Gillys Security and Investigations Services Limited & 2 others v Kenya Revenue Authority & another (Petition 426 of 2019) [2023] KEHC 488 (KLR) (Constitutional and Human Rights) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 488 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 426 OF 2019

M THANDE, J

JANUARY 27, 2023

BETWEEN

GILLYS SECURITY AND INVESTIGATIONS SERVICES LIMITED .... 1ST PETITIONER

JOHN WALTER OWINO ..... 2ND PETITIONER

BEATRICE AKINYI MBOYA ..... 3RD PETITIONER

AND

KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

JUDGMENT

1. In their Petition dated 25.10.19, the Petitioners seek the following reliefs:

    i. An order of judicial review by way of certiorari be and is hereby issued to bring into this Court and quash the 1st Respondent's agency notices dated 19th August 2019, instructing the Kenya Commercial Bank, the NIC Bank, I & M Bank, Family Bank Limited, Equity Bank Limited, DTB Bank Limited, Co-operative Bank of Kenya and the National Bank of Kenya Limited to pay the 1st Respondent the amount of Kshs. 84,718,520.00 from monies owed to, held by or for the 1st Petitioner.

    ii. An order of judicial review by way of certiorari be and is hereby issued to bring into this Court and quash the 1st Respondent's agency notice dated the 6th September 2019, instructing the South Nyanza Company Limited to pay the Respondent the amount of Kshs. 84,718,520.00 from monies owed to held by or for the 1st Petitioner.

iii. A declaration be and is hereby made that the 1st Respondent's officers invitation to the Petitioners for undocumented meetings, their inconsistent claims against the Petitioners, the discordant and conflicting instructions issued to the Petitioners on how to respond to the tax claims contravene the national values and principles of the rule of law, good governance, transparency and accountability in Article 10 of the Constitution as well as Article 47 of the *Constitution*.

iv. A declaration be and is hereby issued that the issuance of the agency notices to the 1st Petitioner's banks and creditors to pay the 1st Respondent the amount of Kshs. 84,718,520.00 from monies owed to, held by, or for the 1st petitioner without giving the 1st, 2nd and 3rd Petitioners an opportunity to be heard contravenes Articles 27, 29, 31, 47, 48 and 50 of the *Constitution* on the Petitioners' rights to equal benefit and protection of the law, fair administrative action, access to justice, and fair hearing, respectively.

v. A declaration be and is hereby issued that the agency notices issued by the Respondent to the 2nd Petitioner's banks and creditors are unlawful and inconsistent with Article 159(2)(c) of the *Constitution*x for denying the 1st, 2nd and 3rd Petitioners the right to exhaust the Alternative Dispute Resolution Mechanisms applicable to tax disputes under the *Tax Procedures Act*, 2015, and the *Tax Appeals Tribunal Act*, 2013 and other relevant tax laws.

vi. A declaration be and is hereby issued, that the 2nd Respondent's intended arrest, charge and prosecution of the Petitioners is against the constitutional principle of the independence of the Office of the Director of Public prosecutions and the public interest principle in prosecutions, as espoused in Article 157 of the *Constitution*.

vii. A conservatory Order be and is hereby issued staying the 1st Respondent's claim dated 17th April 2018 of Kshs. 62,111,2013.00 in VAT tax arrears against the 1st Petitioner, until the tax dispute herein is heard and determined.

viii. A conservatory order be and is hereby issued staying the implementation and execution of the Respondent's agency notices dated 19th August 2019 requiring the Kenya Commercial Bank, the NIC Bank, 1& M Bank, Family Bank Limited, Equity Bank limited, DTB Bank Limited, Co-operative Bank of Kenya and the National Bank Limited to pay to the Respondent the amount of Kshs. 84,718, 520.00 from monies owed to held by or for the 1st Petitioner.

ix. A conservatory order be and is hereby issued staying the implementation and execution of the Respondent's agency notice dated the 5th of September 2019 requiring the South Nyanza Sugar Company Limited to pay the Respondent the amount of Kshs. 84,718,520.00 from monies owed to, held by or for the 1st Petitioner.

x. A conservatory order be and is hereby issued staying the 1st Respondent's claim dated 19th August 2019 of Kshs. 84,718,520.00 in VAT tax arrears against the 1st Petitioner until the tax dispute herein is heard and determined.

xi. A conservatory order be and is hereby issued prohibiting the 2nd Respondent's intended arrest, charge and prosecution of the 1st and 3rd petitioners, until the tax dispute herein is heard and determined.

xii. General damages be awarded to the 1st, 2nd and 3rd Petitioners for the 1st Respondent's unlawful and wrongful agency notices dated 19th August 2019, issued to the Kenya Commercial Bank, NIC Bank, 1 & M Bank, Family Bank Limited, Equity Bank Limited, DTB Bank Limited,

Co-operative Bank of Kenya and the National Bank of Kenya Limited and the agency notice dated 5th September 2019, issued to the South Nyanza Sugar Company Limited, respectively, requiring the banks and the Sugar Company to pay the Respondent the amount of Kshs. 84,718,520.00 from the monies held by, owed to or for the 1st Petitioner.

xiii. Costs of the petition be borne by the Respondents.

xiv. Or that such other Orders(s) as this Honourable Court shall deem fit.

2. The Petitioners' case as set out in the Petition and in the affidavits of the 2nd Petitioner sworn on 25.10.19 and 7.3.22 is that on 17.4.18, the 1st Petitioner received a letter from the 1st Respondent's Acting Chief Manager, Nairobi West – RAC, alleging that it had not filed its Value Added Tax (VAT) returns for the years 2015, 2016, and 2017, and was in arrears of Kshs, 62,111,203/=. The Petitioners and the 1st Respondent's officers had a series of meetings to discuss the tax demands and while this was going on, the 1st Respondent's Account Management Refunds Divisions on 19.8.19 wrote to the 1st Petitioner, demanding payment of Kshs. 84,718,520/= in tax arrears. The 1st Respondent also issued agency notices under Section 42 of the *Tax Procedure Act* (TPA) to Kenya Commercial Bank, NIC Bank, I & M Bank, Family Bank Limited, Equity Bank Limited, DTB Bank Limited, Co-operative Bank of Kenya, National Bank of Kenya Limited and South Nyanza Sugar Company Limited declaring the banks and company to be its agents for collection and payment of the said amount. On 5.9.19, the 1st Respondent's Commissioner, Investigations and Enforcement Department wrote to the 1st Petitioner indicating that an analysis had revealed a variance in the 1st Petitioner's bank statements and iTAX returns for the years 2013-2018.

3. The Petitioners contend that the tax demands are not based on any proven income and the computation of the tax amount is unreasonable, irrational and illegal and based on the 1st Respondent's review of bank statements and the returns filed in the iTAX system for 2013-2018. They further contend that some of the income shown in the bank accounts are lawful receipts from the 1st Petitioner's sister companies and cannot be considered as income nor are they taxable for VAT. Further that the 1st Respondent has not made any default assessments under Section 29 of the *TPA*, to create or establish a legal basis to make a tax demand.

4. It is the Petitioners' case that during the undocumented meetings with the 1st Respondent, they have always reiterated their commitment to settle any genuine tax arrears which may be due after a lawful assessment and determination thereof. The 1st and 3rd Petitioners have been notified by several public and private enterprises with which they have had business dealings, of letters written to them by the 1st Respondent, requiring certain documents for purposes of investigations of tax claims against the 1st Petitioner, without prior notice. Further the various notices they have received from the 1st Respondent's different departments have made it difficult for them to know how or to whom to respond and on which subject matter.

5. The Petitioners also alleged that they are being oppressed, harassed and intimidated by summons to appear before the Directorate of Criminal Investigations (DCI) which constitutes an illegal enterprise to criminalise the tax recovery process when the said tax is not due.

6. The Petitioners thus complain that the 1st Respondent has or is likely to violate their rights to equal protection and equal benefit of the law by failing to issue a default assessment under Section 29 of the *TPA*, by seeking to recover taxes for 2013-2015 contrary to Section 37A of the *TPA*; by breaching Article 27 of the *Constitution* in that it failed to comply with the national values and principles of governance by making uncoordinated and conflicting tax claims and failing to specify the basis and details of computation of the tax arrears demanded; by relying on preliminary review of documents

that have not been properly and conclusively analysed. The Petitioners also contend that the 1st Respondent has violated or is likely to violate their right to fair administrative action in contravention of Articles 47(1) and (2) of the *Constitution* and Sections 4 and 5 of the *Fair Administrative Action Act* (FAAA) by disregarding the provisions of the *TPA* and the legal mechanism for demanding the tax due; by irrationally and unreasonably convening meetings for resolution of the tax dispute while at the same time issuing agency notices for recovery of the tax in dispute.

7. The Petitioners allege that the 1st Respondent has or is likely to violate their rights under Articles 31 and 40 of the *Constitution* in that it has frozen the 1st Petitioner's bank accounts and seized its possessions being funds in the said accounts, without notice to the Petitioners. Further that the 1st Respondent has hindered the Petitioners' right under Article 48 to access to justice by failing to comply with the *TPA* and the *Tax Appeals Tribunal Act* (TATA). Further that the 1st Respondent has or is likely to violate their right to a fair hearing under Article 50(1) of the *Constitution* by requiring the 1st Petitioner to appear before it under Section 61 of the *TPA* without specifying the offence committed; by failing to give the Petitioners the right to be heard before issuance of the agency notices and by demanding tax arrears of Kshs. 62,111,203/= as at 17.4.19 and Kshs. 84,718,520/= as 19.8.19 without explanation as to how these figures were determined.

8. The Petitioners further allege that their right of freedom and security of the person under Article 29 of the *Constitution* is likely to be contravened on account of the likelihood of their being arrested and prosecuted for tax offences by the 2nd Respondent. They accuse the 1st Respondent of a scheme to get the 2nd Respondent to commence criminal investigations and institute charges against them which compromises the independence of the 2nd Respondent in breach of Article 157 of the Constitution.

9. The Petitioners filed an application of even date seeking similar orders in the interim and conservatory orders were granted on 5.11.19.

10. The 1st Respondent opposed the Petition vide replying affidavits by Fredrick Akhonya (Fredrick) sworn on 13.12.19 and by Lydiah Ndirangu (Lydia) sworn on 16.12.19.

11. Fredrick deposed that on 5.9.19, the 1st Respondent through its Investigations and Enforcement Department wrote to the directors of the 1st Petitioner requiring them to attend a meeting to review the tax affairs of the 1st Petitioner, in view of the gross variances noted between the 1st Petitioner's bank statements and the returns filed for the years 2013-2018. The said meeting did not take place prompting the 1st Respondent to write again on 25.10.19 following a request by the 1st Petitioner to appear before the Commissioner to explain the issues raised. In the meanwhile, the 1st Respondent wrote to various entities including the petitioner's bankers pursuant to the provisions of Section 58 of the *TPA* requiring them to provide it with certain documents relating to the ongoing investigations. All this was done by the Respondent in compliance with the law. Further that while no prosecution has been commenced against the Petitioners, the 1st Respondent has powers to institute criminal proceedings against the Petitioners. According to Fredrick, the Petitioners are facing routine procedures and that having concurrent criminal and civil proceedings does not constitute abuse of process; that in any event, the Petitioners will have an opportunity to adduce evidence and cross examine witnesses should they be charged.

12. For her part, Lydiah reiterated the averments by Frederick. She deposed that *vide* a letter dated 24.9.18, the 1st Respondent made a demand, tabulating the amounts due, based on self-assessment returns filed by the Petitioner without making payments for the respective self-assessed taxes. After receiving no response, the matter was referred to the Debt Management Unit vide an internal memo dated 5.11.19. Thereafter a demand letter dated 19.12.18 tabulating the amounts due was sent to the Petitioner but

was not responded to. At a meeting on 30.1.19 with officers of the 1st Respondent, the 2nd Petitioner sought to explain that there was an error in capturing VAT returns, in respect of which he promised to avail supporting documents. He also conceded to PAYE Tax Assessment amounts and promised to communicate a payment plan within 2 weeks, which plan is yet to be communicated to the 1st Respondent. A final demand letter dated 19.8.19 was sent to the Petitioners and agency notices were sent to the various institutions in line with Section 42 of the *TPA*. Further the process of verifying the amount of taxes due and owing from the Petitioners was duly undertaken and enforcement invoked for a total outstanding amount of Kshs. 84,718,520/= as at 19.8.19, in line with the law.

13. Lydia further stated that the actions of the 1st Respondent were done to secure public revenue in accordance with the law and in line with its statutory mandate. Further, that the tax demands were a culmination of various meetings between the parties. The meetings were documented by the 1st Respondent and nothing stopped the Petitioners from documenting the proceedings. On the discordant demands, it was averred that this was occasioned by interest and penalties that accrue with the effluxion of time. Further, the law does not compel the 1st Respondent to exhaust the ADR mechanisms prior to enforcement, taking into account the circumstances of the case. According to her, the Petitioners are not entitled to the orders sought, as they are contrary to Article 201 of the *Constitution*.

14. The 1st Respondent contended that there is no evidence of malice, unlawful actions, want or excess of authority, harassment or intimidation as alleged by the Petitioners. Further that it has a statutory duty recognised under Article 209 of the *Constitution* to collect taxes and should not in the public interest be restrained from performing its duty. The 1st Respondent urged that the Petition be dismissed with costs.

15. The 2nd Respondent filed grounds of opposition dated January 24, 2020. The grounds are that the prayers sought in the Petition are unconstitutional as they seek to prevent the 2nd Respondent from exercising its mandate to the detriment of the criminal justice system and public interest; that no evidence has been adduced to show that criminal proceedings are mounted for an ulterior purpose and how the 2nd Respondent has acted without or in excess of powers conferred upon it by law; that the 1st Respondent has acted within the law and should be allowed in the public interest to lawfully exercise its mandate of tax collection and administration and recommend prosecution where an offence has been committed. The 2nd Respondent urged that the Petition be dismissed with costs.

16. In supplementary affidavits both sworn on 7.3.22, the 2nd Petitioner reiterated his earlier averments. He further stated that the letters exhibited by the 1st Respondent did not address the issues raised in the Petition. He insisted that the they were not given a fair hearing and that the agency notices were issued contrary to the provisions of Section 42(9) of the *TPA*. Further that the Petitioners have never been summoned over the alleged tax offences in respect of which they are being investigated. The Petitioners are thus apprehensive that the unlawful agency notices could be used to mount criminal proceedings against them. The 2nd Petitioner asserted that the Petitioners have always responded to and engaged the 1st Respondent on the issues raised regarding the tax affairs even during the pendency of this Petition. They have attempted to have the issues herein resolved amicably and are not guilty of latches in putting their tax affairs in order as alleged by the 1st Respondent. He further deposed that neither the 1st Respondent nor the Petitioners have finalized and verified the amount of tax payable. As such the alleged lack of compliance to statutory processes cannot arise. Further that pursuant to Section 18(1) of the *Kenya Revenue Act*, the 1st Respondent cannot justify its failure to keep record of meetings between it and the Petitioners or shift the onus for record keeping to the Petitioners. They contended

that 1st Respondent has not given any legal basis why the orders sought should not be granted and urged the Court to allow the Petition as prayed.

17. In response to the 2nd Respondent's grounds of opposition, the 2nd Petitioner reiterated that Article 22 (1) of the *Constitution* guarantees them the right to challenge through this Petition, the conduct of the 1st Respondent in the issuance of unlawful agency notices, which conduct violated their rights and fundamental freedoms in the Bill of Rights; that the 2nd Respondent is joined herein as he may mount the criminal proceedings against the Petitioners outside the confines of the law on recommendation by the 1st Respondent; that the grounds of opposition are unmeritorious, not based on law or facts or evidence and ought to be dismissed.

18. I have given due consideration to the Petition, the responses and the rival submissions filed by the parties herein. The only issue for determination is whether this Court has jurisdiction to hear and determine the Petition in view of the doctrine of exhaustion.

19. The 1st Respondent's case is that the agency notices were informed by gross variances noted between the 1st Petitioner's bank statements and the returns filed for the years 2013-2018. Following a process of verifying the amount of taxes due and owing from the Petitioners the 1st Respondent found that as at 19.8.19, the Petitioners owed the sum of Kshs. 84,718,520/= in tax arrears. The Petitioners are aggrieved by the agency notices issued to the 9 institutions by the 1st Respondent without notice to them. They therefore seek a review by this Court of the administrative decision or action by the 1st Respondent, namely the issuance of the agency notices to the 9 institutions.

20. The question before the Court is whether there exist any remedies under statute for redress under statute and whether the Petitioners exhausted the available administrative remedies, before coming to Court.

21. The *TPA* provides an elaborate mechanism for resolving tax disputes. Part VIII of the *TPA* makes provision relating to tax decisions, objections and appeals. On objections to tax decisions, Section 51 provides as follows:

Objection to tax decision

1. A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.

2. A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.

3. A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

    a. The notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;

    b. in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and

    c. all the relevant documents relating to the objection have been submitted.

4. Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall within a period of fourteen days notify the taxpayer in writing that the objection has not been validly lodged.

5. Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

6. A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

7. The Commissioner shall consider and may allow an application under subsection (6) if—

   a. the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

   b. the taxpayer did not unreasonably delay in lodging the notice of objection.

(7A) The Commissioner shall notify the taxpayer of the decision made under subsection (7) within fourteen days after receipt of the application,

8. Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

9. The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

10. An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

11. The Commissioner shall make the objection decision within sixty days from the date of receipt of a valid notice of objection failure to which the objection shall be deemed to be allowed.

12. A person who is dissatisfied with the decision of the Commissioner under subsection (11) may appeal to the Tribunal within thirty days after being notified of the decision.

22. A party who is aggrieved by a tax decision is required to first lodge an objection against that tax decision with the Commissioner. This must be done before such tax payer seeks remedy under any other written law. This requirement is couched in mandatory terms. Under Section 51(12), if the party is dissatisfied with the decision of the Commissioner on the objection lodged he may appeal to the Tax Appeals Tribunal stablished under the *Tax Appeals Tribunal Act*, 2013. Such appeal must be filed within a period of 30 days after being notified of the decision. If the party is still dissatisfied with the decision of the Tribunal, Section 53 allows such party to appeal the decision to the High Court, which appeal must be filed within 30 days.

23. This is the procedure that the Petitioners herein ought to have followed. It is the Petitioners' contention however, that no tax decision has been made to warrant an objection under Section 51 of the *TPA*.

24. Section 3 of the Act defines a tax decision as follows:

> " tax decision" means—
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> a. an assessment;
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> b. a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;

c. a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under section 15, section 17 and section 18.

d. a decision on an application by a self-assessment taxpayer under section 31(2);

e. a refund decision;

f. a decision under section 48 requiring repayment of a refund; or

g. a demand for a penalty;

25. In its letter to the Petitioners dated 24.9.18, the 1st Respondent made a demand, tabulating the amounts due based on the self-assessment returns filed by the Petitioner without making payments for the respective self-assessed taxes. The Act defines an assessment to mean self-assessment, default assessment, advance assessment, or amended assessment, and includes any other assessment made under a tax law. The self-assessment made by the Petitioners, and the fact of self-assessment is not denied, is clearly a tax decision by dint of Section 3 of the Act.

26. Section 3 of the Act further stipulates the decisions that may be appealed in the Tribunal as follows:

> "appealable decision" means an objection decision and any other decision made under a tax law other than—
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> i. a tax decision; or
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> ii. a decision made in the course of making a tax decision;(emphasis added).

27. As can be seen, the definition of an appealable decision is very wide. A decision made pursuant to an objection is an appealable decision. The definition further includes any other decision made under a tax law. From this broad definition, it is clear that the impugned agency notices which were issued under Section 42 of the Act are appealable decisions. This being the case, the Petitioners ought to have filed an appeal before the Tribunal as provided for under Section 52 of the Act which provides:

Appeal of appealable decision to the Tribunal

1. A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the *Tax Appeals Tribunal Act*, 2013 (No. 40 of 2013).

2. A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.

28. The *Tax Appeals Tribunal Act* (TATA) defines "appeal" as an appeal to the Tribunal against a decision of the Commissioner under any of the tax laws. Section 3 of the TATA establishes the Tribunal to hear appeals filed against any tax decision made by the Commissioner.

29. Section 12 provides for appeals to the Tribunal while Section 13 sets out the procedure for appeal against a decision of the Commissioner. It is only after an appealable decision is heard and determined by the Tribunal that a party may approach this Court. Section 32 makes provision for Appeals to the High Court on decisions of the Tribunal as follows:

1. A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

(1A) A party that has appealed against the decision of the Tribunal in subsection (1) shall within two days of lodging a notice of appeal, serve a copy of the notice on the other party.

2. The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice.

30. Section 53 of the *TPA* also provides:

> A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the *Tax Appeals Tribunal Act*, 2013 (No. 40 of 2013).

31. In the case of *Krystalline Salt Limited v Kenya Revenue Authority* [2019] eKLR, Mativo, J. (as he then was) stated the following regarding agency notices and whether they are appealable decisions:

> 48. The reasons cited are that an agency Notice issued under section 42 of the Act is not an appealable decision capable of being challenged in the Tax Appeals Tribunal pursuant to section 52 of the Act. I have already discussed this issue and held that the impugned decision is an appealable decision and falls within the definition under the act.

The leaned Judge went on to state:

> 54. Third, as demonstrated by the above facts, this is a tax dispute triggered by a decision taken pursuant to the relevant tax law. It does not raise a constitutional question at all to warrant invoking this court's jurisdiction. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[50] The issues raised in this case can be resolved by interpreting the facts and the relevant statutes. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.[51]
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> 55. The arguments presented by counsel for ex parte applicant and all the reasons discussed above do not qualify under the exception requirement. More important, for a litigant to qualify, he must apply for exemption from the court. Differently put, the applicant ought to have moved the court under section 9(4) of the *Fair Administrative Action Act*[52] and demonstrate the existence of exceptional circumstances. This will become clear as I discuss the this provision in detail below.
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> > 40. A proper construction of section 9(2) & (3) above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by 9(4) which provides that: - "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. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances...

32. And in *Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited* (2019) eKLR, the learned Judge stated:

> 51. A casual look at the ex parte applicant's case shows that it is aggrieved by a tax decision. To be specific, it falls within the ambit of the *Tax Procedures Act*.[48] That is the nature of the dispute before the court. No amount of coloring can change the pith, substance and character of the case. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The answer to this question lies in the relevant provisions of the *Tax Procedures Act*.[49] Section 51 of the *Tax Appeals Act*[50] provides for objection to tax decisions. Sub-section (1) thereof provides that a taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law. Sub-section (2) provides that a taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision. Additionally, sub-section (3) provides that a notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.
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> 52. Additionally, section 52(1) of the act provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the *Tax Appeals Tribunal Act*.[51] Further, section 53 of the act provides for appeal to the High Court in the following words, that is, a party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the *Tax Appeals Tribunal Act*.[52]

33. Mumbi Ngugi, J. (as she then was) was of a similar view for in the case of *Rich Productions Limited v Kenya Pipeline Company & another* [2014] eKLR she expressed herself as follows:

> The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that it cannot exercise such jurisdiction in circumstances where the parties before it seek to avoid the mechanisms and processes provided by law, and convert the issue in dispute into a constitutional issue when it is not.

34. I associate with the findings in the cited cases and find that the agency notices complained of by the Petitioners are appealable decisions that ought to have been placed before the Tribunal before coming to this Court.

35. Further, the said agency notices constitute an administrative action within the definition of administrative action under Section 2 of the *Fair Administrative Action Act* (FAAA) which provides that an "administrative action" includes–

i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

36. Section 9 of the *FAAA* sets out the procedure for judicial review as follows:

1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution*.

2. The High Court or a subordinate court under sub-section (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.

5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

37. Section 9(2) of the *FAAA* is explicit that courts shall not review an administrative action or decision unless all the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. This is the doctrine of exhaustion.

38. Article 159(2)(c) of the *Constitution* recognizes and entrenches the use of alternative mechanisms for dispute resolution in the following terms:

> In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-
>
> (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.

39. The doctrine of exhaustion was substantively dealt with by a 5-Judge Bench in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR. The Court stated as follows:

52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

> Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before the *Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.

40. The Court may exercise its discretion to exempt a party from the obligation to exhaust all available remedies before applying to the Court for judicial review of any administrative action. Section 9(4) of the *FAAA* provides:

> 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.

41. For the Court to exercise its discretion in favour of a party, it must be demonstrated that exceptional circumstances exist to warrant such exemption and that such exemption is in the interest of justice. Further, a party desiring such exemption must make an application for the same.

42. In the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* (supra), the Court considered the exceptions to the doctrine of exhaustion and stated:

> 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance Kenya (NASA) (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
>
> What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the

ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

43. That the doctrine of exhaustion encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR wherein the Court of Appeal stated:

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

44. As stated herein, the decision leading to the issuance of the agency notices and the manner in which the notices were issued are appealable decisions. As such, the first port of call by dint of Section 9 of the *FAAA* was the Tribunal.

45. In the end I find that the Petitioners ought to have exhausted the remedies available under the *Tax Procedures Act* and the *Tax Appeals Tribunal Act*, before seeking judicial review of the administrative action complained about. Further the Petitioners did not demonstrate any exceptional circumstances for exemption from the obligation to exhaust the available remedies as required under Section 9(4) of the *FAAA*, nor did they apply for such exemption. In view of the foregoing and by dint of Section 9(2)

of the *FAAA*, I find and hold that this Court lacks the jurisdiction to entertain the Petition herein. Without jurisdiction, the Court has no basis to grant any of the orders sought. The upshot is that the Petition is hereby dismissed with costs.

DATED AND DELIVERED IN NAIROBI THIS 27TH DAY OF JANUARY, 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioners

..... for the 1st Respondent

..... for the 2nd Respondent

.....Court Assistant