



**Macager & 23 others v Kenya Revenue Authority & 4 others (Petition 224 of 2019)
[2024] KEHC 10549 (KLR) (Constitutional and Human Rights) (3 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10549 (KLR)

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

PETITION 224 OF 2019

LN MUGAMBI, J

SEPTEMBER 3, 2024

BETWEEN

**ELVINE LEWARE MACAGER & 23 OTHERS & 23 OTHERS & 23 OTHERS &
23 OTHERS & 23 OTHERS & 23 OTHERS & 23 OTHERS & 23 OTHERS & 23
OTHERS & 23 OTHERS & 23 OTHERS & 23 OTHERS PETITIONER**

AND

**KENYA REVENUE AUTHORITY 1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT
CHIEF MAGISTRATE'S COURT 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

The presumption of innocence under article 50(2)(a) of the Constitution does not automatically apply in civil cases

The 1st petitioner was aggrieved that the 1st respondent accused him of committing tax offences on the basis that his companies had been evading payment of taxes. The court found that both sections 44 and 60 of the Tax Procedures Act had intrinsic safeguards that prevented arbitrariness. The court further held that the presumption of innocence under article 50(2)(a) of the Constitution related to the legal burden in criminal cases and that it did not automatically apply in civil cases. The court also held that the advocate-client confidentiality under section 137 of the Evidence Act and the disclosure requirements permitted under sections 59 and 60 of the Tax Procedures Act were not in conflict with each other.

Reported by Kakai Toili



Constitutional Law – fundamental rights and freedoms – right to fair hearing – presumption of innocence – applicability of the presumption of innocence -whether the presumption of innocence under article 50(2)(a) of the Constitution automatically applied in civil cases – Constitution of Kenya, article 50(2)(a).

Constitutional Law – constitutionality of statutes – constitutionality of sections 44 and 60 of the Tax Procedures Act on seizure and forfeiture of goods and on the power of search and seize, respectively – whether sections 44 and 60 of the Tax Procedures Act were unconstitutional for violating article 31 of the Constitution on the right to privacy – Constitution of Kenya, article 31; Tax Procedures Act (cap 469B), sections 44 and 60.

Statutory – statutes – interpretation of statutes – interpretation of section 137 of the Evidence Act vis a vis sections 59 and 60 of the Tax Procedures Act - whether the advocate-client confidentiality under section 137 of the Evidence Act and the disclosure requirements permitted under sections 59 and 60 of the Tax Procedures Act were in conflict with each other – Evidence Act (cap 80), section 137; Tax Procedures Act (cap 469B), sections 59 and 60.

Constitutional Law – fundamental rights and freedoms – limitation of fundamental rights and freedoms – what were the conditions to be met in the limitation of fundamental rights and freedoms – Constitution of Kenya, article 24.

Brief facts

The 1st petitioner was aggrieved that the 1st respondent accused him of committing tax offences on the basis that his companies had been evading payment of taxes. According to him, his arrest and charge as a result of those claims was done contrary to the law. He posited that the respondents' actions were in direct violation of the petitioners' rights.

The petitioners sought among other orders; declarations that their constitutional rights to human dignity and freedom and security of the person; right to privacy; and rights of an arrested person had been violated by the respondents, their agents, employees and/or servants; and a declaration that section 44(1) and (2) and 60(1), (2) and (3) of the Tax Procedures Act, 2015 were unconstitutional.

Issues

- i. Whether the presumption of innocence under article 50(2)(a) of the Constitution automatically applied in civil cases.
- ii. Whether sections 44 and 60 of the Tax Procedures Act on seizure and forfeiture of goods and on the power of search and seize, respectively, were unconstitutional for violating article 31 of the Constitution on the right to privacy.
- iii. Whether the advocate-client confidentiality under section 137 of the Evidence Act and the disclosure requirements permitted under sections 59 and 60 of the Tax Procedures Act were in conflict with each other.
- iv. What were the conditions to be met in the limitation of fundamental rights and freedoms?

Held

1. Constitutionality of a statute should be guided by the principles of constitutional interpretation set out under article 259 of the Constitution. Further, article 159(2)(e) of the Constitution required that while exercising judicial authority, courts protected and promoted the purposes and principles of the Constitution. In that case, the court was required to determine the constitutionality of a statutory provision.
2. The High Court was clothed with the jurisdiction under article 165(3)(d)(i) of the Constitution to determine whether any law was inconsistent with or in contravention of the Constitution.
3. The rights and fundamental freedoms in the Bill of Rights save for those specified in article 25 of the Constitution (namely, freedom from torture, and cruel, inhuman or degrading treatment or punishment; freedom from slavery and servitude, the right to fair trial and right to an order of *habeas corpus*) could be limited as long as the limitation met the conditions set out in article 24 of the Constitution. The constitutional requirement was that the limitation must be reasonable and



justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account relevant factors including:

1. The importance and purpose of limitation.
 2. Nature and extent of limitation.
 3. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual did not prejudice the rights and fundamental freedom of others; and
 4. The relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose.
4. Article 24(2)(c) of the Constitution had a proviso that underscored that despite clause (1) permitting limitation of a right or fundamental freedom, such limitation shall not limit the right or fundamental freedom so far as to derogate from the core or essential content.
 5. The reasonableness or otherwise of a limitation that was a permissible derogation of the right or fundamental right in question could not be determined without undertaking a proper analysis that considered the objective and effect of the challenged legal provision.
 6. The Constitution in articles 201, 209 and 210 had given the National Government the power to impose taxes specified in article 209(1) of the Constitution or any other tax as may be authorized by legislation as per article 209(2). County governments also had the power to levy taxes as per article 209(3)(a), (b) and (c) of the Constitution. Article 210(1) was categorical that no tax or licensing fee may be imposed, waived or varied except as provided for in legislation.
 7. The Tax Procedures Act (cap 469B) was the means or medium through which the tax collector in exercise of constitutional obligation to collect tax was able to ensure compliance was attained. From a reading of section 2 of the Tax Procedures Act, the intended objective was clear, it was to attain effective and efficient collection of tax and facilitation of compliance by tax payers.
 8. Both sections 44 and 60 of the Tax Procedures Act had intrinsic safeguards that prevented arbitrariness by proportionately striking a fair balance between the taxpayer rights and tax collector's obligations under the law hence they were not unconstitutional. They ensured that tax was lawfully collected while respecting the rights of the taxpayer through by providing that seizure notice must be premised on reasonable belief that there was tax due had not or would not be paid hence it needed to be proved that there were circumstances that reasonably created that belief or suspicion. There was also the requirement that the owner of goods was granted an opportunity to challenge the seizure notice. Section 60 was involving judicial process which was a potential safeguard against arbitrariness. The claim that sections 44 and 60 violated article 31 of the Constitution was thus untenable.
 9. The Tax Procedures Act was a tax enforcement statute aimed at assisting in collection of tax. The procedure referred to in section 56 of the Act did not relate to a criminal proceeding but an objection to a tax decision. The presumption of innocence under article 50(2)(a) of the Constitution related to the legal burden in criminal cases. It specifically began by stating that every person accused had the right to a fair trial, which included the right to be presumed innocent until the contrary was proved. That rule did not automatically apply in civil cases where the burden of proof could be fixed by law or as a matter of fairness.
 10. Prudence and fairness would demand that under the circumstances the legal requirement on allocation of burden was quite reasonable and should not be disturbed. The allegation of unconstitutionality of section 56(1) of the Tax Procedures Act was not established. It did not have any relationship to article 50(2)(a) of the Constitution.
 11. The Evidence Act (cap 80) protected the advocate-client communication. The advocate-client confidentiality under section 137 of the Evidence Act and the disclosure requirements permitted under sections 59 and 60 of the Tax Procedures Act were not in conflict with each other. Section 59 and 60 applied in instances where there was reasonable cause to believe that a tax-payer was non-compliant in fulfilling his/her tax obligations. Section 137 did shield from disclosure communication between



- an advocate and the client if the information was not given in furtherance of an illegal purpose. Such information could not be protected where there was reasonable basis that it was intended to conceal non-payment of tax. In that case, public interest would demand that disclosure be made.
12. A constitutional petition must meet the threshold of specificity and precision requirement in pleading the constitutional rights violated and the manner of infringement by the respondents as against the petitioner.
 13. The duty to obey the law was not optional for any citizen. When non-confrontational approach was applied to ensure compliance with the law had been extended but was totally ignored as was the case in the instant matter, the only remaining option was to use legally compulsive means to effect an arrest provided that it was reasonably executed. Section 7(1) of the Tax Procedures Act conferred authorized officers of the 1st respondent for purposes of administering tax law with all the duties, powers, rights, privileges and protection of a police officer. The arrest was not arbitrarily executed without a just cause hence was not a violation of article 29(1) of the Constitution.
 14. There was no evidence to fault the arrest of the 1st petitioner which was justified due to persistent refusal to submit to the 1st respondent despite investigations finding a sufficient basis to prefer tax related offences. The action taken by the 1st respondent was proportionate to secure compliance with the law and thus did not amount to violation of the 1st petitioner freedom and security of the person as alleged. Equally, there was no evidence of torture that was adduced.
 15. The Constitution recognized the right to privacy by protecting an individual from unnecessary and unauthorized intrusion. There could be a limitation of right to privacy if there were valid or justifiable reasons for the same. Given that the 1st respondent did not just move against the petitioner based on intuition but its decision was backed by findings that pointed strongly to the fact that tax offences had been committed by the petitioners, its actions against the petitioners were proportionate and reasonably necessary and met the threshold under article 24 of the Constitution on limiting the right to privacy in public interest.
 16. In regard to the violation of right to fair administrative action under article 47 of the Constitution, there was no basis for that claim. That opportunity to the petitioners was accorded as the 1st respondent tried to contact the 1st petitioner severally by mobile contact, letters and even emails but was elusive and failed to take advantage of that chance to state his stance on the matter.

Petition dismissed.

Orders

Costs to the respondents.

Citations

Cases

Kenya

1. *Andare, Geoffrey v Attorney General & 2 others* Petition 149 of 2015; [2016] KEHC 7592 (KLR) - (Explained)
2. *Attorney General v Attorney General for and on Behalf of the Inspector General of Police & 3 others ex-parte Thomas Ng'ang'a Munene* Miscellaneous Application Application166 of 2013; [2014] KEHC 4913 (KLR) - (Mentioned)
3. *Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others* Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR) - (Explained)
4. *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* Petition 628 & 630 of 2014; [2015] KEHC 6984 (KLR) - (Mentioned)
5. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14 ,14A,14B & 14C of 2014; [2015] KESC 15 (KLR) - (Explained)



6. *Council of County Governors v Attorney General & another* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) - (Explained)
7. *Council of Governors v Inspector General of National Police Service & 3 others* Civil Application 13 of 2017; [2018] KESC 7 (KLR)
8. *Dry Associates Limited v Capital Markets Authority & another (Interested Party) Crown Berger (K) Ltd* Petition 328 of 2011; [2014] KEHC 5478 (KLR) - (Mentioned)
9. *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* Petition 164B of 2016; [2018] KEHC 7130 (KLR) - (Explained)
10. *G4s Security Services (Kenya) Limited v Domitila Katila & another* Civil Appeal 112 of 2013; [2017] KEHC 1468 (KLR) - (Mentioned)
11. *Gitobu Imanyara 2 others v Attorney General* Civil Appeal 98 of 2014; [2016] KECA 557 (KLR) - (Mentioned)
12. *Itumbi, Dennis v Attorney General & another* Petition 237 of 2015; [2018] KEHC 8921 (KLR) - (Mentioned)
13. *Keroche Breweries LTD & 6 others v Attorney General & 10 others* Petition 295, 309, 314 of 2015; [2016] KEHC 7254 (KLR) - (Mentioned)
14. *Mulinge, Bernard Mwikya v Director of Public Prosecutions & 3 others* Petition 14 of 2018; [2019] KEHC 9205 (KLR) - (Mentioned)
15. *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Mentioned)
16. *Mutungu, Ngulo v Pan African Insurance Co Ltd & 4 others* Civil Miscellaneous Application 60 of 2018; [2019] KEHC 7415 (KLR) - (Explained)
17. *Mwangi, Peter Njuguna & 2 others v Attorney General* Petition 223 of 2013; [2017] KEHC 8410 (KLR) - (Explained)
18. *Njoya, Timothy v Attorney General & another* Petition 479 of 2013; [2014] KEHC 8340 (KLR) - (Mentioned)
19. *Nyakwana, Evans Otieno v Cleophas Bwana Ongaro* Civil Appeal 7 of 2014; [2015] KEHC 8440 (KLR) - (Explained)
20. *Ogendo, Richard Dickson & 2 others v Attorney General & 5 others* Petition 70 of 2013; [2014] KEHC 6197 (KLR) - (Mentioned)
21. *Otieno, Leonard v Airtel Kenya Limited* Petition 218 of 2017; [2018] KEHC 9063 (KLR) - (Mentioned)
22. *Otieno, Mak' Onyango v Attorney General & another* Civil Case 845 of 2003; [2012] KEHC 5476 (KLR) - (Mentioned)
23. *Republic v Commissioner for Domestic Taxes, Kenya Revenue Authority & another ex parte Samuel Kimondo Theuri* Miscellaneous Application 325 of 2014; [2016] KEHC 7624 (KLR) - (Explained)
24. *Samura Engineering Ltd & 10 others v Kenya Revenue Authority* Petition 54 of 2011; [2012] KEHC 5672 (KLR) - (Mentioned)
25. *Siyanga, Emmanuel Suipanu v Republic* Criminal Appeal 124 of 2009; [2013] KEHC 868 (KLR) - (Explained)
26. *SKK & 5 others v Kenya Ports Authority & 4 others; National Council for Persons with Disabilities & another (Interested Parties)* Constitutional Petition 21 of 2016; [2016] KEHC 2420 (KLR) - (Explained)
27. *Tendere, Kefah Momanyi v Director of Public Prosecution & 6 others* Petition 15 of 2017; [2017] KEHC 1116 (KLR) - (Mentioned)
28. *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others* Petition 122 of 2015; [2016] KEHC 7343 (KLR) - (Explained)



29. *Wamwere, Monica Wangu v Attorney General* Civil Appeal 188 of 2017; [2019] KECA 579 (KLR) - (Mentioned)

Tanzania

Ndyanabo v Attorney General [2001] EA 495 - (Explained)

Uganda

Olum and another vs Attorney General [2002] 2 EA - (Explained)

South Africa

1. *Berstein vs Bester* NO (1996) (2) SA 751 - (Explained)
2. *Mistry v Interim National Medical and Dental Council & others* CCT 13/1997 [1998] ZACC 10 - (Mentioned)

United Kingdom

1. *Pearlberg v Varty* [1972] 1 WLR 534 - (Explained)
2. *Reg v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 - (Mentioned)

India

Hamdard Dawakhana v Union of India Air (1960) AIR 554, 1960 SCR (2)671 - (Explained)

Statutes

Kenya

1. Anti-Corruption and Economic Crimes Act (cap 65) In general- (Cited)
2. Constitution of Kenya articles 2(4); 10; 24; 25(a); 28; 29; 31; 47(1),(2); 49(1)(d); 50(2); 137; 156; 157; 159(2)(e); 165(3)(d)(i); 201; 209(1),(2),(3)(a)(b)(c);210; 259- (Interpreted)
3. Evidence Act (cap 80) sections 107, 112, 137 - (Interpreted)
4. Kenya Revenue Authority Act (cap 469) In general- (Cited)
5. National Police Service Act (cap 84)section 35 - (Interpreted)
6. Tax Procedures Act (cap 469B)sections 2, 7, 20, 31, 42, 44(1),(2); 51(2); 52; 56(1); 58; 59(1)(a),(b),(c); 60(1),(2),(3),(10); 97(e); 99; 104(3) - (Interpreted)

Advocates

H Obach & Partners Advocates for the petitioners

Sheila Sanga for the 1st respondent

JUDGMENT

Introduction

1. The petition dated June 7, 2019 is supported by the affidavit of the 2nd to 24th petitioners' director (the 1st petitioner herein) sworn on even date. The petitioners seeks the following relief against the respondents:
 - i. A declaration that the petitioners' constitutional right to human dignity and freedom and security of the person as guaranteed by article 25(a), 28 and 29 of the Constitution have been violated by the respondents, their agents, employees and/or servants.
 - ii. A declaration that the petitioners' constitutional right to privacy as guaranteed by article 31 of the Constitution have been violated by the respondents, their agents, employees and/or servants.
 - iii. A declaration that the petitioners' constitutional rights to fair administrative action as guaranteed by article 47(1) and (2) of the Constitution have been violated by the respondents, their agents, employees and/or servants.



- iv. A declaration that the 1st petitioner's constitutional rights of an arrested person as guaranteed by article 49(1)(d) of the Constitution have been violated by the respondents, their agents, employees and/or servants.
- v. A declaration that the petitioners be compensated a total sum of Twenty-Four Million Kenya Shillings (Ksh 24,000,000) or any other amount that the court deems sufficient and/or appropriate by the respondent for violating their constitutional rights.
- vi. A declaration that section 44(1) & (2) and 60(1), (2) & (3) of the Tax Procedures Act, 2015 are unconstitutional whereas they allow the respondents to unilaterally and arbitrarily seize tax payers' possessions in contravention of article 31(b) of the Constitution.
- vii. A declaration that section 56(1) of the Tax Procedures Act, 2015 is unconstitutional whereas it shifts burden of proof to tax payers in contravention of the general law application under section 107 of the Evidence Act and article 50(2)(a) of the Constitution.
- viii. A declaration that section 58 of the Tax Procedures Act, 2015 is unconstitutional whereas it allows the respondent to unilaterally and arbitrarily search tax payers' properties in contravention of the article 31(a) of the Constitution.
- ix. A declaration that section 59 and 60(10) of the Tax Procedures Act, 2015 are unconstitutional whereas they allow the respondent to demand private and privileged communication between parties in contravention of the general law and application of privilege information under section 137 of the Evidence Act and article 31(d) of the Constitution.
- x. A declaration that section 99 of the Tax Procedures Act, 2015 is unconstitutional whereas it creates offences under sections 59(1)(a), (b) & (c) and 60(3)(d)(e) (f) and (6) of the Act which sections are equally unconstitutional.
- xi. An order of *certiorari* be issued quashing the decision of the 1st respondent to issue the notices dated February 26, 2018 under section 59(1) (c) of the Tax Procedure Act.
- xii. An order of *certiorari* be issued quashing the decision of the 1st respondent to issue notices of assessment of tax dated June 7, 2018.
- xiii. An order be issued quashing the decision of the respondents to issue orders of prosecution in Criminal Cases No 471 and 1519 of 2018 – *Republic v Elvine Leware Macag*.
- xiv. An order of *certiorari* be issued quashing the decision of the 1st respondent to issue agency notices under section 42 of the Tax Procedures Act, 2015 dated February 21, 2019.
- xv. An order for full compensation for general and aggravated damages.
- xvi. Costs of this petition.
- xvii. This court be pleased to issue such order and/or writs as the court may deem fit and/or expedient.

Petitioners' Case

2. On or about March, 2018, the 1st respondent's officer, one John Ekada contacted the 1st petitioner's wife concerning the payment of taxes for the 2nd to 24th petitioners'. The officer also contacted one, George Okoth Okello one of the Directors of the Companies who was also a Clerk to the late George Oriaro Advocate.



3. The 1st petitioner states George Oriaro law firm had all along been filing tax returns for the Companies (petitioners herein) up to the time Counsel George Oriaro Advocate passed on in August 2015. He stated that the Clerk, George Okoth Okello assured him the demise of George Oriaro would not interfere with the instructions as the Law Firm will continue filing his companies tax returns.
4. He depones that when he received the 1st respondent's communication in this matter, he visited the 1st respondent offices where he was arrested and released on the same day on a free bond conditioned on availing himself for a meeting that was scheduled to take place the following week.
5. Upon returning back to the 1st respondent's offices, he was informed that he was to be charged with offences contrary to section 97(e) as read with section 104(3) of the [Tax Procedures Act](#). He depones that his request to consult the Firm of Advocate that had been filing his returns was declined. The respondents' proceeded to institute criminal proceedings against him in Criminal Case No 471 and 1519 of 2018 at Milimani Law Courts.
6. Further the 1st respondent on June 1, 2018 issued notices of assessments of tax against the petitioners. He claims that the tax liability was estimated from their bank statements which information he contends was acquired unconstitutionally. Additionally, he states that the 1st respondent on October 11, 2018 requested for information for payment schedules regarding the 2nd to 24th petitioners', from the Ministry of Environment, Natural Resources and Regional Development, the Ministry of Sports, Culture and Arts and the Ministry of Water and Irrigation. On top of this, he depones that the 1st respondent issued a further notice of assessment upon him personally claiming that he had defaulted to pay taxes.
7. He avers that following this, the 1st respondent suspended his regional KRA PIN which he claims costed him millions of Kenya Shillings for completed works. He moreover claims that he was wrongfully detained and subjected to inhuman treatment. Furthermore, he complained that the criminal charges have injured his reputation and led to loss of business. In like manner, some of the 1st petitioner's properties were auctioned as a result of the respondents' actions while others have caveats and agency notices thus making it hard for him to earn a living.
8. The 1st petitioner is aggrieved that the 1st respondent accused him of committing tax offences on the basis that his companies had been evading payment of taxes. According to him, his arrest and charge as a result of these claims was done contrary to the law. Considering this, he posits that the respondents actions are in direct violation of the petitioners' rights under articles 25(a), 28, 29, 31(c), 47(1) & (2) and 49(1)(d) of the [Constitution](#).

1st Respondent's Case

9. The 1st respondent in response filed its, replying affidavit by its investigations and enforcement officer, John Ekadah sworn on 2 June 8, 2019.
10. He depones that the 1st respondent received information that the 1st petitioner and his companies, the 2nd to 24th petitioners, were suspected on being involved in fraud and money laundering by siphoning money from various government ministries and departments. As such, this instigated an investigation into the matter. The investigation examined the petitioners tax compliance for the period between 2010 and 2017.
11. He depones that the preliminary findings indicated that the petitioners had not filed both corporation tax and VAT, despite earning taxable income. It was discovered that the petitioners had cumulatively been paid Ksh 582,322,534 and not filed returns in that respect to income tax, VAT, PAYE and Capital



- gains tax. This in essence ascertained that the petitioners had committed an offense contrary to section 97 (e) as read with section 104(3) of the [Tax Procedure Act](#).
12. Following the findings, the 1st respondent on 23rd and January 29, 2018 tried to contact the 1st petitioner on his mobile phone however was not able reach him. The 1st respondent thereafter issued a letter dated February 28, 2018 requiring the 1st petitioner to appear before the Commissioner.
 13. The 1st respondent further contacted the 1st petitioner's wife, Violet Akinyi, who is listed as the 18th and 19th petitioners' director and requested she also avails herself for a meeting. It is noted that despite the scheduled meeting with the two, neither of them presented themselves. Further follow ups on the meeting also proved futile as they remained uncooperative.
 14. He states that the 1st respondent correspondingly reached out to other persons listed as Directors for these companies including George Okoth Okello, who was listed as a director for the 6th, 15th, 19th and 20th petitioners.
 15. Mr George appeared before the commissioner on March 6, 2018. He however denied knowing of the existence of the other Companies. The other listed Directors, Steven Otieno Ouma listed for the 18th petitioners and Xylyn Omonge listed for the 5th and 16th petitioners also denied knowledge of the other companies.
 16. He asserts that owing to these circumstances, the 1st respondent was compelled to issue a notice of tax assessment on March 16, 2018 pursuant to Section 31 of the [Tax Procedures Act, 2015](#). In response the 1st petitioner vide an email communication dated March 25, 2018 requested the 1st respondent to grant him 90 days to finalize its workings and make an appropriate response.
 17. He states that despite this promise the 1st petitioner did not avail any documents nor clarify the issues raised. This then caused the 1st respondent to issue notices of assessment on June 7, 2018 pursuant to section 51(2) of the [Tax Procedures Act](#). This time the 1st petitioner did not object to the notice.
 18. He depones that the 1st respondent is empowered under sections 58, 59(1) & (2) of the [Tax Procedure Act](#) to require production of documents by any person to assist the Commissioner determine the tax liability of a person. In line with this, the 1st respondent requested the 1st petitioner's clients as well as his banks to supply information relating to the petitioners business operations. It is said that the 1st petitioner had an opportunity to appeal the said assessments according to section 52 of the [Tax Procedures Act](#) but failed to do so. It is said that the assessments were deemed to be admitted at the Tax Appeal Tribunal. Nonetheless no appeal was preferred by the 1st petitioner in this regard.
 19. In the end, in keeping with section 7 of the [Tax Procedures Act](#), the 1st petitioner was arrested by the 3rd respondent and criminal proceedings instigated by the 2nd respondent. It is noted that during the arrest, the 1st petitioner was informed of the reason of his arrest which was defaulting tax obligations contrary to section 97(e) as read with section 104(3) of the [Tax Procedures Act](#).
 20. He further denies the 1st petitioner's claim that the firm of George Oriaro Advocates were the petitioners' tax agents. This is because the Law firm was not licensed by the Commissioner as required under section 20 of the [Tax Procedures Act](#). As such the Firm was not liable for the tax obligations of the petitioners and neither would this discharge the petitioners from their tax obligations.
 21. In light of these averments he asserts that the 1st respondent acted lawfully. Equally that despite granting the 1st petitioner an opportunity to be heard, he failed to make his case. He stresses that this petition has been filed in bad faith and an attempt by the 1st petitioner to frustrate the 1st respondent's mandate as empowered by the [Kenya Revenue Authority Act](#).



22. Furthermore, he asserts that the 1st respondent's decision to deactivate the 1st petitioner's PIN and place caveats on his property was an administrative decision and any party dissatisfied with the same is required to appeal to the Tax Appeal Tribunal as provided under section 52 of the [Tax Procedures Act](#). This procedure was not exhausted. The petition is thus deemed to lack merit and thus urges the court to dismiss it.

2nd Respondents' Case

23. The 2nd respondent's pleadings and submissions are not in the court file or court online portal (CTS).

3rd, 4th and 5th Respondents' Case

24. These respondents' wide grounds of opposition dated August 16, 2019 opposed the petition on the basis that:

- i. The petitioners have not demonstrated how these respondents violated their constitutional rights.
- ii. The office of the 5th respondent does not have prosecutorial powers under article 156 of the [Constitution](#).
- iii. The 5th respondent is an independent office whose constitutional mandate is to represent the government on legal issues and is not subject to control by any individual or organization.
- iv. The powers to prosecute are vested upon the 2nd respondent under article 157 of the [Constitution](#). The office is independent and does not require the consent of any person to commence criminal proceedings in exercise of his or her powers.
- v. The police have the mandate to investigate a complaint under the [National Police Service Act](#) under section 35 and therefore the 3rd respondent acted in accordance with the law.
- vi. These respondents powers and functions are affirmed by the courts as seen in [Attorney General v Attorney General for and on Behalf of Inspector General of Police & 3 Others ex parte Thoman Ng'ang'a Munene](#) [2014]eKLR and [Kefah Momanyi Tendere v Director of Public Prosecution & 6 others](#) [2017]eKLR.
- vii. The commencement of Criminal Case No 471 and 1519 of 2018 was carried out within the law. Besides the petitioner has not demonstrated how this criminal trial is an abuse of the court process. (See: [Bernard Mwikya Mulinge v Director of Public Prosecutions & 3 others](#) [2019] eKLR).
- viii. The petition does not disclose any unconstitutionality of any impugned sections of the [Tax Procedures Act, 2015](#).
- ix. All Acts of Parliament are presumed to be constitutional unless otherwise as captured in [Council of Governors v Inspector of General of National Police Service & 3 others](#) [2015] eKLR.
- x. The petitioners in challenging the constitutionality of the Tax Procedure Act, 2015 failed to appreciate its overall objective as guided in [Timothy Njoya v Attorney General & another](#) [2014] eKLR.
- xi. Judicial intervention should be limited to acts that are manifestly in breach of the law or where the court is satisfied that the decision maker was manifestly unfair and was influenced by other considerations other than the law.



- xii. The right to privacy claimed to have been violated by the respondents can be limited by the operation of the law if only it can be justified that the limitation is reasonable in an open and democratic society.
- xiii. The petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.

Petitioners' Submissions

- 25. The petitioners through H Obach & Partners Advocates filed submissions dated July 30, 2019. Counsel sought to discuss: whether the petitioners constitutional rights were violated; whether sections 44(1) & (2), 56(1), 58, 59, 60 and 99 of the [Tax Procedures Act](#) are unconstitutional and whether the petitioners are entitled to the reliefs sought.
- 26. On the first issue, counsel reiterated the averments in the 1st petitioner's affidavit and submitted that indeed the petitioners rights had been violated. Counsel submitted that the 1st respondent in carrying out its function relied on the impugned sections which are in direct violation to articles 25(a), 28, 29, 31 (c), 47(1) & (2) and 49(1)(d) of the [Constitution](#). Counsel stressed that article 10 of the [Constitution](#) binds all state organs and officers including the 1st respondent in enforcement of tax laws.
- 27. In support of this argument, reliance was placed in [Samura Engineering Ltd & 10 others vs Kneya Revenue Authority](#) [2012] eKLR , [Keroche Breweries Ltd & 6 others vs. Attorney General & 10 others](#) (2016) eKLR, [Mistry v Interim National Medical and Dental Council & others](#) CCT 13/1997 [1998] ZACC 10, [Dry Associates Ltd v Capital Markets Authority & another](#) (Nairobi Petition [No.328 of 2011](#)).
- 28. Counsel further argued that it is trite law that police officers examine the whole matter before effecting an arrest. He argued that in this case the 1st petitioner was charged before being heard. In support reliance was placed in [Reg. vs Secretary of State for the Home Department Ex Parte Doody](#) [1994] 1 AC 531 and [Richard Dickson Ogendo & 2 others v Attorney General & 5 others](#) [2014]eKLR.
- 29. Counsel on the second issue, relying in [Coalition for Reform and democracy & 2 others vs. Republic & 10 others](#) [2015] eKLR submitted that sections 44(1) & (2), 58 and 60(1) & (3) of the [Tax Procedure Act](#) are unconstitutional as violate article 31(b) of the [Constitution](#). This is because these Sections permit the 1st respondent to unilaterally and arbitrarily seize tax payer's possessions.
- 30. Moreover, counsel submitted section 56(1) of the act unlawfully shifts the burden of proof to the petitioners contrary to section 107 of the [Evidence Act](#) and article 50(2) of the [Constitution](#) hence unconstitutional.
- 31. Counsel added that sections 59 and 60 (10) of the act purport to limit the petitioners constitutional rights yet no justification in line with article 24 of the [Constitution](#) is demonstrated. In essence counsel submitted that the Sections are unconstitutional as allow the 1st respondent to obtain private and privileged communication between parties in violation of article 31 of the [Constitution](#) and the [Evidence Act](#).
- 32. Concluding, counsel submitted that the petitioners were entitled to compensation as discussed in [Otieno Mak' Onyango vs Attorney General & another](#) [2012] eKLR owing to the breach of their constitutional rights.
- 33. In light of exemplary damages, counsel urged the court to appreciate that the 1st petitioner had a good reputation prior to the charges against him. These charges were adjudged to be malicious and as a result



had caused the petitioners to lose their business. in the end, the 1st petitioner was subjected to shame and economic loss. For this reason, counsel urged the court to allow the petition.

1st Respondent's Submissions

34. Counsel, Sheila Sanga filed submissions dated November 4, 2019, where the key issues for determination were identified as: whether the petitioners rights under article 25(1), 28, 29, 31, 47 and 49 of the Constitution were violated; whether sections 44(1) & (2), 56(1), 58, 59, 60 (1)-(3),(10), 99 of the Tax Procedure Act, 2015 are unconstitutional; and whether the reliefs sought should be granted.
35. To commence with counsel submitted that the 1st respondent had not violated the petitioners constitutional rights as alleged. It was stated that all actions taken by the 1st respondent albeit seemed adverse in the 1st petitioner's view, all were sanctioned by the law and done within its confines. Counsel highlighted that constitutional rights save for those under article 25 of the Constitution are not absolute and thus can be limited in line with article 24 of the Constitution.
36. Counsel on the allegation that the 1st petitioner's right to dignity and freedom of security of person was violated submitted that the 1st petitioner had voluntarily gone to the 1st respondent following its call. Nonetheless it was noted that holding of the 1st petitioner was sanctioned by the dictates of section 7 of the Tax Procedure Act.
37. Equally allegations of torture were not established by the 1st petitioner. In addition, it was argued that the 1st petitioner was required to prove the allegation by establishing the principles set out in G4S Security Services (Kenya) Limited vs Domitila Katila & another [2017] eKLR.
38. Further reliance was placed in Monica Wamere v Attorney General [2019] eKLR and Dennis Itumbi v Attorney General & 2 others [2018] eKLR.
39. Counsel held similar sentiments with regards to violation of the petitioners right to privacy. It was noted that the 1st respondent was compelled to seek the information as the 1st petitioner had refused to cooperate with its officers. The action moreover was supported by the law and in public interest. Reliance was placed in Coalition for Reform and Democracy & 2 others v Republic & 10 others [2015] eKLR where it was held that:

“A right to privacy can never be absolute...what needs to be done is to subject the limitation and the purposes it is intended to serve to a balancing test, whose aim is to determine whether the intrusion into an individual's privacy is proportionate to the public interest to be served by the intrusion.”
40. Counsel further noted that the 1st petitioner was accorded sufficient time and notice before any action was taken by the 1st respondent in line with the right to a fair administrative action. It was argued rather that it was the 1st petitioner who failed to uphold this right when he was called upon. Reliance was placed in Mutungi Ngulo v Pan African Insurance Company Ltd & 4 others [2019] eKLR where it was held that:

“The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is not utilized then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.”



41. Counsel as well stressed that the 1st petitioner’s allegations on his arrest were baseless and full of falsehoods. It is stressed that the 1st petitioner was informed of the reasons for his arrest and was not barred from communicating with anyone. Further the 1st petitioner was all thorough represented by an advocate. For this allegation to hold water therefore counsel stressed that the 1st petitioner ought to prove the same as held in *Leonard Otieno v Airtel Kenya Limited* [2018] eKLR.
42. On the constitutionality of the impugned provisions, counsel submitted that this court in answering this issue should be guided by the principles of statutory interpretation. First, the principle of constitutionality as held in *Okiya Ontatah Okioti v Attorney General & another* (2018)eKLR. Second the object and purpose of the impugned Sections as determined in *R V Big M Drug Mart Ltd* [1985] 1 SCR 295.
43. Equally counsel submitted that since the impugned provisions are challenged based on the fact that they violate *the Constitution*, this court should also consider the principles of constitutional interpretation as set out under article 259 of the *Constitution*. In counsel’s view an interrogation of the impugned sections against these principles reveal that the sections are constitutional.
44. Turning to the reliefs sought, in particular the order of certiorari, counsel submitted that the notices of assessment were issued in line with the procedure set out in law under section 31 of the Tax Procedure Act. Before they were effected, the 1st petitioner had an opportunity to object the same pursuant to section 51 of the Act. The 1st petitioner in this regard did not object the notices in accordance with the law thus failing to exhaust the remedies already available before invoking this court’s jurisdiction.
45. Reliance was placed in *Republic v Commissioner for Domestic Taxes & 2 others ex parte Samuel Kimondo Theuri* [2016] eKLR where it was held that:

“However, the applicant was expected to lodge an objection to the assessment within 30 days of the date of the assessment thereof. Again, it is clear this was not done...Once the respondent had communicated in August 2010 that tax was due it was incumbent upon the Applicant to lodge an appeal within the stipulated or specified period under section 229. That was not done.”
46. Counsel further submitted that the petitioners had not proved their case to the effect that the 1st respondent in carrying out its mandate acted *ultra vires* and in bad faith. As such, there was not justifiable reasons for these orders to issue. On the contrary Counsel argued that the petition was made in bad faith intent on frustrating the due process of the law.
47. On the sought compensation of Ksh 24,000,000/-, counsel submitted that the petitioners had not proved their case and thus do not deserve this award. Moreover, it was noted that special damages must not only be claimed specially but proved strictly as held in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

3rd, 4th and 5th Respondents’ Submissions

48. State counsel, Christopher Marwa file submissions dated June 28, 2021 in support of these respondents case. Counsel identified the issues for determination as: whether the respondents violated the petitioners’ rights under article 25(a), 28, 29, 31, 47 and 49 of the *Constitution*; whether sections 44 (1) & (2), 56 (1), 58, 59, 60 (1) – (3), (10), 99 of the *Tax Procedures Act, 2015* are unconstitutional; and whether the petitioners are entitled to the remedies sought.



49. According to counsel, the petition does not disclose any reasonable cause of action against these respondents. Counsel as well argued that the petition was not pleaded with specificity and precision as is required for constitutional petitions as held in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
50. Counsel submitted that the petitioners' case that 1st respondent utilized the petitioners bank statements to register caveats on its properties could not hold water as the right to privacy is not absolute. Reliance was placed in *Stephen Kariuki Kamau & 5 others v Kenya Ports Authority & 6 Others* [2016] eKLR where it was held that:
- “I have cited at length the case law and comparable statutory provisions which indicate that though a patient’s medical record or information is protected under article 31 of the *Constitution of Kenya 2010*, there are circumstances in which such information may be divulged to a third party because the right to privacy is not absolute.”
51. It was additionally submitted that the petitioners had not established any constitutional violation and neither was any evidence adduced to support the claims of torture, cruelty, inhuman and degrading treatment as occasioned by the respondents. In support reliance was placed in *Peter Njuguna Mwangi & 2 others v Attorney General* [2017] eKLR where it was held that:
- “Aside from the fact that no torture has been proved as relates to the events of March 3, 1992, in fact no evidence of an unlawful action after that date has also been given. The almost a yearlong alleged torture would certainly have had long term effects on the Petitioners either physically or psychologically but no evidence in that regard was even alluded to let alone placed before me. That prayer must therefore fail.”
52. On the alleged unconstitutionality of the impugned sections, counsel stressed that it is a general principle that all statutes are presumed constitutional. Therefore, the one who claims otherwise should prove the same which the petitioners failed to do. Reliance was placed in *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* [2018] eKLR where it was held that:
- “Admittedly, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is Constitutional). Discussing the presumption of constitutionality of a statute, the Supreme Court of India stated that:-“In examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment.”
53. Counsel as well appreciated that in determining this question the court should examine the object and purpose of the impugned sections. This is so as to discern the intention of the Act as stated in *Council of County Governors v Attorney General & another* [2017] eKLR. In counsel’s view, the petitioners failed to demonstrate how the impugned sections are unconstitutional and also failed to particularize which provision of the *Constitution* the sections offend. To this end counsel submitted that since the petitioners failed to establish their case, they were not entitled to the reliefs sought.



Analysis and Determination

54. It is my considered view that the issues that arise for determination in this matter are as follows:
- i. Whether sections 44(1) & (2), 56(1), 58, 59, 60(1), (3) & (10), 99 of the [Tax Procedures Act, 2015](#) are unconstitutional;
 - ii. Whether the respondents' violated the petitioners' constitutional rights under article 25(a), 28, 29, 31, 47 and 49 of [the Constitution](#); and
 - iii. Whether petitioners are entitled to the relief sought.

Whether sections 44(1) & (2), 56(1), 58, 59, 60(1), (3) & (10), 99 of the [Tax Procedures Act, 2015](#) are unconstitutional;

55. Constitutionality of a Statute should be guided by the principles of constitutional interpretation set out under article 259 of the [Constitution](#). Further, article 159(2)(e) requires that while exercising judicial authority, courts protect and promote the purposes and principles of the [Constitution](#). In this case, this court is required to determine the constitutionality of a statutory provision. Article 2(4) of the [Constitution](#) provides that
- ”Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”
56. This court (the High Court) is clothed with the jurisdiction under article 165(3)(d)(i) to determine ‘whether any law is inconsistent with or in contravention of the [Constitution](#)’.
57. Courts have consistently applied various tested principles in constitutional interpretation. The Court of Appeal in [Center for Rights Education and Awareness & Another v John Harun Mwan & 6 others](#) [2012] eKLR summarized article 259 which deal with principles to apply in constitutional interpretation as follows:
- a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by article 259.
 - b. The spirit and tenor of the [Constitution](#) must preside and permeate the process of judicial interpretation and judicial discretion.
 - c. It must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.”
 - d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).”



58. The other fundamental principle of constitutional interpretation was underscored by the Court of Appeal of Tanzania in *Ndyanabo v Attorney General* [2001] EA 495 itself a restatement of the law from the English case of *Pearlberg vs. Varty* [1972] 1 WLR 534 where it was held as follows:

“Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”

59. The presumption of constitutionality of a statute was also pithily elaborated by the Supreme Court of India in *Hamdard Dawakhana v Union of India Air* [1960] AIR 554, 1960 SCR (2)671 as follows:

“In examining the constitutionality of a statute, it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment.”

60. The object and effect principle is another mode of constitutional interpretation as held in *Geoffrey Andare v Attorney General & 2 others* [2016] eKLR where the court opined thus:

“It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself. The Supreme Court of Canada in *R vs Big M Drug Mart Ltd*, [1985] 1 SCR 295 enunciated this principle as follows:

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”

61. This same principle was also applied by the constitutional court of Uganda in *Olum and another vs Attorney General* [2002] 2 EA, where it was noted that:

“To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the *constitution*, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by *the constitution*, the impugned statute or section thereof shall be declared unconstitutional...”

62. The *Court in Council of County Governors v Attorney General & another* [2017] eKLR highlights another mode of interpreting the Constitutionality of a Statute by examining the object, effect and the history of the Statute.

“A law which violates the *Constitution* is void. In such cases, the court has to examine as to what factors the court should weigh while determining the constitutionality of a statute.



The court should examine the provisions of the statute in light of the provisions of the Constitution. When the constitutionality of a law is challenged on grounds that it infringes the Constitution, what the court has to consider is the “direct and inevitable effect” of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.

Thus, the history behind the enactment in question should be borne in mind. Thus any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom the Constitution vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with the Constitution.”

63. Cognizant of the above principles, it is now my cardinal duty to evaluate the provisions of the statute that the petitioner alleges are unconstitutional and determine if that is so.
64. The petitioner contended that sections 44(1) & 2, 56(1), 58, 59, 60 and 99 of the Tax Procedures Act 2015 are unconstitutional. The petitioner faulted section 44(1) and (2) and 60 (1) & (3) of the Act for violating article 31(b) of the Constitution allegedly because they permit the 1st respondent to unilaterally and arbitrarily permit tax payer’s possessions. In regard to section 56(1) of Tax Procedures Act, 2015, the petitioner claimed that it is unconstitutional for shifting the burden of proof to the taxpayer in contravention of section 107 of the Evidence Act. For section 59 and 60 of Tax procedures Act, 2015; the petitioner argued that it limits the fundamental rights by permitting the 1st respondent to demand private and privileged communication between parties including advocate/client information in violation of article 31 (d) of the Constitution and article 137 of the Evidence Act without meeting the threshold set in Article 24.
65. The 1st respondent denied and countered the allegations of unconstitutionality fronted by the respondent blow by blow as already captured during the review of the respondent’s case.
66. The rights and fundamental freedoms in the Bill of Rights save for those specified in article 25 (namely, freedom from torture, and cruel, inhuman or degrading treatment or punishment; freedom from slavery and servitude, the right to fair trial and right to an order of habeas corpus) can limited as long as the limitation meets the conditions set out in article 24. The constitutional requirement is that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account relevant factors including:
 - a. The importance and purpose of limitation
 - b. Nature and extent of limitation
 - c. The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others; and
 - d. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

It is however worth noting that article 24(2)(c) also has a proviso underscores that despite clause (1) permitting limitation of a right or fundamental freedom, such limitation shall not limit the right or fundamental freedom so far as to derogate from the core or essential content.



67. The reasonableness or otherwise of a limitation that is a permissible derogation of the right or fundamental right in question cannot be determined without undertaking a proper analysis that considers the objective and effect of the challenged legal provision.
68. It goes without saying that the Constitution in articles 201, 209 and 210 has given the national government the power to impose taxes specified in article 209(1) of the Constitution or any other tax as may be authorized by legislation as per article 209(2). County governments also have the power to levy taxes as per article 209(3) a, b & c of the Constitution. Article 210(1) is categorical that no tax or licensing fee may be imposed, waived or varied except as provided for in legislation.
69. The Tax Procedures Act cap 469 B is the means or medium through which the tax collector in exercise of constitutional obligation to collect tax is able to ensure compliance is attained.

Section 2 to be as follows:

2. Object and purpose of the Act

- (1) The object and purpose of this Act is to provide uniform procedures for—
- (a) consistency and efficiency in the administration of tax laws;
 - (b) facilitation of tax compliance by taxpayers; and
 - (c) effective and efficient collection of tax.

70. From the reading of section 2 above, the intended objective is made clear, it is to attain effective and efficient collection of tax and facilitation of compliance by tax payers. It is against this background my analysis begins.

71. Turning now to the specific provisions of the Act that the petitioner singled out as being unconstitutional, I will start with section 44 and 60 of the Tax Procedures Act. The section provides:

44. Seizure and forfeiture of goods

- (1) This section shall apply to—
- (a) any goods in respect of which the commissioner or authorised officer reasonably believes that the value added tax or excise duty payable in respect of the supply, removal, or import of the goods has not been or will not be paid; or
 - (b) goods for which excise duty has not been paid, unless the owner of the goods has made arrangements that have satisfied the commissioner for the payment of the excise duty, which may include the giving of a security;
 - (c) excisable goods subject to excise control that have been moved, altered, or in any way interfered with, except with the permission of the commissioner;
 - (d) excisable goods in respect of which, any person, in any matter relating to excise, makes or produces a declaration, certificate, application or other document, answer, statement or representation, that is false or incorrect in any particular; or
 - (e) excisable goods in respect of which a refund of excise duty has been unlawfully obtained.



- (2) The commissioner or an authorised officer may seize any goods to which this section applies.
- (3) The goods seized under this section shall be stored in a place approved by the commissioner or authorised officer.
- (4) Subject to subsection (5), when goods have been seized under this section, the commissioner or authorised officer shall, as soon as practicable after the seizure and having regard to the condition of the goods, serve the owner of the goods or the person who had custody or control of the goods immediately before their seizure, a notice in writing—
 - (a) identifying the goods;
 - (b) stating that the goods have been seized under this section and the reason for seizure;
 - (c) setting out the terms for the release or disposal of the goods; and
 - (d) stating that the goods maybe forfeited to the commissioner if they are not claimed in accordance with subsection (7).
- (5) The commissioner or authorised officer shall not be required to serve a notice under this section if, after making reasonable enquiries, the commissioner or authorised officer has insufficient information to identify the person on whom the notice should be served.
- (6) When the commissioner or authorised officer is unable to serve the notice on the person who is required to be served under this section, the commissioner or authorised officer may serve the notice on the person who claims the goods if that person has given sufficient information to enable the notice to be served.
- (7) The commissioner or authorised officer may authorise that goods that have been seized under this section be delivered to the person on whom a notice has been served when that person has paid, or has given security for the payment of, the tax due and payable, or that will become due and payable, in respect of the goods.
- (8) If the tax due and payable, or the tax that will become due and payable, has not been paid and security for the payment of the tax has not been given, the commissioner or authorised officer shall detain the seized goods—
 - (a) in the case of perishable goods, for a period that the commissioner or authorised officer considers reasonable having regard to the condition of the goods; or
 - (b) in any other case—
 - (i) for ten days after the seizure of the goods; or
 - (ii) for ten days after the due date for payment of the tax due in respect of the supply, removal, or import of the goods, whichever is the earlier.
- (9) Where the detention period under subsection (8) has expired, the goods shall be forfeited to the commissioner.



- (10) The commissioner or authorised officer may sell forfeited goods in the manner specified in section 41(6) and apply the proceeds of the sale of the forfeited goods in the following order—
- (a) towards the cost of taking, keeping, and selling the forfeited goods;
 - (b) towards the payment of the Value Added Tax or excise duty that is, or will become, payable in respect of the supply, removal, or import of the goods; and
 - (c) the remainder of the proceeds, if any, shall be retained by the commissioner.
- (11) When the proceeds of the disposal of forfeited goods are less than the total of the tax payable in respect of the supply, removal or import of the goods and cost of taking, keeping, and selling the forfeited goods, the commissioner may proceed to recover the shortfall from the owner of the goods or the person who had custody or control of the goods immediately before they were seized as if the shortfall was a tax payable by that person.

72. Further, section 60 of the [Tax Procedures Act](#) which the petitioner faults as being unconstitutional states:

- “60.) In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
- (2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.
 - (3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or court allows the person to add new grounds.

73. The petitioner assaulted section 44(1) and (2) and 60(1)- (3) of the [Tax Procedures Act](#) stating that they allow unilateral and arbitrary seizure of the tax-payers possessions thereby demeaning the dignity and the spirit of victims subjected to such actions.

74. On reading and understanding of the two sections, I am unable to agree with the petitioner’s contention. Section 44(1) & (2) is coached to is applicable when there is reasonable believe that value added tax or excise duty has not been paid or will not be paid in respect of the subject matter under investigation. In the instant case for instance, the 1st respondent deposed that its actions were informed by intelligence reports and upon conducting its preliminary investigations it found that income to the tune of Kshs 583,322,534 had been received by the petitioners but the taxes due were never remitted. Further, once the 1st respondent seizure is done by the 1st respondent, he is obliged to serve their owner a notice of seizure in writing and the recipient of the notice can lay a claim. It thus means that the section has an inbuilt mechanism that provides the owner a reasonable opportunity to contest their seizure. For Section 60, it is clear that procedure under the said section can only be commenced by obtaining a court warrant. The involvement of the court is meant to ensure and curb arbitrariness as the court must ascertain the presence of reasonable cause before such a warrant can issue. The duty imposed on the court to issue warrant is a safeguard to protect the rights and fundamental freedoms of an individual and the court has to assess if a reasonable basis has been established to limit the rights and fundamental freedoms of the person concerned in the manner proposed.



75. In my view, both section 44 and 60 have intrinsic safeguards that prevent arbitrariness by proportionately striking a fair balance between the taxpayer rights and tax collector's obligations under the law hence it is my finding that they are not unconstitutional. They ensure that tax is lawfully collected while respecting the rights of the taxpayer through by providing that seizure notice must be premised on reasonable belief that there is tax due has not or will not be paid hence it needs to be proved that there were circumstances that reasonably created that belief. suspicion. There is also the requirement that the owner of goods is granted an opportunity to challenge the seizure notice. Section 60 is involving judicial process which as alluded to is a potential safeguard against arbitrariness. The claim that section 44 and 60 violate article 31 of the Constitution is thus untenable.

76. The petitioner also challenged section 56 for placing the burden on the tax payer who is making an objection or appealing by claiming that it is against the general law of application and the Constitution to shift the onus on the taxpayer. This section is on objections and appeals and reads as follows:

Section 5

- (1) In any proceedings under this part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
- (2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.
- (3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the tribunal or court allows the person to add new grounds.

77. The petitioner submitted on this point as follows:

“Section 56(1) of the Tax Procedures Act, 2015 is unconstitutional whereas it shifts the burden of proof to the petitioner...Section 56(1) of Tax Procedures Act is unconstitutional for shifting the burden of proof to tax-payers in contravention of section 107 of the Evidence Act and article 50(2) of the Constitution...”

78. The argument is not legally sound. Evidently, this is a tax enforcement statute aimed at assisting in collection of tax. The procedure referred to in section 56 does not relate to a criminal proceeding but an objection to a tax decision. The presumption of innocence under article 50 (2) (a) of the Constitution relates to the legal burden in criminal cases. It specifically begins by stating that

‘Every person accused has the right to a fair trial, which includes the right to-

- a) to be presumed innocent until the contrary is proved’

79. This rule does not automatically apply in civil cases where the burden of proof can be fixed by law or as a matter of fairness. For instance, despite the petitioner hyping section 107 of the Evidence Act, he equally forgets that that there is section 112 of the same Act that places the burden of proof on the person who has special knowledge of particular facts. Again, we have presumptions that shift the burden in particular circumstances. This point was very well illustrated by the Court of Appeal in the case of *Stanley Mombo Awiti vs Kenya Anti-Corruption Commission* [2019] eKLR where the challenge was mounted that Anti-Corruption and Economic Crimes Act had shifted the burden of proof by requiring the person suspected of possession unexplained assets to forfeit it unless he could provide a sufficient explanation. The court held:

“...The appellant urged his right to be presumed innocent under article 50 (2)(a) of the Constitution was violated as the court shifted the burden of proof and required him to



prove his innocence. It was submitted that the appellant was not informed in advance of the evidence in possession of the respondent because the forfeited properties were neither listed nor enumerated in the Notice dated July 9, 2008.... Section 55(2) of the Act make provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. Section 55(2) of ACECA is in sync with section 112 of the Evidence Act, cap 80 of the Laws of Kenya. section 112 of the Evidence Act, (cap 80 of the Laws of Kenya) provides:

“In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.”

79. Under section 55(2) of ACECA, the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate assets. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorization as property that has been unlawfully acquired. The requirement to explain assets is not a requirement for one to explain his innocence. The presumption of innocence is a fundamental right that cannot be displaced through a Notice to explain how assets have been acquired...”

80. The 1st respondent argued that the tax decision is made up of audit findings and workings by the commissioner (1st respondent) hence it is natural for the taxpayer who is objecting to the decision to be the one to assault that decision. Prudence and fairness would in my view demand that under those circumstances the legal requirement on allocation of burden is quite reasonable and should not be disturbed. I do not find the allegation of unconstitutionality of section 56(1) of the Tax Procedures Act established. It does not have any relationship to article 50(2)(a) of the Constitution either.

81. There was also the allegation that section 58 of Tax Procedures Act is unconstitutional because it allows arbitrary search of tax payers properties while section 59 purports to limit the fundamental rights without meeting the threshold under article 24 of the Constitution. It was argued by the petitioner that his client-advocate privilege was violated yet it is to be maintained even after the death of the Advocate. The two sections state as follows:

58. Power to inspect goods, records, etc.

1. Notwithstanding anything to the contrary in any written law, an authorised officer may inquire into the affairs of a person under any tax law, and shall at all times have full and free access to all lands, buildings, places to inspect all goods, equipment, devices and records, whether in the custody or control of a public officer, or of a body corporate or of any other person, and may make extracts from or copies of those records.
2. An officer acting under subsection (1) may require the owner or employee, or a representative of the owner of the business, to give him all assistance and to answer all questions relating to the inquiry.



59. Production of records

1. For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the commissioner or an authorised officer may require any person, by notice in writing, to—
 - a. produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;
 - b. furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or
 - (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.
2. If the person required to produce documents under subsection (1)(a) is a financial institution—
 - a. the documents shall not, while they are being examined, be removed from the premises of the financial institution or other premises at which they are produced;
 - b. the commissioner or authorised officer carrying out the examination may make copies of such documents for the purposes of any report relating to the examination; and
 - (c) the confidentiality of the information obtained in the course of the examination by the commissioner or authorised officer shall be maintained and the information shall be used solely for the purposes of the tax laws.
3. The commissioner or authorised officer may require that the information referred to in subsection (1) be—
 - (a) given on oath, verbally or in writing, and, for that purpose, the commissioner or authorised officer may administer the oath; or
 - (b) verified by a statutory declaration or in any other manner that the commissioner may prescribe.
4. This section shall have effect despite—
 - (a) any law relating to privilege or the public interest with respect to the giving of information or the production of any documents (including in electronic format); or
 - (b) any contractual duty of confidentiality.

82. The *Evidence Act*, cap 80 Laws of Kenya protects the advocate-client communication. It provides at section 137 as follows:

“...No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his advocate unless he offers himself as a witness, in which



case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but not others...”

The advocate-client confidentiality under section 137 of the *Evidence Act* and the disclosure requirements permitted under section 59 and section 60 of the *Tax Procedures Act* are not in conflict with each other. Section 59 and 60 applies in instances where there is reasonable cause to believe that a tax-payer is non-compliant in fulfilling his/her tax obligations. Section 137 of the *Evidence Act* does shield from disclosure communication between an advocate and the client if the information is not given in furtherance of an illegal purpose. Such information cannot be protected where there is reasonable basis that it was intended to conceal non-payment of tax. In that case, public interest would demand that disclosure be made.

Whether the Rights and Fundamental Rights of the 1st Petitioner were violated by the 1st Respondent

83. A constitutional petition must meet the threshold of specificity and precision requirement in pleading the constitutional rights violated and the manner of infringement by the respondents as against the petitioner. This test was affirmed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR as follows:

“(349) ... Although article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru v Republic*, [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

84. In the same way, the Court of Appeal stressed this position in *Mumo Matemu (supra)* as follows:

“(42) It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”



85. Similarly, the petitioners are obliged to discharge the first burden of proof as stipulated under sections 107 of the *Evidence Act*. In this regard the court in *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR held that:

“ 15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

86. Given the above, the fundamental question is whether the petitioners have established that their rights and fundamental freedoms pleaded in the petition have been violated.

87. The petitioner alleged that the right to freedom and security of the person under article 29 was infringed by the respondent's Act of depriving him his freedom for a number of hours for two days, subjected him to criminal charges causing him untold physical and psychological torture for failure to produce documents relating to tax compliance which he was willing to tender had he been given the time to get them from the firm of the deceased advocate.

88. The 1st respondent refuted the presentation of facts by the 1st petitioner rebutting the presentation of facts by the petitioner. The 1st respondent stated that upon getting intelligence reports and conducting preliminary investigations that showed the petitioners had received colossal income amounting to Kshs. 583, 322, 534 and had not filed any tax returns which amounts to an offence under section 97 (e) as read with section 104(3) of *Tax Procedures Act*, the 1st respondent contacted the 1st petitioner on 23/1/2018 via his known mobile number it was not picked. This made the 1st respondent to write a letter 'JF 2' on February 28, 2018 inviting him to their office to discuss the issue. The 1st respondent also contacted Violet Akinyi (1st petitioner's wife) who is also listed as a Director of Lewar Ventures and Lipepixac Supplies- the 18th and 19th petitioners to attend the meeting to discuss their tax affairs. Violet agreed to meet the 1st respondent on March 1, 2018 which was followed with email confirmation but she did not avail herself.

89. The 1st respondent's effort to reach out to the 1st petitioner and his wife did not materialize as they remained unbothered and uncooperative during investigation stage. The other directors were contacted George Okoth Okello who was a director in 6th, 15th and 20th petitioners and Xlyn Omonge denied connection with the Companies claiming his registration details has been obtained fraudulently and provided a statement and sample signatures. Stephen Ouma also listed as a Director claimed as such. Xlyn Omonge did not turn up. The 1st Respondent sought information available through 3rd Parties and issued tax assessment on March 16, 2018 pursuant to section 31 of the *Tax Procedures Act, 2015*.

90. That is when the 1st petitioner on March 25, 2018 responded through email 'JE 7' acknowledging the receipt of the letter of March 16, 2018. He requested for 90 days and committed to address the issues



raised but never provided the documents or clarifications required. The 1st respondent issued notices of assessment dated June 7, 2018 and there was no objection filed by the petitioner per section 51 of *Tax Procedures Act* (see JE 8). The 1st respondent upon completion of investigation that various tax offences had been committed by the petitioners and was of the view that there was sufficient evidence to sustain a prosecution. It was then that it invited the Directors for statement recording. Consequently, the 1st respondent states that the 1st petitioner was accorded an opportunity to be heard but failed to utilize it.

91. That the 1st petitioner was arrested by the DCI officers based at the 1st respondent and was informed about the reason of his arrest was defaulting in tax obligation contrary to section 97(e) as read with section 104 (3) which is an offence under the *Tax Procedures Act*. The 1st respondent denied claims of torture following the arrest of the petitioner. The 1st respondent thus accused the 1st petitioner of insincerity.
92. Despite very damning allegations in regard to the 1st petitioner's uncooperative posture and his failure to honour the commitment made with the 1st respondent to provide details of information requested about his companies, there was no supplementary affidavit that was filed by the 1st petitioner to counter the 1st respondent's deposition about the 1st petitioner's conduct which prompted the 1st respondent to cause his arrest for purposes of prosecution for the offences that the investigation had detected. In my view, the duty to obey the law is not optional for any citizen. When non-confrontational approach is applied to ensure compliance with the law has been extended but is totally ignored as was the case here, the only remaining option is to use legally compulsive means to effect an arrest provided that it is reasonably executed. Section 7(1) of the *Tax Procedures Act* confers authorized officers of the 1st respondent for purposes of administering tax law with all the duties, powers, rights, privileges and protection of a police officer. In my view, the arrest was not arbitrarily executed without a just cause hence was not a violation of article 29(1) of the *Constitution*.
93. In the circumstances of this case, I am unable to find any evidence to fault the arrest of the 1st petitioner which was justified due to persistent refusal to submit to the 1st respondent despite investigations finding a sufficient basis to prefer tax related offences. I find that the action taken by the 1st respondent was proportionate to secure compliance with the law and thus did not amount to violation of the 1st petitioner freedom and security of the person as alleged. Equally, there was no evidence of torture that was adduced.
94. On violation of right to privacy, the petitioner alleged that the 1st respondent unilaterally acquired bank statements of the petitioners and used the same to calculate alleged tax arrears and issued agency notices with a bid to recovering the arrears. Counsel for the petitioner thus argued:

“ ... Section 31 of the Value Added Tax permits warrantless entry into person's premises on the basis of reasonable grounds established that the Act is not being complied. 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 grounds for suspecting they contain evidence of the commission of any offence under the Act... A warrantless search is a limitation to the right of privacy as it contravenes the standard established at 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 respondents in this case...The obligation of the state 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. ..The respondent has not placed before court material evidence upon which the court may make its own assessment and conclusions to determine whether the action it took was reasonable to do a warrantless search on the petitioner and in the process infringed their



constitutional rights. It therefore follows that the search and seizure contravened provisions of article 31 of the Constitution...”

95. the Constitution recognizes the right to privacy by protecting an individual from unnecessary and unauthorized intrusion in following manner;

Article 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.
96. The petitioner quite correctly concedes that there can be a limitation of right to privacy if there are valid or justifiable reasons for the same. This reverberates well with the ratio in Berstein v Bester NO [1996] (2) SA 751 cited with approval in Tom Ojienda t/a Tom Ojienda & Associates Advocates vs Ethics and Anti-Corruption Commissions & 5 others [2016] eKLR the Lord Ackermann explained the competing nature of privacy right held follows:

“The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy, this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of a civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.”

97. However, notwithstanding the concession that the privacy rights can be limited as long as there is a clear and valid justification, in the instant case the 1st petitioner contended that the 1st respondent did not provide any valid grounds or have any factual basis for the alleged intrusion into the privacy of the petitioners hence there was violation of article 31 rights in respect of the 1st petitioner.

98. In so stating the petitioner fails to acknowledge that the 1st respondent in its replying sworn by John Ekadah on June 28, 2019 disclosed in paragraph 7,8, 9, 10 and 11 as follows:

“7. That the 1st respondent received information to the effect that the 1st petitioner, an employee of the National Treasury through the 2nd – 24 petitioners, being business associated with him were suspected to be involved in fraud and/or money laundering by siphoning money from various government ministries and departments.

“8. That the 1st respondent commenced investigations into entities and individuals who were involved in Government Supplies and had been paid by the Government through its Financial Management System.”



- “9. That the 1st respondent having received the said information commenced investigations into the tax affairs of the 1st -24th petitioners for the period 2010-2017 to check their compliance status. (Attached hereto and marked ‘JE 1’ is a bundle of fact-finding letters written to various government agencies all dated October 11, 2017).”
- “10. That the preliminary findings were that the petitioners were non-filers for both corporation tax and VAT despite them doing business with various government ministries and departments including the Ministry of Water and Irrigation, Ministry of Sports, Culture and Youth Affairs and the Ministry of Environment and Natural Resources, thereby earning taxable income.”
- “11. That the petitioners hereinabove were found to have been paid a cumulative Total of 583,322,534/- and had not filed returns with respect to Income Tax, Value Added Tax, PAYE and Capital gains Tax.
- “12. That from the investigations findings, it was apparent that the petitioners had deliberately defaulted on obligations imposed under Tax Law which is an offence under section 97(e) as read with 104(3) of the Tax Procedure Act.”

99. This was what informed the actions that were initiated against the petitioners by the 1st respondent. in elaborating what amounts to reasonable suspicion the court in Emmanuel Suipanu Siyanga v Republic Criminal Appeal No 124 of 2009 held thus;

“ ... it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time; a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not ground which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time is to be tested objectively. Consequently a suspicion may be reasonable even though subjectively it was based on unreasonable grounds, to prove reasonable suspicion, it must of necessity be recognized that a reasonable suspicion never involves certainly as to the truth. Where it does, it ceases to be suspicion and becomes fact ... there must be satisfactory account ...”

100. I have carefully considered the reasons given by the 1st respondent and it is my considered opinion given that the 1st respondent did not just move against the petitioner based on intuition but its decision was backed by findings that pointed strongly to the fact that tax offences had been committed by the petitioners, its actions against the petitioners were proportionate and reasonably necessary and met the threshold under article 24 on limiting the right to privacy in public interest.
101. In regard to the violation of right to fair administrative action under article 47, I find no basis for this claim in the light of my earlier analysis in which I noted that that opportunity to the petitioners was accorded as the 1st respondent tried to contact the 1st petitioner severally by mobile contact, letters and even emails but was elusive and failed to take advantage of that chance to state his stance on the matter.
102. In the final analysis, i find no merit in this petition which i now proceed to dismiss with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF SEPTEMBER, 2024.

.....



L N MUGAMBI
JUDGE

