



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(JUDICIAL REVIEW DIVISION)

JUDICIAL REVIEW APPLICATION NO. 190 OF 2019

IN THE MATTER OF: AN APPLICATION BY SYLBIA KAMIRU KAUMBUTHU, WILLIAM MANYIEL AND ALLIED SERVICES & LOGISTICS GROUP LTD FOR JUDICIALREVIEW BY WAY OF ORDERS OF CERTIORARI

AND

IN THE MATTER OF: THE ISSUE OF A DEPARTURE PROHIBITION ORDER UNDER SECTION 45 OF THE TAX PROCEDURES ACT, NO. 29 OF 2015

AND

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

AND

IN THE MATTER OF: ARTICLES 39 & 47 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

-VS-

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

EX PARTE

- 1. SYLVIA KAIMURI KAUMBUTHU**
- 2. WILLIAM MANYIEL**
- 3. ALLIED SERVICES & LOGISTICS LIMITED.....EX PARTE APPLICANTS**

JUDGMENT

[1] This judicial review proceedings call for the consideration of section 45 of the Tax Procedures Act 2015, which provides in full as follows:

*“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 prohibition order. 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."

[2] The applicant has by Notice of Motion dated 7th June 2019 upon leave granted on the same date sought judicial review orders of certiorari as follows:

"NOTICE OF MOTION

(Under Article 23 (3) (f) of the Constitution of Kenya 2010, Order 53 Rule 3 (1) of the Civil Procedure Rules 2010, Section 8 (2) of the Law Reform Act Cap 26, Laws of Kenya and all other enabling provisions of the law)

ORDERS that:

1. **AN ORDER OF CERTIORARI do issue to remove to this Honourable Court and quash the Departure Prohibition Order issued by the 1st Respondent against the 1st and 2nd Applicants on the 12th April 2019.**

2. Cost of an incidental to the Application be provided for.

3. Such further and other reliefs that the Honourable Court may deem just and expedient to grant."

[3] The application is based upon grounds set out in the Statutory Statement and a verifying affidavit sworn by the 1st ex parte applicant on the 6th June 2019 verifying the contents thereof as true and correct, as follows:

"GROUNDS UPON WHICH THE RELIEFS ARE SOUGHT

7. The 3rd Applicant is duly registered with the 1st Respondent for purposes of payment of income Tax in compliance with the

provision of the law.

8. On or about November 2018, he 1st Respondent instituted investigations into the 3rd Applicants tax affairs.
9. The 1st Respondent wrote to the 3rd Applicant on the 27th of November 2018 requesting a meeting on the 4th of November 2018. The 3rd Respondent heeded to the request and sent its tax consultant Mr. George Munga (**Annexed hereto and marked "SKK 1" is a copy of the letter requesting the meeting**)
10. The 1st Applicant was called by Miss Nafula Odonya from the 1st Respondents office and in the telephone conversation they a meeting for the 18th of December 2018 (**Annexed hereto and marked "SKK 2" is a copy of the email exemplifying a mutual agreement of a meeting on the 18th of December 2018**)
11. The Applicant conscientiously met officers of the 1st Respondent on the 18th of December 2018. In this meeting it was mutually agreed that the 3rd Applicant provides all the necessary documents to assist in the investigation as well as appoint a tax agent to assist in resolving the technical matters in question. (**Annexed hereto and marked "SKK 3" is a copy of the letter acknowledging the meeting**)
12. The 3rd Applicant took the investigation seriously and immediately appointed KPMG as their Tax Agent. The 3rd Applicant responded to the 1st Respondent's request and provided documents. The 3rd Applicant committed to working with their tax agent in reconciling their accounts and communicated their readiness to pay any outstanding tax. (Annexed and marked "SKK 4" is a copy of the appointment letter)
13. Since the investigation started, before and after the imposition of the Departure Prohibition Order, the 1st Respondent had written to the 3rd Applicant on six occasions through formal letters dated the 27th of November 2018, 18th of December 2018, 24th of December 2018, 4th of February 2019, 4th April 2019 and 13th of May 2019. (Annexed hereto and marked "SKK 5a to SKK 5f" is a bundle of the 1st Respondent's letters".
14. The 3rd Applicant dutifully responded to each one of the 1st Respondents letters providing documents where required that is on 20th of December 2018, 18th of January 2019, 18th of February 2019, 11th of April 2019, 17th of April 2019 and the 16th of May 2019. (Annexed hereto and marked "SKK 6a to SKK 6f" are the 3rd Applicants responses).
15. The 1st Respondent had written to the 3rd Applicant on a number of occasions in the form of electronic mail. The 3rd Applicant dutifully responded to all these electronic mails without fail.
16. The 1st Respondent had requested for meetings with the 3rd Applicant on four occasions that is the 4th and 6th of December 2018 as well as the 6th and 18th of March 2019. Representatives of the 3rd Applicant attended all of them without fail at the time and location convenient for the 1st Respondent that is at their offices at Corporate Place in upper Hill Nairobi. (**Annexed hereto and marked "SKK 7" is a copy of minutes**)
17. Despite the Applicant's clear willingness to settle the concerns of the 1st Respondent, the Commissioner, Investigations and Enforcement issued a Departure Prohibition Order on the 12th of April 2019 against the 1st and 2nd Applicants. (Annexed hereto and marked "SKK 8" is a copy of the Departure Prohibition Order)
18. Prior to this Departure Prohibition Order, the 1st Respondent had not made any formal request to the 1st and 2nd Applicants to avail themselves for recording of statements and therefore the decision of prohibiting their travel is not only arbitrary but irrational and imprudent.
19. The Departure Prohibition Order has made it impossible for the 1st Applicant to report to work in Juba and prevented her from discharging her obligations as the Chief Operations Officer and Director of Allied Services Limited, greatly undermining the performance of the Company.
20. The Departure Prohibition Order has made it impossible for the 2nd Applicant to attend to work in Nairobi and prevented him from discharging his obligations as the Director of the 3rd Applicant, greatly undermining the performance of the sister companies.
21. The issuance of the Departure Prohibition Order was pre-mature and unnecessary because the investigations into the 3rd Applicants tax affairs are still underway. The 1st Respondent has neither determined that the Applicants have defaulted in their tax obligations nor made a formal demand for outstanding taxes if any.
22. Further, the issue of a Departure Prohibition Order is a disproportionate and excessive remedial measure in the circumstances of this case. The 1st Applicant is a Kenyan Citizen with a fixed abode in Kenya, has a family in Kenya, has a known physical office in Nairobi and whose position as the Chief Operations Officer and Director of the 3rd Applicant requires her to be in Kenya every so often.
23. In addition to preventing the 1st Applicant from attending to her duties to Allied Services Limited and the 3rd Applicant, the

Departure Prohibition Order is an unwarranted and an unjustifiable limitation of the 1st Applicant's Right of movement guaranteed to all Kenyan citizen by Article 39 (2) of the **Constitution of Kenya**.

24. The imposition of the Departure Prohibition Order is illegal by its contravention of the provisions of Section 4 and 6 of the **Fair Administrative Action Act 2015** and **Article 47** of the **Constitution of Kenya** since no prior notice nor written reasons were to the Applicants despite a written request by the Applicant to the 1st Respondent. **(Annexed hereto and marked "SKK 9" is a copy of the Demand)**

25. Subsequently, the purported issuance of the Departure Prohibition Order is ultra vires because the officer who issued it is not authorized by the law to issue said order.

26. The imposition of the Departure Prohibition Order is biased since the 1st Respondent in its letter dated 12th April 2019, purports not to know of any assets belonging to the 3rd Applicant, an assertion the 1st Respondent knows to be false since the 1st Respondent acknowledge knowledge of a parcel owned by the 3rd Applicants in its letter dated 4th February 2019.

(Annexed hereto and marked "SKK 10" is a copy of the letter dated 4th February 2019)

27. The imposition of the Departure Prohibition Order is biased since the Applicants pleas for a meeting to discuss the outstanding issues have been ignored by the 1st Respondent. **(Annexed hereto and marked "SKK 11a and SKK 11b are emails from the 1st Applicant requesting a meeting)**

28. Unless the prayers sought by the Applicants are urgently granted as prayed, the 1st and 2nd Applicants will be kept away from their work places and from performing their obligations to Allied Services Limited and to the 3rd Applicant, much to the disruption of their daily operations, for an indefinite period of time and without justification.

29. It is therefore just and proper that all the reliefs sought as enumerated herein be granted."

[4] In response, the 1st respondent has filed a Replying Affidavit sworn by its officer in the Investigation and Enforcement Department on 18th July 2019, principally as follows:

2. **THAT** I am an officer under and in accordance with Section 13 of the Kenya Revenue Authority Act (Cap 469 of the Laws of Kenya) and hence competent to swear this Affidavit and have the authority of the 1st Respondent to do so.

3. **THAT** I have read and Counsel on record has explained to me and I understand the contents of the Notice of Motion dated 17th June 2019, the supporting Affidavit sworn by Sylvia Kaimuru Kaumbuthu on 7th June 2019, the Statutory Statement dated 6th June 2019 and the Verifying Affidavit of Sylvia Kaimuru Kaumbuthu sworn on 6th June 2019 together with all supporting documents attached thereto, and I wish to respond as follows;

4. **THAT** the 1st Respondent has been carrying out investigations into the tax affairs of the applicants for the period 2015-2018 to establish claims that the Applicants had been conducting business whose income is taxable in Kenya since 2015 without declaring the correct income.

5. **THAT** the investigations revealed that the applicants have been carrying out business with various clients and thus have inflows into their banks accounts in Kenya which they neither disclosed nor paid taxes on.

6. **THAT** upon analysis of the bank account statements of the 3rd Applicant held at Equity bank wit; 1470262755513 (USD), it was established that the net inflows which majorly constituted cash deposits were way more than the turnover declared in the company's returns. The undeclared income established was as per the table below;

YEAR	Income as per net bank inflows	Income declared in returns	Undeclared Income	Principal Tax @30%
2015	131,726,400	NIL Return filed	131,726,400	39,517,920.00
2016	264,771,688	1,719,795.00	263,051,893.00	78,915,567.90
2017	527,425,438	7,462,900.00	519,962,538.00	155,988,761.40
2018	356,877,270	77,886,700.00	278,990,570.00	83,697,171.00
TOTAL	1,280,800,796	87,069395	1,193,731,401	358,119,420.3

7. **THAT** upon analysis of the bank account statements of the 1st Applicant, the 1st Respondent established that during the period under investigation, she received income in her bank accounts held Equity Bank as follows:

TAXPAYER	ACCOUNT	2014	2015	2016	2017	2018
Sylvia Kaimuri Kaumbuthu	128016194209	2,860,000.00	17,494,200.00	20,106,990.00	11,121,915.00	10,548,705.00
Sylvia Kaimuri Kaumbuthu	400294387441	362,724.00	644,000.00	6,688,510.00	5,010,399.00	
		3,222,724.00	18,138,200.00	26,795,500.00	16,132,314.00	10,548,705.00

8. **THAT** the 1st Respondent compared this income with what the 1st Applicant declared in her self-assessment returns and the variance was as follows;

YEAR	Income as per net bank inflows	Income declared in returns	Undeclared Income	Principal Tax @ 30%
2014	3,222,724	No Return	3,222,724	966,817.20
2015	18,138,200	4,128,769.00	14,009,431	4,202,829.30
2016	26,795,500	4,535,167.00	22,260,333	6,678,099.90
2017	16,132,314	4,962,158.00	11,170,156	3,351,046.80
2018	10,548,705	4,857,278.00	5,691,427	1,707,428.10
Total	74,837,443	18,483,372	56,354,071	16,906,221.30

9. **THAT** this omission of income from returns constituted offences under Section 97 (a) and (c) of the Tax Procedure Act, 2015.

10. **THAT** the 1st Respondent further that the 2nd Applicant who is a co-director of the 3rd Applicant and who is a non-resident based in Juba Sudan and registered with PIN A11967883U has never filed any returns despite registering for the obligation as a non-resident. Annexed and Marked "MWK 3" is a copy of the ledger.

11. **THAT** on 27th November 2018, the 1st Respondent invited the 1st and 2nd Applicants for a meeting scheduled on 4th December 2018. Annexed and marked "MWK 4" is a copy of the invitation.

12. **THAT** the 1st and 2nd Applicant did not attend the meeting on 4th December 2018 but sent the tax agent.

13. **THAT** another meeting was held on 18th December 2018 where it was agreed that the Applicants would supply to the 1st Respondent various documents within 14 days. Annexed and marked "MWK 5" is a copy of the letter dated 18th December 2018.

14. **THAT** on 20th December 2018, the 3rd Applicant requested for extension of timelines to provide documents from 14 days to 45 days. Annexed and marked "MWK 6" is a copy of the said letter.

15. **THAT** on 24th December 2018 the 1st Respondent wrote to the 3rd Applicant declining the request for extension of time to provide documents to 45 days and requested the 3rd Applicant to provide documents on or before 14th January 2019. Annexed and marked "MWK 7" is a copy of the said letter.

16. **THAT** no documents were provided by 14th January 2019 as requested and the 3rd Applicant wrote to the 1st Respondent on 18th January 2019 providing just a few of the documents requested for. Annexed and marked "MWK 8" is a copy of the letter.

17. **THAT** the 1st Respondent again wrote to the Applicants on 4th February 2019 requesting for documents and also requesting for a meeting on 8th February 2019. Annexed and marked "MWK 9" is a copy of the letter.

18. **THAT** the applicants did not attend the meeting as requested and only responded on 18th February 2019 providing part of the documents sought. Annexed and marked "MWK 10" is a copy of the letter.

19. **THAT** a meeting was held on 6th March 2019 but the Applicants were not in attendance and were represented by their Advocate and tax consultant. Annexed and marked "MWK 11" is a copy of the minutes.

20. **THAT** based on the information in possession of the 1st Respondent and the analysis of documents provided by the applicants, the 1st Respondent provided the Applicant with its findings vide letter dated 4th April 2019. Annexed and marked "MWK 12" is a

copy of the letter.

21. **THAT** the 1st Applicant had not filed returns for 2015; the returns for 2016 had been filed on 26th December 2018, which was after the investigations had commenced and returns for 2017 and 2018 had not been filed. Annexed and marked “MWK 13” are copies of documents relating to 2015 and 2016 returns.

22. **THAT** the 2nd Applicant had not filed any returns from 1st January 2014 despite being registered for income tax obligation of a non-resident. Annexed and marked “MWK 14” is a print-out of his iTax ledger profile.

23. **THAT** the 3rd Applicant had only filed returns for 2016 which were filed on 8th December 2017. Annexed and marked “MWK 15” is a copy of the 2016 returns.

24. **THAT** the 1st Respondent was aware, and this has been confirmed by the 1st Applicant in paragraph 19 of her supporting affidavit sworn on 7th June 2019, that her work station is in Juba.

25. **THAT** I am also aware that the 1st and 2nd Applicants have a permanent residence in Juba, South Sudan and hence the 1st Respondent had reasonable ground to believe that they may permanent leave the country without paying the taxes that may be found due and owing.

26. **THAT** based on the amounts of taxes involved as set out in paragraphs 6-8 herein and the averments contained in paragraphs 9 and 18-25 herein, the 1st Respondent deemed it fit to secure the personal attendance of the 1st and 2nd Applicants and therefore it issued the Departure Prohibition Order on 12th April 2019. Annexed and marked “MWK 16” is a copy of the Order.

27. **THAT** the decision to prohibition the foreign travel of the 1st and 2nd Applicants is further supported by the possibility of them instigation capital flight or personal escape in the light of the magnanimity of the taxes facing them.

28. **THAT** additionally, the decision to issue a Departure Prohibition Order was necessitated by the fact that in as much as investigation was still ongoing, certain offences had been established and at the investigation the 1st Respondent would require both the 1st and 2nd Applicants to appear before the Commissioner and record statements. In order to secure their attendance, issuance of a Departure Prohibition Order was necessary.

29. **THAT** I am advised by the 1st Respondent’s counsel on record, which advice I verily believe to be true that the said section does not require prior notification to the taxpayer of the said action or prior issuance of assessments.

30. **THAT** the 1st Respondent reiterates that contrary to the assertions of the Applicants, the Departure Prohibition Orders were issued by the 1st Respondent in exercise of the powers granted by the provisions of Section 45 of the Tax Procedures Act, No 29 of 2015 and therefore the same are valid and enforceable.

31. **THAT** Section 45 (6) of the Tax Procedure Act is very clear that revocation of a Departure Prohibition Order is on the discretion of the 1st Respondent and the same shall remain in force unless revoked on grounds set out under Section 45(7) of the Tax Procedure Act.

32. **THAT** the Departure Prohibition Order was issued by an officer appointed under section 13 of the Kenya Revenue Act and therefore the same is valid and lawful.

33. **THAT** it is only after the 1st Respondent issued a Departure Prohibition Order that the 1st Respondent received a letter from the Applicants responding to the issues raised on 4th April 2019. Annexed and marked “MWK 17” is a copy of the letter dated 11th April 2019 but received on 12th April 2019.

34. **THAT** subsequently the Applicants supplied to the 1st Respondent with part of the documents that had been requested for in December 2018 vide their letter dated 17th April 2019. Annexed and marked “MWK 18” is a copy of the said letter.

35. **THAT** contrary to the assertions made by the 1st Applicant, the 1st Respondent reviewed the documents received on 17th April 2019 and wrote to the Applicants on 13th May 2019 requesting for other documents which were yet to be received being RTGS and Swift confirmations. Annexed and marked “MWK 19” is a copy of the letter.

36. **THAT** the documents requested for on 13th May 2019 were provided on 16th May 2019. Annexed and marked “MWK 20” is a copy of the letter.

37. **THAT** it is also after a Departure Prohibition Order was issued that the 1st Applicant filed the returns for 2015, 2017 and 2018 on 3rd May 2019. Annexed and marked “MWK 21” are copies of the said returns.

38. **THAT** subsequently the 3rd Applicant filed its returns for 2017 and 2018 on 26th June 2019. Annexed and marked “MWK 22” are copies of the said returns.

39. **THAT** the Departure Prohibition Order was therefore necessary since it is after its issuance that the Applicants have demonstrated seriousness in cooperating with the ongoing investigation since it is the Applicants who were elongating the investigation process by bringing documents in piecemeal.

40. **THAT** to-date the 2nd Applicant has not filed any returns and has not been in the country since the issuance of the Departure Prohibition Order on 12th April 2019.

41. **THAT** in response to the assertion by the 1st Applicant that the 1st Respondent knew of the existence of a property being LR 76/422, I state that this property is part of the investigations being conducted by the 1st Respondent and it cannot therefore be considered as part of properties that can be used to secure any assessed taxes.

42. **THAT** I am advised by the 1st Respondent's advocate on record which advise I verily believe to be true that the 1st Respondent's mandate of collection of revenues is key to the economic development of the country. Consequently, the public and all the arms of the Government and specifically the Judiciary is called upon to assist the 1st Respondent is carrying out its mandate so long as the same is within the Law.

43. **THAT** I genuinely believe the 1st Respondent acted in accordance with the law and those were sound policy decisions, which this Honourable Court should be extremely reluctant to interfere with and further that the Applicants have not demonstrated any good will on their part to comply up until when the Departure Prohibition Order was issued.

44. **THAT** the court should therefore not lift the Departure Prohibition Order since the same was issued in compliance with the law and for justified reasons as set out in this Affidavit.”

[5] Counsel for the parties then filed written submissions respectively dated 21st June 2019 and 26th July 2019, which they highlighted orally at the hearing on 3rd September 2019 as shown in the record of proceedings set out below:

“3/9/19

Coram : Hon E. Muriithi J

Court assistant: Ooko

Mr Mwende for ex parte applicant

Ms Kithinji for 1st Respondent

No appearance for 2nd Respondent

Mr Mwenda

The 1st Respondent proposed a consent dated 1/8/19. We agree to the terms of the consent by letter dated 6/8/19.

Mr Kithinji

The applicant has filed another case criminal Application no. 390 of 2019 before the High Court. Based on that development we were not able to execute the proposed consent. We pray for a date of highlighting of submissions.

Court:

1. There is no settlement
2. The matter to proceed to hearing.

Mr Mwenda for ex parte applicant

Notice of Motion dated 7/6/2019. 1st applicant and 2nd applicant are directors of 3rd applicants.

The 3rd applicant and another company Allied Company are sister companies one is registered in Kenya and the other in South Sudan.

1st Applicant and 2nd Applicant are directors of the 3rd Applicant. I refer to the Affidavit of 1st Applicant.

Tax investigations by 1st Respondent in November 2018.

Correspondence on meeting S.KK7. SKK8 appointment letter of the tax agent to handle the technical matter in the issue.

SKK 9- 6 letters by the 1st Respondent before the imposition of the order subject of the suit.

The 1st applicant responded providing documents where required. SKK 10 (a) - (f) bundle of responses for the 3rd applicant. E-mail responses were also made by 3rd applicant.

SKK11 is a copy of minutes of meetings held between the representative of 3rd applicant and 1st Respondent. There was clear willingness by 3rd applicant to settle tax issues.

On 12/4/19 the 1st Respondent issued a departure prohibition order SKK 12 purporting to rely on S.45 of Tax Procedures Act.

Prior to the Prohibition Order the 1st Respondent had not required any of the applicants to avail themselves to record statement. There was no formal request for a meeting or attendance.

Due to the Departure Prohibition Order, the 1st applicant has been unable to travel to attend to her business for 5 months at the Allied Services Company in South Sudan

The 2nd applicant who is South Sudanese national also cannot attend the Nairobi Company as director of the 3rd Respondent. The issuance of Departure Prohibition Order was premature and unnecessary because investigation at the 3rd Applicant's tax matters are still underway. I refer to paragraph 23 38 of Replying Affidavit, investigations still ongoing.

The 1st Respondent was neither determined that the 3rd Applicant has defaulted nor has the 1st Respondent made a formal demand. It was premature move and unnecessary.

It was inappropriate to issue a Prohibition Order as the 1st Applicant is a Kenyan Citizen with fixed elaborate family and a known physical office in Nairobi. Therefore, there was no need for the departure Prohibition Order to prevent her from discharging duties in such South Sudan when she is accountable in Kenya every so often.

The Departure Prohibition Order is unwarranted and it is a restriction of the applicant's right to movement under Article 39 (2) of the Constitution.

Imposition of departure Prohibition order is illegal as it contravenes section 4 and 6 of the Fair Administrative Act 2015 and Article 47, since no prior reasons were given to the applicant before the action.

Applicants gave 30 days without notice for reasons under section 4 and 6 of Fair Administration Act for the Prohibition Order.

The Departure Prohibition order ultra vires as the officer who issued it is not allowed to issue the order.

The imposition of the order is biased as the 1st Respondent in the order of 12/4/19 purports not to know any assets belonging to the 3rd Applicant.

In the letter of 12/4/19, the 2nd paragraph thereof that the company has no known assets in Kenya.

SKK14. Letter of 4/2/19 refers to land parcel LR 76/422. This is an acknowledgment that the company has land. The action of 1st Respondent is biased.

SKK15 emails for meetings request to discuss documents required by the 1st Respondent and issued a Prohibition Order. The applicant was willing to negotiate but the 1st Respondent issued a Prohibition Order.

The applicant seeks Certiorari to quash the departure Prohibition order by the 1st Respondent against the 1st and 2nd Applicant on 12/4/19. Submissions of 21/6/2019.

Mr Kithinji for 1st Respondent

Application is opposed. Relying on Replying Affidavit of 19/7/2019.

1st Respondent has filed submissions in opposition to the Notice of Motion of 26/7/19.

Affidavit sets out the dispute.

1st Respondent commenced investigation on tax affairs for the year 2015-2018 to confirm that the applicant had been conducting business where income was taxable in Kenya since 2015. The company was registered in 2014 and started trading in 2015.

The tax investigation by 1st Respondent revealed that 1st applicant had been conducting business with various clients and had cash inflows in Kenya. The investigation further disclosed that the applicant did not disclose or pay taxes on the incomes.

Further the 3rd applicant, they held US Dollar account at Equity Bank totaling 1.2 billion for the period under investigation.

At paragraph 6 table of inflows for 1.2 billion.

Investigation revealed that 1st applicant had a personal account. See paragraph 7 which had not been declared.

The 1st Respondent then compared the inflows in 3rd applicant and the 1st applicant and when compared with the self-declaration at paragraph 8 indicates the variances of the declaration and the investigations.

Investigations also revealed that the 1st and 2nd applicant had not filed returns for some of the years under investigations. Offences under section 97 (a) and (c) of Tax Procedures Act of 2015.

2nd applicant who is a co-director of 3rd applicant is a non-resident based in Juba and has Kenyan PIN and has never filed returns since they got the PIN in 2014.

On 27/11/18 1st Respondent invited the 1st and 2nd applicants on behalf of themselves and on behalf of the 3rd applicant to meeting. The 1st and 2nd applicant did not attend the meeting but they sent a tax agent. Another meeting of 8/12/18. It was agreed that applicants would supply documents. I refer to paragraph 13. MWK5.

After the meeting on 18/12/18, on 20/12/18, the 3rd applicant sought for a change of time requesting for 45 days MWK 6 of the Replying Affidavit.

On 24/12/18, the 1st respondent declined the extension of 45 days and requested the applicant to provide the documents by 14/1/2019. I refer to MWK7.

No documents were provided by 14/1/19 but on 18/1/19 3rd applicants wrote to the 1st respondent providing a few of the requested documents MWK8.

On 4/2/19, the 1st respondent requested for the documents to be supplied and a meeting. MWK9. The applicant did not attend the meeting and only responded by letter 18/12/19. MWK 10 providing some documents but not all.

In March 2019, a meeting was held and the applicants were represented by their advocate and tax agent MWK 11.

On 4/4/19, upon analysis of the listed documents supplied the 1st Respondent issued the applicants with its finding, letter of findings MWK 12. After the letter of finding the 1st applicant who had not filed returns for 2015, filed some of the returns exhibited at MWK13.

MWK14 indicates that 2nd applicant had not filed returns. The returns of 3rd Applicant are MWK15. 1st Respondent had been aware that the 1st applicant who is a Kenyan is resident in Juba South Sudan as confirmed by the 1st applicant at Paragraph 19 of the Affidavit based on the amount of the finding and the summaries at paragraph 6 in the Replying Affidavit, the 1st Respondent deemed it fit to issue a departure prohibition order by a letter of finding that had done and because of the magnitude of the taxes the applicant was a flight risk.

The departure prohibition order was necessitated by the fact that although the investigations were ongoing, some offences had been disclosed and it was necessary to secure personal attendance of the applicants and not their advocates or tax agent.

Notice before issuance departure prohibition. Notices is not required because if you notify a person that an prohibition is sought they will leave before the notice is imposed. Section 45 of the Tax Procedures Act requires the 1st Respondent to notify the applicant after the issuance of the departure prohibition order.

Section 45 (6) and (7) of the Tax Procedures Act is a clear provisions as to removal of a departure Prohibition order. Being the Commissioner's process the applicant can get the departure prohibition to be lifted.

Section 13 of the Kenya Revenue Act stipulates that the offices of the Authority. An officer appointed under the section is competent to give an order.

Paragraph 33-42 of the Replying Affidavit indicates that after the departure prohibition order. It was when the applicants started appearing before the Commissioner.

The procedure that is set for a departure prohibition order section 45 of the Tax Procedure Act was complied with. There is no bias and we rely on paragraph 41 of the Replying Affidavit.

The property was part of the investigations and it cannot be accepted as a security for taxes. The issues of bias did not arise.

Freedom of movement under Article 39 must be read in accordance with Article 24 limitation on fundamental rights the court should consider that the limit is under the law in an open and democratic society.

I rely on the submissions to demonstrate the accommodation allowed before the prohibition order was issued. We also rely on section 9 (2) of the Fair Administrative Act which requires exhaust of mechanism before approaching the court. The applicant did not exhaust the resolution mechanism. Section 45 (1) of the Act is worded to cover taxes due or which will become due.

No security has been provided so the departure prohibition order can be discharged.

Mr Mwenda in reply

Paragraph 4 of Martin Karoki's Affidavit claims investigations is with the applicants while SKK9 (a) - (h) indicates investigations only on 3rd applicant.

See also MWK4,5,7,9,12 and 19 relate to the 3rd applicant.

Role of the Kenyan Company was to provide a particular service to South Sudanese Company in collecting recoverable from the South Sudan.

Variance in 3rd Applicant's income is undeclared income. Tax accrues.

Section 45 of Tax Procedures Act envisages that from the time in departure prohibition order is issued is a tax due. There is no tax income. Tax requires a determination. If an investigation is going on, there has not been a determination of any tax due or to become due at a later date.

1st Respondent claims that it is only commissioner who may lift an order. The Constitution grants the court power to issue certiorari.

On security on the Prohibition Order to secure the attendance of the applicants. It was not asking the applicants to attend to write statements.

There is no demand for tax. The 1st Respondent is not asked for payment of any amount or to provide security.

There is no determination on tax due. If we had been asked to provide taxes or security, it would have been a basis for negotiation.

The prohibition order was procedurally unfair and in contravention of Section 4 and 6 of the Fair Administration Act and the Constitution of Kenya."

The issues for determination

[6] The issues arising in this judicial proceedings are:

- a. Whether the departure prohibition order imposed on the applicant herein is *ultra vires* and in breach of the applicant's right to fair administrative action under Article 47 and the Fair Administrative Action Act 2015;
- b. Whether the 1st respondent is biased against the ex parte applicants; and
- c. Whether the 1st respondent has in imposing a departure prohibition order breached the applicant's right of movement under Article 39 of the Constitution.

Whether the action of the 1st respondent ultra vires

[7] The Commissioner did need to personally issue the Departure Prohibition Order as an officer appointed under the Kenya Revenue Authority Act is empowered as follows:

"13. Appointment of Commissioners and other officers

(1) The Board shall appoint to the service of the Authority, such Commissioners as may be deemed necessary.

(2) The Commissioner-General shall, with the approval of the Board, appoint such heads of departments as may be required for the efficient performance of the functions of the Authority. (3) The Commissioner-General shall appoint all other members of staff as may be required by the Authority for efficient performance of its functions.

(4) *The terms and conditions of all persons employed by the Authority shall be determined by the Board.*

(5) *Except as may otherwise be determined by the Board in any particular case, an officer referred to in subsection (1), or in his absence the immediate deputy, shall be entitled to attend and participate in the deliberations of any meeting of the Board but shall have no right to vote. [Act No. 4 of 2004, s. 68.]”*

[8] The commissioner has power to impose a departure prohibition order under section 45 of the Tax Procedures Act of 2015 where he 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.” The power of the Commissioner is exercisable on reasonable grounds and the Commissioner and others who act on such power are protected from civil and criminal liability, under section 45 (9) of the Act.

[9] From the evidence, it was established that the 1st respondent took action under the tax procedures act following unproductive meetings called by the regulator at which the applicants failed to attend and provide all the required documents for the purpose after investigations had found a case of undeclared income inflows into the bank accounts of the applicants in Kenya which they had neither disclosed nor paid taxes on.

[10] The 1st respondent made the decision to impose a departure prohibition order when upon investigations that the applicants had failed to declare huge sums of income at close to 1.2 Billion for the 3rd applicant and 56 Million for the 1st applicant, and that the 1st applicant who was a co-director of the 3rd applicant who is a non-resident based in Juba South Sudan had failed to file tax returns despite registering for the obligation as a non-resident.

[11] The 1st respondent explained that the departure prohibition order was therefore based on the tax obligation under the undeclared incomes and the non-resident status of the applicants, he need to secure personal attendance of the 1st and 2nd Applicants and the likelihood of flight of the applicants in view of the magnitude of the tax obligation facing them.

[12] The applicants urged that there had been no tax determined to be due from them and therefore the prohibition order was premature. However, the process of determination of tax had revealed huge undeclared income for which tax would accrue and in their failure to declare and file returns the applicant had committed offences under the law.

[13] The power to impose a departure prohibition notice exists on account taxes both established and therefore “payable” and those that “will become payable”. From the evidence of revelation by investigations of undeclared inflows of income on which no taxes have been paid, it is clear that taxes may be become due from the applicants upon the conclusion of the on-going investigations. On the evidence already before the this court it cannot be held that the Commissioner acted unreasonably without any reasonable grounds for believing that taxes may become due from the applicants who in view of the residential status in the country may leave the country without paying the taxes.

[14] The 1st respondent also indicated that the applicants had no known asset in the country. The issue of the departure prohibition order is authorized by statute and it may be revoked in the discretion of the Commissioner under section 45 of the Tax Procedures Act set out above. I do not find in the said section a requirement for prior notice before imposition of a departure prohibition notice, a requirement which I agree with the respondents would set off the persons subject of investigations to prior flight.

[15] Moreover, from the evidence of the ex parte applicants, it is clear that the departure prohibition order gave consistently with the right to fair administrative action Article 47 and section 4 of the Fair administration Action Act, reasons for the prohibition as follows:

“Re: Sylvia Kaumbuthu and William Manyiel

The aforementioned persons are the directors of Allied Services and logistic Group Limited, accompany incorporated in Kenya. Investigations conducted on the company has established that the company is engaged in activities geared towards tax evasion.

William Manyiel is a Sudanese national and the company has no known assets in Kenya that may be used to secure the taxes. Further, in the course of our investigation. We may require their attendance to record statements. This is therefore to request that the aforementioned directors whose particulars are as follows should be prohibited from leaving the country unless this notice is revoked in writing by the Commissioner.”

With this information the applicants are informed as to the reasons or the infringement of their right to travel and they may consequently take remedial action as contemplated by the right to fair administrative action.

Whether there is proof of bias against the applicants

[16] There was an explanation by the 1st respondent that its statement that the 3rd ex parte applicant had no known assets in the country was based on the fact that the asset in the proceedings was subject of the investigations as follows:

“[I]n response to the assertion by the 1st Applicant that the 1st Respondent knew of the existence of a property being LR 76/422, I state that this property is part of the investigations being conducted by the 1st Respondent and it cannot therefore be considered as part of properties that can be used to secure any assessed taxes.”.

That explanation is not wholly unreasonable as to support an allegation of bias.

[17] An allegation of bias against a statutory body carrying out its mandate under Statute is a serious allegation which requires on the test of balance of probabilities strong and cogent evidence to prove. See *Re H (minors)* (1996) A.C 563 per Lord Nicholls:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. ...”

[18] The ex parte applicants did not on the evidence before the court discharge this heavy burden in accordance with a plaintiff’s duty under section 107 and 108 of the Evidence Act.

Whether applicant’s right to movement violated

[19] As submitted by the respondent, the applicants have not demonstrated that the provisions of section 45 of the Tax Procedures Act unconstitutionally violate the applicants’ right to movement under Article 39 for being unreasonable in terms of Article 24 of the Constitution and unjustifiable “in an open and democratic society based on human dignity, equality and freedom.” I do not find that the 1st respondent was unreasonable in issuing the departure prohibition order.

Whether the remedy of certiorari sought is available

[20] Section 45 (7) of the Tax Procedures Act 2015 has a statutory mechanism for the removal of a departure Prohibition Order through application to the Commissioner as follows:

“(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.

[21] It is a long established principle of law that a constitutional or judicial review court shall not interfere where there is constitutional and or statutory mechanism for redress of the particular grievance as observed in the *Speaker of the National Assembly v. James Njenga Karume* [1992] eKLR, (2008) 1 KLR (EP) 428, that -

“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

[22] This judicial review court need not intervene in this matter as there exists statutory remedies which the applicants have not exhausted. Indeed, section 9 (2) () of the Fair administration Act 2015 circumscribes the jurisdiction of the court as follows:

“9. (2) 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.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

No leave of court was urged to exempt the applicants from the requirement to exhaust the remedy under the Statute. For this reason, the court is not able take benefit from the case authorities cited by the ex parte applicants on the right to be heard before a decision affecting a person is taken. The applicants have a ready remedy within the provisions of the Statute, and it has, in any event, been demonstrated by the respondent’s affidavit numerous occasions and repeated invitation and opportunity to be heard at meetings, and call for necessary documents, which the ex parte applicant failed to attend in person and produce in full.

ORDERS

[23] Accordingly, for the reasons set out above, the court finds no merit in the application for Certiorari and the same is declined.

[24] There shall be order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 14TH DAY OF NOVEMBER 2019

J.M. MATIVO

JUDGE

Appearances:

M/S Mwenda Kaumbuthu & Co. Advocates for the Applicant.

M/S Judith N. Kithinji & Company Advocates for the 1st Respondent.