

**REPUBLIC OF KENYA**

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

**PETITION NO. E021 OF 2024**

**IN THE MATTER OF ARTICLE 2 (1), 3, 10, 22, 23, 25 (c), 27,  
31, 40, 47, 48, 50, 159, 165 (3) (b) AND 259 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA  
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)  
PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE TAX PROCEDURES ACT (CAP. 469B)  
AND  
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT  
(CAP. 7L)**

**GEBERY  
LIMITED.....PETITIONER**

**VERSUS**

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

**JUDGMENT**

**BACKGROUND**

1. Before the Court is the Petition by **GEBERY LIMITED** dated the 13<sup>th</sup> day of June, 2024 brought under Articles 22, 23, 31, 40, 47, 48, 50 and 165 of the Constitution of Kenya.

2. The facts relied upon are well enumerated in the supporting affidavit by the Petitioner. The particulars of violation of the Constitution and statutory provisions were that the Respondent has violated Articles 2, 3, 10, 22, 23, 25, 27, 31, 40, 47, 48, 50, 159, 165, 259 of the Constitution as well as Section 109 (1), (2) (3) of the Tax Procedures Act.
3. The Petitioner contends that the injury caused was in the nature of procedural impropriety, breach of natural justice, denial of access to justice, questionable authenticity, threatened violation of right to privacy, unreasonableness and unfairness.
4. In the end, the Petitioner sought for orders that;
  - a) A declaration be and is hereby issued that the Respondent's actions leading to the impugned Order for Settlement dated 9<sup>th</sup> May 2024 and the subsequent Objection Decision by the respondent dated 28<sup>th</sup> May, 2024 are unfair, unreasonable, procedurally flawed, illegal, unconstitutional, null and void ab initio as they contravene the provisions of the Tax Procedures Act and the Constitution of Kenya.

b) A Declaration be and is hereby issued affirming the Petitioner's entitlement to due process of the law, right to privacy, fair administrative action, fair hearing and access to justice as guaranteed and safeguarded under Articles 10, 25 (c), 27, 31, 47, 48 and 50 of the Constitution.

c) A Judicial Review Order in the nature of Certiorari be and is hereby issued quashing the impugned Order for Settlement dated 9<sup>th</sup> May 2024 and the subsequent Objection Decision by the Respondent dated 28<sup>th</sup> May, 2014 issued by the Respondent against the Petitioner for being procedurally flawed, unreasonable, unfair, unlawful and in contravention of Section 109 of the Tax Procedures Act and Articles 25 (c), 27, 31, 47, 48 and 50 of the Constitution.

d) A Judicial Review Order in the nature of Prohibition be and is hereby issued prohibiting the Respondent whether by itself, its agents, employees and/or servants or anyone from enforcing or otherwise implementing or taking any recovery action against the Petitioner in line with the impugned Order for Settlement issued on 9<sup>th</sup> May, 2024,

Serial No. 11087 or in any other manner whatsoever harassing or interfering with the Petitioner's business.

5. **BEATRICE WANJIKU NG'ANG'A** filed her affidavit in support of the Petition as a Director of the Petitioner. On 15/4/2024 officers from Kenya Revenue Authority visited and forcefully tried to enter the business premises and they proceeded to issue a Notice of Offence which entry she protested. Through her advocate, she did a letter protesting the said Notice of Offence, and she was asked to produce the said documents and avail herself and that a Notice to Appear before the Commissioner was issued. She sent Benson Mapesa with instructions to deliver the documents requested and not to negotiate or make any admission on her behalf as such the Order for Settlement for a penalty of Kshs. 300,000/= issued came by surprise and the same was not signed by Benson Mapesa. She contended that she was never given written communication of an offence being established and a committee set up to hear the Petitioner. She averred that she was never issued with the request for settlement and only learnt of it when she filed her objection. She stated that the

acts of the Respondent violated her right to be heard, fair administrative action and imposition of an illegal penalty to the Petitioner.

6. **BENSON MAPESA AKHUNGU** swore his affidavit in support of the Petition herein. He deposed that on 26<sup>th</sup> April, 2024, he was engaged by the Petitioner to deliver a letter of protest to the Respondent. In compliance with the Notice to Appear before the Commissioner, the Petitioner on 29/4/2024, tasked him with the delivery of the documents requested by the Respondent. He stated that he delivered the said documents on 2/5/2024. Further, he stated that the Petitioner was requested to report to the Respondent's offices for purposes of closing the file as such on 9/5/2024 he was sent by the Petitioner to facilitate the closure of the file which was said to be a standard procedure despite the offences indicated in the Notice of Offence being reproduced. To his surprise he was issued with a form that indicated a penalty of Kshs. 300,000/= which he refused to sign as his role was only to deliver the documents requested. He averred that he is apprehensive that the actions by the Respondent are faulty as they did not reach

out to the Petitioner before effecting the penalty on the *i-tax* system.

7. **COLLINS C. CHEROGONY** filed his replying affidavit dated 29<sup>th</sup> July, 2024 as an Officer of the Respondent at the Domestic Taxes Enforcement Department-Thika. The Petitioner had an Income Tax Company obligation and VAT obligation being a registered company. On 15/4/2024, officers visited the Petitioner's premises for the usual compliance checks where they introduced themselves. They identified the offences by the Petitioner where they issued a Notice of Offence detailing the offences committed and that the Petitioner was asked to provide monthly POS summaries, monthly z-reports, cash sale books and bank statements, cash sale books and bank statements for the business from 1/4/2023 to 15/5/2024. The Petitioner provided edited POS summaries and a bank statement but failed to produce cash sale books and that Benson Mapesa was sent to appear before the committee who requested the case to be compounded by filling an order for settlement while stating the reason why the offences were committed. The said Benson duly signed the request for

settlement form and the compounding minutes and was satisfied by the explanation given hence he was issued with the Order for Settlement which he declined to sign citing intimidation by the directors of the Petitioner when he called them to inform them of the verdict. He deposed that the Petitioner lodged an objection against the Order for Settlement stating that the penalty order was procedurally flawed as there was no admission to the offences by the company. The Petitioner was informed that the compounding order was final as Benson signed the request for settlement being the Petitioner's accountant and having the authority to appear on behalf of the company. The Respondent was said to have adhered to the provisions of Section 109 of the Tax Procedures Act.

8. In his further affidavit dated 1<sup>st</sup> August, 2024, **BENSON MAPESA AKHUNGU** denied that he was intimidated by the directors of the Petitioner and that he never requested for compounding of the offences as he had no authority but he was informed that the filling of form EA-B was a pre-requisite before closing the file. The said Collins Cherogony was not present on

9/5/2024 when the alleged request for compounding was made as such his depositions are hearsay and of no probative value. He stated that he is not an employee of the Petitioner and that the scope of his authority as appearing on the letter of authority dated 29/4/2024 was limited to delivering the documents requested by the Respondent which documents were received without issues being raised.

9. Parties were directed to canvass the Petition by filing and exchanging written submissions.

#### **PETITIONER'S SUBMISSIONS**

10. The Petitioner submits that the Respondent's actions were marred with procedural impropriety rendering the same irregular. Reliance was placed in the case of ***Mohamud Ibrahim Alio & 2 others vs Independent Electoral and Boundaries Commission (2017) eKLR***. The Petitioner contends that it never admitted to the alleged offences as the alleged admission relied upon by the Respondent was by Benson Mapesa whose authority was only to deliver documents. The Petitioner submits that upon delivery of documents, the Respondent was to communicate on the

analysis and make a formal invitation for purposes of case settlement which was not done. It was not explained to Mr. Mapesa the legal effect as the Petitioner is required to have admitted the offences in writing and requested the Commissioner to compound the offences under Section 109 of the Tax Procedures Act which was not the case herein and that Mr. Mapesa did not have such authority. It was irregular for the Petitioner to be asked to appear before the compounding committee before it had admitted the alleged offences and requested for settlement. In any case, the averments by Mr. Mapesa in the request for settlement were said to be protests. A copy of admission was not attached in the Order for Settlement as required as such any ensuing decision was void ab initio. Reliance was placed in the case of **Republic vs Chengo & 2 others (Petition 5 of 2015) (2017) KESC 15 (KLR)**. Further, that through its letter dated 23/4/2024, the Petitioner denied all the allegations appearing in the Notice of Offence and without a hearing it was directed to pay Kshs. 300,000/= which was not justified violating its right to fair administrative action. Reliance was placed in the case of

***Republic vs National Police Service Commission Exparte Daniel Chacha Chacha (2016) eKLR.*** The Petitioner's right to access to justice was said to have been violated when a compounding committee was set up even before the admission to the offences and the alleged minutes have not been produced in court. The forceful attempt to try and enter the Petitioner's premises was said to be in violation of the Petitioner's right to privacy. Reliance was placed in the case of ***Robert K. Ayisi vs Kenya Revenue Authority & another (2018) eKLR.*** Lastly, the Petitioner sought for award of damages of Kshs. 1,000,000/= for the violation of its rights placing reliance on the case of ***Robert K. Ayisi (supra).***

### **RESPONDENT'S SUBMISSIONS**

11. The Respondent submits that the dispute herein does not meet the threshold of a constitutional petition as the penalty order dated 16/5/2024 are factual issues that fall within the jurisdiction of the civil court. Reliance was placed in the case of ***Anarita Karimi Njeru vs The Republic (1979) eKLR.*** It was submitted that in order to determine whether the process and decision to issue the penalty order dated 16/5/2024 was

proper, the Court must analyze evidential material which the Petitioner has failed to produce hence the alleged violations are denied by the Respondent. The Petition was said to be an attempt to circumvent the provision that a penalty order is final and that the reliefs sought are couched to fit a constitutional petition.

### **ISSUES FOR DETERMINATION**

12. Having considered the Petition, the replying affidavit and the rival written submissions, the issues arising for determination are

- i) Whether the Respondent followed the right procedure as required by the law.
- ii) Whether the Petitioner's rights were violated
- iii) What relief to grant to the Petitioner if any

### **ANALYSIS**

**Whether the Respondent followed the right procedure as required by the law.**

13. The Respondent on 15/4/2024 visited the Petitioner's premises for usual compliance checks where the Petitioner

was found to have committed the offence as listed in the Notice of Offence which they proceeded to issue.

14. The Petitioner sent its representative one Mr. Mapesa for purposes of only delivering the requested documents.
15. It is the Petitioner's contention that the said representative was made to fill a request for settlement which subsequently culminated to the order for settlement for the sum of Kshs. 300,000/=.
16. It is this procedure by the Respondent that the Petitioner claims was procedurally flawed as provided by Section 109 of the Tax Procedures Act as such its rights were violated.
17. **Section 109** of the Tax Procedures Act provides that:-

***(1) The Commissioner may, where he is satisfied that a person has committed an offence under a tax law in respect of which a penalty of a fine is provided, or in respect of which anything is liable to forfeiture, compound the offence and may order that person to pay such sum of money, not exceeding the amount of the fine to which he or she would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may think fit and the Commissioner may order anything liable to forfeiture in connection therewith to be condemned:***

**Provided that the Commissioner shall not exercise his or her powers under this section unless the person admits in writing that he or she has committed the offence and requests the Commissioner to deal with the offence under this section.**

**(2) For the purposes of subsection (1), the Commissioner shall constitute a committee of not less than three officers to consider applications for the compounding of offences.**

**(3) An order by the Commissioner in accordance with this section shall—**

**(a) be in writing under the hand of the Commissioner and the offender, and witnessed by an officer;**

**(b) specify the name of the offender, the offence committed, the sum of money ordered by the Commissioner to be paid, and the date or dates on which payment is to be made;**

**(c) have a copy of the written admission referred to under subsection;**

**(2) attached;**

**(d) be served on the offender;**

**(e) be final and not be subject to appeal; and**

**(f) on production in any court, be treated as proof of the conviction of the offender for the offence specified, and may be enforced in the same manner as a decree of a court for the payment of the amount stated therein.**

18. From the above provision of the law, the Commissioner can only compound the offence once a person admits in writing and requests the Commissioner to compound the offence whereby the Commissioner will then constitute a committee.
19. In the instant case, the evidence on record is that the Respondent upon finding the Petitioner with offences as listed in the Notice of Offence dated 15/4/2024 proceeded to issue a Notice to Appear before the Commissioner dated 26/4/2024.
20. On its part, the Petitioner protested to the Notice of Offence vide its letter dated 23/4/2024 and in its letter dated 29/4/2024, sent Mr. Mapesa to deliver documents requested by the Respondent in its letter dated 26/4/2024.
21. It is clear that when Mr. Mapesa visited the Respondent's office on 9/5/2024 he was made to fill the request for settlement which was followed by an order for settlement of Kshs. 300,000/=.
22. There is no evidence by the Respondent that the Petitioner admitted in writing that it committed the offences that were being alleged by the Respondent and requested for compounding of the offences. Further, there is no evidence

that a committee was formed as alleged by the Respondent as there is no evidence of the minutes. It is also noted that the Respondent did not attach the admission as made by the Petitioner as well as minutes for the compounding committee.

23. The Respondent's claim is that Mr. Mapesa was acting on behalf of the Petitioner as such had the authority from the Petitioner, this Court is of a contrary opinion as it is clear that the said Mr. Mapesa was only mandated to deliver documents. Any other actions by Mr. Mapesa are considered by this Court to be outside the scope of his mandate as such cannot stand.

24. The fact that compounding of the offences by the Respondent meant that a fine if any would ensue as such it was only fair that the Petitioner be present in person. In the circumstances, and bearing the above, this court is satisfied that the Respondent failed to follow the prescribed procedures provided by the law.

### **Whether the Petitioner's rights were violated**

25. The Respondent contends that the issues raised by the Petitioner are of a civil nature. The Petitioner alleges that its

right to fair administrative action was violated as they were not accorded a hearing and that its right to privacy was also violated when the Respondent's officers forcefully attempted to enter the Petitioner's premises.

26. There is evidence that the Respondent did not follow the right procedure in arriving at its decision to fine the Petitioner Kshs.300,000/=. The Petitioner was never accorded an opportunity to appear personally before the compounding committee as such there is no doubt that its right to fair administrative action was violated.

27. Lastly, the Petitioner sought for declaratory orders as well as Kshs. 1,000,000/= as damages for the violation of its rights. The Petitioner has however not provided evidence as to the loss incurred as a result of the violation of its right as such the award of damages of Kshs. 1,000,000/= cannot issue. Refer to the case of ***Gitobu Imanyara & 2 others v Attorney General (2016) KECA 557 (KLR)***.

28. In the end, the Petition is found to be partially merited in terms of the orders sought in the Petition.

## **FINDINGS AND DETERMINATION**

29. For the forgoing reasons this Court finds the Petition has merit and it is hereby allowed as follows;

- a) A Declaration be and is hereby issued that the Respondent's actions leading to the impugned Order for Settlement dated 9<sup>th</sup> May 2024 and the subsequent Objection Decision by the Respondent dated 28<sup>th</sup> May, 2024 are found to be unfair, unreasonable, procedurally flawed, illegal, unconstitutional, null and void ab initio as they contravene the provisions of the Tax Procedures Act and the Constitution of Kenya.
- b) A Declaration be and is hereby issued affirming that the Petitioner is entitled to due process of the law, fair administrative action, fair hearing and access to justice as guaranteed and safeguarded under Articles 10, 25 (c), 27, 31, 47, 48 and 50 of the Constitution.
- c) A Judicial Review Order in the nature of Certiorari be and is hereby issued quashing the impugned Order for Settlement dated 9<sup>th</sup> May 2024 and the subsequent Objection Decision by the Respondent dated 28<sup>th</sup> May, 2014 issued by the Respondent against the Petitioner for

being procedurally flawed, unreasonable, unfair, unlawful and in contravention of Section 109 of the Tax Procedures Act and Articles 25 (c), 27, 31, 47, 48 and 50 of the Constitution.

- d) A Judicial Review Order in the nature of Prohibition be and is hereby issued prohibiting the Respondent whether by itself, its agents, employees and/or servants or anyone from enforcing or otherwise implementing or taking any recovery action against the Petitioner in line with the impugned Order for Settlement issued on 9<sup>th</sup> May, 2024, Serial No. 11087.
- e) The Petitioners claim for an award of damages is found to be devoid of merit and it is disallowed.
- f) To bring closure to this matter each party shall bear their own costs.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU  
THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**A. MSHILA**

**JUDGE**

**In the presence of;**

Sanja - Court Assistant

N/A - For the Petitioner

N/A - For the Respondent

ORIGINAL