Republic v Nairobi City County; Murage (Ex parte) (Application 4 of 2017) [2023] KEHC 22870 (KLR) (Judicial Review) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22870 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 4 OF 2017

J NGAAH, J

SEPTEMBER 29, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

NAIROBI CITY COUNTY ..... RESPONDENT

AND

MAINA MURAGE ..... EX PARTE

Magistrates Court has jurisdiction to determine a suit for recovery of rates filed pursuant to the provisions of the Rating Act

The applicant sought among other orders; an order of certiorari to quash the respondent's decision contained in its notice of rates demand. The instant court found that the court that had been clothed with the requisite jurisdiction to determine a dispute that had been lodged for recovery of rates under section 17 of the Rating Act was the Magistrates Court. The court further held that a judicial review court would not, in exercise of its discretion, normally make the remedy of judicial review available where another body had exclusive jurisdiction in respect of the dispute.

Reported by Kakai Toili

Jurisdiction *– jurisdiction of Magistrates Courts vis a vis the High Court sitting as a judicial review court - jurisdiction to determine a suit for recovery of rates filed pursuant to the provisions of the Rating Act - whether the Magistrates Court had the jurisdiction to determine a suit for recovery of rates filed pursuant to the provisions of the Rating Act - whether judicial review remedies would be available before exhausting other available remedies under the Rating Act for resolution of the dispute - Rating Act Cap. 267, section 17.*

Judicial Review *– grounds for judicial review – requirement for grounds in an application for judicial review to be stated in precise, clear and unambiguous terms - whether it was mandatory for the grounds in an application for*

judicial review to be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave - Civil Procedure Rules, 2010, Order 53 rules 1(2) and 4(1).

***Judicial Review** – nature and purpose of judicial review – merit review - what was the purpose of merit review in a judicial review application.*

Brief facts

The applicant sought among other orders; an order of *certiorari* to quash the respondent's decision contained in its notice of rates demand. The applicant averred that he was a rateable owner of two properties in Nairobi (the suit properties). According to the applicant, the suit properties had been subject to payment of land rates from 1987 and 1992. The applicant deposed that he had a long running dispute with the respondent over the rates and interest due and payable on the suit properties.

By rates demand notices the respondent demanded payment of Kshs. 4,588,950 and Kshs. 6,120,526 as rates and interests due and owing in respect of the suit properties. Subsequently, the respondent filed recovery proceedings against the applicant in Nairobi City Court Civil Suit No. 22 of 2016 on 23 to enforce its demand for payment. The applicant contended that the demands for payment of the amounts were illegal because they had been made in excess of jurisdiction and powers conferred upon the respondent.

It was the respondent's case that it had the authority to enforce the payment of rates and interests against any ratepayer who had defaulted in payment. The respondent claimed that the applicant's contentions were more to do with the merits of the case and in particular the calculations of rates which matters could only be properly canvassed in the trial court where the applicant could adduce evidence and substantiate his claim.

Issues

i. Whether the Magistrates Court had the jurisdiction to determine a suit for recovery of rates filed pursuant to the provisions of the Rating Act.
ii. Whether judicial review remedies would be available before exhausting other available remedies under the Rating Act for resolution of the dispute?
iii. What were the grounds upon which the remedy for judicial review could be granted?
iv. Whether it was mandatory for the grounds in an application for judicial review to be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.
v. What was the purpose of merit review in a judicial review application?

Relevant provisions of the Law

Rating Act Cap. 267

Section 17 - Enforcement of payment of rate

(1) If, after the time fixed for the payment of any rate, any person fails to pay any such rate due from him and any interest on any such unpaid rate as provided in section 16 of this Act, the rating authority may cause a written demand to be made upon such person to pay, within fourteen days after service thereof on him, the rate due by such person and interest thereon calculated in accordance with section 16 (3) of this Act which demand shall be in the appropriate form in the Second Schedule.

(2) If any person who has had such demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate and interest in the manner hereinafter prescribed.

(3) Every plaint in such proceedings shall set forth the particulars of the land on which the rate was levied, of the rate so due and demanded and of any interest payable thereon.

(4) Every summons issued in proceedings taken under this section shall order the defendant to appear and answer the claim on a day to be therein specified, and every such summons may be served—

1. *by post; or*
2. *by fixing it on or to some conspicuous part of the land; or*
3. *by any mode of service authorized by any Rules made under the Civil Procedure Act (Cap. 21).*

(5) Where judgment is given in favour of the rating authority suing for recovery of rates, the decree of the court shall be in the appropriate form in the Second Schedule.

(6) A decree granted by a subordinate court in favour of the rating authority plaintiff under this section may be enforced by any mode of execution authorized by any Rules made under the Civil Procedure Act and, if the sum due under such decree is secured by a charge over the land by virtue of section 19 of this Act, the decree-holder may apply to the Supreme Court by originating summons to order the sale of such land in enforcement of such charge, and the Supreme Court may make an order directing the sale of such land subject to such conditions and with all such directions usual to the nature of such a summons as the justice of the case may require and such summons and any notice or document relating thereto may be served in the manner provided by subsection (4).

(7) Except as provided in this section, the Civil Procedure Act (Cap. 21) shall extend to any proceedings to secure the payment of any unpaid rate and to the execution of any decree or order granted or made in any such proceedings.

(8) Notwithstanding anything contained in the Limitation of Actions Act (Cap. 22), a suit or proceedings to recover money due in respect of any rate may be commenced at any time within twelve years of the day upon which the rate became due and payable.

Held

1. Order 53 rule 1(2) of the Civil Procedure Rules stated in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application was made. Order 53 rule 4(1) of the Civil Procedure Rules stated unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave. The grounds upon which administrative action was subject to control by judicial review were illegality, irrationality and procedural impropriety.
2. The grounds of illegality, irrationality and procedural impropriety were ordinarily regarded as the traditional grounds for judicial review. In exercise of its discretion, a judicial review court would intervene and grant the remedy for judicial review if any of them was proved to exist. The list was by no means exhaustive. Development of that area of law could yield further grounds on a case-by-case basis.
3. Since they formed the foundation upon which the application for judicial review was based and for which reliefs were sought, the grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave. Courts would not entertain applications where grounds had not been identified and accurately stated. Stating the grounds in precise terms was not, as it were, a matter of analytical nicety but it was a practical necessity.
4. The applicant would have done well to come out clearly and stated in no uncertain terms the acclaimed ground or grounds upon which judicial review reliefs were sought. However, going by his averments in paragraph 28 of the statutory statement, the reliefs were sought on the ground of illegality. At least, there was no hint or suggestion that the respondent's actions were faulted for the reason of irrationality, procedural impropriety or lack of proportionality.
5. Both the applicant and the counsel for the respondent had invoked the Rating Act Cap. 267 as the law applicable. Section 17 of the Rating Act was largely self-explanatory. The written demand by the rating authority to which reference had been made in section 17(1) was the demands which the applicant had alluded to in his affidavit as those dated November 3, 2016 and June 13, 2016 respectively. Both parties were in agreement that it was after applicant failed to honour the demand and pay the outstanding rates or the alleged outstanding rates that section 17(2) kicked in and a suit was filed to recover rates due on one of the applicant's properties.
6. The applicant could not be said to have acted; illegally, *ultra vires* the Rating Act or exceeded its jurisdiction in the circumstances. All the respondent did was to seek to enforce section 17 of the Rating Act. In so doing the respondent could properly be said to have not only understood correctly the law regulating its decision-making power with respect to enforcement of payment of rates but also that it gave effect to it. There was no evidence to suggest the contrary.

7. Like every other rate payer who, for one reason or another, would want to contest the demands for rates by the respondent or any suit filed for recovery of these rates, the applicant had every right to dispute the demands by the respondent. If anything, section 17(4) of the Rating Act underscored that right. It was in the spirit of that provision that the applicant responded and not only entered appearance in Nairobi City Court Civil Suit No. 22 of 2016 but also filed a defence in that suit opposing the respondent's claim.
8. The court that had been clothed with the requisite jurisdiction to determine a dispute that had been lodged for recovery of rates under section 17 of the Rating Act was the Magistrates' Court. That was expressly stated in section 25 of the Act. The Nairobi City Court was legally appropriately placed to determine the suit that had been lodged by the respondent as Civil Case No. 22 of 2016 since it was a suit for recovery of rates filed pursuant to the provisions of the Rating Act. Being seized of jurisdiction, the Magistrates Court would certainly dispose of the respondent's claim taking into consideration any issues a discontent rate payer may raise in his defence.
9. All that the applicant had raised in his defence to the respondent's claim were matters which the Magistrates' Court could properly dispose of within the premises of the Rating Act. None of the questions raised before the Magistrates' Court was a constitutional issue for which the instant court would be called upon to invoke its jurisdiction under article 165(3)(b) or (d) of the Constitution to determine it and neither were they questions that would require the court to invoke its special judicial review jurisdiction for judicial review reliefs.
10. The jurisdiction of the Magistrates' Court could not be ousted merely by claiming, without any basis, a violation or threatened violation of the Constitution with respect to a party's rights to property or any other right for that matter. The applicant's argument that sought to rope in what he regarded a violation or threatened violation of his right to property as guaranteed by the Constitution appeared to be too remote.
11. A judicial review court would not, in exercise of its discretion, normally make the remedy of judicial review available where some other body had exclusive jurisdiction in respect of the dispute.
12. Where Parliament had provided a form of appeal which was equally convenient in the sense that the appellate tribunal could deal with the injustice of which the applicant complained, the court should, as a rule, allow the appellate machinery to take its course. The prerogative orders formed the general residual jurisdiction of the court whereby the court supervised the work of inferior tribunals and sought to correct injustice were no other adequate remedy existed, but both authority and common sense seemed to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction existed elsewhere.
13. Section 9(2) of the Fair Administrative Action Act was clear that the court should not entertain disputes whose resolution had been provided for elsewhere by an Act of Parliament.
14. Judicial review, rather than an ordinary suit such as the one filed by the respondent in the Magistrates' Court and in which it was open to the applicant to raise a counter-claim, was not the most convenient, beneficial and effectual means through which the applicant's dispute could be resolved. It was in the trial court that the evidence in support of each of the parties case would be interrogated, scrutinised and tested, an exercise that a judicial review court was ill-disposed to undertake.
15. Orders of judicial review would be granted where the alternative statutory remedy was nowhere near so convenient, beneficial and effectual. The court would take into account such factors as whether the alternative statutory remedy would resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review.
16. Where the existence or non-existence of a fact was left to the judgment and discretion of a public body it was incumbent upon the court to leave the decision of that fact to the public body to whom Parliament had entrusted the decision-making power. Section 25 of the Rating Act had entrusted the

task of examination of evidence in resolution of claims under section 17 of the Act to the Magistrates' Court and not the instant court.

17. Judicial review would not be the most preferred procedure because the alternative statutory procedure would certainly determine the questions raised by the parties fully and directly; and, in all likelihood, the statutory procedure would be quicker than the procedure by way of judicial review.

18. The suit before the Magistrate's Court was a simple suit for recovery of rates. It had a statutory backing. The constitutionality of the provisions upon which the suit had been instituted had not been questioned. The applicant did not raise any jurisdictional issue on the basis of violation or threatened violation of his right to property either under article 40 of the Constitution or any other provision thereof in his defence. That was a ground that had been raised for the first time in the proceedings in what was a futile attempt to oust the Magistrates' Court jurisdiction.

19. The bid to transfer the suit to the High Court was not necessarily because the Magistrates Court lacked jurisdiction but was out of the applicant's belief that if the suit in the Magistrate's Court was transferred to the High Court, it would be disposed of together with another suit in the High Court and therefore save judicious time. But the suit in the High Court had not been revealed in the defence. Even then, there was no evidence that the applicant ever made any application for the transfer of the suit from the Magistrate's Court into the instant court on any ground.

20. Judicial review was concerned with reviewing not the merits of the decision in respect of which the application for judicial review was made, but with ensuring that the bodies exercising public functions observed the substantive principles of public law and that the decision-making process itself was lawful. The purpose of the remedy of judicial review was to ensure that the individual was given fair treatment by the authority to which he had been subjected yet it was no part of that purpose to substitute the opinion of the Judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless that restriction on the power of the court was observed, the court would, under the guise of preventing the abuse of power, be itself guilty of usurping power.

21. A judicial review court was free to play a more intrusive role in exercise of its supervisory jurisdiction by way of judicial review over subordinate courts, tribunals and other such like bodies whose decisions were amenable to judicial review, and subject decisions of those bodies to merit examination. But that the merit review may not be of much consequence because a judicial review court would not substitute its own decision for that of the court, tribunal or other public body.

22. Perhaps, the only purpose merit review would serve in the circumstances would be to guide the direction of the court, tribunal or other public body would take in making what was the correct decision. That was in a case where the impugned decision was remitted to those decision-making bodies for reconsideration. The court could not think of any other reason a judicial review court would engage in a merit review exercise only for it to remit the matter to the decision-making body.

23. A question that could arise in future conversations on the subject was, assuming the tribunal to which a decision had been remitted by the court for reconsideration was influenced by the merit review, whether that in itself amounted to an indirect substitution of the tribunal's decision with that of the court. There was room for development in that area of the law and indeed its growth had been dynamic over the years. Judicial review was capable of being extended to meet changing circumstances, but not to the extent that it became something different from review by developing an appellate nature. Judicial review, as we knew it, must be keep to its lane.

24. A judicial review court must, as much as possible, confine itself to the question of legality. That was, it was concerned with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers. The court had not seen any of those deficiencies in the respondent's decision to demand from the applicant rates.

Application dismissed with costs.

Citations

Cases

Kenya

1. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR) - (Explained)
2. *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others* Civil Appeal 46 of 2012; [2016] KECA 729 (KLR) - (Applied)

United Kingdom

1. *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141; [1982] UKHL 10; [1982] 1 WLR 1155 - (Applied)
2. *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374, [1984] 3 WLR 1174, [1985] ICR 14, [1984] 3 All ER 935, [1985] IRLR 28 - (Explained)
3. *R v Crown Court at Carlisle, ex p Marcus-Moore* (1981) Times, 26 October, DC - (Followed)
4. *R v Hillingdon London Borough Council ex parte Puhlhofer* [1986] AC 484; [1986] 1 All ER 467 (HL) - (Explained)
5. *R v Home Secretary; ex parte, Daly* [2001] 2 AC 532; [2001] UKHL 26; [2001] 3 All ER 433 - (Applied)
6. *R v Paddington Valuation Officer ex parte Peachey Property Corporation Ltd* [1966] 1 QB 380 - (Applied)
7. *R v Peterkin, ex parte Soni* [1972] Imm AR 253 - (Applied)

Texts

1. Fordham, M., (Ed) (2012), *Judicial Review Handbook* London: Hart Publishing, 6th Edn para 34.1
2. Mackey , JPH., (Ed) (2010), *Halsbury's Laws of England* London: LexisNexis Butterworths 5th Edn Vol 61 para 602

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53 rules 1, 2, 3, 4(1) - (Interpreted)
2. Constitution of Kenya articles 20, 22, 23, 40- (Interpreted)
3. Fair Administrative Action Act (cap 7L) sections 7, 9,11- (Interpreted)
4. Magistrates' Court Act (cap 10) section 8 (3)- (Interpreted)
5. Rating Act (cap 267) sections 2, 16(3); 16(4); 17(8); 25- (Interpreted)

United Kingdom

Rules of the Supreme Court [UK] order 53- (Interpreted)

Advocates

None mentioned

JUDGMENT

The Application

1. The application before court is a motion dated January 20, 2017expressed to be brought under order 53 rules 1, 2 and 3 of the *Civil Procedure Rules*, sections 7, 9, and 11 of the *Fair Administrative Action Act, 2015* and articles 20, 22, 23, 40 and 47 of the *Constitution*.

2. The applicant seeks a plethora of prayers which I can do no better than reproduce them as they appear on the face of the motion. They are in the following terms:

   "1. An order of *certiorari* be issued to remove into this court and quash forthwith: -

a. the respondent's decision contained in its notice of rates demand dated November 3, 2016demanding payment of Shs 4,588,950 as the rights and interests allegedly due and owing from the applicant in respect of Nairobi/Block 82/622, Sunrise Estate, Nairobi;

b. the decision of the respondent contained in its rates demand notice dated June 13, 2016demanding payment of Shs 6,120,526 as the rates and interest allegedly due and owing from the applicant in respect of LR No 9104/67 in Gigiri, Nairobi.

c. The respondent's decision to institute proceedings against the applicants in Nairobi city civil suit number 22 of 2016 to enforce its demand for payment of rates and interests of Shs 6,120,526 in respect of the said property LR No 9104/67.

2. An order of prohibition be issued to prohibit and stop the respondent from:

a) acting in violation or in excess of the jurisdiction conferred upon it by the *Rating Act*;

b) instituting any recovery proceedings in courts or otherwise taking action to enforce its demands for payment of Shs 4,588,950 in respect of Nairobi/Block 82/622 or from proceeding with the prosecution of the suit filed in respect of LR No 9104/67 in Nairobi City Court Civil Suit No 22 of 2016 until the respondent first:

i) gives full credit the applicant for the rights and interests of Kshs 28,653 which he paid to its own lawyers on 23 November 1994 for Nairobi/Block 82/622, and reverses all the interest it has charged him on that amount for the last 22 years or so, and

ii) gives him full credit for the waiver of interest which he was/entitled to under the amnesties for waiver of interest offered by the respondent in 2003, 2007 and 2009 and reverses and removes that interest from his rate accounts.

3. An order of *mandamus* be issued to compel the respondent to:-

a) recognise and give full credit to the applicant for the payment he made to its lawyers (Meenye & Co Advocates) on November 23, 1994to satisfy a decree of Shs 37,950/70 obtained by the respondent against him in Nairobi RMCC No. 1670 of 1993 in respect of the rates and interested you for Nairobi/Block 82/622 up to December 31, 1993;

b) give full credit to the applicant for the waiver of interest penalties which he was and is entitled to under the amnesties for waiver of interest offered by the respondent to Nairobi ratepayers in 2003, 2007 and 2009;

c) comply fully with the provisions of sections 16(3), 16(4) and 17(8) of the *Rating Act* and reverse/remove all the rates from the live it and interest unlawfully tied to the applicant's rights accounts for Nairobi/Block 82/622 and LR No 9104/67;

d) revise and amend the applicant's rate accounts for the two properties after giving him credit for the payment he made to the respondent's lawyers in November 1994 and also credit for the interest waived by the respondent's amnesties of 2003, 2007 and 2009.

e) allow and facilitate the applicant to pay the rates lawfully due for his properties under the same terms and conditions that were applicable to the amnesties the respondent has offered to ratepayers since 2011, and grant him the full benefit of credits for waiver of interest offered by the respondent to other ratepayers under those amnesties.

4. The respondent's unlawful actions are also serious violations of the *Fair Administrative Action Act, 2015* and consequently, in addition to the above prerogative writs of *certiorari*, prohibition and *mandamus*, the applicant shall also apply for the following declarations, orders and relieves under sections 7 and 11 of the *Fair Administrative Action Act*.

5. A declaration that the respondent's decision to demand payment and enforce recovery of Shs 6,120,526 for LR9104/67 and Shs 4,588,950 for Nbi/Block 82/622 are unlawful null and void, unreasonable and oppressive, a flagrant disobedience of sections 16 (3), 16(4) and 17(8) of the *Rating Act*, an abuse of its powers as a rating authority under violation of the applicant's rights to property under article 40 of the *Constitution*.

6. A declaration that the respondent's decision to recover and/or to enforce the recovery of the principal rates which go back to more than 12 years from the date when they became due and payable is unlawful, *ultra vires* and in excess of its jurisdiction under the *Rating Act* and a violation of section 17(8) of the said *act*.

7. A declaration that the respondent's decision to charge interest compounded every month is unlawful, *ultra vires* and in excess of its jurisdiction under the *Rating Act* and a violation of section 16(3) of the said *Act*.

8. A declaration that the respondent's decisions to charge, and its actions to enforce recovery of interest which exceeds the amount of the principal rate owing are unlawful, *ultra vires*, in excess of its jurisdiction under the *Rating Act* and a violation of section 16(4) of that *Act*.

9. A declaration under section 11 of the *Fair Administrative Action Act* that having regard to section 7(2) of the said *Act*, the decisions of the respondent to deny credit to the applicant for the interest waived by the amnesties it offered to ratepayers in 2003, 2007 and 2009, and its refusal to recognise and give credit to the applicant for the payment of rates and interest he made to its lawyers on November 23, 1994 were/are:-

    a) unlawful, unreasonable, oppressive and procedurally unfair;

    b) made in bad faith and failed to take into account relevant considerations;

    c) not rationally connected to the information before or available to the respondent;

    d) a breach of its statutory duties and/or a failure to act in discharge of its duties;

    e) an abuse of the respondent's power and discretion as a rating authority, and

    f) a violation of the applicant's legitimate expectations and of his right to property under article 40 of the *Constitution*.

10. An order restraining the respondent from demanding any payment for rates and interest, or from taking any action to enforce payment of rates and interest until it: -

    a) gives the applicant full credit of the interest waived by the respondent's amnesties of 2003, 2007 and 2009;

    b) gives the applicant full credit for the rates and interests which he paid to its own lawyers in November 1994,

    c) reverses and removes from the applicant's rating accounts all the interest that it has wrongly charged to those accounts.

11. An order directing the respondent to comply fully with the provisions of section 16(3), 16(4) and 17(8) of the *Rating Act*, and perform and discharge its duties under that *Act*.

12. An order for payment of general and exemplary damages to the applicant.

13. An order for payment of the costs and expenses of these proceedings.

3. The application is based on a statutory statement dated January 11, 2017 and an affidavit sworn by the applicant on even date, verifying the facts relied on.

4. The applicant is an advocate of this honourable court. He has sworn that he is a rateable owner of two properties in Nairobi. These properties have been described as Nairobi Block 82/622 situate in Sunrise estate and LR No 9104/67 in Gigiri Estate. The applicant purchased these properties in 1986 and 1991 respectively. Accordingly, the two properties have been subject to payment of land rates from 1987 and 1992 respectively.

5. The applicant also deposes that he has been having what he has described as a "long running dispute with the respondent" for the past six or so years over the rates and interest due and payable on the two properties. By a rates demand notice dated November 3, 2016, the respondent demanded payment of Kshs 4,588,950 as rates and interests due and owing in respect of Nairobi Block 82/622.

6. By another rates demand notice dated June 13, 2016, the respondent demanded a sum of Kshs 6,120,526 as the rates and interest due and owing in respect of LR No 9104/67. Subsequently, the respondent filed recovery proceedings against the applicant in Nairobi City Court Civil Suit No 22 of 2016 on June 23, 2016 to enforce its demand for payment of this amount.

7. The applicant swears that the demands for payment of the amounts which, in his view, are exorbitant, are illegal because they have been made in excess of jurisdiction and powers conferred upon the respondent by the *Rating Act*, cap. 267 and in violation of sections 16(3), 16(4) and 17(8) of that *Act*.

8. The demands for payment have been unlawfully made because it is the applicant's case that they have been made for the past 25 and 30 years in violation of section 17(8) of the *Rating Act* which is to the effect that proceedings for recovery of rates must be commenced within 12 years from the date when those rates became due and payable.

9. According to the applicant's own calculations, the maximum principal rates recoverable for Nairobi / Block 82/622 is Kshs 90,360. But the respondent is demanding Kshs 153,810 which is more than the total principal rates that would have been payable for this particular property for the past 30 years, if it was to be assumed that the applicant has not paid any rates during that period.

10. Likewise, the maximum rates recoverable for LRNo 9104/67 under section 17(8) of the Act is Kshs 243, 470 yet the respondent has demanded a sum of Kshs 332,068 which is more than the total principal rates that would have been payable for the property between 1992 and 2014, again, assuming that the applicant had not paid any rates during this period.

11. It is the applicant's case that the interest penalties of Kshs 4,435,140 on Nairobi /Block 82/622 and Kshs 5,788,458 on LR No 9104/67 are illegal and irrecoverable under section 16(3) and (4) of the *Rating Act*. The interest is illegal because the respondent has been charging interest on rates arrears at the rate of 3% per month compounded every month in violation of section 16(3) the of the *Act* which is expressly states that the rating authority shall charge simple interest at the rate of 3% per month. Properly calculated, the interest payable would have been Kshs 179,107/20 for Nairobi /Block 82/622 and Kshs 482,594/40 for LR No 9104/67 for the past 12 years.

12. By charging interest of Kshs 4,435,140 for Nairobi /Block 82/622, the respondent is alleged to have unlawfully charged the applicant more than 49 times the interest chargeable under section 16(4) of the *Rating Act* and by charging interest of Kshs 5,788,458 for LR No 9104/67, the respondent has overcharged the applicant by more than 23 times the maximum interest allowed under that very section.

13. The respondent is also alleged to have refused to amend its records to give credit for the rates the applicant paid in 1994 for Nairobi /Block 82/622 and give credit to the applicant for the waiver of interest that he was entitled to after payment of the principal rates for the two properties under three amnesties for waiver of interest offered by the respondent to ratepayers in the years 2003, 2007 and 2009.

14. According to the applicant, he has paid a total sum of Kshs 413,672/70 for the 2 properties for the last 22 years. The first payment for Nairobi /Block 82/622 was made on 23rd November 1994 after the respondent obtained judgment against the applicant in Nairobi Resident Magistrates Court Civil Case No 1670 of 1993. When the applicant discovered that a judgment had been obtained and a prohibitory order issued against the property on November 23, 1994, the applicant paid the respondent's lawyers the full sum of Kshs 37,950/70. However, the respondent has refused to give the applicant credit for the payment.

15. The next payment he made for LR No 9104/67 was on December 22, 2000 when he paid the sum of Kshs 142,827 to the respondent to clear the rates for the property up to December 31, 1999.

16. The respondent is said to have offered amnesty of up to 100% waiver of interest in mid-2003 which the applicant decided to take advantage of. He was advised to pay principal rates of Kshs 46,800 for Nairobi /Block 82/622 for the 10-year period (from 1994 to 2000) and the sum of Kshs 57,230 for LR No 9104/67 for 4 years from 2000 to 2003.

17. It is the applicant's position that he paid the amounts on 12th and June 27, 2003 and cleared the rates for the two properties for the period up to December 31, 2003.

18. Four years later, the applicant took advantage of another amnesty offered by the respondent in January 2007 and after he had been advised of the principal rates due, he paid the respondent the sum of Kshs 22,320 for Nairobi /Block 82/622 and Kshs 60,140 for LR No 9104/67. The payments are said to have been made on 31st January 2007 and the rates were cleared for both properties for the period up to December 31, 2007.

19. On November 27, 2009, the applicant took advantage of yet another amnesty offered by the respondent and paid the rates of Kshs 12, 240 together the administrative charges of Kshs 360 for Nairobi /Block 82/622 and Kshs 32,980 and administrative charges of Kshs 825 for LR No 9104/67.

20. From 2011 until July or August 2016, the applicant says that he has attempted to pay rates under further amnesties offered by the respondent in the last 6 years, but he has not been able to do so because the respondent has unlawfully and unreasonably refused to give him the credit for the waiver of interest that he was entitled to under the amnesties of 2003, 2007 and 2009 and has also refused to acknowledge the payment he had made to its advocates in 1994.

21. The applicant swears that he had a legitimate expectation that he would benefit from the waiver of interest under those amnesties and the respondent has no right to frustrate those expectations or withhold the credit for the waived interest from him. The respondent's actions, it is alleged, have denied the applicant the opportunity of paying the rates of his properties under several amnesties for waiver of

interest that the respondent has been offering in the last 6 years to members of the public since August 2011.

22. The applicant states that since he may not be in a position to pay the unlawful and exorbitant amounts the respondent is demanding, his right to property under article 40 of the *Constitution* is threatened with the violation as there is a real and grave danger that he could lose the two properties unless this Honourable Court intervenes and halts what the applicant deems unlawful demands and illegal actions of the respondent.

Respondent's Response

23. The respondent opposed the applicant's motion and filed a replying affidavit to that effect. The affidavit was sworn on February 13, 2017by Dr. Robert Ayisi who has introduced himself as the acting county secretary of the respondent.

24. It is the respondent's case that the respondent has the authority to enforce the payment of rates and interests against any ratepayer who has defaulted in payment and the powers to do so are circumscribed in section 17 as read with section 2 of the *Rating Act*.

25. These provisions of the law are enforced by written demand notices to ratepayers to enable them make payments within the specified time and when payments are not forthcoming, proceedings are instituted to recover the rates.

26. The respondent admitted having made written demands to the applicant requesting him to make the payments. It proceeded to file recovery proceedings when the applicant failed or defaulted in payment of the rates due. These recovery proceedings are Nairobi City Court Civil Suit No. 22 of 2016 in which the respondent seeks to recover the sum of Kshs 6,120, 526 in respect of LR No 9104/67.

27. As far as the waiver notices are concerned, it is deposed that they have a time limit after which a rate payer cannot insist on their availability and waiver of interest. In any event, although the applicant alleges to have paid rates on June 12, 2003and 31st June 2003 pursuant to a waiver offered in 2003 by the respondent, the exhibit provided by the applicant is for a waiver offered in 2004. Thus, the waiver was to be paid in 2004 and not 2003 as alleged by the applicant.

28. Again, although the applicant alleges to have paid the rates on January 31, 2007, the waiver period was between October 2007 and January 2008 meaning that the applicant was to make payments between these periods to be able to enjoy the offer.

29. The respondent has also sworn that the applicant's contentions are more to do with the merits of the case and in particular the calculations of rates which matters can only be properly canvassed in the trial court where the applicant can adduce evidence and substantiate his claim.

Submissions, Analysis and Determination

30. In their submissions, the parties have to a great extent rehashed the facts upon which the application is based.

31. As always, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are amenable to judicial review is the grounds upon which the application is made and, by extension, upon which judicial review reliefs are sought.

32. Order 53 rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

33. And order 53 rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

34. The grounds to which reference has been made in these provision of the law have not been left to speculation. They were enunciated in the English case of *Council of Civil Service Unions versus Minister for the Civil Service* [1985] AC 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under

this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

35. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. In exercise of its discretion, a judicial review court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed. According to the Court of Appeal in *Suchan Investment Limited versus Ministry of National Heritage & Culture & 3 others* [2016] eKLR, this principle was first adopted in *R versus Home Secretary; ex parte, Daly* [2001] 2 AC 532.

36. Since they form the foundation upon which the application for judicial review is based and for which reliefs are sought, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

37. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, *Judicial Review Handbook*, at Paragraph 34.1 states as follows:

> "The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of
>
> (a) potentially applicable grounds and
>
> (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

38. The 'new order' referred to in this passage is order 53 of the *Rules of the Supreme Court of England* whose provisions are more or less in *pari materia* with our own order 53 of the *Civil Procedure Rules, 2010*. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity.

39. Turning back to the applicant's application, the applicant has to a greater degree reproduced the depositions in the affidavit verifying the facts relied upon and the facts in the statutory statement as the grounds upon which he seeks relief. The closest he has come to in coming out clearly on which of the acknowledged grounds of judicial review he has based his application is in paragraph 28 in the statement in which he has stated as follows:

> "28. The respondent's demands and actions to enforce payment of rates and interest of Shs. 4,588,950 and 6,120,526 for the applicant's two properties are illegal as they are ultra vires and in excess of its jurisdiction under the *Rating Act* and in flagrant violation of sections 16(3), 16(4) and 17(8) of that Act."

40. In some of the rest of the paragraphs under the head of "the grounds upon which the reliefs are sought" the respondent's actions have been described as "unlawful"," "illegal," "arbitrary", "oppressive" and "malicious". The applicant has also alleged that his rights under article 40 of the *Constitution* is threatened with violation and that his legitimate expectation has been frustrated.

41. For reasons I have given, the applicant would have done well to come out clearly and stated in no uncertain terms the acclaimed ground or grounds upon which judicial review reliefs are sought. However, going by his averments in paragraph 28 of the statutory statement, I take it that the reliefs are sought on the ground of illegality. At least, there is no hint or suggestion that the respondent's actions are faulted for the reason of irrationality, procedural impropriety or lack of proportionality.

42. Taking cue from Lord Diplock's definition of what illegality entails, the fundamental and overarching question in this application is whether the decision-maker, in this case the respondent, in demanding for rates and taking a further action to sue the applicant for their recovery, understood correctly the law regulating its decision-making power and, if so, whether it gave effect to it.

43. The parties are in agreement of what the pertinent law is, in the circumstances of this case. Both the applicant and the learned counsel for the respondent have invoked the *Rating Act* cap 267 as the law applicable. One of the provisions upon which the answer to the question turns is section 17 of the *Act* on the enforcement of payments of rates. Owing to its relevance to the determination of this application, it is necessary that I reproduce it here verbatim. It reads as follows:

> 17. Enforcement of payment of rate
>
> (1) If, after the time fixed for the payment of any rate, any person fails to pay any such rate due from him and any interest on any such unpaid rate as provided in section 16 of this Act, the rating authority may cause a written demand to be made upon such person to pay, within fourteen days after service thereof on him, the rate due by such person and interest thereon calculated in accordance with section 16(3) of this Act which demand shall be in the appropriate form in the Second Schedule.
>
> (2) If any person who has had such demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate and interest in the manner hereinafter prescribed.
>
> (3) Every plaint in such proceedings shall set forth the particulars of the land on which the rate was levied, of the rate so due and demanded and of any interest payable thereon.
>
> (4) Every summons issued in proceedings taken under this section shall order the defendant to appear and answer the claim on a day to be therein specified, and every such summons may be served—
>
> (a) by post; or
>
> (b) by fixing it on or to some conspicuous part of the land; or
>
> (c) by any mode of service authorized by any Rules made under the *Civil Procedure Act* (cap. 21).
>
> (5) Where judgment is given in favour of the rating authority suing for recovery of rates, the decree of the court shall be in the appropriate form in the Second Schedule.
>
> (6) A decree granted by a subordinate court in favour of the rating authority plaintiff under this section may be enforced by any mode of execution authorized by any rules

made under the *Civil Procedure Act* and, if the sum due under such decree is secured by a charge over the land by virtue of section 19 of this Act, the decree-holder may apply to the Supreme Court by originating summons to order the sale of such land in enforcement of such charge, and the Supreme Court may make an order directing the sale of such land subject to such conditions and with all such directions usual to the nature of such a summons as the justice of the case may require and such summons and any notice or document relating thereto may be served in the manner provided by subsection (4).

(7) Except as provided in this sec tion, the *Civil Procedure Act* (cap 21) shall extend to any proceedings to secure the payment of any unpaid rate andto the execution of any decree or order granted or made in any such proceedings.

(8) Notwithstanding anything contained in the *Limitation of Actions Act* (cap 22), a suit or proceedings to recover money due in respect of any rate may be commenced at any time within twelve years of the day upon which the rate became due and payable.

44. This provision of the law is largely self-explanatory. The written demand by the rating authority to which reference has been made in section 17(1) is no doubt the demands which the applicant has alluded to in his affidavit as those dated November 3, 2016and 13 June 2016 respectively. Both parties are also in agreement that it is after applicant failed to honour the demand and pay the outstanding rates or the alleged outstanding rates that section 17(2) of the *Act* kicked in and a suit was filed to recover rates due on one of the applicant's properties.

45. From the applicant's own affidavit, it would appear that all that the respondent has attempted to do is to apply section 17 of the Act in its bid to enforce payment of the rates which, in its view, were due.

46. In the impugned demands, for instance, time was fixed for payment of the rates or any interest thereof. It has not been alleged that the rating authority which, in this case, is the respondent did not cause a written demand to the applicant. As a matter of fact, it is as a result of the demands for payment, at least, on one of the properties and a suit for recovery of rates on the other property that the applicant filed the instant suit. The applicant has not also claimed that the respondent did not give him adequate time or, to be precise, the prescribed fourteen-day period within which to pay the rates demanded after service of the demand notice. The form of the notice has also no been impinged.

47. As noted above, a suit was instituted when the applicant defaulted to make the payment in accordance with the demand made for the outstanding rates together with interest on one of the properties.

48. The question that then arises is; can the applicant be said to have acted illegally in these circumstances? Can it be said to have acted *ultra vires* the *Rating Act* or exceeded its jurisdiction? I reckon not. When I consider the material before me and, in particular, the evidence provided by the applicant, I am persuaded that all the respondent did was to seek to enforce section 17 of the *Rating Act*. And in so doing the respondent can properly be said to have not only understood correctly the law regulating its decision-making power with respect to enforcement of payment of rates but also that it gave effect to it. There is no evidence to suggest the contrary.

49. As far as I understand the applicant, he is mainly contesting the demands by the respondent of the rates due on the applicant's properties. This is apparent from his pleadings in the statutory statement and depositions in the affidavit sworn to verify the facts relied upon. Sample the following paragraphs in his statutory statement for instance:

28. The respondents demands and actions to enforce payment of rates and interest of Shs. 4,588,950 and Shs. 6,120,526 for the applicant's as they are *ultra vires* and in excess of its

jurisdiction under the *Rating Act* and in flagrant violation of sections 16(3), 16(4) and 17(8) of that *Act*.

29. The respondent has unlawfully demanded from the applicant and has taken action to enforce payment of rights and interests for the last 25 and 30 years in violation of section 17(8) of the *Rating Act* which states that proceedings for the recovery of rates must be commenced within 12 years from the date when those rates became due and payable.

30. The maximum principle rates recoverable for the last 12 years for Nairobi/Block 82/622 is Kshs 90, 360 yet the respondent is demanding Shs. 153, 810 which is even more than the rates of Shs. 151,290 levied for this property since it was bought 30 years ago.

31. The maximum principle rates recoverable for L.R. No. 9104/67 for the last 12 years is Kshs 243,470, yet the respondent is demanding and has instituted recovery proceedings for payment of Shs. 332,068 which is also more than the total rates levied for that property for a period of 23 years from when the property was bought in 1991 to 2014.

32. The respondent has been charging illegal interests at the rate of 3% per month compounded every month contrary to and in violation of section 16 (3) of the *act* which says that the "... rating authority shall charge simple interest at the rate of 3% per month".

33. The respondent is demanding illegal interest of Shs. 4,435,140 for Nbi/Block82/622 and Shs. 5,788,458 for L.R. 9104/67 in violation of section 16(4) of the *Rating Act* which states that "the interest charged shall not exceed the principal amount of the rate owing."

34. The maximum interest that the respondent unlawfully charge for Nairiobi/Block 82/622 is Shs. 90,360 and by demanding payment of Shs. 4,435,140 for that property, it has overcharged the applicant by more than 49 times the interest it is permitted to recover under section 16 (4) of the *Rating Act*. Likewise, the maximum interest the respondent is entitled to charge for LR. 9104/67 is Shs. 243,470 and by demanding Shs. 5,788,458, it is overcharging him by more than 23 times the interest it is allowed to charge under the law.

35. The respondent's refusal to recognise and give credit to the applicant for the payment he made to the respondent's lawyers (Meenye and Co. Advocates) on 23rd November 1994 is unlawful and arbitrary, oppressive and malicious.

36. Similarly, the respondent's refusal to grant the applicant credit for the waiver of interest that he had been given or was entitled to under the amnesties of 2003, 2007 and 2009 is also unlawful, arbitrary and unreasonable."

50. Like every other rate payer who, for one reason or another, may want to contest the demands for rates by the respondent or any suit filed for recovery of these rates, the applicant had every right to dispute the demands by the respondent. If anything, section 17(4) underscores this right when it states that:

> "Every summons issued in proceedings taken under this section shall order the defendant to appear and answer the claim on a day to be therein specified, and every such summons may be served..." (Emphasis added).

51. No doubt, it is in the spirit of this provision that the applicant responded and not only entered appearance in Nairobi City Court Civil Suit No 22 of 2016 but also filed a defence in that suit opposing the respondent's claim.

52. It is worth noting that the applicant's pleadings in the instant application are strikingly similar to the averments made in his defence filed in Nairobi City Court Civil Suit No 22 of 2016. What, in effect,

the applicant has done is to escalate his defence in the magistrates' court suit into the instant suit against the respondent. The only difference is that the applicant has, in this suit, asked for specific prayers, apart from the judicial review reliefs, against the applicant in what, in ordinary circumstances, would have been some sort of counter-claim against the respondent in the suit in the magistrates' court.

53. The point, however, is that the court that has been clothed with the requisite jurisdiction to determine a dispute that has been lodged for recovery of rates under section 17 of the *Rating Act* is the magistrates' court. This so expressly stated in section 25 of the *Act* which reads as follows:

> Jurisdiction of magistrates
>
> Notwithstanding anything to the contrary in the *Magistrate's Courts Act* (Cap. 10), any magistrate empowered to hold a subordinate court of the first class shall have jurisdiction to hear and determine suits for the recovery of rates under this Act.

54. It follows that the Nairobi City Court is legally appropriately placed to determine the suit that has been lodged by the respondent as Civil Case No. 22 of 2016 since it is a suit for recovery of rates filed pursuant to the provisions of the *Rating Act*. Being seized of jurisdiction, the magistrates court would certainly dispose of the respondent's claim taking into consideration any issues a discontent rate payer may raise in his defence.

55. Bearing this in mind, I am of the humble view that all that the applicant has raised in his defence to the respondent's claim are matters which the magistrates' court could properly dispose of within the premises of the *Rating Act*.

56. Based on the evidence presented before it, the court would decide, for instance, whether the respondents action to demand and seek to enforce payment of rates and interest were in violation of sections 16(3), 16(4) and 17(8) of that *Act*; or, whether, in doing so, the respondent was demanding more than the maximum principle rates on any of the applicant's properties. The court has also the competence to decide whether the respondent's demands and suit are time-barred. Similarly, nothing would bar the magistrates' court from determining whether the respondent was charging illegal interest and also whether any sums paid to the respondent through its advocates had been credited to the applicant's account or not. It would also determine whether the applicant is entitled to the benefit of any waiver that has previously been offered to the rate payers.

57. In holding as I do, I find the words of Lord Brightman in *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484, [1986] 1 All ER 467, HL, befitting. The learned judge noted at 518 and 474 as follows:

> "Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

58. None of the questions raised before the magistrates' is a constitutional issue for which this Honourable Court would be called upon to invoke its jurisdiction under article 165(3)(b) or (d) of the *Constitution* to determine it and neither are they questions that would require this court to invoke its special judicial review jurisdiction for judicial review reliefs.

59. The jurisdiction of the magistrates' court cannot be ousted merely by claiming, without any basis, a violation or threatened violation of the *Constitution* with respect to a party's rights to property or any

other right for that matter. The applicant's argument that seeks to rope in what he regards a violation or threatened violation of his right to property as guaranteed by the *Constitution* appears to be too remote, to say the least. This is what the applicant says in paragraph 26 of his affidavit with regard to his right to property:

> "37. That since I may not be in a position to pay the unlawful and exorbitant amounts the respondent is demanding, my right to property under article 40 of the *Constitution* is threatened with violation as there is a real and grave danger that I could lose my two properties unless this court intervenes to put a stop to the unlawful demands and illegal actions of the respondent."

60. This statement is lacking in substance for two reasons: first, it has already been noted that under section 17 of the Rates Act, the respondent is entitled to demand payment of rates and in default of this payment to suffer the recovery. Secondly, to the extent that the respondent has filed a suit for the recovery of the demanded rates, the respondent's claim is subject to proof and it is only after such a proof that the court will determine the amount due as rates and any other amount that may have accrued as a result of non-payment as claimed by the respondent and, most importantly, as determined by the court. The applicant has, on his part, filed a defence to the claim and there is no doubt that the court will consider his defence before coming to a determination. In other words, should the applicant be found to owe any amounts to the respondent, it will only be after he has been taken through due process in which he would have had a chance to participate by, inter alia, testing the respondent's evidence by way of cross-examination and also by presenting his own evidence to counter the respondent's claim. The applicant cannot, therefore, proceed as if he has been prejudged and condemned to pay any particular sum as outstanding rates when the respondent's claim is still pending for determination.

61. It is worth remembering that a judicial review court will not, in exercise of its discretion, normally make the remedy of judicial review available where some other body has exclusive jurisdiction in respect of the dispute. In the English decision of *R versus Peterkin, ex p Soni* [1972 Imm AR 253 Lord Widgery CJ had this to say on the need to exhaust appellate avenues before moving to court:

62. Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course. The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice were no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere."

63. Our very own Court of Appeal has held in the *Speaker of the National Assembly v Karume*, Civil Application No. NAI 92 of 1992 that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

64. And section 9(2) of the *Fair Administrative Action Act* No 4 of 2015 is also clear that this court should not entertain disputes whose resolution has been provided for elsewhere by an Act of Parliament. It states as follows:

9.

(2) Procedure for judicial review.

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

65. But I am minded that judicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' (see *R v Paddington Valuation Officer, ex p Peachey Property Corpn Ltd* [1966] 1 QB 380 at 400). The court will, of course, take into account such factors as whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review.

66. From what I gather, the resolution of the applicant's case would mainly revolve around evidence on accounting. Without appearing to pre-empt what the magistrates' court may decide, it may be necessary to determine if the applicant paid any monies in settlement of rates due; whether his rates account was duly credited; whether he was overcharged or subjected to inapplicable interest rates; whether the applicant was and is still entitled to any waivers that the respondent may have offered to its rate payers over the years and such like issues. These questions may require evidence on accounting in order to resolve them.

67. In these circumstances, I would not say that judicial review, rather than an ordinary suit such as the one filed by the respondent in the magistrates' court and in which it is open to the applicant to raise a counter-claim, is the most convenient, beneficial and effectual means through which the applicant's dispute can be resolved. To the contrary, it is in the trial court that the evidence in support of each of the parties case will be interrogated, scrutinised and tested, an exercise that a judicial review court is ill-disposed to undertake.

68. I would go back to the case of *Puhlhofer v Hillingdon London Borough Council* (*supra*) on the best suited forum to determine disputed facts when considering whether or not to entertain a judicial review application where an alternative remedy or procedure exists. It was aptly put in that case that where the existence or non-existence of a fact is left to the judgment and discretion of a public body it is incumbent upon the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power. In the instant case, I would say section 25 of the *Rating Act* has entrusted this task of examination of evidence in resolution of claims under section 17 of the *Act* to the magistrates' court and not this Honourable Court.

69. I also would not say that that judicial review would be the most preferred procedure because the alternative statutory procedure will certainly determine the questions raised by the parties fully and directly; and, in all likelihood, the statutory procedure would be quicker than the procedure by way of judicial review.

70. At the risk of belabouring the point, I need to reiterate that the suit before the magistrate's court is a simple suit for recovery of rates. It has a statutory backing. The constitutionality of the provisions upon which the suit has been instituted has not been questioned.

71. As matter of fact, the applicant did not raise any jurisdictional issue on the basis of violation or threatened violation of his right to property either under article 40 of the *Constitution* or any other provision thereof in his defence. This is a ground that has been raised for the first time in these proceedings in what I opine to be a futile attempt to oust the magistrates' jurisdiction. In his bid to do that, the applicant has invoked section 8(3) of the *Magistrates Court Act*, cap. 10 which states that:

> Nothing in this Act may be construed as conferring jurisdiction on the magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a

violation, infringement or denial of our rights or fundamental freedom in the Bill of Rights. (Emphasis added).

72. Going by his own averments, the applicant is apprehensive that there is a threat of violation to his right to property. He does not claim that the right has either been violated, infringed or denied. Assuming the applicant had pleaded in his defence the threat of violation to his right to property under the *Constitution*, this provision of the *Constitution* would still be of little assistance to him in his quest to avoid the magistrates' jurisdiction.

73. But as has been noted the applicant never contended in his defence the magistrates' court is deficient in jurisdiction, for one reason or the other. All he said was that he wanted the suit to be transferred to the High Court, not because the magistrates' court was deprived of jurisdiction, but because the applicant wanted the suit to be heard together with some other undisclosed suit. This is apparent in paragraphs 3 and 13 of his defence. Paragraph 3 reads as follows:

Paragraph 3 reads as follows:

> " "3. As will become clear from this defence and the documents attached hereto, the rates disputes for both properties have for the last thirteen years been handled together, and are so closely interrelated with each other that for the expeditious disposal of the two disputes and efficient use of limited judicial resources, prudence would dictate that both matters be handled and dealt with together in the same court. The defendant therefore reserves the right to apply for an order for the transfer of the suit to the High Court so that the two matters can be dealt with by the same court.
>
> And paragraph 13 reads as follows:
>
> 13. Save except (sic)what is expressly admitted herein, the defendant denies each and every allegation contained in the plaint as if the sake (sic) were set out herein and traversed seriatim.
>
> Reasons wherefore the defendant prays that the plaintiff suit to be transferred to the High Court for hearing and final disposal in that court as stated in paragraph 3 and 13 hereabove, and in the alternative, that the plaintiff's suit be dismissed with costs."

74. So, the bid to transfer the suit to the High Court was not necessarily because the magistrates court lacked jurisdiction but was out of the applicant's belief that if the suit in the magistrate's court was transferred to the High Court, it would be disposed of together with another suit in the High Court and therefore save judicious time. But the suit in the High Court has not been revealed in the defence. Even then, there is no evidence that the applicant ever made any application for the transfer of the suit from the magistrate's court into this honourable court on any ground.

75. It follows that the question whether the magistrates court had jurisdiction to determine the rates dispute need not have arisen because it was not an issue in the first place.

76. Turning back to the jurisdiction of judicial review which the applicant has invoked in this application, it has been consistently held that judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but with ensuring that the bodies exercising public functions observe the substantive principles of public law and that the decision-making process itself is lawful. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected yet it is no part of

that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power (see *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 143 and 154).

77. While I agree with the applicant that in the Court of Appeal decision in *Suchan Investment Limited versus Ministry of National Heritage & Culture & 3 Others* (*supra*), the court held that a judicial review court may to some degree entertain merit determination, it is important to remember that the same court was categorical that:

> "56. Analysis of article 7 of the *Constitution* as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action... It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On a case by case basis, future judicial decisions should delineate the extent of merit review under the provisions of the Fair Administrative Action Act."

78. I understand the court to be saying that a judicial review court is now free to play a more intrusive role in exercise of its supervisory jurisdiction by way of judicial review over subordinate courts, tribunals and other such like bodies whose decisions are amenable to judicial review, and subject decisions of these bodies to merit examination. But that the merit review may not be of much consequence because a judicial review court will not substitute its own decision for that of the court, tribunal or other public body.

79. Perhaps, the only purpose merit review would serve in these circumstances would be to guide the direction of the court, tribunal or other public body would take in making, what in the court's view, is the correct decision. This is in a case where the impugned decision is remitted to these decision-making bodies for reconsideration. I cannot think of any other reason a judicial review court would engage in a merit review exercise only for it to remit the matter to the decision-making body. And if I am right in this, a question that may arise in future conversations on this subject is, assuming the tribunal to which a decision has been remitted by the court for reconsideration is influenced by the merit review, wouldn't that in itself amount to an indirect substitution of the tribunal's decision with that of the court?

80. I must hasten to add that there is room for development in this area of the law and indeed its growth has been dynamic over the years. But while embracing these developments I would adopt the words of Donaldson LJ in *R v Crown Court at Carlisle, ex p Marcus-Moore* (1981) Times, 26 October, DC, where he said that judicial review was capable of being extended to meet changing circumstances, but not to the extent that it became something different from review by developing an appellate nature. Judicial review, as we know it, must be keep to its lane.

81. A judicial review court must, as much as possible, confine itself to the question of legality. That is, it is concerned with whether a decision-making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached or abused its powers. (See *Halsbury's Laws of England/Judicial Review* (volume 61 (2010) 5th Edition) at paragraph 602).

82. I cannot say that I have seen any of these deficiencies in the respondent's decision to demand from the applicant rates which, in the respondent's view, are due and owing and in its subsequent action to institute proceedings against the applicant to recover these rates.

83. In the final analysis, and for reasons I have given, I find no merit in the applicant's application. It is hereby dismissed with costs. Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI ON 29 SEPTEMBER 2023

NGAAH JAIRUS

JUDGE