



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 398 OF 2018**

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

**-VERSUS-**

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

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

**JUDGMENT**

1. The Petitioner, Seyed Hassan Dashti Khavidaki, through the petition dated 13<sup>th</sup> November, 2018 prays for orders as follows:

**a. A declaration that the Petitioner's constitutional right to equality before the law, human dignity, freedom and security of the person, fair administrative action and fair hearing as guaranteed by Articles 25 (c), 27, 28, 29, 38, 47 and 50 of the Constitution have been violated and/or threatened to be violated by the Respondents, their agents, employees and/or servants.**

**b. This Honourable Court be pleased and do hereby grant a judicial review order of prohibition to prohibit the Respondents, their officials, employees, servants and/or agents or anybody working under or for them from commencing any civil or criminal processes, arresting, summoning, questioning, threatening or in any way harassing the Petitioner with respect to any tax questions with respect to Farab International FZE.**

**c. A permanent injunction to restrain the Respondents, their officials, employees, servants and/or agents or anybody working under or for them from commencing any civil or criminal processes, arresting, summoning, questioning, threatening or in any way harassing the Petitioner with respect to any tax questions for Farab International FZE.**

**d. This Honourable Court be pleased and do hereby grant a judicial review order of certiorari to quash the Respondents' decision to confiscate the Petitioner's passport and to issue a Departure Prohibition Order against the Petitioner, commence any civil or criminal processes, arrest, summon, question, threaten or in any way harass the Petitioner with respect to any tax questions for Farab International FZE.**

**e. Costs of this Petition.**

**f. And any other or further relief as this Honourable Court may deem fit to grant.**

2. The 1<sup>st</sup> Respondent is the Kenya Revenue Authority and the 2<sup>nd</sup> Respondent is the Attorney General.

3. The Petitioner's case as set out in the petition and the affidavit sworn in support thereof is that he is an Iranian citizen legally permitted to reside and work in Kenya under a permit granted to him on 5<sup>th</sup> April, 2018. His averment is that he is employed by Farab International FZE Limited ('the Company') as their representative for Kenya, Tanzania and Uganda. His specific role is to assist the Company as a bank signatory for purposes of clearing financial obligations.

4. The Petitioner deposes that on 24<sup>th</sup> October, 2018 the 1<sup>st</sup> Respondent issued him with a Departure Prohibition Order ('the Order') over investigations relating to VAT assessment of Kshs. 188,378,324/- with respect to the Company. Upon returning to Kenya following the issuance of the Order, the Petitioner asserts that he was accosted by officers of the 1<sup>st</sup> Respondent who confiscated his passport.

5. The Petitioner claims that he is not a shareholder, director, manager or representative of the Company and therefore the actions of the 1<sup>st</sup>

Respondent are unlawful and illegal as he is not a controlling member of the Company. The Petitioner relies on Section 45 as read with Section 18 of the Tax Procedures Act, 2015 ('TPA') to support his case.

6. According to the Petitioner, the Company appointed Invisor Consulting to engage the 1<sup>st</sup> Respondent concerning the tax demand issued on 27<sup>th</sup> September, 2018, and on 27<sup>th</sup> October, 2018, an objection to the 1<sup>st</sup> Respondent's tax demand was filed.

7. The Petitioner avers that as a result of the illegal investigations and decision to arbitrarily arrest him for fictitious tax arrears without following the law on the collection of tax arrears, the respondents have violated his right not to be discriminated against under Article 27 of the Constitution. The Petitioner asserts that he was singled out and illegally detained pursuant to unknown tax arrears. It is also asserted that his right to human dignity under Article 28 of the Constitution was infringed upon as his passport was confiscated without any reason and he was forced to live within his hotel premises for fear of being arrested for lacking valid documentation. Additionally, the Petitioner claims that he was subjected to indignity by the respondents when they declined to follow the law on the recovery of tax arrears.

8. The Petitioner states that his right to freedom and security of the person under Article 29 of the Constitution was infringed upon when the respondents purported to arrest him without any lawful and justifiable cause. Further, that his right to economic and social freedom under Article 38 was violated when the respondents confiscated his passport resulting in unlawful and unreasonable false imprisonment.

9. The Petitioner avers that his right to fair administrative action under Article 47 of the Constitution was violated as the 1<sup>st</sup> Respondent did not notify him in writing or orally of the tax violation as required under Section 29(2) of the TPA.

10. The 1<sup>st</sup> Respondent opposed the petition through a replying affidavit sworn on 23<sup>rd</sup> November, 2018 by Martin Karoki. It is averred that the 1<sup>st</sup> Respondent had discovered that the Company had not declared or paid VAT on payments received from a project it had carried out. According to the 1<sup>st</sup> Respondent, in the course of investigations, the Company was engaged and requested for documents and explanations but the Petitioner has to date remained uncooperative and disinterested in the matter. Upon completing the investigations, the Company was issued with a tax demand dated 27<sup>th</sup> September, 2018 which it objected to on 24<sup>th</sup> October, 2018. The objection was, however, dismissed and the assessment confirmed on 7<sup>th</sup> November, 2018 and that decision has not been appealed by the Company.

11. The 1<sup>st</sup> Respondent states that the Petitioner as the Company representative was responsible for the day to day operations of the Company and in the course of the investigations he was the contact person with the 1<sup>st</sup> Respondent in respect of the tax investigations.

12. It is deposed that the conduct of the Company's representatives during the investigations coupled with the fact that the project has since been concluded necessitated the issuance of the Order against the Petitioner since he is the only representative of the Company known to the 1<sup>st</sup> Respondent and based on the stated reasons is, in the 1<sup>st</sup> Respondent's view, the person in charge of the Company's affairs in Kenya.

13. The 1<sup>st</sup> Respondent refers to sections 15(1)(i) and 16(1) of the TPA on the definition of a 'tax representative' and asserts that the Petitioner is the tax representative of the Company in Kenya as he has admitted in his supporting affidavit that he was appointed by the Company to clear its financial obligations.

14. The 1<sup>st</sup> Respondent contends that it acted in accordance with the law and the powers granted to it by the provisions of Section 45(1) of the TPA. According to the 1<sup>st</sup> Respondent the petition is not brought in good faith as it is meant to circumvent the law and delay the payment of taxes that are due and payable. The 1<sup>st</sup> Respondent avers that there would be substantial loss to the Government of Kenya in terms of revenue if the orders sought by the Petitioner are granted. It is further deposed that no constitutional rights of the Petitioner have been violated as alleged and the reliefs sought are inconsequential as they have been overtaken by events.

15. The Petitioner by way of a further affidavit dated 18<sup>th</sup> March, 2019 avers that he is not a controlling member of the Company but simply an employee and the point of contact between the 1<sup>st</sup> Respondent and the Company. He contends that the Company is a separate legal entity and he cannot face tax enforcement mechanisms in his individual capacity for acts the 1<sup>st</sup> Respondent is pursuing the Company for.

16. The Petitioner asserts that the enforcement mechanisms against him are illegal, oppressive, arbitrary and call for the intervention of the Court. He further contends that the Government of Kenya will not suffer any loss if the orders sought are granted.

17. The Petitioner through submissions dated 19<sup>th</sup> March, 2019 submits on the law regulating the collection of taxes and enforcement. He relies on sections 18 and 45 of the TPA and submits that he is not a director, general manager, company secretary, or other senior officer or controlling member of the Company and thus should not have been served with the Order. He further asserts that no evidence has been led by the 1<sup>st</sup> Respondent to show that he has derived any benefit from the Company and he cannot be made to pay the tax obligation of a corporate entity.

18. The Petitioner also claims that the Company is cooperating with the respondents and has not refused to pay taxes. The Petitioner is of the opinion that as an employee he cannot be punished because his employer has already disputed the claimed tax.

19. The Petitioner points to sections 49, 50, 51, 52, 53, 77, 78 and 84 of the TPA on objections and appeals from tax decisions and submits that the 1<sup>st</sup> Respondent is using the Order as a tool of harassment in breach of his fundamental human rights without just cause. The Petitioner opines that the confiscation of his passport amounts to detaining him.

20. On the interpretation, application and enforcement of the Tax statutes, the Petitioner relies on several cases including **Keroche Industries Limited v Kenya Revenue Authority & 5 others; Republic v Commissioner of Domestic Taxes Large Tax Payer's Office**

**Ex-Parte Barclays Bank of Kenya Ltd [2012] eKLR; and Cape Brandy Syndicate v Inland Revenue Commissioner [1921] 1 KB 64.**

21. The Petitioner submitted that the 1<sup>st</sup> Respondent flouted clear provisions of statute and basic requirements of fair administrative action in issuing the tax demand. The Petitioner asserted that the 1<sup>st</sup> Respondent applied a methodology that failed the statutory duty placed upon it. According to the Petitioner, the issuance of the Order and the confiscation of his passport breached his rights to liberty, movement, security and socio-economic rights under the Bill of Rights without justifiable cause. Reliance was placed on several decided cases including **Republic v Commissioner of Domestic Taxes Large Tax Payer’s Office Ex-Parte Barclays Bank of Kenya Ltd [2012] eKLR; Isaac Gathungu Wanjohi & others v Attorney General & others Nairobi HCC Petition Number 154 of 2011; R v Kenya Revenue Authority ex-parte L.A.B. International Kenya Limited, Misc. Civil Application No. 82 of 2010; and Kenafric Industries Ltd v Commissioner of Domestic Taxes & 4 others, Petition No. 99 of 2011.**

22. Before delving into the substance of the petition, I find it necessary to determine if this Court has jurisdiction to hear and determine this case. Although none of the parties raised the issue of jurisdiction, I am guided by the dictum in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR** that:

**“It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court.”**

23. The Court of Appeal in the case cited above recognises that a court can raise the issue of jurisdiction on its motion even where the parties in the litigation have not alluded to it. This was affirmed in the case of **Anaclet Kalia Musau v Attorney General & 2 others [2020] eKLR** where it was held that:

**“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:**

**“40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:**

**“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)”**

24. Now that it is established that the court can raise the issue of jurisdiction on its own motion, it is necessary to state why this is so. The answer is found in **Owners of the Motor Vessel “Lillian S” (supra)** where it was posited that:

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

25. From the foregoing, it is gathered that a court cannot proceed to hear or determine a matter until it is established that it has the proper jurisdiction to do so. The question of jurisdiction does not have to be exclusively raised by a party in a matter but can be raised by the court itself where it believes that it may not be well placed to deal with a matter.

26. I have raised the issue of jurisdiction in this matter specifically because the Petitioner herein wishes for this Court to review an administrative decision. The review jurisdiction of the courts is limited by Section 9(2) of the Fair Administrative Action Act, 2015 thus:

**The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

27. The Petitioner has asked this Court to review the decision of the 1<sup>st</sup> Respondent to serve him with the Order under Section 45 of the TPA. The Petitioner insists that he is not the correct person that the 1<sup>st</sup> Respondent should have pursued and that he was merely a representative or employee of the Company. Moreover, he contends that the Company has objected to the tax decision. The 1<sup>st</sup> Respondent opposes the petition on the grounds that the Petitioner was the correct person to pursue and the Company has not appealed the decision of the Commissioner confirming the tax assessment.

28. This Court, however, cannot review the decision of the 1<sup>st</sup> Respondent, which is an appealable decision according to the definition provided in Section 3 of the TPA, unless the Petitioner has first exhausted all other remedies. This is not a new concept, and has been pronounced by several courts including by the Court of Appeal in **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** where it was held that:

**“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the**

**jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”**

29. The doctrine of exhaustion is not only a statutory requirement but is also a constitutional command under Article 159 of the Constitution. A party who does not wish to be bound by the exhaustion doctrine is allowed under Section 9(4) of the Fair Administrative Action Act, 2015 to apply for an exemption, and such an exemption will only be allowed if it is in the interest of justice. However, in the matter before me, the Petitioner did not apply for exemption and therefore is bound by the doctrine. There is also no material placed before the Court upon which the Court can exercise its discretion and allow the Petitioner to leapfrog the alternative dispute resolution mechanism provided to him by the TPA.

30. In conclusion, I find that this Court has a constitutional duty under Article 159 to recognise and promote alternative forms of dispute resolution. This is also a statutory duty under Section 9(2) of the Fair Administration Action Act, 2015. This Court cannot therefore allow the Petitioner to circumvent the jurisdiction of the Tax Appeals Tribunal under Section 52 of the TPA and the Tax Appeals Tribunal Act, 2013. It is only upon exhausting the statutory remedies that the Petitioner can finally approach this Court and not by way of a constitutional petition but through an appeal.

31. For the reasons already stated, I determine that this Court does not have the requisite jurisdiction to hear and determine this matter. The Petition is therefore dismissed.

32. The parties are directed to bear their own costs of these proceedings.

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

**W. KORIR,**

**JUDGE OF THE HIGH COURT**