Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment)

Neutral citation: [2022] KEHC 5 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION E023 OF 2021

JM MATIVO, J

JANUARY 24, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

AND

PROTO ENERGY LIMITED ..... EXPARTE

JUDGMENT

1. Pursuant to this courts leave granted on 7th May 2021, vide an application dated 11thMay 2021 expressed under Order 53 Rules 1, 2, 3 of the Civil Procedure Rules, 2010, sections 8 and 9 of the *Law Reform Act*,[1] sections 59 and 72 of the *Tax Procedures Act*[2](the TPA), section 4 of the *Fair Administrative Action Act*[3](the FAA Act), Articles 47 and 50 of the *Constitution* and all the enabling provisions of the law, the applicant seeks Mandamus to compel the Respondent to process its Request for a back end filing of its amended Tax return for the year 2018. It also prays for Mandamus to compel the Respondent to issue it with a current Tax Compliance Certificate. Lastly, it prays for costs of the application.

2. The application is premised on the grounds that the applicant, a registered tax payer has over the years been filing its tax returns in accordance with Section 24(1) of the TPA and the *Value Added Tax*[4] (the

1 Cap 26, Laws of Kenya.

2 Act No. 29 of 2015.

3 Act No. 4 of 2015.

4 Act No. 35 of 2013.

VAT) Act. The applicant states that on or around the 27th of March 2020, it filed its returns for the year 2018 based on its unaudited financial records, but on or around 5th August 2020, it became necessary to amend the said returns to reflect the true position. It states that on or around 27th January 2021, it requested the Respondent to assist it to upload its amended income tax return for 2018 but the Respondent failed to respond, and also, the Respondent failed to respond to its application for a tax compliance certificate and owing to the Respondent's failure it cannot file its 2019 income tax nor will it be able to file its 2020 income tax returns by June 2021 (now past).

3. The applicant contends that the Respondent's inaction jeopardizes its business because it cannot apply for and obtain licenses from the Energy and Petroleum Regulatory Authority (EPRA) and the National Environmental Management Authority amongst other statutory bodies which require a Tax Compliance Certificate as a pre-requisite to license it to trade, hence, it risks being driven out of business. Also, the applicant states that the Respondent's action is contrary to what is expected of a public body and endangers its 1750 employees whose livelihood is at stake and its only recourse is Mandamus to compel the Respondent to perform its statutory duty which they have refused to perform to its detriment.

The Respondent's Replying affidavit

4. M/s Margaret Pere, an Assistant Manager in the Respondent's Investigation & Enforcement Department appointed under section 13 of the *Kenya Revenue Authority Act*[5] swore the Replying affidavit dated 21st June 2021. Essentially, the substance of her affidavit is that this application is pre-mature, frivolous and an abuse of court process; that investigations on the applicant who is registered for income tax company, Value Added Tax, and Income Tax PAYE obligation revealed that the despite having a turn over running into millions, it failed to file and pay taxes for 2018 and 2019. Further, that an in-depth analysis into its bank account revealed Kshs. 15,424,663,045/= inflows and after adjustments its net income compared to the declared income revealed a variance of Kshs. 7.8 billion indicating possible fraudulent evasion of taxes. M/s Pere averred preliminary investigations established that the applicant was involved in tax fraud by evading payment of taxes amounting to Kshs. 3,307,943,822/= excluding the yet to be done investigations on its account at Gulf Africa Bank Limited.

5. She averred that under section 31 (2) & (3) of the TPA, the Commissioner has the discretion upon application by a taxpayer who wishes to amend its self-assessment to either allow a tax payer to amend the same or refuse the application, and that the applicant is still under investigations for fraud whose outcome will inform the next decision. Further, that the applicant cannot compel the Respondent to allow it to amend the returns because the Commissioner reserves the discretion to do so based on the circumstances of the case.

6. She also deposed that section 72 (2) of the TPA provides that the Commissioner may issue a Tax Compliance Certificate valid for the period specified in the certificate upon the applicant fulfilling conditions that the Commissioner may impose. Also, she deposed that a Tax Compliance Certificate, as the name suggests, is only issued when a taxpayer is tax compliant and the Commissioner has the discretion to reject an application for a Tax Compliance Certificate or withdraw an already issued Tax Compliance Certificate if it is established that the Tax Payer is not compliant.

7. M/s Pere averred that a Tax Payer is deemed non-compliant when after an investigation or audit it is established that the Tax payer made incorrect statements in his or her returns which affected tax liability, omitted certain income from returns or deliberately defaulted on any obligation imposed under a tax law. She deposed that the Respondent has established that the applicant made incorrect statements in

5 Act No. 2 of 1995.

its returns as shown in the variances between established income and declared income. Further, that the applicant despite trading with a turnover of Kshs. 3,695,841,885/= in 2018 failed to file returns which were due by 30th June 2019, and that the applicant as an afterthought filed late returns for 2018 on 27th March 2020 and declared zero turn over.

The applicant's further Affidavit

8. The applicant filed a further affidavit dated 15th September 2021 sworn by Mr. Nicholas Kokita its company secretary. The salient averments are that the applicant filed its tax returns for 2018 using its unaudited tax returns and subsequently, it established that it needed to amend the returns but it encountered challenges on the i-tax system and it engaged the Respondent for help but it failed to respond without providing reasons. The applicant states that the Respondent's discretion to accept or reject the amendment must be exercised within the law and that section 31(3) of the TPA empowers the Commissioner to accept or reject an application for amendment and the Commissioner is required to notify the taxpayer in writing its decision within 30 days of receiving the application.

9. Further, he averred that the Respondent is empowered under section 31 (1), (3) (4), (5),(6), (7), (8) and (9) of TPA to amend an assessment in the case of gross or willful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time. Also, the applicant states that the Respondent has abused its discretion in denying its request and in failing to inform the applicant of its decision within 30 days of receiving the application. Also, the applicant states that section 31 (2) of the TPA encompass the right to a fair hearing and the natural rules of justice enshrined under the FAA Act and Articles 47 and 50 of the Constitution.

10. Also, he averred that the applicant legitimately expected the Respondent in performance of its statuary duties to comply with the procedures and communicate its decision within the stipulated timelines. Lastly, the Respondent's conduct is an abuse of discretion and the unreasonable delay amounts to failure to discharge a duty imposed under the law.

The Respondent's supplementary affidavit

11. M/s Margaret Pere swore the supplementary affidavit dated 22nd October 2021. She deposed that preliminary finding by the Respondent depicted fraudulent acts of tax evasion contrary to section 97 of the TPA and whereas section 31 (2) of the TPA allows a taxpayer to apply for amendment of returns, section 31 (4) (a) empowers the commissioner to amend a taxpayer returns upon establishment of gross, wilful neglect, evasion or fraud at any time. She deposed that the applicant's application for amendment was triggered by the Respondent's investigations, so it was an afterthought to defeat the investigations.

12. She deposed that section 96 (1) (b) of the TPA provides that a person commits an offence if he deliberately omits any matter or thing without which the statement would be false or misleading in a material particular. Further, she deposed that the applicant failed to disclose that through its tax agent, after the applicant applied for amendment, the Commissioner asked the applicant to furnish some details but it failed to comply and that this suit was triggered by the investigations and it seeks to forestall possible prosecution.

The applicant's advocates submissions

13. The applicant's counsel cited *Republic v Kenya Revenue Authority ex parte Yaya Towers Limited*[6] in which the court held that the remedy of judicial review is concerned with reviewing the decision-making process not the merits of the decision and reiterated the grounds for judicial review which are

6 {2008} e KLR.

abuse of discretion; irrationality; Excess of jurisdiction; improper motives; failure to exercise discretion; abuse of the rules of natural justice; fettering of discretion and error of law. He also cited the Supreme Court in *Peninnah Nadako Kilishwa v Independent Electoral Boundaries Commission & 2 others*[7] that: -

> " The well-recognized principle in such cases, is that the court's target in judicial review is always no more than the process which conveyed the ultimate decisions arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence an Applicant making a case for judicial Review has to show that the decision in question was illegal, irrational or procedurally defective."

14. He also cited *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd*[8] which underscored that judicial review is concerned with the decision-making process not the decision itself. Buttressed by the said decisions he urged this court to examine whether the Respondent observed the due process in making or failing to make a decision on the applicant's application dated 27th January 2021. He submitted that amendment of the Tax returns is provided under Section 31 (2) of the TPA which provides: -

> (2) A taxpayer who has made a self-assessment may apply to the Commissioner, within the period specified in subsection (4) (b) (i), to make an amendment to the taxpayer's self-assessment
>
> (3) Where an amended self-assessment return has been submitted under subsection (2), the Commissioner may accept or reject the amended self-assessment return and where he rejects, he shall furnish the taxpayer with the reasons for such rejection within thirty days of receiving the application. (Emphasis mine)

15. Counsel submitted that under section 31 (1) and (3) (4), (5), (6), (7), (8) and (9) of TPA the Respondent is empowered to amend an assessment.

16. Counsel submitted that the Respondent abused its discretion by failing to adhere to the laid down process under Section 31 (3) of the TPA and by relying on the probability whether there exists fraud in order to reject its application. He cited *R v DPP & 2 Others Exparte Nomoni Saisi*[9] which held that the court can interfere with exercise of discretion where there is an abuse of discretion; where the decision-maker exercises discretion for an improper purpose; where decision-maker is in breach of the duty to act fairly; or if the decision-maker has failed to exercise statutory discretion reasonably; or if the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; or if the decision-maker fetters the discretion given or fails to exercise discretion and where the decision is irrational and unreasonable. Counsel submitted the the Respondent has abused its statutory discretion by purporting to reject the applicant's application to amend its tax return. He argued that it failed to exercise its statutory discretion reasonably because it did not comply with section 31 (3) of the TPA which provision encompasses the right to a fair hearing and natural justice enshrined under the FAA Act and Articles 47 and 50 of the Constitution.

7 {2015} e KLR.

8 Civil Appeal No.185 of 2001.

9 {2016} e KLR

17. Counsel submitted that Article 47 of the Constitution and section 4 (1) of the FAA Act contemplates that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. He submitted that if a right or fundamental freedom has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. He submitted that section 4(2) contemplates that every person has the right to be given written reasons for any administrative action taken against him; while section 6 provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.

18. Counsel cited section 31 (3) of the TPA which provides:

> Where an application has been made under subsection (2), the Commissioner may—
>
> (a) Amend the self-assessment; or
>
> (b) Refuse the application,
>
> And the Commissioner shall notify the taxpayer in writing of the decision within thirty days of receiving the application
>
> and argued that the Respondent failed to comply with the procedural rules under the Constitution, FAA Act and the TPA in failing to communicate its decision within the statutory timelines, and in so doing, it failed to discharge its statutory functions which is unfair, unreasonable, unjustified and in breach of the rules of natural justice. He argued that Section 7 of the FAA Act grants this court jurisdiction to review an administrative action or decision if inter alia a mandatory and material procedure or condition prescribed by an empowering provision was not complied with and where there was an abuse of discretion, or where there is an unreasonable delay or failure to act in discharge of a duty imposed under any written law. He contended that the Respondent failed to comply with the mandatory provisions of section 31 of the TPA, the FAA Act and Constitution. He also argued that the Respondent abused its discretion, and unreasonably delayed by failing to discharge a duty imposed under the TPA.

19. Further, counsel submitted that the Respondent violated the applicant's legitimate expectation under Section 31 (3) of the TPA that in performance of its statuary duties, the Respondent will comply with the procedures laid down and communicate its decision within the stipulated timelines. He cited the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*[10] :-

> " Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."

20. Further, counsel cited *R v Devon County Council, ex parte Baker and Another*; *R v. Durham County, ex parte Curtis and Another*[11] in support of the proposition that a claim of legitimate expectation can only be established when there is a clear representation, upon which it was reasonable for the claimant

[10] SC Petition Nos. 14, 14A, 14B & 14C of 2014.

[11] {1995} 1 All ER 73.

to rely; and if this condition is fulfilled, then the public body will be bound by the representation, unless its promise is inconsistent with its statutory obligations. Counsel submitted that legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. He argued that in lodging its application to amend the assessment and file an Amended Tax Return, the applicant legitimately expected that the Commissioner would comply with the relevant procedures in flagrant violation of the applicant's legitimate expectation. He submitted that legitimate expectation ought not to be frustrated because it is the root of the constitutional principle of the Rule of Law which requires predictability and certainty in government dealings with the public.

21. Additionally, counsel submitted that a procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken and that the applicant has established the existence of a representation by virtue of Section 31 (2) and (3) of the TPA which is clear and unambiguous and an expectation which is reasonable in the sense that a reasonable tax payer would act upon it, and, that the expectation was induced by the Commissioner who has the authority to process all applications and make decisions. Counsel cited *Republic v Kenya National Examinations Council ex parte Gathenji & 8 Others*[12] in which the Court of Appeal cited with approval, *Halsbury's Law of England*[13], thus:

> " The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

22. He also cited *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another*[14] in which the the court held that mandamus is an equitable remedy that serves to compel a public authority to perform a legal duty and it is a remedy which controls procedural delays and laid down the applicable tests mandamus. Additionally, counsel submitted that the Respondent has a public duty under Section 31 of the TPA owed to the applicant as a tax payer and that the applicant has met all the conditions precedent to merit the orders sought. He argued that there is no other recourse available to the applicant to enforce its rights. He reiterated that judicial review is concerned with the decision-making process and citing *Republic v Registrar of Societies & 3 Others ex parte Lydia Cherubet (Interim Chairperson) & 2 others*[15] he argued that the applicant seeks to review a fundamentally flawed process. Lastly, counsel argued that it is only fair and just that the Respondent be condemned to pay the costs of these proceedings.

The Respondent's counsel's submissions

12 Civil Appeal No 234 of 1996.

13 *4th Edn. Vol. 7 p. 111 para 89.*

14 {2018} e KLR.

15 {2016} e KLR.

23. The Respondent's counsel submitted that the applicant has not refuted the Respondent's findings that the applicant made incorrect returns for 2018 which constitutes tax evasion contrary to section 97 of the TPA. He submitted that amendment of tax returns pursuant to section 31 (4) (a) of the TPA is restricted and it is the Respondent's statutory mandate. He argued that the applicant's application for amendment was triggered by the investigations and submitted that the applicant's actions were a breach of section 96 (1) (b) of the TPA and by requesting for more information, the Respondent acted with the purview of the law.

24. To fortify her arguments, counsel cited *Republic v Cabinet Secretary for Treasury & another ex parte Theresa Ongore Auma; Kenya Revenue Authority (Interested Party)*[16] in support of the proposition that the court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy available; further, that the court will issue compelling orders if the duty to perform the function exists. He argued that from the material presented to this court, there is a pending dispute of tax evasion, hence an order of mandamus cannot issue.

25. Additionally, counsel submitted that this court cannot usurp the Respondent's functions under section 31 (4) of the TPA nor can the court compel the Respondent to exercise its discretion in a particular manner. To fortify his argument, counsel cited *Republic v Public Procurement Administrative Review Board & 2 others ex parte Pelt Security Services Limited*[17] in support of the proposition that once it is shown that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene. She argued that the instant application is basically an appeal and not a judicial review application. Lastly counsel cited *Republic v Kenya Revenue Authority ex parte Bata Shoe Company (Kenya) Limited*[18] which underscored the fact that payment of tax is an obligation imposed by the law and the taxman is obligated to collect up to the last coin due from a tax payer.

Determination

26. I find it useful to cite Wheelright K[19] who gives a good summary and places into perspective what constitutes fair procedural due process when a tax authority initiates an inquiry and audit. He states that taxpayers should be given prior notification of the audit and the opportunity to request postponement of the audit if they have good reasons. He states that as in any administrative decision, the tax authority should explain to taxpayers why they are chosen for an audit, what taxes and what years the audit will cover, what documents, books and other records will be required, how the audit will proceed, and give the taxpayer the opportunity to contact and use a legal or other representative in dealing with the tax authority.

27. The author goes on to state that at the commencement of the audit the taxpayer should receive clear guidelines from the revenue authority, setting out the audit procedures, the rights and duties of taxpayers during the audit as well as details of the tax authority's practices and rules governing the outcome of the audit. Undisputedly, the above statements are in line with the provisions of Article 47 of the Constitution and section 4 of the FAA Act. Compliance with these requirements would satisfy the key constitutional obligations placed on the revenue authority.

16 {2020} e KLR.

17 {2018} e KLR.

18 {2014} e KLR.

19 Wheelright K Taxpayer' Rights in Australia in Bentley D Taxpayers' Rights: An International Perspective Revenue Law Journal Bond University: Queensland 1998 at page 49.

28. The rule of law principle requires that all government action must comply with the law, including the Constitution. Government action includes the exercise of public power. As such, the exercise of all public power is subject to the Constitution. The Constitution contains constitutional obligations such as those in Article 47, and 232 of the Constitution. The standards demanded by the Constitution for the exercise of public power are that it should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given. Whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry. In relation to the exercise of power by the Respondent, the rule of law requires that the exercise of public power should not be arbitrary, and that the decision taken must be rationally related to the purpose for which the power was given. The Respondent must carry out its constitutional obligations in line with the rule of law.

29. The nub of the applicant's grievance is that the Respondent abused its discretion by declining its request to amend its tax returns. Writing on abuse of discretion, W. W. Hall & Ryan G. Anderson[20]states: -

> " Perhaps no standard of review is subject to more misuse than the most common standard: abuse of discretion. Lawyers often wonder how appellate courts can make "abuse of discretion" mean so many different things. Indeed, one appellate court judge lamented that the abuse of discretion standard "means everything and nothing at the same time. "One appellate court panel's view of an abuse of discretion can be another panel's notion of a completely reasonable decision. Similar to identifying hard-core pornography, knowing when there has been an abuse of discretion, for most appellate judges, tracks Justice Stewart's famous line: "I know it when I see it." (Footnotes omitted).

30. At its core, "discretion" means choice. To find an abuse of discretion, the reviewing court "must determine that the facts and circumstances presented 'extinguish any discretion [or choice] in the matter.'" Therefore, simply because a decision maker has exercised its discretion to decide a matter differently than a reviewing court under similar circumstances does not establish an abuse of discretion. In other words, the reviewing court "may not substitute its own judgment for the decision maker. The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the decision maker's action." Rather, a decision maker abuses its discretion if its decision is "arbitrary, unreasonable, and without reference to [any] guiding [rules and] principles" or is "'so arbitrary and unreasonable such that no reasonable person presented with the same set of facts and circumstances could arrive at the same decision.

31. A decision maker abuses its discretion if it exercises a power that it does not legally possess or declines to exercise a power of discretion vested to it by law when the circumstances require that the power be exercised. A decision maker may also abuses its discretion if it purports to exercise its discretion without sufficient information upon which a rational decision may be made or if it exercises its power of discretion by making an erroneous choice as a matter of law by making a choice that is "not within the range of choices permitted by law or by arriving at its choice in violation of an "applicable legal rule, principle, or criterion or by making a choice that is "legally unreasonable in the factual-legal context in which it is made.

32. The court is generally reluctant to interfere which a functionaries' exercise of discretion "unless it is satisfied that the discretion was influenced by wrong principles, or a misdirection on the facts, or the decision reached could not reasonably have been made by a reasonable person properly directing

[20] Standards of Review in Texas, 50 ST. MARY'S L.J. 1099 (2019). Available at https://commons.stmarytx.edu/thestmaryslawjournal/vol50/iss4/4

himself to all the relevant facts and principles. For the court to intervene, there must have been a material misdirection on the part of the decision maker.

33. The traditional grounds of abuse of discretion are: mala fides, ulterior purpose or motive, and failure to apply mind. Abuse of discretion could also fall within the description in section 7(2)(a) to (o) of the FAA for inter alia not being rationally connected to the purpose of the empowering provision; the information before the administrator; and, the reasons given for it. The relevant factors to be taken into account in determining whether a decision maker abused its power includes the source of the power; the nature of the power; the subject matter of the power; whether the power involves the exercise of a public duty; how closely the power is related, on the one hand, to policy matters which are not administrative, and on the other hand to the implementation of the enabling legislation.

34. The source of the power is specifically set out in the enabling tax legislations, namely, the *Kenya Revenue Authority Act*,[21]the *Income Tax Act*,[22] the *Tax Procedures Act*,[23] The *Value Added Tax Act*,[24] the *Tax Appeals Tribunal Act*[25] and the East African Community Customs Management Act, 2004. The nature of the power sought to be regulated in these statutes is to regulate tax compliance. The subject matter of the power is conduct in the form of exercising a discretion. The power is exercised by Respondent's officials who are empowered to exercise specific public duties prescribed in the enabling Tax laws. The implementation of the policy of tax compliance through legislation is to audit taxpayers in pre-identified areas as envisaged by the tax legislations.

35. In addition, the exercise of Respondent's power must fall within the powers lawfully conferred upon them in terms of the Constitution and the tax statutes and must not be arbitrary or irrational. The decision taken be it is an assessment or request for information as happened in this case, or to request documents must be rationally related to the purpose for which the power was given, namely, for the administration of the tax laws. This requirement must be satisfied so as not to fall short of the standards demanded by the Constitution and the enabling statute which would include compliance with the principle of legality generally, and various constitutional and statutory obligations.

36. By now it is clear that a party seeking review a decision citing the circumstances relied upon by the applicant must demonstrate that the act or omission constitutes a clear abuse of discretion. Closely tied to the issue at hand is the question whether the Respondent acted in an arbitrary manner. Arbitrary and Capricious means doing something according to one's will or caprice and therefore conveying a notion of a tendency to abuse the possession of power. This is one of the basic standards for reviewing administrative decisions. Under the "arbitrary and capricious" standard, an administrative decision will not be disturbed unless it has no reasonable basis. When an administrator makes a decision without reasonable grounds or adequate consideration of the circumstances, it is said to be arbitrary and capricious and can be invalidated by a court on that ground. In other words, there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment. An action not based upon consideration of relevant factors is arbitrary, capricious, an abuse

21 Act No. 2 of 1995.

22 Cap 470, Laws of Kenya.

23 Act No. 29 of 2015.

24 Act No. 35 of 2015.

25 Act No. 40 of 2015.

of discretion. So is an action not in accordance with the law or if undertaken without observance of procedure required by law.[26]

37. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest or arbitrariness. A power is exercised fraudulently if intended for an improper purpose. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

38. Unreasonableness and irrationality are grounds for Judicial Review. Reasonableness, within the context administrative law cannot be imbued with a single meaning.[27] Pillay states that the first element of a reasonable administrative action is rationality, and the second is proportionality. Rationality means that evidence and information must support a decision an administrator takes.[28] Hoexter explains that the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects and to consider using less drastic means to achieve the desired goal.[29]

39. Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of FAA Act.[30] The section provides that:- "A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator." The test for rationality was stated as follows:[31]

> " The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise, a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."

40. In the application of that test, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the materials made available and the conclusion arrived at.[32] Contextualizing the impugned decision with the circumstances and the law under which it was made leaves the court with the irresistible conclusion that the Respondent was not influenced by other considerations, nor has utter abuse of power and discretion been proved. The applicant is under investigations arising from its own returns. The investigations are founded on the law. The Respondent requested for details from the applicant to consider its request for

26 See *Natural Resources Defense Council, Inc. v. United States EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992)].

27 Hoexter, C. 2007. *Administrative law in South Africa.* Cape Town: Juta.

28 Pillay, A. 2005. Reviewing reasonableness: an appropriate standard for evaluating state action and inaction? *South African Law Journal*, 122(2): 419-439.

29 Supra Note 62.

30 Act No. 4 of 2015.

31 By Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (4) SA 674 *(CC)* at page 708; paragraph 86.

32 In *Trinity Broadcasting (Ciskei) v ICA of* SA, 2004(3) SA 346 (SCA) at 354H- 355A, Howie P.

amendment. It failed to provide the details. Instead, it rushed to this court. There is nothing to show that the impugned decision was not founded on the enabling statute or not connected or related to the purpose of the statute. There is nothing to show that the alleged refusal to allow the amendment was influenced by extraneous circumstances. It has not been demonstrated that the alleged failure to allow the amendment was not rationally connected to the purpose of the statute or the discretion given under the act.

41. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[33] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.'

42. The law as evidenced by the sections invoked by the applicant permits the Respondent to not only investigate tax evasion but also to request for information to make an informed decision whether or not to allow amendment of returns. To allow or disallow the amendment must pass the legal requirements. The applicant's failure or omission to supply the requested information is its own undoing in this case. By failing to provide the information sought, the applicant was ill advised on the uniqueness of tax law which places a high degree of burden on a tax payer prove correctness or otherwise of its returns. I will spare some ink and paper to explain this uniqueness in the succeeding paragraphs.

43. For starters, a significant factor adding to the taxpayer's burden in tax cases is the presumption of correctness which attaches to the Commissioner's assessments or determinations of deficiency.[34] The commissioner's determinations of tax deficiencies are presumptively correct. Although the presumption created by the above position is not evidence in itself, the presumption remains until the taxpayer produces competent and relevant evidence to support his position.[35] If the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented, with the burden of proof on the taxpayer.

44. To further illustrate this point, under our system of self-reporting of tax liability, the taxpayer initially decides the extent and amount of his/her statutory obligation to pay tax. The taxpayer in such cases generally possesses the objective evidence. Certainly, with the exception of filed returns and information provided by the taxpayer, the Revenue authority is in a poor position to establish an affirmative case. The common-law allocation of the burden of proof to the party in possession of the evidence is clearly appropriate.[36] It has been argued that the allocation of the burden of proof to the party in possession of relevant knowledge surely meets this goal.[37]

45. The rationale for the above position is that by placing the burden of proof on the party in possession of relevant information, the possibility of destruction of adverse information is minimized and time is saved by making that party responsible for culling through its own records to meet its burden. Placing

33 {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

34 Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 Hastings L.J. 239 (1988).

35 A & A Tool & Supply Co. v. Commissioner, 182 F.2d 300, 304 (10th Cir. 1950).

36 Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 Hastings L.J. 239 (1988).

37 Ibid.

the burden of proof on the government in tax cases would detract from these goals. Taxpayers might be tempted to destroy adverse relevant evidence and tax collection costs would increase because of the Revenue Authority's difficulty in finding relevant information.[38]

46. Perhaps I should mention that the uniqueness of tax laws is underscored by the fact that even where the constitutionality of such provisions has been challenged, courts have consistently held that placing the burden upon the tax payer is not unconstitutional nor is it contrary to Parliament's intent.[39]There is a distinction between the legal burden of proof and the evidential burden of prove. These are two different concepts. The *Evidence Act*[40] places the burden of proving the existence any fact in issue on the party who assets. The evidential burden exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led. It is the latter form of burden which may shift from one party to the other. By requesting the information from the applicant, the Respondent acted perfectly within the law because the information is held by the applicant. By failing to provide the information sought, the applicant allowed a golden opportunity of shifting the evidential burden of prove to the Respondent to disapprove the correctness or otherwise of its returns.

47. Placing the burden of proof in tax cases on the tax payer reflects the unique nature of the tax system. This is evident from the three-fold justifications for placing the burden on the tax payer. These are: - (a) the presumption of correctness; (b) the government's need for revenue' and, (c) the taxpayer's possession of evidence.

48. The most significant justification for placing the burden of proof on the tax payer is the practical consideration that the Commissioner cannot sustain the burden because he does not possess the needed evidence. Under the system of self-reporting tax liability, the taxpayer possesses the evidence relevant to the determination of tax liability. It is simply fair to place the burden of persuasion on the taxpayer, given that he knows the facts relating to his liability, because the commissioner must rely on circumstantial evidence, most of it coming from the taxpayer and the taxpayer's records. The taxpayer must present a minimum amount of information necessary to support his position. This safety valve seems to place the burden of production on the taxpayer without relieving the Commissioner of the overall burden of proof. The tax payers' evidence must meet this minimum threshold.

49. A presumption of correctness arises from the Commissioner's determination/assessment. The presumption remains until the taxpayer produces competent and relevant evidence to support his/her position. When the taxpayer comes forward with such evidence, the presumption vanishes and the case must be decided upon the evidence presented. The question here is that the applicant cannot refuse to furnish the information requested and fault the Respondent for refusing to allow its request for amendment. The Respondent cannot allow the amendment without any basis nor is the Respondent obligated to grant the amendment. On the contrary, the law permits the Respondent to decline the request.

50. By now it is trite that a taxpayer always has the burden of proof in tax proceedings regardless of whether it is a review of an objection decision or an appeal. It should be noted that the burden of proof is a different concept to the standard of proof. The taxpayer's burden of proof comprises two parts: – establishing, with evidence, the underlying facts on which the law is to operate (and in this regard, the

38 Ibid.

39 254 F.2d 416 (2d Cir. 1958).

40 Cap 80, Laws of Kenya.

standard of proof to which each fact must be proved is relevant);[41] and – that the operation of the law when applied to those facts establishes that the assessment is excessive or erroneous.

51. "Burden of Proof" at the Tax Court is somewhat unique. At the Tax Court, a taxpayer is required to disprove an assessment by the Commissioner. The Supreme Court of Canada in Johnston v Minister of National Revenue[42] decided that the onus is on the taxpayer to "demolish the basic fact on which the taxation rested." Again, the Supreme Court of Canada provided guidance on this issue in Hickman Motors Ltd. v Canada[43] which held that the onus is met when a Taxpayer makes out at least a prima facie case. Prima facie is another legal term that literally means "on its face." To prove a case "on its face" you must provide evidence that, unless rebutted, would prove your position. According to the said decision, a prima facie case is made when the taxpayer can produce unchallenged and uncontradicted evidence. Once the taxpayer has made out a prima facie case to prove the facts, the onus then shifts to the Revenue Authority to rebut the prima facie case. If the Revenue Authority cannot provide any evidence to prove their position, the taxpayer will succeed. By now it is clear the applicant spoiled its case the moment is refused to furnish the information sought.

52. Flowing from the applicants own failure to avail the information sought, there is nothing to show that the Respondents alleged failure to grant the amendment or even the alleged failure to grant a tax clearance certificate is unreasonable. The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it[44] and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated.[45]This stringent test has been applied in Australia,[46] where the court held that in order for invalidity to be determined, the decision must be one, which no reasonable person could have reached, and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." I am not persuaded that a different body properly addressing itself to the same facts and circumstances and the law could have arrived at a different conclusion. In fact, the ex parte applicant never advanced this argument despite citing unreasonableness.

53. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decisionfalls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and law. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it. The tests for legal unreasonableness comprises of any or all of the following:-

    a. specific errors of relevancy or purpose,

41 FCT v Thomas [2018] HCA 31 at [84] and [85] per Gageler J.

42 {1948} S.C.R. 486.

43 {1997} 2 SCR 33.6

44 See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

45 *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

46 In *Prasad v Minister for Immigration* {1985} 6 FCR 155.

b. reasoning illogically or irrationally,

c. reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified;

d. giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[47]

54. The applicant has not demonstrated any of the above tests. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently. Judicial intervention in Judicial Review matters is limited to the following cases: -

a. Where the decision was arrived at arbitrarily, capriciously or mala fides, or,

b. As a result of unwarranted adherence to a fixed principle, or,

c. In order to further an ulterior or improper purpose, or

d. Where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or,

e. Where the decision of the functionary was so grossly unreasonable as to warrant the inference, or,

f. Where the decision maker failed to apply his mind to the matter.

55. Having analyzed the material before me, I find nothing to suggest that the Respondent's actions are tainted by an error of law. When a court is asked to invalidate a decision on grounds of error of law, its task is simply to satisfy itself whether the decision was arrived at based upon relevant evidence, and, whether, the decision maker acted in an arbitrary manner and reached a finding of fact not supported by any evidence. It also entails examining whether the decision maker misdirected himself and directed its attention to the wrong issue by misconstruing a statute. It involves examining whether the decision maker stepped beyond the legal limits or acted in an arbitrary manner by reaching an unreasonable conclusion based on the material before it.

56. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision can be judicially challenged on grounds that the administrative decision does not comply with these basic requirements of legality.

[47] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

57. The most obvious example of illegality is where a body acts beyond the powers, which are prescribed for it. In other words, it acts ultra vires. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

58. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant of their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it. No argument was presented in this case to suggest that the Respondent exceeded its powers.

59. The concept 'error of law' is mainly concerned with the erroneous applications of the law. I have carefully searched the law and the applicant's grievance. I find no traces of an erroneous application of the law. Two critical issues flow from the foregoing. First, whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the Respondent. Second, judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.[48]

60. We must bear in mind the fact that the provisions conferring mandate upon the Respondent must be read in the context of not one but three different imperatives. The first is to enable the Respondent to effectively carry out its specially identified statutory mandate. The Constitution and the statutes clearly envisage an important and active decisional role for the Respondent to perform its functions through the application of the law. The Respondent has a constitutional and a statutory duty to collect revenue and to take enforcement action against defaulters within the parameters of the law. It has a duty not to allow tax amendments where the circumstances do not warrant the amendment. It has a duty not to issue tax clearance certificates if the taxes are due.

61. The Respondent's case is that the applicant filed nil returns, and that its investigations revealed a disparity between the applicants' inflow and the amounts disclosed in its returns. It is common ground that the applicant requested to amend its returns. The point of departure is that the Respondent states that confronted with the investigation and imminent enforcement action for filing false returns, the applicant applied to amend its returns. The Respondent states that it requested for more information from the applicant which was to inform its next course of action, but instead of supplying the information, the applicant instituted these proceedings seeking to compel the Respondent to amend its returns and also to issue it with a Tax Compliance Certificate. I have in several of my decisions stated that when the legality of a decision, act or omission is challenged, a court ought first to determine whether, through the application of all legitimate interpretive aids,[49] the impugned decision, act or omission is capable of being read in a manner that complies with the mandate conferred by the enabling

[48] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11.

[49] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

statute. I have placed the material before me side by side with the law. I find nothing before me to fault the Respondent's position.

62. The applicant also cite breach of legitimate expectation. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. Second, if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

63. The first step in the analysis has both an objective and a subjective dimension. First, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.[50] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

64. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[51] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[52] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows: -

> " Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."[53]

65. The requirements for the existence of such an expectation were restated in National Director of Public Prosecutions v Philips.[54] These include:- (i) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the

50 Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.

51 Søren Schønberg, *Legitimate Expectations in Administrative law* 118 (2003); *C.f.* Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMB. L. J. 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today than is the case in EU law, *see*, Administrative Law of the European Union, its Member States And The United States 285 (Rene Seerden & Frits Stroink eds., 2002).

52 Ibid.

53 Ibid.

54 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.

administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

66. Discussing legitimate expectation, H. W. R. Wade & C. F. Forsyth[55] states thus:-

> " It is not enough that an expectation should exist; it must in addition be legitimate....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... Second, clear statutory words, of course, override an expectation howsoever founded..... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy...."
>
> "An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice." (Emphasis added)

67. Statutory words override an expectation howsoever founded. A decision maker cannot be required to act against clear provisions of a statute just to meet one's expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. I have placed the tests for legitimate expectation explicated in the above authorities' side by side with the applicants' arguments and the facts of this case. I find that the applicant has not satisfied the tests for the doctrine of legitimate expectation.

68. The applicant also cited alleged violation of Articles 47 and 50 of the Constitution and a violation of the right to natural justice. The constitution recognizes a duty to accord a person procedural fairness when a decision is made that affects a person's rights, interests or legitimate expectations.[56] Procedural fairness contemplated by Article 47 and the FAA Act demands a right to be heard before a decision affecting one's right is made. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted: - "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[57] However, the standards of fairness are not immutable. The principles of fairness are not to be applied by rote identically in every situation. This is because what fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.[58] Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[59]

55 (*Administrative Law*, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000, at pages 449 to 450.)

56 *Kioa v West* (1985), Mason J.

57 See S. De Smith, *Judicial Review of Administrative Action*, 4th ed. J. Evans (1980), 352- 4.

58 See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

59 See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

69. Turning to the alleged breach of Article 47 and 50 rights the applicant evidently confused the fair hearing under the two articles. In a subtle but masterly fashion, the Court of Appeal in *Judicial Service ommission v Mbalu Mutava*[60] explained the distinction between the two. It stated that the right to a fair administrative action under Article 47 broadly refers to administrative justice in public administration and it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[61]

70. In the same vein, regarding the above Court of Appeal in J.S.C. v Mbalu Mutava[62] held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50(1) (2) of the Constitution. It held: - first, fair administrative action broadly refers to administrative justice in public administration. Second, it is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. Third, the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[63]Fourth, fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

71. The governing statutes regulate the process for tax assessment, filing returns and amendment of return and enforcement measures. The law as I see it does not require a hearing in the circumstances of this case. I find no merit in the argument that the applicant's right to Natural Justice or a fair administrative action were violated. I find solace in the following passage from the South African Court of Appeal in the judgment of Nugent JA in Kemp and Others v Wyk and Others[64] thus:-

> " A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammeled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this *Court in Britten and Others v Pope 1916 AD 150* and remain applicable today."

Conclusion

60 {2015}eKLR.

61 Ibid.

62 {2015}eKLR

63 Ibid.

64 (335/2004) [2005] ZASCA 77; [2008] 1 All SA 17 (SCA) (19 September 2005).

72. Mandamus will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed.[65] Simply put, Mandamus is a judicial command requiring the performance of a specified duty which has not been performed. Originally a common law writ, Mandamus has been used by courts to review administrative action.[66] As I have stated in several authorities including the decision cited by the applicant's counsel and also in Republic v County Secretary, Nairobi City County & Another ex parte Tom Ojienda & Associates[67] the tests for granting an order of Mandamus are been settled. These tests were set out in Apotex Inc. v Canada (Attorney General),[68] discussed in Dragan vs. Canada (Minister of Citizenship and Immigration).[69] These are: -

There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:
I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv)) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

73. Contrary to the applicant's advocate submissions, from the material presented before me, there is absolutely nothing to show that the applicant satisfied any of the above tests to merit the writ of mandamus. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at in excess of jurisdiction, arbitrarily, capriciously, mala fides or in breach of natural justice, a position best explained in *Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge & Others*.[70]

74. A reading of the enabling statute leaves me with no doubt that it imposes a general duty upon the Respondent to decline a request to amend returns where the legal requirements have not been met.

65 See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

66 W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

67 {2019} e KLR.

68 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

69 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

70 Civil Appeal No. 266 of 1996 {1997} e KLR.

Such circumstances include but are not limited to where a tax payer is under investigations for fraud or tax evasion or has failed to supply required information as in this case. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or has violated the law or committed a criminal offence or where the applicant is under investigations for tax fraud or evasion or has failed to avail required material or where a remedy would impede the authority's ability to perform its functions, or where the judge considers that an alternative remedy could have been pursued.

75. Stressing the discretionary nature of judicial review remedies, the court in *Republic v Judicial Service Commission ex parte Pareno*[71] held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized.[72]

76. I only need to rely the Court of Appeal decision in *Makupa Transit Shade Limited & Anor vs. Kenya Ports Authority & Another*[73] to show that the order of Mandamus sought by the applicants in this case is wholly underserved: -

> "What of the Order of mandamus" The general rule is that the issuance of mandamus is limited to where there is specific legal remedy for enforcing it or the alternative legal remedy is less convenient, beneficial and effectual.[74] Its scope against public bodies is limited to performance of a public duty where statute imposes a clear and unqualified duty to do that act.[75] However if the duty is discretionary as to its implementation, then mandamus cannot dictate the specific way the decision will be exercised. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.[76] ...The applicant in addition has to show that it has a legal right to the performance of the legal duty by the party against whom it issues."

77. Flowing from my analysis of the facts presented in this case, the law and authorities and the suppositions arrived at on each and every issue discussed, the conclusion becomes irresistible that the

71 {2004} 1 KLR 203-209

72 See *Anthony John Dickson & Others vs. Municipal Council of Mombasa*, Mombasa HCMA No. 96 of 2000.

73 {2015} e KLR.

74 See *Halsbury Laws of England* 4th ed. Vol. 1. Para 89.

75 See *Manyasi v. Gicheru & 3 Others, [2009] KLR 687.*

76 See *Halsbury's Law of England, 4th Ed Vol. 1*

applicant does not deserve the judicial review orders sought. Accordingly, I dismiss the applicant's application dated 11thMay 2021 with costs to the Respondent.

Orders accordingly

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF JANUARY 2022.

JOHN M. MATIVO

JUDGE