Republic v Kenya Revenue Authority & another; Shapi & 3 others (Exparte) (Judicial Review E038 of 2021) [2021] KEHC 401 (KLR) (16 December 2021) (Judgment)

Neutral citation: [2021] KEHC 401 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

JUDICIAL REVIEW E038 OF 2021

JM MATIVO, J

DECEMBER 16, 2021

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT

PHILIPH INTERNATIONAL AUCTIONEERS ..... 2ND RESPONDENT

AND

HIAM KHALID SHAPI ..... EXPARTE

DORMOHAMED MOHAMED DORMOHAMED ..... EXPARTE

FUAD FAWZI OMAR ..... EXPARTE

ASMAHAN NAGIEB OMAR ALI GADIM T/A TARBOUCH CAFE ..... EXPARTE

JUDGMENT

1. By way of a Notice of Motion dated 13th September 2021 expressed under the provisions Articles 40, 47, 50 and 165(6) of the Constitution, Section 8(2) of the *Law Reform Act*,[1] Sections 2(ii), 3, 4 & 7 of the *Fair Administrative Action Act*[2] (the FAA Act) and Order 53 of the *Civil Procedure Rules*, 2010 and all the enabling provisions of the law of the law, M/s Hiam Khalid Shapi, Dormohamed Mohamed Dormohamed, Fuad Fawzi Omar and Asmahan Nagieb Omar Ali Gadim T/A Tarbouch Cafe (herein after referred to as the applicants) pray for Certiorari to quash the 1st Respondent's decision to levy distress contained in the Notice of Distress dated 25thAugust 2021 and the Proclamation of

1 Cap 32, Laws of Kenya.

2 Act No. 4 of 2015.

Attachment of even date requiring the 2nd Respondent to distrain their moveable goods and chattels to recover tax arrears allegedly owed from the applicants. They also pray for costs of the application.

2. The grounds in support of the application are that on 25th August 2021 the Respondents served them with a letter dated 21st January 2021 indicating that they were in Tax arrears amounting to Kshs. 10,037,846/= and on the same day they were also served with a Notice of Distress dated 24th August 2021 in respect of the said sum.

3. They state that the Respondents entered into their business premises and purported proclaim and attach their properties to recover the said sum and auctioneer's charges of Kshs. 426,513.28/= despite having paid taxes in full. They state that the Respondents' actions are unreasonable, procedurally unfair, unlawful and ultra vires and contrary to natural justice hence null and void. Also, they state that they were notified about the said taxes on 25th August 2021, 8 months after the tax assessment was done giving them 10 days to comply. They contend that they were not accorded an opportunity to object to the tax decision as required by section 51(1) & (2) of the *Tax Procedures Act*[3] (the TPA) which requires an objection to be made within 30 days of the tax assessment.

4. They state that depriving them the opportunity to object prevented them from demonstrating that the alleged arrears are as a result of double taxation for the months of April 2017, July 2017, and October 2017 and September 2017 as evidenced by the 1st Respondent's letter dated 21st January 2021. For this reason, they claim the recovery process is ultra vires Section 45 of the TPA which limits distrain of properties to tax defaulters only. Also, the applicants state that the Respondent's administrative actions and the proclamation is unlawful, unreasonable and procedurally irregular and it offends Article 40 of the Constitution and Section 51 of the TPA.

5. Further, the applicants state these Judicial Review proceedings are necessary under the circumstances because the remedies under the TPA and the Tax *Appeal Tribunal Act*[4] (the TPA Act) are insufficient to remedy their grievances because:- under Section 51(1) & (2) of the TPA, a party is required to lodge an objection to a taxation decision within 30 days of the taxation decision while under Section 51(11) of the TPA, the 1st Respondent is obligated to make a decision on the objection within 60 days of the receipt of the objection.

6. Additionally, they state that the Remedy under the said statutes is in adequate because under Section 12 of the TAT Act, one can only lodge an appeal to the Tax Appeal Tribunal (the TAT) subject to the relevant tax laws including section 51(1), (2) and (11) of the TPA. They contend that the Respondent purportedly made a taxation decision vide letters dated 2nd November 2020, 16th December /12/2020 and 21st January 2021 and only notified them about it 8 months late to deliberately deny them the statutory right of first receiving the taxation decision, objecting to the same within 30 days, receiving the decision on the objection within 60 days and appealing to the TAT.

7. They contend that the Respondent's actions and omissions have limited their recourse to the TAT since the Tribunal can only hear and determine an appeal where one has lodged an objection to a taxation. As a consequence, the applicants state that there is no objection decision that can be appealed against in the TAT and that their rights to property is under imminent threat, hence, the impugned actions are tainted with illegality, irrationality and procedural impropriety. They state that the non-compliance with the Rules of Natural Justice provided in Article 47 (1) of the *Constitution* and Section 4 of the *Fair*

[3] Act No. 29 of 2015.

[4] Act No. 40 of 2013.

Administrative Action Act[5] (the FAA Act) is a ground to warrant the orders sought. The above grounds are replicated in the verifying affidavit of Dormohamed Mohamed Dormohamed dated 6th September 2021 annexed to the application seeking leave and also in the Statutory Statement filed therewith.

The 1st Respondent's Replying affidavit

8. The application is opposed. On record is the Replying affidavit dated 20th September 2021 sworn by Mr. Martin Gichango, an officer within the 1st Respondent's Domestic Taxes Department, Mombasa Tax Service Office appointed as such under the *Kenya Revenue Authority Act*.[6] The crux of the 1st Respondent's case as I glean it from the said affidavit is that the 1st Respondent complied with the law in issuing the notices; that the taxes had crystallised; and that the applicants perpetually made VAT returns without payments from July 2015 to March 2018. The Respondent also states that the 1st Respondent constantly engaged the applicants as evidenced by the letter dated 6th June 2017 from the applicants confirming receipt of the 1st Respondent's previous letters; that, vide a letter dated 20th July 2017, the 1st Respondent wrote to the applicant notifying them about its VAT Arrears of Kshs.3,752,835/=; that the applicants acknowledged the said letter vide its letter dated 18th August 2020.

9. Also, the 1st Respondent maintains that vide a further demand notice dated 2nd November 2020, it sought payment of outstanding taxes, and, by a further letter dated 16th December 2020, it wrote to the applicant seeking payment of outstanding taxes. Additionally, it is the applicant's case that vide a further letter dated 21st January 2021, it wrote to the applicants seeking payment of outstanding taxes of Kshs.10,037,846/= and in absence of a positive response, it invoked the provisions of Section 42 of the TPA and issued Agency Notices dated 27th January 2021 to the applicant's bankers seeking to recover the outstanding taxes.

10. The 1st Respondent states that having failed to realise the outstanding taxes, it invoked its powers under Section 41 of the TPA and issued Notice of Distress and a Proclamation/attachment dated 25th August 2021. Further, that the 1st Respondent engaged the applicants to pay the tax vide several demand notices dated 20th July 2017, 2ndNovember 2020 and 16th December 2020. Also, upon receipt of the letter dated 20th July 2021 in which the 1st Respondent made a tax decision demanding Kshs.3,752,835, the applicants ought to have filed a Notice of Objection under Section 51(2) of the TPA. Additionally, the 1st Respondent states that the applicant replied its letters through its auditor S. Omar and Company Certified Public accountant, indicating that the applicant had paid the tax demanded and promised to avail prove of payment. Further, the Respondent states that the applicant provided copies of banking slips and Payment Registration Number which were found to be fake prompting enforcement action to recover the outstanding taxes.

11. The 1stRespondent states that that having failed to file a Notice of Objection, the assessed taxes were deemed to be uncontested, due and collectable, hence, the applicant cannot be heard to say that they were not afforded an opportunity to object to the tax decision as per Section 51 of the TPA. Further, the 1st Respondents states that in the circumstances of this case, its actions cannot be termed as unlawful, unreasonable, procedurally irregular and/or contrary to Article 40 of the Constitution nor can the decision be said to have been made in an opaque, arbitrary, high handed, whimsical manner or in disregard of the principles of natural justice. The 1st Respondent contends that the impugned decision is not grossly unreasonable to warrant interference by this court. Lastly, the 1st Respondent states that

5 Act No. 4 of 2015.

6 Cap 469, Laws of Kenya.

the application does not meet the minimum threshold for grant of the orders sought; that it is an abuse of court process; and that the 1st Respondent executed its mandate within the boundaries of the law.

The applicant's supplementary affidavit

12. The applicants filed the supplementary affidavit of Dormohamed Mohamed Dormohamed in response to the 1st Respondent's Replying affidavit. Essentially, the crux of the affidavit is that that the tax for the period in question had been paid, that the applicants supplied copies of proof of payment but the 1st Respondent failed to reply its letter dated 18th August 2017 creating a legitimate expectation that the matter had been resolved by the supply of proof of evidence of payment.

13. The applicant averred that its letter dated 18th August 2017 was in response to 1st Respondent's tabulation in the letter dated 20thJuly 2017, so it amounted to a valid objection under Section 51 of the TPA because applicants objected to the arrears and indicated that they had fully settled the amounts and also supplied proof of payments as required by Section 51(3)(a)-(b) of the TPA. They averred that the 1stRespondent was mandated under Section 51(11) of the TPA to render an objection decision within 60 days from 18th August 2017. Further, the applicants contend that they had a legitimate expectation that the 1st Respondent's failure to respond to their letter dated 18th August 2017 within 60 days meant that its Objection was allowed under section 51(11) of the TPA. Additionally, they dispute having been served with the Demand letter dated 16th December 2020.

The applicant's advocates submissions

14. The applicant's counsel submitted that sections 51 and 71 (2) of the TPA do not prescribe a specific format for lodging a valid objection and that the applicants' letter of 18th August 2017 responding to the 1st Respondent's letter dated 20th July 2017 amounts to a valid objection because it was lodged within 30 days as required by Section 51 (1) and (2) of the TPA. He submitted that the said letter stated that the applicants had paid the taxes in question and requested the 1st Respondent to amend its records and withdraw the notice sent to its Bank. He submitted that the said letter constituted the grounds of objection; the amendments required to be made to correct the decision, and the reasons for the amendments as per Section 51 (3) (a) of the TPA. He argued that the applicants enclosed proof of payment as required by Section 51 (3) (c) of the TPA.

15. Additionally, counsel submitted that even if the objection was not validly lodged, the 1st Respondent was obligated by Section 51(4) and 71(2) of the TPA to notify the applicants in the event the objection was invalid or bad in form. To buttress his argument, he relied on *Republic v Kenya Revenue Authority Ex-Parte M-Kopa Kenya Limited*[7] in support of the proposition that there is no format for making an objection and that what is required is the substance rather than form. He cited section 72 of the *Interpretation and General Provisions Act*[8] and submitted that it cures deviation from the prescribed form. Fortified by the forgoing provisions, counsel urged the court to find that the objection was validly lodged vide the letter dated 18th August 2017. Also, the applicants' counsel submitted that section 51(4) and 71(2) of the TPA requires the 1st Respondent to immediately communicate to the Taxpayer if the objection lodged is invalid or where there is want of form in the objection.

16. He argued that section 51 (8) of the TPA requires the Commissioner to render an Objection Decision which under section 58 (10) should include a statement of findings on the material facts and the reasons for the decision. He cited section 51(11) which requires the Commissioner to make the objection decision within 60 days from the date of receipt of the notice of objection; or any further information

7 {2018} e KLR

8 Cap 2, Laws of Kenya.

the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed and cited *Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited*.[9] Counsel submitted that the 1st Respondents blatantly flouted the legal procedure because, it failed to notify the applicants in writing that its objection dated 18thAugust 2021 was not validly lodged; nor did it communicate in writing the objection decision within 60 days from 21st August 2017 from 18thAugust 2017. He argued that the 1st Respondent was estopped by its conduct from demanding the alleged arrears and proclaiming its goods.

17. Also, the applicants' counsel submitted that the 1st Respondent's failure to respond to the letter dated 18th August 2017 within 60 days and serving the demand letter, Notice of Distress and the proclamation was irrational, unreasonable and arbitrary. Further, that failure to render an objection decision created legitimate expectation that the objection had been allowed as per section 51(11) of the TPA. Also, that the communication was made 3 years late. He argued that the aforesaid failures were aimed at depriving the applicants the opportunity to object and cited *Silver Chain Limited v Commissioner Income Tax & 3 others*[10] which held that tax assessment disputes should be dealt with in accordance with the law.

18. To further buttress his argument, he argued that the 1st Respondents actions created a legitimate expectation and cited Republic v Kenya Revenue Authority Ex-Parte M-Kopa Kenya Limited[11] which held that inter alia that legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. He also relied on Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited[12] which held inter alia that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. Fortified by the above authorities, he urged the court to find that the 1st Respondent's actions are irrational, illegal and violated the applicants' right to equal protection of the law, the right to a fair administrative action under Article 47 of the Constitution and Section 7 of the FAA Act.

19. The applicants' counsel also relied on Republic v Commissioner of Domestic Taxes Ex Parte Fleur Investments Limited (supra) in support of the proposition that "the test in relation to rationality requirements is twofold, being, first, that the decision-maker must act within the law and in a manner consistent with the Constitution, entreated not to misconstrue the nature of his or her powers and, second, that the decision must be rationally related to the purpose for which the power was conferred. This is because if it is not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law."

The 1st Respondent's advocates submissions**

20. The 1st Respondent's counsel submitted that judicial review is a remedy of last resort and where another statutory procedure lies, then the same ought to be pursued first. He cited section 9(3) of the FAA Act which provides that the High Court shall if not satisfied that the remedies referred to in sub section 2 have been exhausted direct that the applicants shall first exhaust such remedy before instituting proceedings under sub section 1. He cited *Speaker of National Assembly v Njenga Karume*[13] in which

9 {2020} e KLR.

10 {2016} e KLR

11 {2018} e KLR.

12 {2020} e KLR.

13 {2018} 1 KLR.

the Court of Appeal held that "where there is a clear procedure for redress or any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. He also cited Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry and 1756 others which held that where a dispute resolution mechanism exists outside courts, the same ought to be exhausted before the jurisdiction of the court is invoked and that courts ought to be approached as a measure of last resort. Counsel also cited *Re Francis Gitau Parsimei & others versus National Alliance Party*[14]which emphasized the principle that where the Constitution and/ or statute establishes a dispute resolution procedure then that procedure must be used and that specialized bodies established under the statutes ought to be given leeway to conduct their proceedings freely without unnecessary interference by the court.

21. To further underscore his point, counsel relied on the Mui Coal Basin Community[15] in which the court stated: - "The reasoning is based on the sound constitutional policy embodied in Article 159 of the Constitution that of a matrix dispute resolution system in the country. Our constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice JB Ojwang has felicitously called as "Ascendant Judiciary." The constitution does not create an imperial judiciary zealously fuelled by tenets of legal centrism and a need to legally cognize every social economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution created a constitutional preference for other mechanisms for dispute resolution including statutory regimes in certain cases."

22. Bolstered by the above jurisprudence, counsel submitted that where there is a mechanism for appeal or review under any written law, the courts will be reluctant to entertain such matters and it is only in exceptional circumstances that an order for judicial review would be granted. He argued that the TAT is not only available but also effective and best equipped to deal with the issues raised by the applicant's application. Citing section 9(4) of the FAA Act, counsel submitted that no reason was advanced that the appeal mechanisms established under the act is not adequate to warrant the intervention of the court by a way of judicial review nor has the applicant satisfied exceptional circumstances under section 9(4) of the FAA. He urged the court to find that the applicants ought to have exhausted all the available remedies before approaching the court.

23. Counsel submitted that judicial review remedy is discretionary in nature and the powers of review must be exercised sparingly. He cited *Kuria & 3 others v the Attorney General*[16] in which the court observed that a prerogative order is an order of serious nature and cannot and should not be granted lightly. Further, he submitted that judicial review process is concerned with the decision-making process and not the merits of the decision. He also argued that upon being served with demand the notices, the applicant ought to have filed a notice of objection under section 51 (2) of the TPA, but they chose to respond to the demand letter through his tax agent indicating that they had paid the tax and provided copies of banking slips and Payment Registration Number which were found to be fake. He submitted that he who seeks equity must come with clean hands and argued that the applicants' hands are tainted with dirt and they not deserve the orders sought.

24. He also submitted that the applicants are inviting this court to review the merits of the tax decision. He argued that the TAT is best equipped to deal with the nature and veracity of the issues raised in

[14] Petition 356 of 2012.

[15] Petition 305 of 2012.

[16] {2002}.

the instant application. He relied on *R v JSC ex parte Pareno*[17] which held that "the remedy of judicial review is concerned with reviewing not the merit of the decision in respect of which the application for judicial review is made but the decision-making process itself. It is important to remember, in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authorities to which he has been subjected, and that it is no part of that purpose to substitute the opinion or of the individual judges for that of the authority constituted by law to decide the matter in question."

25. He also cited R v KRA Ex parte Yaya Towers Limited in support of the proposition that the remedy of judicial review is concerned with reviewing not the merits of the decision but the decision-making process. He argued that the application is not within the scope of judicial review but it is calling upon this court to delve into the merits of the decisions. Also, he submitted that the applicant has not demonstrated that the 1st Respondent acted outside its statutory mandate.

26. On the submission that the decision is tainted with irrationality, unreasonableness, and contrary to the applicant's legitimate expectation, counsel argued that the 1st Respondent wrote to the applicant informing it of its VAT arrears totalling to Kshs. 3, 752, 835/=, that the applicants through their tax agent acknowledged the demand through a response dated 18th August 2020. He argued that the applicants ignored the Demand Notice dated 2nd November 2020, 16th December 2021 and 21st January 2021 and the 1st respondent invoked the provisions of section 42 of the TPA and issued Agency Notices to the applicant's bankers with a view to recovering the outstanding taxes. Additionally, he submitted that the Agency Notices having failed to realise the outstanding tax arrears, the 1st Respondent invoked its statutory powers under section 41 of the TPA to collect the said taxes from the applicant by issuing a notice of distress and proclamation of attachment/repossession of moveable property dated 25thAugust 2021. He submitted that the applicants having failed to file a Notice of Objections, the assessed taxes were deemed uncontested, due and collectable by the 1st Respondent.

27. He submitted that the applicant was accorded an opportunity to object in accordance with section 51 of the TPA but chose to sleep on their rights, hence, the 1st Respondent cannot be said to have acted unlawfully, unreasonably, irrational or contrary to Article 40 of the Constitution, nor can the 1stRespondent be said to have acted unreasonably within the Wednesbury's principle by undertaking enforcement. He relied on *R v Kenya Power & Lighting Company Ltd & Another*[18] in support of the holding that the law places the onus on the applicant to demonstrate that the impugned decision was so absurd that no sensible person could ever dream that it falls within the powers of the authority. He also relied on *R v Public Procurement Administrative Review Board & Another Ex parte Gibb Africa Ltd & Another*[19]and the Court of Appeal decision in *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2others*.[20] He argued that courts will only interfere with the decision of a public

17 High Court Misc Application No 1025 of 2003.

18 {2013} e KLR.

19 {2012} e KLR.

20 Civil Appeal No 145 of 2011.

authority if it is outside the band of reasonableness. He also cited Professor Wade in Administrative Law[21] cited Boundary Commission case-[22]

> " The doctrine that power must be exercised reasonably has to be reconciled with no less important doctrine that the court must not ursurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The Court must therefore resist the temptations to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

28. Lastly, counsel submitted that the orders sought are not available because the applicant has failed to demonstrate that the respondent's decision was tainted with irrationality or unreasonableness to merit the orders sought.

Determination

29. The nub of the applicants' grievance as disclosed in the application seeking leave is that on 25th August 2021 the Respondents served them with a letter dated 21st January 2021 indicating that they were in Tax arrears amounting to Kshs. 10,037,846/= and a Notice of Distress dated 24th August 2021 in respect of the said sum pursuant to which their goods were proclaimed despite having paid the taxes. They contend that they were not accorded an opportunity to object to the tax decision as per section 51(1) & (2) the TPA which requires an objection to be made within 30 days of the tax assessment. They argued that the manner in which the enforcement decision was being undertaken was a deliberate move to deprive them the opportunity to object to the decision. Essentially, it is on the strength of the above grievance that the applicants approached this court and secured an ex parte order for leave to operate as stay pending hearing of these judicial review proceedings. I will revert to this point shortly.

30. The salient features of the 1st Respondent's response to the applicants' case are that the applicants perpetually made VAT returns without payments; and that the 1st Respondent constantly engaged the applicants as demonstrated by the applicants' letter dated 6th June 2017 confirming receipt of the 1st Respondent's previous letters. It also states that vide a letter dated 20th July 2017, the 1st Respondent wrote to the applicant notifying them about its VAT arrears of Kshs.3,752,835/= and the applicants acknowledged the said demand vide a reply dated 18th August 2020 from their tax agent A.S.Omar & Company. The 1st Respondent also stated that vide letters dated 2nd November 2020, 16th December 2020 and 21st January 2021, the 1st Respondent wrote to the applicants seeking payment of outstanding taxes and in absence of a positive response, it invoked the provisions of Section 42 of the TPA and issued Agency Notices dated 27th January 2021 to the applicant's bankers seeking to recover the outstanding taxes. Further, in absence of payment, 1st Respondent invoked its powers under section 41 of the TPA and issued the Notice of Distress and Proclamation/attachment. More important is the 1st Respondent's contention that that the applicant failed to file a Notice of Objection hence the taxes became due and collectable. Also of notable is the 1st Respondent's argument that the applicants forwarded some banking slips claiming they paid which were found to be fake.

31. In response to the 1st Respondent's reply, the applicants filed the supplementary affidavit alluded to above in which they inter alia stated that its letter dated 18th August 2017 amounted to a valid objection

21 5th Edition at page 362.

22 {1983} 2 458, 475

under Section 51 of the TPA because applicants objected to the arrears and indicated that they had fully settled the amounts and also supplied proof of payments as required by Section 51(3)(a)-(b) of the TPA, hence the 1stRespondent was mandated under Section 51(11) of the TPA to render an objection decision within 60 days from 18th August 2017 and failure to do so meant that its Objection was allowed under section 51(11) of the TPA.

32. From the applicants' supplementary affidavit, a pertinent question warranting interrogation is whether the applicants are guilty of material non-disclosure. From the 1st Respondent's replying affidavit, it is evident that the parties engaged in previous communication. The applicants vide their letter dated 18th August 2010 acknowledged the 1st Respondent's letters, yet in their application seeking leave they disputed receiving the same communication. There is evidence that the 1st Respondent issued notices to the applicant's bank. Clearly, the argument that the 1st Respondent never communicated to them prior to the impugned demand Notices cannot be true. The applicants wrote claiming to have paid and attaching purported payments which were found to be fake. At the ex parte stage, the applicant never disclosed that they wrote the letter dated 18th August 2020. On the contrary, they said there was no prior communication. They did not disclose that they had forwarded payment documents which were found to be fake.

33. At the ex parte stage, the applicant never disclosed to the court that they had engaged the 1st Respondent including writing the letters referred to above. It is settled law that a person who approaches the court or a tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court or the Tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge, or, which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or attempting to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.[23]

34. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage.[24] The applicants were under a solemn duty to bring to the attention of the court the existence of the relevant correspondence and leave it to the court to determine the merits or otherwise of the case. The duty of a litigant is to make a full and frank disclosure of the material facts. The material facts are those, which it is material for the court or Tribunal to know in dealing with the issues before the court or tribunal. The duty of disclosure therefore applies not only to material facts known to the applicants, but also to any additional facts, which they would have known if they had made inquiries. The question that inevitably follows is whether the non-disclosure in this case was innocent. To me, the non-disclosure cannot be said to be innocent.

35. As mentioned earlier, at the ex parte stage, the applicants secured stay orders on the basis of the material presented before the court as at this point. This brings into view the other stricture of granting an ex parte order which has the effect of extinguishing substantive rights in the interim without hearing the other side. Remarkably, an ex parte proceeding resulting in ex parte orders are exceptions to the basic court procedure which requires both parties be present to canvass their respective positions before a

23 {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

24 Brinks-Mat Ltd vs Elcombe {1988} 3 ALL ER 188.

judge. As a general rule, ex parte matters usually involve urgent requests and often result in temporary orders pending an inter partes hearing at a near future date.

36. However, the law demands that in allowing ex parte proceedings courts balance the right of individuals to receive fair notice against the need for the interest of justice for the court to step in to prevent imminent and irreparable harm. That is the basis upon which to maintain the integrity of the justice system, where a court order resulting from ex parte hearing should be quickly followed with a full hearing inter partes.

37. In this regard, the law enjoins an applicant appearing before the court without notice to other party to exhibit a high quality and degree of sincerity and honesty. He or she must be candid. He or she must be frank. He or she must be open. Each must keep nothing that touches on the matter away from the court. This hallowed proposition of law has been reiterated time without a number in numerous decisions. In *Esther Muthoni Passaris v Charles Kanyuga & 2 Others*[25]in which the court cited previous decisions among them *Rex v Kensington Income Commissioners, ex parte princess Edmond De Polignac*[26] and stated as follows: -

> " There is no controversy that there exists a court made rule that if a party moves the court for restraining or injunctive orders ex parte (without notice, then the party is obligated to disclose the facts which the court thinks are most material to enable the court to fairly form its judgement. Where a party does not observe this rule, he disentitles himself from the relief which he asks the court to grant and such relief will not even be visited by the court at the inter partes stage."

38. This rule which has existed since *Castelli v Cook*[27] and was intended to ensure that parties who appear ex parte before the court are not deceitful and do not break faith with both the court and the other parties to litigation, has been followed in various subsequent cases.[28] So strong is the rule that where disclosure has not been met the court will not even decide the applicant's application on its merits. Washington LJ succinctly put in the following words: -

> " It is perfectly well established that a person who makes an exparte application to the court that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest disclosure then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him."

39. In their supplementary affidavit, the applicants; case mutated to a fresh ground which was not canvassed in the application seeking leave. They contended that their dated 18th August 2020 amounted to an objection and argued that the 1st Respondent was obligated to render an objection decision within 60 days from the date of receipt of their letter. They argued that the failure to render an objection

25 {2015} e KLR.

26 {1917} 1KB 486.

27 {1849} 68 E.R. 36.

28 See for example R.v Kensington Income Tax Commissioners ex parte Princess Edmond De Polignac [1917] 1KB 486, Smith v Croft No.1 {1986} (1WLR) 58, Boreh v Djibouti {2015} EWHC 769, Tiwi Beach Hotel Ltd v Stamn 1990 – 1994 EA 565, Bonde v Steyn {2013} 2 KLR among others.

decision meant that the objection was allowed. Alternatively, they urged the court to treat the said letter as an objection. To justify the said argument, argued that under the law, an objection need not be in any prescribed format.

40. To me, the evident mutation of the applicants' suit to a new ground not pleaded in the application seeking leave is impermissible. This is because a party may in any pleading plead any matter which has arisen at any time, whether before or after the proceedings commence. However, the issue introduced in the supplementary affidavit is not a issue which arose after the proceeding began. A party shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with previous pleading made by the party. The effect of the above proposition is that since pleadings form the factual basis upon which each party's case is built, parties in an action are bound by their pleadings, as such in the course of the proceeding's parties are not allowed to allege new facts or make new claims outside or inconsistent with the original pleading. The applicant's argument that its aforesaid letter amounts to an objection is inconsistent with their earlier position. This explains why parties are granted an opportunity to amend pleadings thereby affording the other side the opportunity to oppose. Judicial review proceedings are sui generis. Its highly doubtful whether once an applicant obtains leave to commence judicial review proceedings citing grounds in support of the application, it is permissible for the same party to introduce new grounds by way of a supplementary affidavit which amounts to repairing its case to the prejudice of the oppositive party.

41. An orderly system of litigation requires that each party put his or her best foot forward. It contemplates that the initial pleadings will disclose the factual grounds upon which a suit is founded. A supplementary affidavit is meant to clarify matters raised in the respondent's response but not to introduce factual and legal issues which substantially alter the suit. These should be left to a formal amendment so as to afford the other party the opportunity to respond to the application to amend. Litigation by instalments is not to be encouraged. There is a strong interest in party fully disclosing his case, which should only be departed from in exceptional circumstances. Parties make strategic decisions in the course of litigation, and except in narrow circumstances they must be held to those decisions. When all of the various factors, tests and considerations are taken together, the importance of the integrity of the trial process - the search for the truth through evidence - is an overarching consideration.

42. The evident mutation of the applicants' grounds aside, the argument that the applicants' aforesaid letter amounted to an objection and the twin argument inviting this court to treat it as such is attractive. However, a reading of the applicants' application seeking leave and the Statutory Statement and the supplementary affidavit shows that the original complaint as clearly manifested in the applicant's application for leave was that it was served with the Demand Notices and Proclamation without any prior notice or communication. In response to this ground of assault, the 1st Respondent presented documents demonstrating that there was prior communication which the applicants' acknowledged in writing. The 1st Respondent went further to negate the applicant's argument that it had paid the claim by stating that the purported payment slips were found to be fake. Confronted with this unrelenting rebuttal, the applicant introduced "new grounds" in its supplementary affidavit. This time the argument is that its letter dated 18th was an objection or it ought to be treated as such. Further, the failure to render an objection decision means that its "objection" is deemed as allowed. Against this background, it is evident that the said argument is a clear afterthought.

43. The other ground upon which the applicants' argument attractive as it is collapses is that it raises more questions than answers. First, is the question why the applicant never raised the said argument in the application for leave if at all such a ground existed. Second, one thing is clear, which is the applicants never objected to the tax decision. Flowing from the above discussion, the applicants' argument that its letter amounted to an objection or it be deemed as such collapses.

44. Next, I will address the question whether this suit offends the doctrine of exhaustion of remedies. The touchstone of the applicants' case as far as the instant issue is concerned is two-fld. One, that the 1st Respondent never rendered an objection decision and therefore there was no decision capable of being challenged at the TAT. Two, that even if the applicants were to file their claim at the TAT, the said forum cannot grant the applicant an effective remedy owing to the issues raised in this case.

45. In order to properly contextualize the issue at hand, it is convenient to recall that the preamble to the TPA Act provides that it is an act of Parliament to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected proposes. Section 52 (1) of the act provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the TAT Act.[29] The act defines an "appealable decision" to mean an objection decision and any other decision made under a tax law other than— (a) a tax decision; or (b) a decision made in the course of making a tax decision.

46. The preamble to the TAT Act[30]provides that it is an Act of Parliament to make provision for the establishment of a Tribunal; for the management and administration of tax appeals, and for connected purposes. The act defines Tax Law to mean— (a) the *Income Tax Act*;[31] (b) the *Customs and Excise Act*;[32] or (c) the Value Added Tax;[33] (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner.

47. Section 3 of the act establishes a Tribunal known as the TAT to hear appeals filed against any tax decision made by the Commissioner. The words to note in this provision is "any tax decision." There is no contest before me that the decision under challenge in these proceedings is a tax decision within the said definitions. Also relevant is section 12 of the act. It provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal; Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings. The foregoing provisions of the law warrant no explanation. The question is whether the applicants ought to have challenged the enforcement action before the TAT instead of invoking this court's jurisdiction. Differently put, does this suit offend the doctrine of exhaustion.

48. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. Our jurisprudence is awash with declarations by our superior courts addressing this doctrine. This doctrine is now of esteemed juridical lineage in Kenya.[34] The doctrine was articulated by the Court of Appeal[35] in Speaker of National Assembly vs Karume[36] (supra), a pre-2020

29 Act No. 40 of 2013.

30 Ibid.

31 Cap 470, Laws of Kenya.

32 Cap 472, Laws of Kenya.

33 Cap 476, Laws of Kenya.

34 Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

35 Ibid.

decision. However, many Post-2010 court decisions have adopted the reasoning and have provided justification and rationale for the doctrine under the 2010 Constitution.[37] (For example, the Court of Appeal in Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 others[38](supra) and the Matter of the Mui Coal Basin Local Community[39](supra).

49. Of great importance are the vital lessons from the decided jurisprudence on the doctrine. At least two principles are evident. One, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[40] Two, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. From the earlier cited statutory definitions, it is evidently clear the enforcement action under challenge is an appealable decision under the TPA Act. It falls under "any other decision."

50. Section 9(2) of the FAA Act provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Sub-section (3) provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

51. The use of the word shall in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[41]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[42] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

52. The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to

36 {1992} KLR 21.

37 Ibid.

38 {2015} eKLR.

39 {2015} eKLR.

40 Ibid.

41 Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

42 Ibid.

denote obligation.[43] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[44]

53. A faithful reading of section 9(2) & (3) of the FAA Act leaves no doubt that the said provisions are couched in mandatory terms. This being the clear intention of the said provisions, the only way out is the exception provided under section 9(4), which provides that: - "Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements are highly notable from the above sub-section. One, the applicant must demonstrate exceptional circumstances.

54. The applicant did not come out clearly to demonstrate what exceptional circumstances are presented in this case. They only cited absence of an objection decision even though their original version cited absence of previous notice which mutated to failure to render an objection decision.

55. But more important to interpret what constitutes exceptional circumstances contemplated under the said provision. Of course, the answer to this question depends on the facts of each case[45] and it is not possible to have a closed list. Article 47 of the Constitution is heavily borrowed from the South African Constitution. In addition, the FAA Act[46] is heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions offer some useful guidance. The following points from a leading South African decision are worth reading: -[47]

    i. What is ordinarily contemplated by the words “exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . .”

    ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

    iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

    iv. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

    v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal

43 See Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC.

44 This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

45 See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

46 Act No. 4 of 2015.

47 In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional. # In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

56. Where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[48] To me exceptional circumstances mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case.

57. Further, there was no attempt to demonstrate that the internal remedy would not be effective and/or that its pursuit would be futile for this court to permit the applicant to approach the court directly. There was no argument that the tribunal has developed a rigid policy, which renders the requirement for exhaustion futile. It has not been established that applying the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of this case suggests otherwise. The provisions are very clear on the jurisdiction of the Tribunal.

58. By now it is manifestly clear that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the FAA Act.[49] An applicant seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[50] Section 9(4) of the FAA Act[51] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances. Section 9(4) of the FAA Act[52] postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine.

59. Flowing from the above paragraphs, it follows that even if I were to be persuaded by the applicants' argument that in absence of an objection decision and an effective remedy, they were left out with option but to approach the court, the applicant's argument, attractive as it is would collapse on

48 See Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC) para 39, Mokgoro J

49 Act No. 4 of 2015.

50 See Nichol & another v Registrar of Pension Funds & others 2008 (1) SA 383 (SCA) para 15; Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others 2014 (5) SA 138 (CC) para 115.) [21]

51 Act No. 4 of 2015.

52 Act No. 4 of 2015.

grounds that it cannot pass the hurdle erected by section 9(4) of the FAA Act. Simply put, the applicants never applied for an exemption. On this ground alone, this case collapses.

60. Perhaps, I should add that it is uncontested that the impugned decision constitutes an administrative action as defined in section 2 of the FAA Act. Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the applicant can show exceptional circumstances to exempt him from this requirement[53] and has sought and obtained an exemption from the court.

61. By now, it is trite that the principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. Flowing from the above discussion, it is my conclusion that the applicants ought to have exhausted the available mechanism before approaching this court. Accordingly, it is my finding that this case offends section 9 (2) of the FAA Act. On this ground alone, this case is dismissed.

62. Notwithstanding my above conclusions, I will consider the merits of the application. The applicants' assault the 1st Respondent's actions on grounds that it was unreasonable, procedurally unfair, unlawful, ultra vires and contrary to natural justice because the taxes had been fully paid. They contend it was wrong to communicate the decision over 8 months after the tax assessments were made and allowing them only 10 days to comply. They argue that they were not accorded an opportunity to object to the tax decision, and that the decision offends Articles 40 & 47 (1) of the Constitution, Section 51 of the TPA and Section 4 of the FAA Act. They argue that the 1st Respondent's failure to respond to the letter dated 18th August 2017 within 60 days and the failure to render an objection decision created legitimate expectation that the objection had been allowed as per section 51(11) of the TPA.

63. A vital precept of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated qualifications to this general principle, namely: - (a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised; and (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach of statutory construction. In addition, a generous and purposive interpretation should be adopted which gives expression to the underlying values of the Constitution and the purposes of the statute.

64. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The courts when exercising this power of construction are enforcing the rule of law, by requiring public bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the

[53] Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae) {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, Nichol & another v Registrar of Pension Funds & others [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[54] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

65. 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,[55] the impugned decision, act or omission is capable of being read in a manner that complies with the mandate conferred by the enabling statute.

66. The question before me is whether the power conferred on the Respondents by the enabling statues was properly exercised. Since the touchstone of the applicant's assault stands on the doctrine of ultra vires, it is useful to recall the classic judicial pronouncement on the doctrine in *Council of Civil Service Unions v Minister for the Civil Service*[56] in which Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision and/or action ultra vires. These grounds are; illegality, irrationality and procedural impropriety.

67. Later judicial decisions incorporated a fourth ground to Lord Diplock's classification, namely; proportionality.[57] What Lord Diplock meant by "Illegality" as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. Lord Diplock explained the term "Irrationality" by succinctly referring it as "unreasonableness" in Wednesbury Case.[58] By "Procedural Impropriety" His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

68. However, judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area, then it was prima facie performing the tasks entrusted to it by the legislature. In such a case, a court will not interfere with the decision. The role of the court in such cases was well stated in *Republic v National Water Conservation & Pipeline Corporation & 11 Others*[59] where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith.

69. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple ultra vires and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing

[54] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[55] 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

[56] {1985} AC 374.

[57] See, R v Secretary of State for Home Department ex. p. Brind {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[58] Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223.

[59] {2015} eKLR.

to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

70. The ultra vires principle is based on the postulation that court intrusion is legitimated on the ground that the courts are applying the intent of the legislature. It is correct to say that Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The ultra vires principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the ultra vires principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The ultra vires principle thus conceived provided both the basis for judicial intervention and established its limits.

71. There is no contest that the 1st Respondents are statutorily ordained to undertake the enforcement action. The 1st Respondent's position is that it complied with the law in issuing the Demand Notice and the Proclamation. The enabling provisions of the law have severally been cited by the parties. There was no convincing argument that the 1st Respondent acted outside its powers.

72. Under Section 7 of the FAA Act, a decision or administrative action may be judicially reviewed if, among other things, if the decision was taken in bad faith or arbitrarily or capriciously, or the decision is not rational or is otherwise unconstitutional or unlawful. 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. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power. The arguments before me do not in any manner demonstrate the above ground.

73. It is also important to mention that the applicant has not demonstrated that the taxes are not due. On the contrary, there is uncontroverted evidence that the applicants provided fake payment deposits. The assessment was issued pursuant to section 51 (2) of the TPA Act and the agency Notices were issued as provided by section 42 of the TPA Act. A reading of these provisions leaves no doubt that the applicants' arguments are unmerited.

74. The applicants 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.

75. 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.[60] 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.

76. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[61] 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.[62] 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."[63]

77. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in National Director of Public Prosecutions v Philips.[64] 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 administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

78. Discussing legitimate expectation, H. W. R. Wade & C. F. Forsyth[65] 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

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

61 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).

62 Ibid.

63 Ibid.

64 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.

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

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)

79. 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.

80. 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 applicants have not satisfied the tests for the doctrine of legitimate expectation to apply in the circumstances of this case. This ground collapses.

81. The applicant's counsel argued that the Respondent's acts of issuing the Demand Notices is unreasonable and irrational. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the FAA Act. 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.

82. 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[66] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[67]

83. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others[68] O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.[69]

> "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 [1976] UKHL 6; [1976] 3 All ER 665 at 697[1976] UKHL 6; , [1977] AC 1014 at 1064 as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. ... Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him."

66 {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

67 Lord Cooke in R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd, {1995} 1 All ER 129 (HL) at 157.

68 {2004} ZACC 15; 2004 (4) SA 490 CC at 512, para 44.

69 {1995} 1 All ER 129 (HL) at 157.

84. In *Carephone (Pty) Ltd v Marcus NO*[70] per Froneman JA, stated the test as follows:-

> "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

85. 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. Put differently, whether the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law. The following propositions can offer guidance on what constitutes unreasonableness. First, wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. Second, this ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom, which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ. Third, 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.

86. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

87. Legal unreasonableness comprises of any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; 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; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[71]

88. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. 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.

89. A decision which fails to give proper weight to a relevant factor may also be challenged as being unreasonable.[72] It is a well-established principle that if an administrative or quasi-judicial body takes

70 1999 (3) SA 304 *(LAC)* at 316, para 36.

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

72 Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 per Mason J (at 41).

into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.[73] The following propositions can offer guidance on what constitutes unreasonableness: -

i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;

ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;

iii. 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;

90. Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of FAA act which 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."

91. There was no argument before me citing any of the above to demonstrated rationality. It's not enough to recite the word unreasonable or irrational and end there. The statute provides details as shown above. Differently put, the FAA Act not only expanded the grounds for judicial review but it provided them with a statutory underpinning while Article 47 constitutionalized grounds for judicial review. The test for rationality was stated as follows by Chaskalson P, in Pharmaceutical Manufacturers Association of SA and Another: I*n re Ex parte President of the Republic of South Africa and Others*:-[74]

> " 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."

92. In *Trinity Broadcasting (Ciskei) v ICA* of,[75] Howie P stated the rationality test as follows-"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 material made available and the conclusion arrived at."

73 See Patel vs Witbank Town Council 1931 TPD 284 Tindall J said (at 290);

74 2000 (4) SA 674 (CC) at page 708; paragraph 86.

75 SA 2004(3) SA 346 (SCA) at 354H- 355A.

93. I have carefully examined the tax assessment, the Demand Notices and the Proclamation and the enabling provisions of the statute. I have placed the grounds cited side by side with the enabling statutory provisions. I do not see any traits of ultra vires or irrationality, procedural impropriety or unreasonableness. There is nothing to show that a reasonable person or Tribunal, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the applicants have not demonstrated that the decision was tainted with unreasonableness or irrationality.

94. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at illegally, arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

95. The applicant also cited alleged violation of Articles 40 and 47 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.[76] 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."[77] However, the standards of fairness are not immutable. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.[78]Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[79]

96. In J.S.C. v Mbalu Mutava[80] the Court of Appeal held 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.[81]

76 Kioa v West (1985), Mason J.

77 See S. De Smith, Judicial Review ofAdministrativeAction,4th ed. J. Evans (1980), 352- 4.

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

79 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).

80 {2015}eKLR.

81 Ibid.

97. The decision complained of is an administrative function. It is a tax assessment and enforcement Action after the applicants failed to pay. The governing statutes regulate the process for tax assessment and enforcement. There is evidence of correspondence between the applicants and the 1st Respondents. The Notices and enforcement action were issued as the law provides, and, the applicants were served as required. There is nothing to show that the requisite procedures governing the issuance of the notices were not followed. 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*[82] 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

98. Applying the jurisprudence discussed above and the law to the facts of this case, I am not persuaded that the circumstances of this case warrant the granting of any of the reliefs sought. It is my finding that the Respondent's actions are grounded on the enabling statutes. Put differently, the enforcement action is not tainted with illegality, irrationality or procedural impropriety. The Respondents acted intra vires.

99. The applicants seek orders of Certiorari. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

100. 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 where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, there is un rebutted allegations that the applicants presented fake tax payment receipts.

101. 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. Additionally, it involves examining whether the decision

[82] (335/2004) [2005] ZASCA 77; [2008] 1 All SA 17 (SCA) (19 September 2005).

maker stepped beyond the legal limits or acted in an arbitrary manner by reaching an unreasonable conclusion based on the material before it.

102. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach. In view of my analysis of the facts, the law herein above and my findings discussed herein above, the conclusion becomes irresistible that the ex parte applicants have not demonstrated that the impugned decision is tainted with illegality, irrationality, unreasonableness or any of the judicial review grounds to warrant the judicial review orders sought. Accordingly, the ex parte applicant's application dated 13th September 2021 is hereby dismissed with no orders as to costs.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF DECEMBER 2021

JOHN M. MATIVO

JUDGE