



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 176 OF 2018**

**DUNCAN ZIYANAI MURASHIKI.....PETITIONER**

**-VERSUS-**

**THE COMMISSIONER GENERAL,**

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

**THE COMMISSIONER, INVESTIGATIONS & ENFORCEMENT,**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR, DIRECTORATE OF**

**IMMIGRATION & REGISTRATION OF PERSONS.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner, Duncan Ziyantai Murashiki, is a citizen of Zimbabwe and was, at the time of filing his petition, lawfully residing in Kenya and working for gain as the General Manager of Libya Oil Kenya Limited (hereinafter simply referred to as the Company).
2. The 1<sup>st</sup> Respondent is the Commissioner General of Kenya Revenue Authority appointed under Section 11(1) of the Kenya Revenue Authority Act, 1995 and is the Chief Executive Officer of the Kenya Revenue Authority.
3. The 2<sup>nd</sup> Respondent, the Commissioner, Investigations & Enforcement, Kenya Revenue Authority, is a statutory office established pursuant to Section 13(1) of the Kenya Revenue Authority Act, 1995 exercising delegated powers of the 1<sup>st</sup> Respondent pursuant to Section 11(4) of the Act.
4. The 3<sup>rd</sup> Respondent, the Director, Directorate of Immigration & Registration of Persons, is a statutory office holder appointed pursuant to Section 13 of the Kenya Citizenship & Immigration Act, 2011.
5. The 4<sup>th</sup> Respondent is the Attorney General of the Republic of Kenya and the principal legal adviser to the Government of Kenya pursuant to Article 156(4) of the Constitution.
6. The Petitioner's case is that he was employed on 20<sup>th</sup> July, 2014 as the General Manager of the Company for a period of three years running from 1<sup>st</sup> September, 2014 to 31<sup>st</sup> August, 2017. His contract was extended through a letter dated 9<sup>th</sup> October, 2019 for a period of two years running from 1<sup>st</sup> September, 2017 to 31<sup>st</sup> August, 2019.
7. On 27<sup>th</sup> October, 2017 the 1<sup>st</sup> and 2<sup>nd</sup> respondents commenced investigations on the tax liability of the Company for the years 2010 to

2016. This was followed by various meetings between the Company and the 1<sup>st</sup> and 2<sup>nd</sup> respondents' officers in a bid to resolve the issues being investigated. Subsequently, the 2<sup>nd</sup> Respondent in a letter dated 3<sup>rd</sup> April, 2018 forwarded a preliminary report on the findings of their investigations and requested the Company for more information and a response to the issues raised in the preliminary report within seven days. The Company responded through a letter dated 10<sup>th</sup> April, 2018 indicating its readiness to amicably resolve the issues raised expeditiously. The Company even went further to request a meeting with a view to resolving the pending issues.

8. On 3<sup>rd</sup> May, 2018 while investigations against Company were still ongoing, the 2<sup>nd</sup> Respondent purporting to exercise the powers of the 1<sup>st</sup> Respondent under Section 45 of the Tax Procedures Act, 2015 ('TPA') issued a Departure Prohibition Order ('DPO') to the 3<sup>rd</sup> Respondent against the Petitioner on the ground that he was a flight risk. The 2<sup>nd</sup> Respondent notified the 3<sup>rd</sup> Respondent that the reason for the DPO was the ongoing investigations against Company. The 3<sup>rd</sup> Respondent was directed to prohibit the Petitioner from leaving Kenya unless the DPO was revoked in writing by the 1<sup>st</sup> Respondent as stipulated in the TPA.

9. The Petitioner consequently filed the petition dated 5<sup>th</sup> May, 2018 challenging the constitutionality of certain provisions of the TPA and the legality of the actions of the respondents. Through the petition, the Petitioner seeks the following reliefs:

a) **The Honourable Court be pleased to hold and declare that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein have acted in violation of the provisions of the Constitution of Kenya, 2010 and the national values and principles of governance embodied under Article 10 as well as the principles and values of public service embodied in Article 232 of the Constitution of Kenya, 2010;**

b) **The Honourable Court be pleased to hold and declare that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein have infringed on, infringed and violated the Petitioner's right to human dignity and freedom and security of person decreed and protected under Articles 28 and 29(a) of the Constitution of Kenya, 2010;**

c) **The Honourable Court be pleased to hold and declare that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein have infringed on, infringed and violated the Petitioner's right to fair administrative action decreed and protected under Article 47 of the Constitution as read with the provisions of the Fair Administrative Action Act, 2015;**

d) **The Honourable Court be pleased to hold and declare that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein have infringed on, infringed and violated the Petitioner's right to access to justice and fair hearing decreed and protected under Articles 48 and 50(1) of the Constitution of Kenya, 2010;**

e) **The Honourable Court be pleased to hold and declare that the Departure Prohibition Order (DPO) issued on 3<sup>rd</sup> May 2018 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein is illegal, unconstitutional and in contravention of the human rights and fundamental freedoms under the Constitution of Kenya, 2010 and the laws of Kenya and is hence null, void and of no effect;**

f) **The Honourable Court be pleased to hold and declare that the departure Prohibition Order (DPO) issued on 3<sup>rd</sup> May 2018 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein was without any legal, constitutional or statutory basis and was in bad faith hence null, void and of no effect;**

g) **An Order of Certiorari do issue removing into this Honourable Court for purposes of being quashed the Departure Prohibition Order of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents issued on 3<sup>rd</sup> May 2018 prohibiting the Petitioner herein from leaving Kenya or obtaining customs and immigration clearance;**

h) **An Order of Prohibition do issue prohibiting the Respondents herein by themselves, their servants, agents or employees from relying on the Departure Prohibition Order issued on 3<sup>rd</sup> May 2018 or prohibiting the Petitioner herein from leaving Kenya or obtaining customs and immigration clearance while leaving or entering Kenya;**

i) **The Honourable Court be pleased to hold and declare in so far as the Section 45 of the Tax Procedures Act, 2015 grants the Respondents herein powers to restrain any person from leaving Kenya or obtain immigration or customs clearance in Kenya without due process and a fair administrative action and/or a fair hearing, the said Section is in conflict with the provisions of Articles 24, 39, 47 and 50(1) as read with the provisions of the Fair Administrative Action Act, 2015 thus unconstitutional and void and of no effect;**

j) **The Honourable Court be pleased to hold and declare the provisions of Section 45(9) of the Tax Procedures Act, 2015 conflicts with Articles 1(3), 10, 159(1), 160, 165(3) and 232 of the Constitution of Kenya, 2010 thus unconstitutional, void and of no effect;**

k) **The Honourable Court be pleased to award the Petitioner general damages against the Respondents herein jointly and severally for breach of his fundamental rights and freedoms;**

l) **The costs consequent upon this Petition be borne by the Respondents in any event on indemnity basis;**

m) **The Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances to remedy the violation of the Petitioner's fundamental rights.**

10. The Petitioner's case is that he is not a director, shareholder or member of the Company within the meaning of the Companies Act, 2015

or the provisions of sections 18(4) and 45(1)(b) of the TPA and a DPO cannot be issued against him. It is the Petitioner's averment that he does not owe any tax to the 1<sup>st</sup> and 2<sup>nd</sup> respondents and neither has such a demand for tax payment or liability been issued against him in order for Section 45 of the TPA to be invoked.

11. The Petitioner avers that prior to the issuance of the DPO he was not granted an opportunity to be heard or present himself before the 2<sup>nd</sup> Respondent. He deposes that he is a separate juridical entity from the Company and cannot be held personally liable to pay the taxes which Company is being investigated for. The Petitioner additionally states that Company has been cooperating with the 1<sup>st</sup> and 2<sup>nd</sup> respondents and has undertaken in writing to co-operate with their officers to resolve any pending issues. It is his case that the Company has no intention of evading its tax liabilities to warrant the application of Section 45 of the TPA.

12. The Petitioner avers that by issuing the DPO without any reasonable justification as required under Article 24 of the Constitution, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have violated his right to freedom of movement as enshrined in Article 39(2). Further, that the actions of the said respondents have also violated his rights to dignity under Article 28 and freedom and security of person under Article 29(a).

13. It is additionally the Petitioner's averment that the failure by the respondents to issue adequate notice and reasons for the proposed administrative action and to give him an opportunity to be heard and make representations violated his right to fair administrative action as guaranteed and protected under Article 47 as read with sections 2 & 4 of the Fair Administrative Action Act, 2015 and Article 50(1) of the Constitution. Apart from the highlighted rights, the Petitioner asserts that his rights as enshrined in Articles 2(4), 10 and 39 of the Constitution have also been violated and continue to be violated.

14. It is the Petitioner's case that Section 45 of the TPA is not applicable to him and by invoking it and issuing the DPO, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions are devoid of legality and procedural propriety thereby failing the test of constitutionality owing to the imperatives enshrined under Articles 10 and 232 of the Constitution.

15. The Petitioner deposes that that Section 45(9) of the TPA is in any event unconstitutional as it purports to bar any judicial review or scrutiny of a departure prohibition order. He contends that the provision is therefore in conflict with Articles 1(3), 2(1), 10, 159(1), 160, 165(3) and 232 of the Constitution thus making it null and void. He consequently argues that the unconstitutionality of the DPO makes it unenforceable against him.

16. The Petitioner avers that the respondents' unconstitutional, illegal, oppressive, unfair and unreasonable acts have prejudiced him as he is prohibited from leaving Kenya unless the DPO is revoked by the 1<sup>st</sup> Respondent. It is the Petitioner's case that his position as the Chief Executive Officer of the Company entailed frequent travel which had been severely impacted by the DPO.

17. It is the Petitioner's case that the Tax Appeals Tribunal established under the Tax Appeals Tribunal Act, 2013 does not have jurisdiction over the issues raised in the petition and neither was it functional at the time the petition was filed. The Court was urged to grant the reliefs sought otherwise the Petitioner's constitutional rights would continue being violated by the respondents.

18. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition through a replying affidavit sworn by John Ekadah on 18<sup>th</sup> May, 2018. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' case is that over the years they have been experiencing challenges in effectively assessing, collecting and accounting for tax revenue due to various acts, omissions and vices perpetrated by taxpayers resulting in incorrect or lower tax declarations. They state that the TPA has robust provisions to secure the recovery of taxes from taxpayers who may want to frustrate collection of taxes. It is further their averment that pursuant to Section 32(1) of the TPA any tax payable by a person law is a debt due to the Government payable to the Commissioner.

19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents confirm that they are aware that the Petitioner is the General Manager of Company. It is their deposition that pursuant to the powers conferred on the 1<sup>st</sup> Respondent by Section 5(1) of the Kenya Revenue Authority Act they commenced tax investigations into the affairs of the Company on 27<sup>th</sup> October, 2017. They assert that by his designation, the Petitioner was the person responsible for the day to day operations of the Company and had full mandate and access to the Company's tax matters. It is their averment that the Petitioner was throughout the investigations the contact person who they engaged and had meetings in respect of the tax affairs of the Company.

20. The 1<sup>st</sup> and 2<sup>nd</sup> respondents depose that following the investigations they issued a report on their preliminary findings to the Petitioner which indicated that the Company had a tax liability of approximately Kshs.15 billion. They confirm that on 10<sup>th</sup> April, 2018, the Company through the Petitioner responded to the preliminary report. It is their case that despite indulging the pleas of the Petitioner on behalf of Company for extension of time, the Petitioner has on various occasions frustrated the investigation process. They aver that in an attempt to recover the taxes they invoked one of the tools for recovery of taxes by issuing the DPO under Section 45 of the TPA.

21. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that despite the existence of the DPO the Petitioner travelled out of the country on 6<sup>th</sup> May, 2018 and was arrested at the airport on 12<sup>th</sup> May, 2018 upon his return. It is therefore their case that the Petitioner has not approached this Court with clean hands. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that as a sign of good faith and because of the willingness by the Petitioner to cooperate in the tax investigations the passport had since been released to him. According to them, the Petitioner's rights have not been violated as alleged and that the stated rights are in any case limitable under Article 24(1) of the Constitution in order to safeguard the public's interest in enhancing revenue collection and combating tax evasion.

22. On the alleged unconstitutionality of Section 45(9) of the TPA, the 1<sup>st</sup> and 2<sup>nd</sup> respondents assert that only acts carried out within the law are shielded from criminal or civil proceedings meaning that any unlawful act is open to the scrutiny of the courts. They therefore urge the Court to find that the provision is constitutional.

23. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also filed grounds of opposition dated 10<sup>th</sup> August, 2018 through which they oppose the petition on the grounds that:

- a) **That the Petition offends the doctrine of presumption of constitutionality of a statute passed by Parliament;**
- b) **That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted in accordance with the law and made sound decisions guided by the law and lawfully acted in their official capacity;**
- c) **That the right of freedom of movement is not an absolute right and may be limited subject to infringements of the law by any person;**
- d) **That the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, lawfully done, may be challenged by any aggrieved party in a court of competent jurisdiction;**
- e) **That the Petition is otherwise incompetent, misconceived and an abuse of the court process as it does not demonstrate how the Petitioner's fundamental rights have been violated.**

24. The 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the petition through grounds of opposition dated 21<sup>st</sup> May, 2018 as follows:

- a) **That the Notice of Motion has not met the threshold for the grant of conservatory orders as held by the Supreme Court in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & Others (SCK Petition No. 2 of 2013);**
- b) **That conservatory orders should only be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes of a case which in the instant case all tilt against issuing any conservatory order since the interests of the State merge with the public interest, the impugned Act is intended to serve the public;**
- c) **That there is a general presumption of law that statutes enacted by Parliament are constitutional and the burden falls on the person who alleges otherwise to rebut this presumption. See Supreme Court of India case of Hambardda Wakhana v Union of India [1960] AIR 554 where the learned Judges observed that, "In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment."**
- d) **That declaring a statute unconstitutional is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established which is not the case herein. See Lee v Bude in Torrington Rly (1871) L.R. 6;**
- e) **In Mount Kenya Bottlers Limited & 3 others v Attorney General and Others, Nairobi Petition No. 72 of 2011 [2012] eKLR, the Court stated that; "it must be upheld and as Wiles J. stated in Lee v Bude in Torrington Rly (1871) L.R. 6, the courts cannot act as "regents" over what is done in Parliament because such an authority does not exist;**
- f) **That the impugned law is in operation and it is the machinery that aids the Kenyan government in the administration of tax laws and ensuring every person pays tax including expatriates working in Kenya and therefore to suspend any of its provisions at this stage will seriously jeopardize the operations of the Kenya Revenue Authority and yet should the Petition succeed, there are sufficient mechanisms in law to undo any injustice caused, if at all;**
- g) **That the Petitioner's constitutional rights that have allegedly been violated are not absolute since the Constitution in Article 24 provides for the limitation of rights and fundamental freedoms on various grounds;**
- h) **That Section 45(9) of the Tax Procedures Act, 2015 is clear that no proceedings, criminal or civil, may be instituted or maintained against the government, the Director, the Commissioner, an officer authorized to act under this section, or a customs, immigration, police, or any other person for anything lawfully done under this section;**
- i) **The Petition and the Notice of Motion are otherwise incompetent, misconceived, misplaced and are an abuse of the process of this Honourable Court as the Petitioner's rights and fundamental freedoms have not been breached in any manner.**

25. The Petitioner filed submissions dated 15<sup>th</sup> November, 2018. The Petitioner submits that since the 3<sup>rd</sup> and 4<sup>th</sup> respondents had challenged the jurisdiction of this Court to entertain the petition, the Court must first satisfy itself that it has jurisdiction to handle the matter before proceeding to make any determination as was held in the cases of **Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** and **Re Matter of the Advisory Opinion of the Supreme Court, Constitutional Application No. 2 of 2011**.

26. The Petitioner submit that Article 165 of the Constitution confers upon this Court both general and specific jurisdiction. Further, that Article 165(3)(b) as read with Article 23 confers upon this Court jurisdiction to hear and determine questions of violation of human rights and interpretation of the Constitution. It is the Petitioner's submission that this petition raises constitutional questions in regard to the rights enshrined and protected under Articles 28, 29(a), 39, 47 and 50(1). He asserts that this Court is called upon to make a determination whether

these rights were infringed by the respondents in issuing the DPO dated 3<sup>rd</sup> May, 2018. It is additionally the Petitioner's contention that his case raises questions on the constitutionality of Section 45 of the TPA hence bringing the matter within the ambit of this Court.

27. The Petitioner submitted that courts have found time and again that statutory ouster clauses, such as Section 45(9) of the TPA, which seek to limit the High Court's jurisdiction or bar persons from instituting legal proceedings have no legal effect.

28. In support of his assertion that Section 45 of the TPA is unconstitutional, the Petitioner submitted that this Court is required by Article 259 of the Constitution to interpret the Constitution in a manner that promotes its values, purposes and principles while advancing the rule of law and rights and fundamental freedoms. He argues that although this Court is required to be guided by the principle of presumption of constitutionality, such a presumption should not apply to statutes that purport to limit fundamental human rights. It is the Petitioner's position that he has discharged the burden of proof by demonstrating that Section 45 of the TPA offends Articles 1(3), 10, 24, 39, 47, 48, 50(1), 159(1), 160 and 165(3) of the Constitution.

29. According to the Petitioner, Section 45(1), (2) & (3) of the TPA requires the Commissioner to specify in the departure prohibition order, which must be served on the person prohibited from travelling, the tax payable by the person or the Company which they control. It is further submitted that Section 45(4) enjoins the 3<sup>rd</sup> Respondent to immediately enforce the departure prohibition order and prevent the person from departing from Kenya, confiscate and retain the person's personal identification documentation. Further, that Section 45(5) of the TPA enjoins the 1<sup>st</sup> and 3<sup>rd</sup> respondents to deny the person customs and immigration clearance. According to the Petitioner, other than the departure prohibition order's effect against a person being immediate, it stays in force until revoked by the Commissioner as provided in Section 45(6).

30. It is further the Petitioner's case that Section 45(9) of the TPA provides that no proceedings, criminal or civil, may be instituted against the respondents for anything done lawfully under the Section 45. The Petitioner contend that Section 45 of the TPA does not in any way give the person affected by the administrative action an opportunity to be heard and make representations prior to issuance of the departure prohibition order or to institute court proceedings. It is therefore the Petitioner's contention that any action taken under Section 45 of the TPA greatly prejudices the person's rights under Articles 10, 24, 39, 47, 48 and 50(1) of the Constitution.

31. It is the Petitioner's submission that the impugned provision does not only violate the stated provisions of the Constitution but also the principles of transparency and accountability under Articles 10(2) and 232(1)(e) & (f) of the Constitution. The Court is urged to find that the purpose and effect of Section 45 of the TPA is to shield the respondents' actions from judicial scrutiny hence limiting this Court's constitutional mandate under Articles 159, 160 and 165.

32. The Petitioner contends that pursuant to Articles 24(3) of the Constitution, the respondents are enjoined to prove that Section 45 of the TPA satisfies the criteria for limitation constitutional rights and fundamental freedoms. It was further submitted that the TPA does not comply with Articles 24(2) as it does not specifically state that the Act is intended to limit any specific right or fundamental freedom. Further, that the Act does not state the nature and extent of limitation nor is it clear about the right to be limited. This Court is therefore urged to find that Section 45 of the TPA is unconstitutional, void and of no effect.

33. The Petitioner asserts that the respondents' action of arresting him upon arrival from a business trip and confiscating his passport violated his right to freedom of movement. According to the Petitioner, his passport was only released to him after he filed this petition. It is pointed out that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' admission that they have been engaged in discussions with the Company over the disputed tax confirms that there has been no tax assessment or tax liability against the Petitioner in person.

34. The Petitioner is also of the view that the DPO was not issued in compliance with the provisions of Section 45 of the TPA. The Petitioner submits that the impugned provision applies only to individuals or persons controlling companies who want to leave Kenya without satisfying their tax obligations. The Petitioner submits that the DPO should not have been issued against him as he is a mere employee of the Company and the 1<sup>st</sup> and 2<sup>nd</sup> respondents have not claimed any taxes from him in his personal capacity. The Court is consequently urged to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions fail the test of legality to even be construed as a justification for the limitation of the Petitioner's rights to freedom of movement, fair administrative action, access to justice and fair hearing.

35. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed submissions dated 15<sup>th</sup> January, 2019. They commenced by stating that tax collection is an important aspect of development policy as it is associated with sustainable economic development. They stated that national and county government revenue mainly come from taxes which are spent on education, public welfare, road construction among other activities. It is their case that in order to increase tax compliance in the country, the TPA among other laws, have been enacted by Parliament to ease tax collection.

36. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that while enacting the TPA, one of the considerations by Parliament was how to ensure taxes are collected from persons who want to leave the county so as to abscond their tax responsibility. One of the effective tools provided to achieve this goal where there is a significant tax debt is the departure prohibition order provided under Section 45 of the TPA. Once this order is issued the person against whom it is issued cannot leave the country until the tax debt is paid in full or an agreement on settlement has been reached between the taxpayer and the Commissioner. They submit that the rationale of issuing the order is based on the international law principle that the enforcement of tax obligations is an assertion of a State's sovereignty within its borders and cannot be enforced in another State because a country's sovereignty is limited within its borders and once a taxpayer leaves there is no way of recovering the tax debt. The decision of **Government of India v Taylor (1955) AC 491** is cited as expounding on the said legal principle.

37. It is additionally the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submission that extradition for tax offences may not be permitted except where states have signed bilateral or multilateral treaties for tax purposes. They stated that in the circumstances of this case, Kenya does not have an extradition treaty with Zimbabwe and the only way taxes can be collected from foreigners who have no attachments in the country is when they are in the country hence the necessity of the departure prohibition order. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that departure prohibition orders are not unique to Kenya as countries like Australia frequently utilize them.

38. The 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that issuance of departure prohibition orders is not done lightly but on the basis that the Commissioner believes on reasonable grounds that it is desirable to make such a person not leave Kenya as provided under Section 45 of the TPA. They submit that in the circumstances of this case, the issuance of the DPO was informed by the fact that the Petitioner is the current General Manager of the Company and a custodian of all documents within the Company needed by the respondents to assess its tax liability. They therefore assert that the DPO was issued within the law.

39. It is submitted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the Petitioner has simply stated the constitutional provisions allegedly violated without demonstrating how those provisions were violated by the invocation of Section 45 of the TPA by the respondents. It is their case that the Petitioner has therefore failed to sufficiently demonstrate how a departure prohibition order as a tax collection tool is unconstitutional hence failing to discharge the burden of proof as held in the case of **Geoffrey Andare v Attorney General & 2 others**.

40. On the alleged unconstitutionality of Section 45 of the TPA, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that an Act of Parliament can only be declared void and unconstitutional if it is in conflict with a specific constitutional provision and as the Petitioner has not proved such conflict, this petition is offensive to the doctrine of presumption of constitutionality. In that regard, they argue that in interpreting an Act of Parliament, courts should confine themselves to the specific constitutional clauses which the law is alleged to infringe and only where the statute is in conflict with the Constitution should the statute be voided. It is their submission that the Court while interpreting the impugned provision must not be guided by the particular circumstances of the Petitioner but by the fact that the law is applicable to many people in different circumstances who have tax liabilities within the jurisdiction of the Republic of Kenya. Reliance is placed on the cases of **State v Acheson (1991) (2) SA805 (NM)** and **Hamdard Dawakhana v Union of India (1960) AIR 554, 1960 SCR (2) 671**.

41. In response to the question as to whether this Court has jurisdiction to hear and determine this petition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted themselves to this Court's jurisdiction.

42. On the whether the Petitioner's rights were violated, the 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that there was no violation of any of the Petitioner's constitutional rights. Referring specifically to Section 45(9) of the TPA, they assert that the Petitioner's view that the provision bars institution of proceedings against the respondents is erroneous as the provision does not stop anyone from seeking redress in a court of competent jurisdiction in the event the respondents do not act lawfully. They relied on the decision in **Manoj Kumar Khara v Fiji Revenue & Customs Authority Civil Action No.122 of 2013** in support of the proposition that the court is at liberty to use its discretion where there has been abuse of office by any public official.

43. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that contrary to the Petitioner's assertions, the DPO was issued because the Commissioner reasonably believed that the Petitioner was a representative of the directors of the Company and would leave the country before the Company's tax liability had been satisfied. They rely on, among other cases, **T v Federal Commissioner of Taxation (1986) FCA 433**; **Troughton v Deputy Commissioner of Taxation (2008) FCA 18**; **Danco v Federal Commissioner of Taxation (1987) 19 ATR 443**; **Bakri v Deputy Commissioner of Taxation (2017) FCA 20**; and **Geoffrey Edelsten v Commissioner of Taxation (1988) G 882** for the submission that the Petitioner has not discharged the onus of proving that the DPO is invalid.

44. Upon perusal of the pleadings and submissions of the parties, I find that the issues for the determination of this Court are the constitutionality of Section 45 of the TPA and the violation of the Petitioner's fundamental rights and freedoms by the issuance of the DPO against him.

45. Before delving into the key issues identified above, I need to mention in passing that although the Petitioner appears to suggest that the 3<sup>rd</sup> and 4<sup>th</sup> respondents challenge the jurisdiction of this Court, I do not discern such challenge from their grounds of opposition dated 21<sup>st</sup> May, 2018. For purpose of record, and as correctly conceded by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, this Court has jurisdiction to hear and determine this petition as it is premised on the contention that Section 45 of the TPA is unconstitutional as it violates or limits various constitutional rights. The duty of determining the constitutionality of statutory provisions falls squarely within the jurisdiction of this Court and I will therefore proceed to determine the Petitioner's case.

46. I will first start by determining the question of the alleged unconstitutionality of Section 45 of the TPA, 2015 since the decision on this issue will guide the Court on how to proceed with the question of the alleged violation of the Petitioner's constitutional rights and fundamental freedoms. The Petitioner's case is that the impugned provision is unconstitutional because the person upon whom the departure prohibition order is issued is never given an opportunity to be heard or make representations prior to issuance of the order or to even institute court proceedings. It is urged that the provision therefore greatly prejudices a person's rights under Articles 10, 24, 39, 47, 48 and 50(1) of the Constitution.

47. The 1<sup>st</sup> and 2<sup>nd</sup> respondents on the other hand contend that one of the considerations by the Parliament while enacting the impugned provision was to ensure that taxes are collected from persons who want to leave the county with the intent of absconding their tax obligations. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, the rationale of Section 45 of the TPA is that once a taxpayer leaves Kenya there can be no way to recover the tax debt unless a specific clause exists through a multilateral treaty with the country to which the person emigrates.

48. This Court remains alive to its duty under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, and advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and in a manner that contributes to good governance. Moreover, in exercising its judicial authority, this Court is obliged by Article 159(2)(e) to protect and promote the purposes and principles of the Constitution.

49. The principles to be considered in interpreting the Constitution were reiterated by the Court of Appeal in the case of **Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR** as follows:

**“a. that as provided by Article 259 the Constitution 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.

b. that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

c. that the Constitution must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.”

d. that 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).”

50. There are a number of well-established principles that are employed in determining whether an Act of Parliament is constitutional. These principles guide the Court in declaring the constitutionality or lack thereof of a statute. Those principles were succinctly expressed in the Tanzanian case of *Ndyanabo v Attorney-General* [2002] AHRLR 243 (TzCA 2002) thus:

“[19.] We propose, before commencing to examine the correctness or otherwise of counsel's arguments, to allude to general principles governing constitutional interpretation which, in our opinion, are relevant to the determination of the issues raised by counsel in this appeal. These principles may, in the interests of brevity, be stated as follows. First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law...

[20.] Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, that our young democracy not only functions but also grows, and that the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed. Thirdly, until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction.”

51. In determining the constitutionality of a statutory provision, the Court is required to read the impugned provision against the constitutional provisions allegedly violated by it. This principle was expressed in the Ugandan case of *Zachary Olum & another v Attorney General* [2000] UGCC 3 as follows:

“To determine the constitutionality of a section of a statute or Act of Parliament, 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 its 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.”

52. In *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR the Court of Appeal expressed the importance of understanding the intention of lawmaker in interpreting a statute when it held that:

“14. Alive to the fact that we are called upon to interpret the aforementioned provisions, we remind ourselves of the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. Halsbury's Laws of England, 4<sup>th</sup> Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 1372 provides:-

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

15. The intention of a statute can be identified through a number of factors. In *Cusack -vs- Harrow London Borough Council* (2013) 4 ALL ER 97, the Supreme Court observed:-

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

Further, in Halsbury's Laws of England (supra):-

“It is one of the linguistic canons applicable to construction of legislation that an Act is to be read as a whole, so that an

enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act...”

53. The impugned Section 45 of the TPA empowers the Commissioner to issue a departure prohibition order barring any person with tax liabilities from exiting Kenya. The provision states:

**45. (1) This section applies when the Commissioner has reasonable grounds to believe that a person may leave Kenya without paying —**

**(a) a tax that is or will become payable by the person; or**

**(b) a tax that is or will become payable by a company in which the person is a controlling member.**

**(2) The Commissioner may issue a departure prohibition order, in writing, to the Director in relation to a person to whom this section applies stating-**

**(a) the name and address of the person; and**

**(b) the amount of tax that is or will become payable by the person or by a company in which the person is a controlling member.**

**(3) The Commissioner shall, as soon as practicable after issuing a departure prohibition order under subsection (1), serve a copy of the order on the person named in the order.**

**(4) Where the Director has been issued with an order under this section, the Director or an officer authorised by the Director, shall, so far as is permitted by any other written law or this Act, shall prevent the person named in the order from departing Kenya, including by the confiscation and retention of the person's passport, identity card, visa, or other travel document authorising the person to leave Kenya.**

**(5) A person who is the subject of a departure prohibition order shall not be granted customs or immigration clearance.**

**(6) A departure prohibition order shall remain in force until it is revoked by the Commissioner.**

**(7) The Commissioner shall revoke a departure prohibition order if-**

**(a) the person named in the order pays in full the tax payable or that will become payable by that person or by a company in which that person is a controlling member; or**

**(b) the person named in the order makes an arrangement satisfactory to the Commissioner for the payment of the tax that is or will become payable by that person or by a company in which that person is a controlling member.**

**(8) As soon as practicable after making a decision to revoke a departure prohibition order, the Commissioner shall notify the Director and the person named in the order.**

**(9) No proceedings, criminal or civil, may be instituted or maintained against the Government, the Director, the Commissioner, an officer authorised to act under this section, or a customs, immigration, police, or any other person for anything lawfully done under this section.**

**(10) In this section-**

**“company” means a company within paragraph (a) of the definition in section 3; and “Director” means the Director-General of the Kenya Citizens and Foreign Nationals Management Service appointed under section 13 of the Kenyan Citizenship and Foreign Nationals Management Service Act, 2011. 12 of 2011.**

54. It is appreciated that States impose taxes within their jurisdiction on their citizens and businesses as a way of raising revenue. The importance of taxes cannot be underscored because without taxes governments would be unable to meet the development demands of their countries in sectors such as health, education and administration. The role played by well-utilized taxes in the development of a country cannot be disputed. Taxes also play a big role in the improvement of a country’s economy leading to job creation and improvement of the standards of living.

55. In the case of **Export Trading Company v Kenya Revenue Authority [2018] eKLR** the Court observed the important role played by taxes in the development of a country but warned of the need for the processes and procedures of tax collection to meet the legal and constitutional thresholds. This is what the Court said:

**“24. This court notes that the importance of taxation and the collection of taxes for any government cannot be gainsaid. It must however be noted that the processes and procedures leading to the collection of the said taxes must meet the relevant**

legal and constitutional thresholds in order to ensure the citizen's rights have not been violated and/or are threatened with violation. The importance of having proper laws in taxation matters was emphasized in the case of *Okiya Omtatah Okioti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR where the court observed that:

**“The imposition of the excise duty is bound to have an impact on the rights under Article 43 (1). Tax inherently infringes the right to property, being an expropriation of one's hard-earned money. It follows that for the tax to be lawful, the law introducing it must not only be lawful, but it must meet the Article 24 analysis test in that it must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”**

56. The power to impose tax in Kenya is vested in the national government as clearly expressed in Article 209(1) & (2) of the Constitution thus:

**209. Power to impose taxes and charges**

**(1) Only the national government may impose-**

**(a) income tax;**

**(b) value-added tax;**

**(c) customs duties and other duties on import and export goods; and**

**(d) excise tax.**

**(2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3)(a) or (b).**

57. The principles that govern public finance are captured in Article 201 of the Constitution as follows:

**(a) there shall be openness and accountability, including public participation in financial matters;**

**(b) the public finance system shall promote an equitable society, and in particular—**

**(i) the burden of taxation shall be shared fairly;**

**(ii) revenue raised nationally shall be shared equitably among national and county governments; and**

**(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;**

**(c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;**

**(d) public money shall be used in a prudent and responsible way; and**

**(e) financial management shall be responsible, and fiscal reporting shall be clear.**

58. My interpretation of Article 201 of the Constitution is that in order to ensure the responsibility of paying taxes is shared equally and fairly among taxpayers, the government has a duty to ensure that the tax owed is remitted and not evaded. Taxes are directly linked to the development of a nation and their collection has a public interest element. It therefore follows that failure by the government to ensure that the tax due and owed is collected amounts to failure to fulfill its constitutional mandate which is realized through the Kenya Revenue Authority.

59. The question is whether Section 45 of the TPA as drafted violates the rights of taxpayers. The Petitioner argues that Section 45 of the TPA is inconsistent with and violates Article 24 which provides the Bill of rights cannot be limited except by law; the right to human dignity under Article 28; the right to freedom and security of person, which includes the right not to be deprived of freedom arbitrarily or without just cause under Article 29(a); the right to freedom of movement under Article 39(2); the right to fair administrative action under Article 47; the right to access justice under Article 48; and the right to fair hearing of a dispute that can be resolved by the application of the law before an impartial court or tribunal under Article 50(1).

60. It is reasonable to conclude that Section 45 of the TPA restricts the right to freedom of movement and the right to leave Kenya as protected by Article 39(1) & (2) of the Constitution.

61. Article 24 provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

62. Among the factors to be taken into account, when considering whether a limitation of a right or fundamental freedom is justifiable, are the nature of the right or fundamental freedom; the importance of the purpose of the limitation; the nature and extent of the limitation; the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose. Article 24(3) requires the State or any person seeking to justify a particular limitation to demonstrate to the court, tribunal or other authority that the requirements of the Article have been satisfied.

63. The question therefore is whether the use and need of a departure prohibition order is justified when one takes into account the rights and fundamental freedoms limited by its deployment, the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.

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

65. In **Troughton v Deputy Commissioner of Taxation [2008] FCA 18; (2008) 166 FCR 9**, the Court while interpreting the provision on departure prohibition orders held that:

**“21. However, there is authority which I should follow that suggests that the purposive dimension of s 14S should not be ascertained from such a literal reading of the words of the section. In *Dalco v Federal Commissioner of Taxation (1987) 19 ATR 443, 447-458*, Young J said of s 14S:**

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

**His Honour’s view was endorsed in the court in *Edelsten v Federal Commissioner of Taxation (1989) 85 ALR 226, 230* and in *Skase v Commissioner of Taxation (1991) 32 FCR 206, 209 and 210-211*. In the latter case, Pincus J said that “there must be ... the circumstance that recoverability will be affected by the departure of the taxpayer from Australia.” (32 FCR at 211).**

**22. It follows that s 14S(1)(b) should be read not literally, but as though it referred to a belief by the Commissioner (on reasonable grounds) that it was desirable that the person not leave Australia without discharging the tax liability or making the arrangements there referred to. Thus it is not to be taken as a given that, in every case, the departure of the person from Australia will make it unlikely, or at least less likely, that the tax liability will be discharged, or that the ability of the Commissioner to recover the tax will be impaired. These are things which must be considered by the Commissioner in every case. The purpose of s 14S, and accordingly a central purpose of Part IVA, is not the prevention of persons (owing tax) from leaving Australia *simpliciter*: it is the prevention of such persons from leaving Australia where, in the Commissioner’s belief reasonably arrived at, the recovery of tax would or might thereby be impaired.**

**23. In that result, at least so far as revealed by s 14S, the general scope and objects of Part IVA of the Administration Act are as contended for by both sides in the present case. As contended for by the Commissioner, they are the projection of the revenue. As contended for by the applicant, they are the prevention of persons (owing tax) from leaving Australia where that would affect the recoverability thereof.”**

66. In ***Dalco v Federal Commissioner of Taxation (1987) 19 ATR 443, 447-458***, the Court held that:

**" Section 14T [revocation of a DPO] gives the clue that the matters which spark the making of a section 14S order are that the recoverability of tax will be affected by the departure of the taxpayer from Australia. Accordingly, once the Commissioner is satisfied that the tax is completely irrecoverable then it cannot be the case that collection of the tax will be affected by the taxpayer going outside Australia and the *raison d’être* for making the order has gone so that the order must be revoked. I am of the view that that is the way that one approaches the section. The Commissioner is to believe on reasonable grounds that it is desirable to stop a person leaving Australia because it is necessary to collect the tax that is owed to the government and that that discharging of the tax liability will be affected by the person going overseas".**

67. Similarly, in ***Edelsten v Federal Commissioner of Taxation (1992) 92 ATC 4285***, it was stated that:

**"In other words, it is only the possibility or likelihood that the taxpayer's departure from Australia would adversely affect the revenue that there should be under this Act a restriction on the right of an individual in a free society to travel without bureaucratic impediment. The power to issue a DPO may not be exercised penalty or for other purposes."**

68. In ***Troughton (supra)***, the Court stated that:

**“...it is not to be taken as a given that, in every case, the departure of the person from Australia will make it unlikely, or at**

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

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

70. As already stated, Section 45 of the TPA serves the lawful purpose of ensuring that the State fulfills its constitutional mandate of ensuring fair distribution of the tax burden. The departure prohibition order is a tool for enforcing tax obligations on those who may wish to evade taxes. The Petitioner has not shown that there are other reasonable alternatives which the State can use to collect taxes from those who may want to leave the country without meeting their tax obligations. The provision is therefore compliant with the requirements of Article 24 of the Constitution on limitation of certain rights. The rights that are limited by the deployment of a departure prohibition order are rights which can be limited as long as the provisions of Article 24 of the Constitution have been complied with.

71. Section 45(9) of the TPA has been interpreted by the Petitioner to mean that the entities and persons mentioned therein have a blanket cover of protection and hence immune to legal proceedings for their actions. This is a view I reject as the legislation is quite clear in its wording that the protection provided is only for '*anything lawfully done under this section.*' The lawfulness of State actions is first and foremost dictated by the Constitution which binds all people under Article 2(1) of the Constitution. To that end any action that is not in line with the Constitution and the law will be rendered null and void once reviewed by the courts. It is important to also appreciate that once a person affected by a decision deems the same to be unlawful, it is only the courts and the tribunals which can determine the lawfulness of the impugned action. The entities and persons named in Section 49(5) of the TPA are not the persons to determine the lawfulness of their actions. The provision does not add much value to the TPA but it cannot be said to be unconstitutional as it does not bar access to the courts and tribunals.

72. A departure prohibition order by its very nature imposes a significant restriction on the rights of the affected taxpayers as it deprives them of their liberty to travel outside Kenya, the rights to human dignity and freedom and security of the person. The drafters of the statute recognized the impact of this restriction on a person's liberty and freedom of movement hence the intentional wording in Section 45(1) that the provision '*applies when the Commissioner has reasonable grounds to believe that a person may leave Kenya without paying*' a tax that is due or will become payable by the person. The critical phase in the process of determining whether to issue a departure prohibition order is whether there are '*reasonable grounds*' which makes it desirable to curtail a person's right to move out of Kenya prior to discharging a tax obligation or making satisfactory arrangements for payment of the tax.

73. In a nutshell, although Section 45 of the TPA limits the right to freedom of movement as enshrined in Article 39 of the Constitution, the limitation is appropriately justified in line with Article 24(1) of the Constitution. Additionally, the limitation is proportionate keeping in mind the purpose and effect of the law in question. The impugned provision is clear and precise in its wording revealing the drafters' intent. In my view, the impugned provision is necessary in a democratic society and in the interest of the public as it ensures that the risk to the country's revenue is averted. I accordingly find that Section 45 of the Tax Procedures Act, 2015 is constitutional.

74. Having found that Section 45 of the Tax Procedures Act, 2015 is constitutional, it follows that all matters arising in regard to the enforcement of the provision falls within the remit of the Tax Appeals Tribunal established under Section 3 of the Tax Appeals Tribunal Act, 2013. The Petitioner is at liberty to approach the Tribunal if he finds that the DPO was issued in contravention of the law.

75. In view of what I have stated in this judgement, I find no merit in the petition. The petition is therefore dismissed and the parties are directed to meet their own costs of the proceedings.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2021.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**