

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. E223 OF 2022**

**BETWEEN**

**WU LIUHONG.....**  
**PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup>**  
**RESPONDENT**  
**ATTORNEY GENERAL.....2<sup>ND</sup>**  
**RESPONDENT**

**J U D G M E N T**

**Introduction**

1. The Petition dated 19<sup>th</sup> May 2022 is supported by the Petitioner’s affidavit in support of similar date. The Petitioner challenges the Departure Prohibition Order issued against him by the 1<sup>st</sup> Respondent on the basis that was done against the laid down procedure under the Tax Procedures Act and was thus in violation of his rights under Article 28, 39 and 47 of the Constitution.
2. Accordingly, the Petitioner seeks the following reliefs against the 1<sup>st</sup> Respondent:

- a) A declaration that the Departure Prohibition Order (DPO) issued against the Petitioner is unconstitutional and thus null and void.**
- b) A declaration be issued that the actions by the 1<sup>st</sup> Respondent violated the Petitioner's constitutional rights as well as his right to freedom of movement.**
- c) The Director of Immigration be prohibited from enforcing the Departure Prohibition Order issued against the Petitioner.**
- d) The Petitioner be awarded General damages for violation of his constitutional rights.**
- e) Costs of the Petition to the Petitioner against the 1<sup>st</sup> Respondent.**

### **Petitioner's Case**

3. The Petitioner a Chinese national, depones that the 1<sup>st</sup> Respondent on diverse being 12<sup>th</sup> August 2021 and 13<sup>th</sup> October 2021, issued letters addressed to the Directors of Boda East Africa Limited and Feiya Wood Company Limited. The letters addressed issues on their tax obligations.
4. Subsequently, the 1<sup>st</sup> Respondent issued a Departure Prohibition Order (DPO) which the Petitioner through his advocates, protested in a letter dated 16<sup>th</sup> March 2022. He alleges that by the time the DPO was being issued, he had by then resigned, thus lacked capacity to be issued with the DPO.

5. The Petitioner asserts that the 1<sup>st</sup> Respondent in its response dated 21<sup>st</sup> April 2022, denied revocation and cancellation of the impugned DPO. In addition, it is stated that the impugned DPO was issued on this date.
6. The Petitioner argues that the procedure that led to issuance of the DPO was devoid of any factual and legal basis in contravention of Section 45 of the Tax Procedures Act. Equally that the action violates Article 47 of the Constitution which requires the 1<sup>st</sup> Respondent to accord the Petitioner a fair administrative action. In like manner, the 1<sup>st</sup> Respondent's action is said to have curtailed the Petitioner's freedom of movement as protected under Article 39 of the Constitution.
7. On this basis, the Petitioner contended that the DPO is unlawful, unconstitutional and oppressive to the Petitioner.

### **1<sup>st</sup> Respondent's Case**

8. The 1<sup>st</sup> Respondent in reply to the Petition filed Grounds of Opposition dated 2<sup>nd</sup> June 2022 on the basis that:
  - i. *The Application is frivolous, vexatious, bereft of any justifiable substance and a complete waste of the Court's time.*
  - ii. *The Applicant has failed to attach the impugned Departure Prohibition Order that would enable the 1<sup>st</sup> Respondent to respond substantively.*

- iii. *In the absence of the Departure Prohibition Order, the allegations by the Applicant remain baseless, unfounded and unconscionable.*
- iv. *This is a Court of record and it is trite that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- v. *The Applicant has referred to, but has not attached any annexures whatsoever to support its allegations.*
- vi. *This Court cannot give orders in vain, and especially where the Applicant merely states, without sufficient proof, that a violation has occurred.*
- vii. *Ultimately, this application and Petition offend the succinct provisions of Article 50 (2) (b) of the Constitution.*
- viii. *In the circumstances, the 1<sup>st</sup> Respondent is totally alien to the allegations raised by the Applicant.*

### **2<sup>nd</sup> Respondent's Case**

9. The 2<sup>nd</sup> Respondent did not file any response. None was found in the Court file or in the Court Online system (CTS).

### **Petitioner's Submissions**

10. In support of his case, the Petitioner through Keaton and Keaton Advocates filed submissions dated 7<sup>th</sup> July 2022 in which the following issues were raised:

*What were the legal requirements to be met for the issuance of a valid departure prohibition order, whether*

*the issuance of a departure prohibition order, without notifying the Petitioner was a violation and or breach of the provisions of section 45 of the Tax Procedure Act No. 29 of 2015 by the Commissioner, whether the issuance of the Departure Prohibition Order (DPO) without consideration of the legal facts in favor of the Petitioner who had since ceased to be Director of the two Companies was violation of the provisions of section 45 of the Tax Procedure Act No. 29 of 2015 Laws of Kenya, whether issuance of the Departure Prohibition Order (DPO) to the Petitioner without adequate reasons/and or notice to allow him an opportunity to be heard, was a violation of the right to fair administrative action, whether the issuance of a departure prohibition order, that did not comply with legal requirements under section 45 of the Tax Procedure Act No. 29 of 2015, was a violation of the Petitioner's economic rights, whether the issuance of a departure prohibition order, that did not comply with legal requirements under section 45 of the Tax Procedure Act No. 29 of 2015, was a violation of the Petitioner's freedom of movement, whether the Departure Prohibition Order issued by the 1<sup>st</sup> Respondent is valid under the Law in the instance, whether the Petitioner entitled to the remedies sought and whether the Petitioner entitled to damages for the violations and or continued violations of his constitutional rights by the 1<sup>st</sup> Respondent.*

11. Counsel submitted that the legal requirement for issuance of a DPO is provided under Section 45 of the Tax Procedures Act. Counsel argued that the 1<sup>st</sup> Respondent is barred effecting the DPO without notifying the Petitioner. In this case, it was contended that the DPO was issued in breach of this provision. Further, that the Petitioner was neither a director, a beneficial owner nor controlling member of either

of the two companies. Moreover, that the Petitioner did not fall within the definition contemplated by Section 18 of the Act. In light of this, Counsel submitted that issuance of the DPO by the 1<sup>st</sup> Respondent against the Petitioner was fatally defective, unfounded and lacked a legal basis.

12. The Petitioner relied on the case of **Export Trading Company v Kenya Revenue Authority [2018] eKLR** where it was held that:

*“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”*

13. Further reliance was placed in **Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others [2018] eKLR.**

14. On the right to a fair administrative action under Article 47 of the Constitution, it was submitted on behalf of the Petitioner that the action must be expeditious, fair, lawful and reasonable and that where such an action adversely affect a person’s right or fundamental freedom, the affected person is entitled to be given written reasons. Counsel submitted that the DPO issued by the 1<sup>st</sup> Respondent was

not served on the Petitioner neither were the contents made available to him, contrary to this provision.

15. Counsel submitted that the Petitioner only learnt of the impugned DPO from the Office of the Immigration as he applied for the **Class 'G' Permit**. Counsel contended that the DPO remains unexplained and unserved upon the Petitioner almost one and a half years since it was issued.
16. Counsel stated that the principle of legality governs the exercise of all public power including in the realm of administrative action. To buttress this point reliance was placed in **Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR** where the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature being:

*“a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.*

*Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the*

*rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

*Irrationality and proportionality- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker."*

17. On the importance of the right to a fair administrative action, Counsel relied in **Dry Associates Ltd v Capital Markets Authority and Another [2012] eKLR** where it was held that:

*"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution."*

18. Like dependence was placed in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1, Judicial Service Commission v Mbalu Mutava & another [2014] eKLR** and **Attorney General v Kituo cha Sheria & 7 others [2017] eKLR**.

19. On the Petitioner's freedom of movement under Article 39 of the Constitution, Counsel submitted that its limitation ought to have been established on sufficient and legally sound

grounds. It was stated that the DPO does not state how long it is to remain in force and thus it is unclear how long the Petitioner will remain confined, unable to move. It was noted that issuance of this Order also violated the Petitioner's economic rights and was discriminatory, as the Petitioner was selected without any justification of who to issue the DPO to. Counsel argued that the 1<sup>st</sup> Respondent had failed to demonstrate to this Court that the limitation on the Petitioner's rights was justified.

20. Reliance was placed in **Seyed Hassan Dashti Khavidaki vs. KRA & Another (2018) eKLR** where it was held that:

*“Taking the above considerations into account and the circumstances of this case juxtaposed to the fact that it is the petitioner's fundamental rights and freedoms that are at stake of being violated and continue to be violated, I am satisfied that the petitioner has demonstrated, prima facie, that continued violation of the rights and fundamental freedoms has a higher risk of injustice to warrant this court's intervention, than declining the application. It is also clear that if the court does not respond to the petitioner's plea at this stage, he will continue to suffer prejudice in that violations of his fundamental rights already occasioned will continue given that the disputed tax may take long to resolve yet the petitioner will have to remain confined and unable to exercise his right of movement.”*

21. Counsel in light of this submitted that the Petitioner having proved that his rights under Article 28, 39 and 47 of the Constitution were violated, was entitled to damages of Ksh.10,000,000. This is in relation to the one and a half

years he has been unable to fully transact his business as has been living in constant fear of being barred from leaving and entering the country in the ordinary course of business, therefore losing on his investment.

22. To support this claim, reliance was placed in **Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another [2019] eKLR** where it was held that:

*“Award of damages entails exercise of judicial discretion, which should be exercised judicially... Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation...”*

23. Additional dependence was placed in **Tinyefuze v Attorney General of Uganda [1997] UGCC3**.

### **1<sup>st</sup> Respondent’s Submissions**

24. The 1<sup>st</sup> Respondent’s Counsel, Anthony Juma Opondo filed submissions dated 14<sup>th</sup> September 2022 and discussed *whether there is a DPO issued by the 1<sup>st</sup> Respondent under Section 45 of the Tax Procedures Act against the Petitioner.*

25. Counsel relying in Section 107,108 and 109 of the Evidence Act submitted that the law places the burden on the Petitioner to prove the existence of the DPO as alleged was issued by the 1<sup>st</sup> Respondent. Counsel submitted that while the Petitioner asserted that he had been informed orally of the existence of the DPO, he did not adduce any evidence to show that he was denied a work permit because of the alleged DPO.
26. In addition, it was argued that the Petitioner did not demonstrate that he had tried to leave the Country and was prohibited because of existence of an alleged DPO.
27. The 1<sup>st</sup> Respondent thus submitted that the Petitioner's case is founded purely on hearsay. Accordingly, the 1<sup>st</sup> Respondent was unable to respond to the assertions made in the Petition pertaining to the existence of the DPO.
28. The 1<sup>st</sup> Respondent thus relied on **Raila Amolo Odinga and another v IEBC & 2 Others (2017) eKLR** where it was held that:

*“The legal burden of proof in a case is always static and rests on the claimant throughout the trial. It is only evidential burden of proof which may shift to the defendant depending on the nature and effect of evidence adduced by the claimant.”*

29. On the same point, the 1<sup>st</sup> Respondent relied on **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi and another [2004] eKLR.**

### **2<sup>nd</sup> Respondent's Submissions**

30. State Counsel, Eve Mbede filed submissions dated 6<sup>th</sup> October 2022 and underscored two issues: *whether the said order has deprived the Petitioner his constitutional right to Liberty and whether the procedure that was used to issue the Departure Prohibition Order was an abuse of the law.*
31. Counsel stated that the operative law to determine whether the procedure for issuance of the alleged DPO was lawful is Section 45 of the Tax Procedures Act. This Section stipulates the instances where the Commissioner can issue the DPO being where the Commissioner has reasonable ground to believe that a person may leave Kenya without paying a tax that is or will become payable by the person or a tax that is or will become payable by a company in which the person is a controlling member or tax representative. According to Counsel, the Petition does not hold water and so should be dismissed.

### **Analysis and Determination**

32. It is my considered view that the issues that arise for determination are:

- i. Whether Departure Prohibition Order was issued against the Petitioner as alleged, and if so, whether the issuance of the said DPO was lawful?***
- ii. Whether the Petitioner's constitutional rights under Article 28, 39 and 47 of the Constitution were violated by the 1<sup>st</sup> Respondent.***
- iii. Whether the Petitioner is entitled to the relief sought.***

***Whether Departure Prohibition Order was issued against the Petitioner as alleged, and if so, whether the issuance of the said DPO was lawful?***

33. The Petition is primarily founded on alleged unprocedural issuance of a Departure Prohibition Order against the Petitioner by the 1<sup>st</sup> Respondent. As such, the prayers that the Petitioner seeks in the Petition include:

- a) A declaration that the Departure Prohibition order (DPO) issued against the Petitioner is unconstitutional and thus null and void***
- b) ...***
- c) The Director of Immigration be and is hereby prohibited from enforcing the Departure Prohibition Order issued against the Petitioner.***

34. In response, the 1<sup>st</sup> Respondent filed grounds of opposition dated 2/6/22 where it indicated thus:

- ii) The Applicant has failed to attach the impugned Departure Prohibition Order that would enable the 1<sup>st</sup> Respondent to respond substantively.*
- iii) In the absence of the Departure Prohibition Order, the allegations by the Applicant remain baseless, unfounded and unconscionable.*
- iv) This is a Court of record and it is trite that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- v) The Applicant has referred to, but has not attached any annexures whatsoever to support its allegations.*
- vi) This Court cannot give orders in vain, and especially where the Applicant merely states, without sufficient proof, that a violation has occurred.*

35. In the submissions of the Petitioner, the Petitioner appears to have avoided the pertinent factual issue of the existence of the DPO and went straight to frame the first issue to be 'what were the legal requirements to be met for the issuance of a valid departure prohibition order, yet the 1<sup>st</sup> Respondent has disputed the factual foundation of the Petition by insisting on proof that there was, in fact, a DPO in place to even warrant a response from the 1<sup>st</sup> Respondent.

36. In the submissions of the 1<sup>st</sup> Respondent, it referred to Sections 107, 108 and 109 of the Evidence Act and argued that burden of proof to demonstrate the a DPO was issued by the 1<sup>st</sup> respondent against the Petitioner lay on the petitioner himself. As such, the 1<sup>st</sup> Respondent's submitted:

*"The Respondent submits that the Petitioner has failed to attach the impugned DPO to enable the 1<sup>st</sup> Respondent respond effectively. The 1<sup>st</sup> Respondent is totally alien to the allegations raised by the Petitioner. To date the Petitioner has failed and/or neglected to file a copy of the impugned DPO before this Honourable Tribunal: The DPO remains imaginary."*

37. The substratum of the Petition thus rests on the factual assertion that the 1<sup>st</sup> Respondent issued a DPO against the Petitioner.

38. The 1<sup>st</sup> Respondent contests that despite making that affirmative claim against it, the Petitioner has not sufficiently demonstrated that such DPO actually exists to warrant a rebuttal from the 1<sup>st</sup> Respondent, and as such, the Court should find that the Petition is premised on mere speculation as opposed to a valid factual foundation.

39. The Petitioner referred to a letter allegedly authored by the 1<sup>st</sup> Respondent to the Petitioner's Advocate on 21<sup>st</sup> April, 2022 where in response to a letter by the Advocate for the Petitioner, the 1<sup>st</sup> Respondent appears to make a suggestion on the existence of a DPO against the Petitioner.

40. The 1<sup>st</sup> Respondent has however insisted throughout the proceedings that it is unaware of the said DPO on 30<sup>th</sup> July, 2024, M/s Chelagat for 1<sup>st</sup> respondent stated:

***“I do not think I will need to highlight my submissions. What the Respondent says we did not issue DPO. KRA never issued any DPO and there is no DPO attached.”***

41. When Mr. Keaton for the Petitioner referred her to the 1<sup>st</sup> Respondent letter of 21<sup>st</sup> April, 2022 in which there was a statement made to the effect *‘request for cancellation of DPO is hereby denied’*. Ms. Chelagat denied knowledge of that letter and insisted that the Petitioner did serve it alongside the Petition.

42. One thing is clear though. Departure Prohibition order is a legal document issued pursuant to clear legal procedures as provided for in Section 45 of the Tax Procedures Act. If it does exist, it should not be a matter of implication to be gathered in correspondences exchanged. It should be exhibited.

43. What the Petitioner is inviting this Court to do is simply infer that because he wrote to the 1<sup>st</sup> Respondent alleging that it had issued a DPO and the 1<sup>st</sup> Respondent in response wrote back referring to the issue he had drawn attention to then the court should find that there is a DPO in place.

44. The law on Departure Prohibition Orders is provided for under Section 45 of the Tax Procedure Act. It provides as follows:

- (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 or tax representative.*
- (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 or tax representative.*
- (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 tax representative; 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 or tax representative.*
- vii) A controlling member is defined in Section 3 of the Tax Procedure Act as “controlling member” has the meaning assigned to it in Section 18(4) (b). Section 18 (4) (b) of the Act states:*

*“controlling member”, in relation to a company, means a member who beneficially holds, directly or indirectly, either alone or together with a related person or persons—*

  - a. fifty per cent or more of the voting rights attaching to membership interests in the company;*

- b. *fifty per cent or more of the rights to dividends attaching to membership interests in the company; or*
- c. *fifty per cent or more of the rights to capital attaching to membership interests in the company;*

*"member", in relation to a company, means a shareholder or any other person with a membership interest in the company;*

*"membership interest", in relation to a company, means a share or other ownership interest in the company; and*

*"private company" has the same meaning assigned to it in the Companies Act (Cap. 486).*

- 45. Issuance of a DPO follows a detailed process that must be undertaken openly with no room for speculation or inferences. In my view, it is not open for the Court to be invited to ascertain the existence of the DPO by mere inference or guesswork. The Court cannot grant declaratory orders based on speculation.
- 46. In fact, the Petitioner has not even cited any factual incident to the effect that he has been/was blocked from departure on the basis of the existence of the alleged DPO.
- 47. Section 107 of the Evidence Act requires whoever alleges existence of a fact to prove it. It states:

### **107. Burden of proof**

*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*

48. The Supreme Court in **Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)** elaborated and affirmed the principle thus:

***“[49] Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”***

***[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:***

***“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”***

49. Without actual evidence that exhibits a copy of the alleged DPO that was issued pursuant to Section 45 of the Tax Procedures or evidence of factual prohibition at departure of the Petitioner, this Petition stands on quick sand.
50. The 1<sup>st</sup> Respondent has insisted that it is unaware of the existence of the alleged DPO. It was thus upon the

Petitioner to adduce sufficient, credible and admissible evidence to prove that fact, that is, the DPO does in fact exist. The affidavit of the Petitioner does not sufficiently prove this crucial fact. There is no copy of the DPO, he does not disclose the official channel through which he learnt about its existence, and more importantly, there is no proven incident in his affidavit deponing that his departure from the country has been blocked at any one time.

51. Without proof that the DPO does exist, I do not think it would be necessary to even proceed deal with any other issue as the other issues involve elaborate examination of the statutory and constitutional provisions, of which, their applicability and relevance would have been based on the proof of the primary fact, the existence of the DPO. Without this critical evidentially foundation being proved, the substratum upon which the constitutional violations is based inevitably collapses.

52. I find that the Petition lacks merit and is hereby dismissed.

53. I make no orders as to costs.

***Dated, Signed and Delivered virtually at Nairobi this 5<sup>th</sup> December, 2025.***

**L N MUGAMBI**

**JUDGE**