressed itself as follows at page 307;

“The Courts have said time and again that where infringements of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not under *the Constitution*. This case highlights the un-wisdom of ignoring that advice.... *The Constitution* sets out to declare in general terms the fundamental concepts of justice and right that should guide and inform the law and the actions of men. While an infringement of *the Constitution* might in certain cases give rise to the redress provided for at section 14, yet, as has been proclaimed by the highest Court in the land, it is not, “a general substitute for the normal procedures for invoking judicial control of administrative action.” (See *Harrikissoon v A-G* [1979] 3 WLR 62).

13. It was further observed in the case of *Minister of Home Affairs vs Bickle & Others* (1985) LRC Const (per (Georges C.J));

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

54. I do not find reason therefore to delve any further on this particular issue for reasons aforesated.



**Whether the Departure Prohibition Orders dated 19<sup>th</sup> April 2018 issued and against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Petitioners were lawful.**

55. The law on Departure Prohibition Orders is provided for under Section 45 of the Tax Procedure Act. It provides as follows:

1. This section applies when the Commissioner has reasonable grounds to believe that a person may leave Kenya without paying—
  - a. a tax that is or will become payable by the person; or
  - b. a tax that is or will become payable by a company in which the person is a controlling member or tax representative.
2. The Commissioner may issue a departure prohibition order, in writing, to the Director in relation to a person to whom this section applies stating—
  - a. the name and address of the person; and
  - b. the amount of tax that is or will become payable by the person or by a company in which the person is a controlling member or tax representative.
3. The Commissioner shall, as soon as practicable after issuing a departure prohibition order under subsection (1), serve a copy of the order on the person named in the order.
4. Where the Director has been issued with an order under this section, the Director or an officer authorised by the Director, shall, so far as is permitted by any other written law or this Act, shall prevent the person named in the order from departing Kenya, including by the confiscation and retention of the person's passport, identity card, visa, or other travel document authorising the person to leave Kenya.
5. A person who is the subject of a departure prohibition order shall not be granted customs or immigration clearance.
6. A departure prohibition order shall remain in force until it is revoked by the Commissioner.
7. The Commissioner shall revoke a departure prohibition order if—
  - a. the person named in the order pays in full the tax payable or that will become payable by that person or by a company in which that person is a controlling member or tax representative; or
  - b. the person named in the order makes an arrangement satisfactory to the Commissioner for the payment of the tax that is or will become payable by that person or by a company in which that person is a controlling member or tax representative.

56. A controlling member is defined in Section 3 of the Tax Procedure Act as A “controlling member” has the meaning assigned to it in Section 18(4) (b) Section 18 (4) (b) of the Act states:

“controlling member”, in relation to a company, means a member who beneficially holds, directly or indirectly, either alone or together with a related person or persons—

- a. fifty per cent or more of the voting rights attaching to membership interests in the company;



- b. fifty per cent or more of the rights to dividends attaching to membership interests in the company; or
- c. fifty per cent or more of the rights to capital attaching to membership interests in the company;

"member", in relation to a company, means a shareholder or any other person with a membership interest in the company;

"membership interest", in relation to a company, means a share or other ownership interest in the company; and

"private company" has the same meaning assigned to it in the [Companies Act](#) (Cap. 486).

57. The rationale of Departure Prohibition Order (DPO) was discussed in *Duncan Ziyani Murashiki v Commissioner General, Kenya Revenue Authority, Commissioner, Investigations & Enforcement, Kenya Revenue Authority, Director, Directorate of Immigration & Registration of Persons & Attorney General* [2021] KEHC 13378 (KLR) as follows:

“64. The departure prohibition order is commonly used in Australia. In an article titled: THE OTHER PART IVA – DEPARTURE PROHIBITION ORDERS, Therese Catanzariti of 13 Wentworth Chambers notes that Part IVA of the Tax Administration Act 1953 (Cth) authorizes the Commissioner to prohibit both Australian nationals and foreigners who have Australian tax debts from departing Australia. She observes that although the provision has been described as “a severe intrusion into a person’s liberty, privacy and freedom of movement”, granting “extreme, almost draconian, powers” to the Commissioner, the provision remains critical as a country’s imposition of tax is an assertion of sovereignty.

... In *Dalco v Federal Commissioner of Taxation* (1987) 19 ATR 443, 447-458, Young J said of s 14S:

I am of the view that that is the way that one approaches the section. The Commissioner is to believe on reasonable grounds that it is desirable to stop a person leaving Australia because it is necessary to collect the tax that is owed to the government and that that discharging of the tax liability will be affected by the person going overseas.

... It follows that s 14S(1)(b) should be read not  
22. literally, but as though it referred to a belief by the Commissioner (on reasonable grounds) that it was desirable that the person not leave Australia without discharging the tax liability or making the arrangements there referred to. Thus it is not to be taken as a given that, in every case, the departure of the person from Australia will make it unlikely, or at least less likely, that the tax liability will be discharged, or that the ability of the Commissioner to recover the tax will be impaired. These are things which must be



considered by the Commissioner in every case. The purpose of s 14S, and accordingly a central purpose of Part IVA, is not the prevention of persons (owing tax) from leaving Australia simpliciter: it is the prevention of such persons from leaving Australia where, in the Commissioner's belief reasonably arrived at, the recovery of tax would or might thereby be impaired.

23. In that result, at least so far as revealed by s 14S, the general scope and objects of Part IVA of the Administration Act are as contended for by both sides in the present case. As contended for by the Commissioner, they are the projection of the revenue. As contended for by the applicant, they are the prevention of persons (owing tax) from leaving Australia where that would affect the recoverability thereof...
66. In *Dalco v Federal Commissioner of Taxation* (1987) 19 ATR 443, 447-458, the Court held that:
- " Section 14T [revocation of a DPO] gives the clue that the matters which spark the making of a section 14S order are that the recoverability of tax will be affected by the departure of the taxpayer from Australia. Accordingly, once the Commissioner is satisfied that the tax is completely irrecoverable then it cannot be the case that collection of the tax will be affected by the taxpayer going outside Australia and the *raison d'être* for making the order has gone so that the order must be revoked. I am of the view that that is the way that one approaches the section. The Commissioner is to believe on reasonable grounds that it is desirable to stop a person leaving Australia because it is necessary to collect the tax that is owed to the government and that that discharging of the tax liability will be affected by the person going overseas".
67. Similarly, in *Edelsten v Federal Commissioner of Taxation* (1992) 92 ATC 4285, it was stated that:
- "In other words, it is only the possibility or likelihood that the taxpayer's departure from Australia would adversely affect the revenue that there should be under this Act a restriction on the right of an individual in a free society to travel without bureaucratic impediment. The power to issue a DPO may not be exercised penalty or for other purposes."
68. In *Troughton* (*supra*), the Court stated that:
- "...it is not to be taken as a given that, in every case, the departure of the person from Australia will make it unlikely, or at least less likely, that the tax liability will be discharged, or that the ability of the Commissioner to recover the tax will be impaired. These are



things which must be considered by the Commissioner in every case. The purpose of s 14S, and accordingly a central purpose of Part IVA, is not the prevention of persons (owing tax) from leaving Australia simpliciter: it is the prevention of such persons from leaving Australia where, in the Commissioner's belief reasonably arrived at, the recovery of tax would or might thereby be impaired."

69. An analysis of Section 45 of the TPA reveals that for the provision to be enforced, the 1st Respondent must have reasonable grounds informing the issuance of the departure prohibition order. The provision applies to all persons as it does not distinguish between a citizen and a foreign national. The provision is clear as to whom an order shall be issued against. A written copy is required to be issued as soon as practical. What 'as soon as practical' means is not specified. The essence of a departure prohibition order is to curtail evasion of taxes and any knowledge of such an order prior to its issuance would be counterproductive to its goal. The Section provides that a person will be stopped from leaving the country as long as the tax liability exists. The departure prohibition order can only be revoked by Commissioner once the tax is paid in full or satisfactory arrangements are made for the payment of the tax.

70. As already stated, Section 45 of the TPA serves the lawful purpose of ensuring that the State fulfills its constitutional mandate of ensuring fair distribution of the tax burden. The departure prohibition order is a tool for enforcing tax obligations on those who may wish to evade taxes..."

58. Similarly, in *Bare v Kenya Revenue Authority & another* [supra] the Court stated as follows:

"20. The Departure Prohibition Order clearly provides that under 45(2) of the Act that the Commissioner may issue a Departure Prohibition Order, in writing to the Director in Relation to a person to whom this Section applies stating :-

- "a) the name and address of the person; and
- b) the amount of tax that is or will become payable by the person or by a company in which the person is controlling member."

21. The Departure Prohibition Order issued herein provides that:

"the aforesaid person is a director of City Gas Limited and is also doing business as an individual, and is suspected not to be declaring correct income for tax purposes."

The author of the departure prohibition order Mr DKS Yego, did not disclose nor demonstrate by way of affidavit or otherwise why he believed that the Petitioner would leave country without paying tax. In the instant petition it has not been shown nor demonstrated as at the time the impugned order was issued, what amount of tax was due and payable from the petitioner or the City Gas East Africa Limited as at September 5, 2019 when the impugned order was issued. It is further noted that at any rate, the Departure Prohibition Order refers to a different entity, thus, City Gas Limited in which the petitioner's



interest has not been demonstrated and in which the Petitioner contend he has no interest in.

22. I find from clear provisions of *Tax Procedures Act*, 2015 before a Departure Prohibition Order can issue, that the amount of tax payable or likely to be payable must be determinable. I find that is not the case in this matter. I find that it is wrong, unjustifiable and contrary to the law for Departure Prohibition Order to be issued to anyone on mere suspicion he/she owes some tax or has a debt of tax that is not determinable.”

59. Correspondingly in *Brian Nasiche Waluchio v Kenya Revenue Authority & Director of Immigration Services* [2020] KEHC 5015 (KLR) the Court opined as follows:

“ 34. The law is clear that the DPO shall be revoked if the conditions set out under section 45(7) of the Tax Procedure Act are satisfied. Under section 45(6) of Tax Procedure Act, the revocation of DPO is at the discretion of the 1<sup>st</sup> Respondent and the same is to remain in force until revoked by the 1<sup>st</sup> Respondent in accordance with the law. In the instant petition the petitioner has satisfied the conditions set out under section 45(7) of the Act. He has produced compliance certificate duly issued by the 1<sup>st</sup> Respondent and further no evidence has been availed to demonstrate he is a controlling member of the company. In view of the aforesaid, there are no basis for the DPO to remain in force.”

60. The Petitioners contend that the departure prohibition orders issued against them is unlawful. However, a reading of the above authorities confirm that a departure prohibition order can validly be issued where there are reasonable grounds to believe that recoverability of tax will be impaired by the departure of the taxpayer as a way of countering tax evasion. Further, it is also acknowledged that service of departure prohibition order is effected upon Director of Immigration in the first instance before the subject of the Departure Prohibition Order for obvious reason that giving this information in advance to the subject of the order will most likely be counter - productive and would not serve the purpose it was intended for.

61. The question thus becomes, did the Respondent demonstrate before this court existence of reasonable grounds for the issuance of the departure prohibition order against the Petitioners?

62. As conceded by the Petitioners, the High Court in its judgment of 31<sup>st</sup> January 2022 - Commercial and Tax Division ITA No. E086 of 2020 has already adjudged that the Company (5<sup>th</sup> Petitioner) in which the 1<sup>st</sup> – 4<sup>th</sup> Petitioners have an interest owes Kshs.472, 564, 129 of unpaid tax. That is a colossal amount.

63. There was thus a prima facie justifiable reason by the Respondent for the issuance by the Commissioner, a Departure Prohibition Order under Section 45 (2) of the *Tax Procedures Act* to thwart potential tax evasion.

64. The right of movement under Article 39 is not absolute and may be limited as long as the conditions set out in Article 24 of *the Constitution* are met. Enforcement of lawful tax obligations is a justifiable ground.

65. The Respondent has a duty to protect the State’s revenue leakages through possible tax evasion and Departure Prohibition Order issued under such circumstances is in opinion of this court a justifiable limitation under Article 24 of rights and fundamental freedoms of the Petitioners.



- 66. The issue of discriminatory application of the Section 45 (2) does not arise as the Section is not applied against a select category of persons but in all deserving cases where there are reasonable grounds that a person having unsettled tax obligations might leave the jurisdiction thereby making taxes due unrecoverable.
- 67. In the overall analysis, I find no merit in this Petition which is hereby dismissed. As the Respondent did not participate, I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MILIMANI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**L N MUGAMBI**  
**JUDGE**

