REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. JR. APPLICATION NO. 211 OF 2018

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY (KRA).....1ST RESPONDENT

THE COMMISSIONER-GENERAL (KRA).....2ND RESPONDENT

THE COMMISSIONER, INVESTIGATIONS

& ENFORCEMENT (KRA)….....3RD RESPONDENT

THE DIRECTOR, DIRECTORATE OF IMMIGRATION

AND REGISTRATION OF PERSONS.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

EX PARTE

NEW FLAMINGO HARDWARE & PAINTS LIMITED.....1ST APPLICANT

HANG SHUN INTERNATIONAL COMPANY LIMITED.....2ND APPLICANT

TOKYO TRADING GLOBAL LIMITED.....3RD APPLICANT

KINGWAY TYRES LIMITED.....4TH APPLICANT

TRIBE HOTEL LIMITED.....5TH APPLICANT

CREATIVE INNOVATIONS LIMITED.....6TH APPLICANT

NAGDA PRABHULAL.....7TH APPLICANT

XIONG YING IMPORT & EXPORT CO. LIMITED.....8TH APPLICANT

WORLD BRANDS (K) LIMITED.....9TH APPLICANT

TONONOKA FIREWORKS LIMITED.....10TH APPLICANT

MAHESH & TIRTH CONSTRUCTION LIMITED.....11TH APPLICANT

GREENHILLS INVEST LIMITED.....12TH APPLICANT

SHRI KRISHANA BHIMJI HIRANI.....13TH APPLICANT

VIVA-LINE LIMITED.....14TH APPLICANT

METRO PHARMACEUTICALS LIMITED.....15TH APPLICANT

READY TIMBER MERCHANTS LIMITED.....16TH APPLICANT

DHIRAJ KUMAR BHIMJI HIRANI.....17TH APPLICANT

-CONSOLIDATED WITH-

NAIROBI HC MISC JR. APPLICATION NO. 185 OF 2018

REPUBLIC.....APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY (KRA).....RESPONDENT

-EX PARTE-

STEELSTONE (K) LIMITED.....1ST APPLICANT

CARTON MANUFACTURERS.....2ND APPLICANT

TRANSPACIFIC LIMITED.....3RD APPLICANT

HALL EQUATORIAL LIMITED.....4TH APPLICANT

MERIDIAN HOLDINGS LIMITED.....5TH APPLICANT

CRESCENT DISTRIBUTORS SERVICES LTD.....6TH APPLICANT

CRESCENT TECH LTD.....7TH APPLICANT

PERKINS AMBALAL PATEL T/A

CHAMPIONS AGENCIES.....8TH APPLICANT

SPECTRE CHEMICALS LIMITED.....9TH APPLICANT

NAKURU PLASTICS LIMITED.....10TH APPLICANT

AADEEM TRADING COMPANY LIMITED.....11TH APPLICANT

KEROMATT LIMITED.....12TH APPLICANT

SAFARI CONNECT LIMITED.....13TH APPLICANT

ANAND COMMUNICATIONS LIMITED.....14TH APPLICANT

HOTCELL ENTERPRISES LIMITED.....15TH APPLICANT

SMARTHPHONE STORES LIMITED.....16TH APPLICANT

SRIMAN TRADING CO. LTD.....17TH APPLICANT

THREE A CONSTRUCTION LIMITED.....18TH APPLICANT

ARJUN MORARJI THAKAR.....19TH APPLICANT

SAWLA ENTERPRISES LTD.....20TH APPLICANT

SHANIR DISTRIBUTORS LTD.....21ST APPLICANT

CANDY LAND LIMITED.....22ND APPLICANT

RAMESH HARILAL GHAGHADA.....23RD APPLICANT

JUDGEMENT

1. Nairobi HC Misc. Judicial Review Application No. 211 of 2018 and Nairobi HC Misc. Judicial Review Application No.185 of 2018 were consolidated on 12th June, 2019 by Mativo, J who directed that the consolidated matters be heard before this Court, together with Nairobi HC Constitutional Petition No. 167 of 2018 Mohamed Ali T/A Top Model Apparels & 44 others v Kenya Revenue Authority, as they all raise issues arising from similar decisions made by Kenya Revenue Authority.

MISC. JR. APPLICATION NO. 211 OF 2018

The Ex Parte Applicants' Case

2. The seventeen ex parte applicants led by New Flamingo Hardware & Paints Limited (herein after simply referred to as the applicants) by way of a statutory statement dated 25th May, 2018 and notice of motion application dated 29th May, 2018 brought under Order 53 of the Civil Procedure Rules, 2010 (CPR), seek the following orders from this Court:

> **"1. a.) CERTIORARI to remove into this Honourable Court and quash the decision of the 1st, 2nd and 3rd Respondents of declaring Value Added Tax (VAT) as unpaid as conveyed by numerous Demand Notices sent to the Applicants and subsequent Additional Assessments sent to the Applicants pursuant to the said Demand Notices without following due process as laid out in the Value Added Tax Act and in contravention with the Constitution.**
>
> **b.) PROHIBITION directed at the 1st, 2nd and 3rd Respondents prohibiting them whether by themselves, agents, servants or howsoever otherwise, from serving agency notices on the Applicants' bankers, freezing the Applicants' bank accounts, suspending the Applicants' PINS, threatening, intimidating, harassing, prosecuting the Applicants, or in any other way acting in enforcement and/or implementation of the demand notices served upon the Applicants herein pursuant to the Demand Notices.**
>
> **c.) MANDAMUS compelling the 1st, 2nd and 3rd Respondents to immediately surrender and return the passport no. BK 011624 confiscated on 17th May 2018 by the 3rd Respondent and/or his agents.**
>
> **d.) CERTIORARI to remove into this Honourable Court and quash the decision of the 1st, 2nd, 3rd & 4th Respondents of issuing an unlawful Departure Prohibition Order against the 7th Applicant.**
>
> **e.) PROHIBITION directed at the Respondents herein by themselves, their servants, agents, immigration officers or employees from prohibiting the applicants from departing Kenya, confiscating the Applicants' passports or any travel document and denying them any customs or immigration clearance or in any way interfering with the applicants' entry into, stay and residence or exit from Kenya on the basis of any departure prohibition order.**
>
> **2. THAT such other relief as the Honourable Court may deem just and expedient to grant.**
>
> **3. THAT the costs of and incidentals to this Application be provided for."**

3. The Kenya Revenue Authority (KRA); the Commissioner-General (KRA); the Commissioner, Investigations & Enforcement (KRA); the Director, Directorate of Immigration and Registration of Persons; and the Honourable Attorney General are the respective 1st to 5th respondents.

4. The applicants bring this matter to Court on the grounds that in April 2018 they received demand notices from the 1st Respondent claiming back input VAT which they had successfully claimed from KRA arising out of transactions between them and third party suppliers between 2014 and 2018. The basis for the demands was that the applicants never purchased any goods from the third party suppliers but only purchased invoices from those suppliers.

5. The applicants further allege that the 1st Respondent also claimed corporate tax on the erroneous theory that the alleged fictitious sales were used to reduce the amount of corporate tax payable and accordingly the 1st Respondent sought to recover the alleged unpaid tax.

6. The applicants assert that the demand notices and KRA's reasoning are preposterous and outrageous. Furthermore, they complain that they were not given an opportunity to be heard before the issuance of demand notices which gave them only seven days to pay the amounts

demanded. It is averred that the applicants made several requests to be heard on the demand notices but their requests were refused by KRA.

7. The applicants claim that the issuance of the demand notices violates the provisions of the Value Added Tax Act (VAT Act), 2013 and all other tax legislations which require taxpayers to be given at least thirty days to pay taxes or lodge objections to the taxes.

8. The application is supported by the verifying affidavits of the 3rd, 7th, 10th, 13th, 14th and 15th applicants sworn on 25th March 2018. The applicants depose that KRA had ignored the mandatory statutory requirements before making their demands. It is alleged that the 1st Respondent made the demands without carrying out an assessment contrary to Rule 9 of the Seventh Schedule of the VAT Act; issued a seven days' notice for payment instead of the thirty days' notice stipulated in the VAT Act and Tax Procedures Act, 2015 ('TPA'); and, ignored the fact that KRA has sixty days after a party has objected to assessment of tax to make a decision on the taxpayer's objection.

9. It is also averred that KRA has acted *ultra vires* its mandate to collect taxes and has chosen to impose new taxes and/or requirements for tax collection.

10. The applicants depose that by reclaiming the input tax, the Commissioner accepts that he made a mistake in allowing the applicants' claim for the input tax and is subjecting the applicants to suffer for his own mistake. Furthermore, it is contended that the Commissioner's actions are an admission of fault by KRA as the invoices presented to the KRA for the goods supplied to them were issued by suppliers whose PINs were in KRA's system. It is additionally averred that the allegation by KRA that no goods were supplied lacks merit and no shred of evidence to this effect has been supplied.

11. The applicants' case is further supported by the supplementary affidavits sworn by the 15th Applicant on 31st October, 2018, in which the allegation by the respondents that the applicants were involved in the "missing trader" fraud is strongly refuted. The applicants aver that they have evidence that they were dealing in legitimate trade whereas KRA has failed to establish any fraudulent scheme or falsehood.

12. It is further deposed that the Commissioner failed to issue the applicants with assessments concerning his determination and instead issued demands as if the tax issued had been determined. It is additionally the applicants' case that the Commissioner violated Section 31 of the TPA by issuing amended assessments without issuing original assessments.

13. The applicants express their intention to rely on the doctrine of estoppel by negligence owing to alleged failure by KRA to monitor their own tax agents and transferring the consequences of their negligence to taxpayers.

The 1st, 2nd and 3rd Respondents Case

14. The 1st, 2nd, and 3rd respondents filed replying affidavits sworn by D.M. Mwangi on 21st June, 2018 in response to the affidavits of the 3rd, 7th, 10th, 13th, 14th and 15th applicants. It is contended that in the process of carrying out tax investigations into a "missing trader" scheme the said respondents identified the applicants as beneficiaries of the scheme. As a result, the 1st Respondent issued demands comprising of VAT and corporate tax for the period 2015 to 2016 in respect of the applicants' tax liabilities.

15. The respondents assert that they followed the laid down procedural requirements, and acted according to the law as Section 9 of the Seventh Schedule of the VAT Act is non-existent and was repealed in 2013. It is averred that the sixty-day notice applies where a taxpayer has filed a valid objection to an assessment under Section 51 of the TPA.

16. It is contended that the applicants are not deserving of the judicial review orders sought as they have come before Court with unclean hands. Further, that the applicants have failed to demonstrate how the 1st, 2nd and 3rd respondents acted *ultra vires* and unreasonably as the respondents followed the laid down procedure in determining the tax due. It is also asserted that the respondents acted within their mandate under Section 5(1) of the Kenya Revenue Authority Act, Cap. 469 to administer and enforce all provisions of the written laws as set out in Part 1 and 2 of the First Schedule to the Act for the purposes of assessing, securing, collecting and accounting for all revenues in accordance with those laws.

17. The respondents aver that it would be in the public interest for the matter to be dismissed.

18. The 4th and 5th respondents did not participate in the proceedings.

The Ex Parte Applicants' Submissions

19. The applicants filed written submissions dated 31st October, 2018, and submits that the issues for determination are:

i. Whether the decision by the applicants to file judicial review proceedings as opposed to lodging appeals at the Tax Appeals Tribunal is warranted

20. The applicants contend that the Tax Appeals Tribunal ("Tribunal") has no jurisdiction to entertain an appeal arising out of the respondents' impugned actions on the grounds that under Section 12 of the Tax Appeals Tribunal Act, 2013 ("TATA") the right to appeal to the Tribunal is governed by the provisions of the relevant tax legislation pursuant to which the impugned decision was made. It is the applicants' case that since the respondents' impugned decision was made pursuant to the provisions of the VAT Act, the relevant tax legislation that would donate the right to appeal to the Tribunal is the TPA.

21. Further, that under Section 51 of the TPA, an aggrieved person can only appeal to the Tribunal in respect of a tax decision. The

applicants contend that bearing in mind that KRA made its decision pursuant to Section 66 of the VAT Act, it means that the same does not constitute a tax decision under Section 2 of the TPA and no appeal therefore lies to the Tribunal from the impugned decisions. Reliance is placed on the principle established in the case of **Stanbic Bank Kenya Limited v Kenya Revenue Authority [2009] eKLR** that tax legislations should be interpreted strictly.

22. The applicants submit that even if the Tribunal had jurisdiction, the demand notices' requirement for compliance within seven days renders the redress mechanism provided by the TPA ineffective since the procedures to be followed before the Tribunal can hear an appeal requires a minimum of 102 days. The applicants urge that the 1st Respondent's keenness in enforcing the demands was demonstrated by the fact that the 7th Applicant had been arrested and charged for failure to pay taxes.

23. The applicants additionally submit that at the time of lodging this application the Tribunal was not properly constituted and as such no remedy could be issued by the Tribunal. It is thus urged that the only remedy available to the applicants at the time of filing the application could only be provided by this Court.

ii. Whether this Court should grant the orders sought

24. The applicants submit that these judicial review proceedings were necessitated by the unreasonable, unfair, unlawful and biased decision of KRA to issue tax demands based on unsubstantiated allegations. The applicants assert that KRA violated the natural justice principle of *audi alteram partem* for reason that it had evaluated and allowed their claims for input tax only to suddenly, and several years later, claim that the same ought not to have been allowed and demand payment of the same within seven days, without giving them an opportunity to be heard. The applicants assert that the failure to hear them before determining that they were part of a tax avoidance scheme violated their rights under Articles 47 and 50 of the Constitution.

25. It is the applicants' submission that the 1st Respondent acted *ultra vires* by purporting to initiate enforcement action against them even before formally making a determination under Section 66(2) of the VAT Act, and before communicating the determination, if any. The applicants further highlight sections 28 and 31 of the TPA and assert that KRA failed to follow the procedure therein when it issued demand notices instead of issuing amended assessments since the applicants had filed their tax returns.

26. The applicants contend that the 1st Respondent acted illegally and in violation of the law in issuing the impugned demand notices as they purport to punish the applicants for alleged crimes committed by third parties; purport to punish the applicants for the consequences of the respondents' breaches of their statutory duties; and for approbating and reprobating at the same time. That a party should not be allowed to approbate and reprobate at the same time is supported by the decision of Court of Appeal in **Bake "N" Bite Ltd v Rachel Nungare & 15 others [2015**] **eKLR.**

27. The 1st Respondent is also alleged to have illegally characterized lawful trade as tax avoidance schemes. It is contended that based on KRA's own evidence, no tax benefit accrued to the applicants within the meaning of Section 66 of the VAT Act to justify the erroneous conclusion that the applicants were involved in a tax avoidance scheme. The applicants rely on the decisions in **Stanbic Bank (K) Ltd v Kenya Revenue Authority [2009] eKLR; JDI Trading Ltd v Commissioners of HMRC [2012] UKFTT 642; Synectiv Ltd v Commissioner of HMRC [2017] UKUT 0099;** and **Commissioners of HMRC v CCA Distributors Ltd [2015] UKUT 0513** where the courts decided that a taxpayer cannot be victimised based on mere suspicion.

28. The applicants assert that KRA purports to impose on them obligations that are not founded on any law by stating that some of the applicants failed to furnish details and particulars belonging to the third parties with whom they traded. The applicants contend that they furnished all the information in their possession relating to the alleged fraudsters and there is no law enjoining them to keep the records of other registered VAT agents. They assert that Section 93 of the TPA only requires them to keep their own records.

29. It is further argued that the law does not impose upon the applicants the obligation to police other registered VAT agents and to be personally answerable for their acts and omissions as suggested by the respondents. It is submitted that it is not the business of the applicants to concern themselves with whether other registered VAT agents are faithfully and diligently honouring their obligations under the VAT Act.

30. The applicants close their submissions by contending that the respondents are restrained by the principle of estoppel by negligence from denying that the alleged fraudsters were genuine and *bona fide* suppliers of taxable supplies since they registered them as such and issued them with valid PINS and ETR machines; that the trades between the applicants and alleged fraudsters were valid since KRA has approved the input VAT claims on such trades; and that the tax invoices issued to the applicants were genuine and authentic as KRA has authorised the alleged fraudsters to corroborate the same with ETR receipts which have not been disowned by KRA in all the replying affidavits. The decision in **Coventry Shepherd & Company v Great Eastern RLY Co (1883) 11 QBD 776** is cited as enunciating the doctrine of estoppel by negligence.

The 1st, 2nd and 3rd Respondents' Submissions

31. The 1st, 2nd and 3rd respondents filed submissions dated 21st November, 2018 in which they submit that the issues for determination are:

i. Whether the decision by the applicants to file judicial review proceedings as opposed to lodging an appeal at the Tribunal is warranted

32. The 1st, 2nd and 3rd respondents assert that there is a procedure provided under Section 51(1) of the TPA by which an aggrieved person can formalise their concerns. It is urged that there is a properly established tax forum, being the Tribunal, to hear disputes such as the one placed before this Court by the applicants. The respondents assert that the issue before this Court is a tax dispute and the applicants ought to have approached the Tribunal as per the requirements of the TPA. The respondents support their arguments by citing decisions in **Republic v Kenya Revenue Authority Ex-Parte New Frarims Wholesalers Limited & 3 others; Grain Bulk Handlers Ltd v Kenya Revenue**

Authority [2018] eKLR; Metcash Trading Limited v The Commissioner for the South African Revenue Service (citation not provided)**;** and **The Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Chairman, Rent Restriction Tribunal & 99 others [2018] eKLR.**

33. It is submitted that according to sections 7 and 9 of the Fair Administrative Action Act, 2015 ("FAA Act"), a court or tribunal may review an administrative decision, and therefore the Tribunal as a subordinate court has the jurisdiction to hear this matter. The decision in **Republic v Rent Restriction Tribunal & 2 others Ex-Parte Evans Nyahoro, Paul Kinuthia Kirundi JR Misc. Application No. 366 of 2017** is cited for the holding that judicial review is a remedy of last resort which should not be invoked where there exist appropriate remedies to redress the grievance complained of. The respondents contend that the applicants ought to have exhausted all other legal avenues provided under the law, and it is only if such alternative remedies could not provide an efficacious and satisfactory answer that they could have moved this Court.

34. The respondents submit that the matter before this Court is an appeal disguised as a judicial review matter. They question whether judicial review is an appropriate procedure for examining the issues raised in this matter. According to the respondents, the Tribunal is the better forum for addressing the applicants' complaints. The respondents support their arguments by relying on the decisions in **Republic v Public Procurement Administrative Review Board & another Ex Parte Express DBB Kenya Limited [2018] eKLR; Kenya Pipeline Ltd v Hyosung Ebara Company Ltd** (citation not provided).

35. The respondents contend that the applicants have already filed tax appeals in respect of the demand notices challenged herein and have been given directions by the Tribunal on those appeals. The respondents therefore submit that the applicants are abusing the court process by forum shopping. It is submitted that the arguments raised herein by the applicants, including claims of estoppel by negligence and *ultra vires* conduct, can be raised before the Tribunal.

ii. Whether the 1st, 2nd, and 3rd Respondents deliberately violated the principles of natural justice

36. It is submitted that the respondents did not breach the rules of natural justice as the applicants rushed to Court when they received demand letters yet to date KRA has not carried out any enforcement. The case of **HC Misc. Civil Application No. 283 of 206, Kapa Oil Refineries Ltd v Kenya Revenue Authority & 3 others** is cited for the submission that the applicants should not be granted any orders as they prematurely approached the Court before their rights were violated by the respondents.

iii. Whether the 1st, 2nd, and 3rd Respondents acted *ultra vires* their mandate

37. The respondents submit that they followed the statutory procedure and did not act *ultra vires* their mandate. It is asserted that the seven days' notice to the applicants was because the tax benefit enjoyed was based on fraudulent or fictitious invoices and not actual sales as per the provisions of Section 42 of the VAT Act. Reliance is placed on the case of **Joyce Karambu Ringera v Resident Magistrate, Meru & another [2014] eKLR.**

iv. Whether the demands for payment the Respondents are malicious, arbitrary, oppressive unreasonable, unjust and a violation of the Applicants' right to a fair hearing

38. The respondents contend that the applicants have not proven that KRA was irrational, unreasonable, malicious and arbitrary or oppressive when it demanded payment of taxes. Further, that the demands were not issued out of mere suspicion but from the findings of a task force mandated to arrest tax evasion.

39. The respondents assert that the applicants were made aware of the findings through the demands and granted an opportunity to raise their objections once the assessments were raised. The respondents place reliance on the decision in **NRB HC Misc. Civil Application No. 119 of 2007: Match Masters Ltd v KRA Customs Department** for the submission that the impugned decisions cannot be said to have been irrational or unreasonable as they were based on investigations.

v. Whether the Applicants are entitled to the reliefs sought

40. The respondents argue that a prohibition order cannot be issued as no enforcement measures have been carried out except the issuance of the assessments. It is further contended that such an order cannot be granted if it is intended to prevent KRA from undertaking its statutory mandate of safeguarding and collecting government revenue.

41. It is argued that an order of mandamus cannot be issued as the 7th Applicant's passport was confiscated to prevent him from departing from the country awaiting the obtaining of the departure prohibition order.

42. It is also asserted that an order of certiorari cannot be issued to quash the departure prohibition order against the 7th Applicant because the tax disputes have not been determined and the 7th Applicant has not made arrangements with the respondents on the payment of the taxes. It is argued that his departure will frustrate the collection of taxes.

MISC JR. APPLICATION NO. 185 OF 2018

43. The ex parte applicants led by Steelstone (K) Limited ("herein after simply referred to as the applicants") approached the Court by way of a statutory statement dated 7th May, 2018 and the substantive notice of motion application dated 10th May, 2018 seeking the following reliefs:

"1. That the Court be pleased to grant the judicial review orders of:

a) **Certiorari to remove into this Honourable Court and quash the decision of the Respondent of declaring Value Added Tax (VAT) as unpaid as conveyed by the numerous Demand Notices without following due process as laid out in the Value Added Tax and in contravention to the Constitution.**

b) Prohibition directed at the Respondent prohibiting the Respondent/KRA, whether by itself, agents, servants or howsoever otherwise, from serving agency notices on the Applicant's bankers, freezing the Applicants' bank accounts, suspending the Applicants' PINs, threatening, intimidating, harassing, prosecuting the Applicants, or in any other way acting in enforcement and/or implementation of the demand notices served upon the Applicants herein.

2. That the Court be pleased to issue any other orders it deems just and fair in the circumstances.

3. That the costs of this Application be provided for."

44. The Respondent is Kenya Revenue Authority ("KRA").

The Applicants' Case

45. The issues raised in this application stem from the same circumstances as those in JR Application No. 211 of 2018. The application is supported by the affidavits of all of the applicants sworn on 7th May, 2018.

46. The applicants assert that KRA has frozen the bank accounts of the 16th Applicant. They aver that this action was taken arbitrarily before KRA determined the VAT claimed was indeed due. As in JR Application No. 211 of 2018, it is alleged that KRA has issued threats to the applicants including the threat to prosecute them if they do not pay the demanded taxes.

47. It is claimed that the Respondent breached Articles 26, 40, 41 and 43 of the Constitution. According to the applicants, the demand for payments within seven days is unreasonable and may cripple their businesses as they are unable to raise the amounts within such a short period. It is their case that paying the demanded amounts will render their businesses redundant and lead to grave financial losses affecting the livelihoods of hundreds of employees and in turn their rights to life, property, livelihood and employment. The applicants also claim that the Respondent's action of making demands based on documents that they alone are privy to and forcing the applicants to make payments within seven days is a clear violation of their right to human dignity under Article 28 of the Constitution.

48. The applicants further claim that the Respondent has breached the right to equal protection of the law under Article 27 of the Constitution by targeting businesses owned by persons of Asian descent.

49. The applicants further aver that Articles 35 of the Constitution has been violated as KRA is relying on *"preliminary information"* held by them alone, to harass the applicants. The applicants allege that they have attempted to get information from KRA but their requests have been declined.

50. Article 47 of the Constitution is also alleged to have been violated on the ground that KRA made demands without carrying out any assessment contrary to Rule 9 of the Seventh Schedule of the VAT Act; and that KRA demanded payments within seven days thereby ignoring the timelines stipulated by the VAT Act and TPA.

51. The applicants depose that KRA has acted *ultra vires* its mandate to collect taxes and has instead imposed new taxes and requirements for tax collection.

52. The applicants depose that by reclaiming the input tax, the Commissioner accepts that he made a mistake in allowing the applicants' claim for the input tax and is subjecting the applicants to suffer for his own mistake. Furthermore, it is contended that the Commissioner's actions are an admission of fault by KRA as the invoices presented to KRA for the goods supplied to them were issued by suppliers whose PINs were in KRA's system. It is additionally averred that the allegation by KRA that no goods were supplied lacks merit and no shred of evidence to this effect has been supplied.

53. The Respondent is further accused of breaching Article 48 of the Constitution by declining receipt of any letters of objection or any response or inquiry and only pushing for the payment of the demanded taxes. Further, that the Commissioner breached Article 50 for failing to give the applicants a chance to be heard or defend themselves regarding the claims.

54. The applicants contend that the doctrines of estoppel and legitimate expectation were also breached.

55. By way of a further affidavit sworn by Evans Ochieng' on 25th June, 2018, it is deposed that the Respondent has not filed a response to the 10th, 12th and 15th applicants' averments and has thus admitted the correctness and truthfulness and accuracy of the facts in their affidavits which remain uncontroverted and unchallenged.

56. It is deposed that the crux of the Respondent's case is that the applicants allegedly deducted input VAT in respect of purchases for which no supplies were made despite the applicants have annexed invoices for the purchases backed by bank statements showing payment. The applicants assert that the Respondent acted irrationally and unreasonably by alleging that no purchases were made.

57. It is also contended that the Respondent acted irrationally by targeting the wrong parties; and arbitrarily and in bad faith by raising assessments in respect to impugned demands which has paralysed the applicants' businesses. The applicants allege that some of them have therefore been forced to pay the impugned taxes under duress and in violation of their procedural rights and the provisions of Section 51(3) (b) of the TPA that restrains the Respondent from demanding payment of disputed taxes where objections are lodged.

58. The applicants aver that at the time of filing their application there was no forum outside of this Court which was competent to resolve this matter as the Tribunal was not properly constituted as the three-year mandate of the members of the Tribunal had expired in April 2018 and had not been extended.

The Respondent's Response

59. The Respondent filed a replying affidavit sworn by Patrick Ngoku on 8th June, 2018, and subsequent replying affidavits sworn on 20th June, 2018 in response to the notice of motion application dated 10th May, 2018 and the verifying affidavits of the 1st, 2nd, 6th, 8th and 16th applicants.

60. The Respondent avers that upon conducting investigations it unearthed a major tax evasion scheme and determined that the applicants had engaged in and benefited from the scheme. It is the Respondent's case that based on its preliminary findings and a review of the applicants' tax returns and declarations, it informed the applicants that they had underpaid taxes and demanded payment of the underpaid tax.

61. The Respondent asserts that since they had subsequently raised tax assessments in respect to the applicants, the letters communicating the preliminary findings had been overtaken by events and served no other purpose.

62. Further, that since the applicants had objected to the assessments, the Respondent had 60 days to make its objection decisions as per Section 51 of the TPA, and the time for making the decisions had not lapsed. The Respondent therefore urged that this suit was premature as the procedure under the TPA was still ongoing and should be given a chance to reach its logical conclusion.

63. The Respondent termed the allegation that it was targeting persons of Asian descent as baseless.

64. The applicants are alleged to be using the suit to circumvent express statutory provisions which is an outright abuse of the court process. Further, that the Respondent is empowered under Section 42(3) as read with Section 66 of the VAT Act to demand tax emanating from tax avoidance schemes and demand the underpaid taxes within seven days or issue assessments for the same.

65. The Respondent contends Rule 9 of the Seventh Schedule of the VAT Act relied on by the applicants does not exist. Also, that demands for payments within seven days were issued after it became apparent that the applicants were involved in tax evasion which is a criminal offence and the applicants had a right to object to the demands as per Section 51 of the TPA. It is averred that the sixty days for making an objection decision only applied where a taxpayer had filed a valid objection to an assessment, and that in any event, the sixty days had not lapsed as at the time the applicants moved to this Court.

66. The Respondent asserts that it has an obligation to pursue tax evaders and that the statutory mechanisms for resolving disputes should first be exhausted before invoking judicial review.

The Applicants' Submissions

67. The applicants filed written submissions dated 28th June, 2018 and submit that the issues for determination are:

i. Whether this Court has jurisdiction over the instant case, and whether the judicial review proceedings are competently before the Court

68. The applicants submit that this Court has broad jurisdiction to determine the instant case competently, and the requisite powers to remedy the rights violated by issuing judicial review orders. Reliance is placed on the judgment in **Ernst & Young LLP v Capital Markets Authority & another [2017] eKLR.**

69. The applicants reject, as baseless and legally untenable, the Respondent's contention that the statutory mechanisms under the TPA have not been exhausted. It is argued that Section 51 of the TPA requires the applicants to lodge notices of objection with the Commissioner of Domestic Taxes yet the same Commissioner issued the impugned demand notices and hence is not independent and impartial. Further, that Section 52 of the TPA contemplates appeals from the Commissioner's decision to be filed before the Tribunal, which Tribunal, according to the applicants, was not properly constituted.

70. It is submitted that Section 10 of the TATA requires at least three members to constitute a panel for any proceedings before the Tribunal, and that at the time of filing submissions the Chairperson was the sole member of the Tribunal. The applicants therefore contend that the prescribed statutory remedies were ineffectual and incapable in law to give reliefs to the ex parte applicants, and their sole recourse was to this Court.

ii. Whether the substantive judicial review motion has merit and should be allowed

71. The applicants submit that the substantive motion is merited and should be allowed on the grounds that the impugned demand notices were illegally issued and therefore amounted to an abuse of power; that there was impropriety in procedure and failure to follow due process in issuing the demand notices thereby subjecting the ex parte applicants to unfair administrative action and breach of their rights to natural justice; and, that the demand notices have an improper motive of coercing the applicant companies, which are owned by persons of Asian

descent, to unfair and discriminatory treatment.

72. Still on the assertion that the Respondent violated the right to protection from discrimination under Article 27 of the Constitution, it is submitted that the notices are directed to persons from one community showing that KRA deliberately targeted companies run, owned and managed by persons of Asian descent.

73. On the alleged violation of the right to access information under Article 35, it is asserted that the KRA has withheld information which informed their decision to issue the demand notices. According to the applicants, KRA bore the legal and constitutional burden to furnish them with such information, with sufficient details, to enable them to answer to the allegations in line with their constitutional right to a fair hearing. Additionally, that the Respondent had assumed guilt of the applicants based on preliminary information, and no follow up was given on what became of the preliminary information and the applicants were not invited to provide rebutting information.

74. The applicants assert that their right to life, right to property, right to employment, and economic and social rights under Articles 26, 40, 41 and 43 of the Constitution were violated by the issuance of the demand notices.

75. The applicants contend that the right to fair hearing under Article 50(1) was breached as the Respondent found the applicants guilty, determined the quantum of their liability, and sentenced them by ordering that the liability must be discharged in seven days lest punitive action be taken, all before notifying the applicants of any inquiry and inviting any representations on the issue.

76. It is argued that the right to a fair hearing was denied for reasons that the demand notices presumed the guilt of the applicants; that the short notice denied them adequate time and facilities to prepare a defence; and the notices did not inform the applicants of their right to seek recourse either on appeal or review. The arguments are supported by reference to the decisions in **Pashito Holdings Ltd & another v Paul Nderitu Ndung'u & others [1997] 1 KLR (E&L),** and **Republic v Fazul Mahamed & 3 others ex p. Okiya Omtata Okoiti [2018] eKLR.**

77. It is submitted that KRA is estopped from making its demands as they already audited the accounts of the applicants and gave them clearances, and the applicants' claims for VAT were accepted by the Commissioner for VAT without any questions. According to the applicants, KRA cannot now claim its earlier decisions of clearing the applicants were wrong. This position is supported by the case of **Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited [2015] eKLR.**

78. Concerning the doctrine of legitimate expectation, the applicants submit that the VAT Act at Section 11 of the Seventh Schedule provides that the documents required while claiming input tax are an invoice and ETR receipt. The applicants assert that they met the threshold and therefore any demand for other documents or requirements is an attempt to amend the law. It is further submitted that the Commissioner's actions are an admission of fault as the invoices presented to the applicants for the goods supplied were done by suppliers whose PINs were in the Respondent's iTax system. Also that the applicants were issued with ETR receipts and the ETR system is managed by KRA.

79. It is therefore urged that the circumstances established a legitimate expectation that KRA had verified and satisfied itself on the regularity and propriety of the ETR receipts, which led the applicants to believe that they had satisfied their VAT obligations. The Respondent, it is submitted, cannot therefore contend that the VAT obligations were not met, absent of a hearing and concrete proof which has not been provided. Reliance is placed on the decisions in **CCSU v Minister for Civil Service [1984] 3 All ER 935**; **R v Devon County Council ex p. Baker [1995] 1 All ER;** and **Keroche Industries Ltd v KRA & 5 others [2007] eKLR.**

80. On the issue of procedural impropriety and arbitrariness, it is submitted that the right to fair administrative action under Article 47 of the Constitution was violated for the reasons already provided under the statutory statement and verifying affidavits of the applicants. It is contended that KRA acted *ultra vires* its mandate which is to collect tax in accordance with the law as opposed to imposing new taxes or requirements for tax collection. The applicants contend that KRA failed to meet any of the prescriptions under the Section 4 (3) & (4) of the FAA Act, the VAT Act, and the TPA.

iii. Powers of the Court in Judicial Review

81. It is submitted that the Court has supervisory jurisdiction and is empowered to interrogate the legality, rationality and procedural propriety in the manner in which a decision is made and to intervene where constitutional and statutory provisions are not complied with. The applicants assert that they have justified the grant of the orders of certiorari and prohibition. The assertions are supported by the decisions in **Republic v PPARB & 3 others ex. p. Saracen Media Ltd [2018] eKLR;** and **R v KNEC ex p. Geoffrey Gathenji Njoroge & 9 others [1997] eKLR.**

82. The applicants filed supplementary submissions dated 1st November, 2018 in support of and furtherance of their written submissions.

The Respondent's Submissions

83. The Respondent filed submissions dated 18th December, 2018. It is submitted that the High Court's Judicial Review Division is not the appropriate forum for this matter. The Respondent avers that the proper forum for this matter as envisioned in Article 169(2) of the Constitution is the Tribunal.

84. The Respondent outlines the procedure for an aggrieved taxpayer to raise concerns against a tax decision. It is stated that the procedure as provided under Section 51 of the TPA dictates that a taxpayer shall first lodge a notice of objection, and if dissatisfied with the objection decision, appeal to the Tribunal. They rely on the holdings in **Ex-Parte New Frarims Wholesalers Limited (supra);** and **Grain Bulk Handlers Ltd (supra).**

85. The Respondent further relies on sections 7 and 9 of the FAA Act to support the argument that the Tribunal has the jurisdiction to deal with the matter as part of the internal mechanism provided by the TPA. This argument is supported by reference to the decision in **The Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme (supra).**

86. The Respondent submit that this application is an appeal disguised as a judicial review matter as the issues raised by the applicants are questions that can only be addressed through an examination of the evidence against each of the applicants.

87. It is contended that the matters are currently before the Tribunal as the applicants filed appeals, and therefore the Court should not grant the remedies sought. It is asserted that granting orders may scuttle the proceedings before the Tribunal.

88. On whether the matter has satisfied the test for judicial review to warrant grant of the remedies being sought, it is submitted that the applicants have failed to prove that the Commissioner acted outside the law in sending out the demand notices. The Respondent asserts that the applicants were afforded time to respond and were sent constant reminders but they elected against responding to the queries raised. Reliance is placed on the decisions in **Republic v Public Private Partnerships Petition Committee (The Petition Committee) & 3 others Ex Parte APM Terminals** (citation not provided); **Republic v National Environment Management Authority** (citation not provided); **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR eKLR; Kenya Revenue Authority & 2 others v Darasa Investments Limited, Civil Appeal No. 24 of 2018;** and **Republic v Principal Secretary Ministry of Mining ex-Parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR.**

The Analysis

89. I have carefully considered the arguments put forward by the parties herein, and, in my view, the issues for the determination of this Court are:

a) Whether this Court has jurisdiction over the instant case;

b) Whether the respondents failed to follow due process and therefore acted *ultra vires;*

c) Whether the respondents violated the rules of natural justice and the applicants' rights under Articles 26, 27, 28, 35 and 47 of the Constitution; and

d) Whether the applicants are entitled to the reliefs sought.

Whether the Court can adjudicate on the matters herein

90. In the ruling I delivered herein on 9th March, 2019 I observed that:

> **"In the matter before me the ex-parte applicants have complained that they were not afforded an opportunity to be heard before they were issued with the tax demand notices by KRA. These are indeed complaints that fit into the judicial review docket. What the Respondents are required to do is to establish that all proper procedures were followed and the impugned decision was not illegal, unfair or irrational."**

91. The scope of judicial review proceedings has been affirmed in several decisions. In **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR**, it was stated that:

> **"91. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters."**

92. I also rely on the holding in **Republic v Secretary of the Firearms Licensing Board & 2 others Ex -parte: Senator Johnson Muthama [2018] eKLR** that:

> **"22. Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. It is notable that in the present proceedings, this Court is being asked in exercise of its supervisory jurisdiction, to review the lawfulness of the 1st Respondent's decision.**
>
> **23. For such a decision to be amenable to judicial review, it must affect an individual's interests and should arise out of the exercise of a public function, which in essence qualify them as quasi-judicial functions. It thus goes without saying that where a public officer has been granted statutory powers, the exercise of such powers is subject to the supervisory jurisdiction of the Court. In the present case, the 1st Respondent's decision clearly affects the Applicant's rights to the security of his person, and it is the duty of the Court to ensure that the exercise of such powers is legal, rational and compliant with the principles of natural justice….**
>
> **28. In the present application the Applicant is challenging the exercise of the 1st Respondent's statutory powers under the Firearms Act, and in particular alleging that his rights to fair administrative action have been infringed in the exercise of**

that power. This is thus a function and power that is not only amenable to judicial review, but is also justiciable, and therefore within the jurisdiction of this Court."

93. The applicants herein are alleging that the respondents exercised their tax collection powers without due regard to the procedures established by statute. The applicants complain that the proper procedures were not followed and as a result their rights were infringed, thus inviting the jurisdiction of the Court under Article 165(6) of the Constitution.

94. The respondents raise the argument that this application is an appeal disguised as a judicial review application. The respondents are correct to some extent. The applicants have indeed raised some issues which are beyond the scope of judicial review. For instance, in the supplementary submissions dated 1st November, 2018 filed in JR Misc. Application No. 185 of 2018, the applicants raise substantive issues such as the issue of KRA *"purporting to illegally characterize lawful trades as Tax Avoidance Schemes"*. However, it must always be remembered that judicial review proceedings are not fact-finding or truth-finding proceedings. What is established through judicial review proceedings is whether an action was done, or a decision was made in compliance with the statutory procedure, the rules of natural justice and the decision is rational.

95. On this I draw support from the Court's holding in **Republic v Divisional Criminal Investigation Officer (DCIO) Langata & 2 others; Cyril Global Investment Limited & 3 others (Interested Parties) Ex Parte Coast Price Motor Limited [2019] eKLR** that:

"22. It is an established position that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue, which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. Resolving the question of ownership would require direct evidence to be adduced and tested through cross-examination of witnesses before the court can determine which of the two logbooks is genuine."

96. There is the issue as to whether the applicants exhausted the mechanisms established by statute for resolving disputes before approaching this Court. The submission by the applicants that a decision made under Section 66 of the VAT Act is not a tax decision as defined by Section 3 of the TPA is without merit. Decisions made under the VAT Act are brought under the provisions of the TPA by Section 2 of the TPA which provides the object and purpose of the Act as follows:

"2. Object and purpose of the Act

(1) The object and purpose of this Act is to provide uniform procedures for—

(a) consistency and efficiency in the administration of tax laws;

(b) facilitation of tax compliance by taxpayers; and

(c) effective and efficient collection of tax.

(2) Unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under this Act shall apply.

(3) This Act shall be interpreted to promote the object of the Act.

97. However, the applicants have stated that at the time of filing their applications the Tribunal was not properly constituted. The respondents did not answer this averment. The applicants had been given a short period within which to pay the demanded amounts. They were therefore entitled to seek justice from the courts as that was the only available forum at that time.

98. It is also observed that the applicants have raised issues falling within the judicial review jurisdiction and the Court should address those issues. Therefore, I will only be answering the question of whether the respondents in sending out the tax demands to the applicants failed to follow the correct procedure laid out under the TPA and the VAT Act thereby infringing the applicants' rights under the Constitution and the FAA Act.

99. On the substantive issues raised by the applicants concerning their alleged participation in tax avoidance schemes and their subsequent liability to pay the impugned taxes, I concur with the respondents that the Tribunal is better placed to determine the issues as the same are issues of fact. It is not disputed that the Tribunal is now properly constituted thereby providing an avenue for persons aggrieved by the decisions of the Commissioner to address such grievances. That the Tribunal is now functional is confirmed by the applicants' reliance on a decision issued by the Tribunal on 25th March, 2020.

Whether the Respondents failed to follow due process and therefore acted *ultra vires* their mandate

100. The applicants assert that the respondents acted *ultra vires* as they issued demand notices before issuing amended assessments, and failed to give them sufficient opportunity to respond to the claims against them. The applicants depose that KRA ignored the mandatory statutory requirements before making the demands. The respondents assert that they followed the laid down procedural requirements and acted according to the law.

101. To ascertain whether the proper procedure was followed, the applicable law needs to be considered. I have perused the VAT Act and cannot find the Seventh Schedule referred to by the applicants. The Seventh Schedule was indeed found in the VAT Act, Cap. 476 which was repealed by Section 88(1) of the VAT Act No. 35 of 2013 which is the current law. However, the proper procedure is provided for in

sections 42 and 66 of the VAT Act and Section 31 of the TPA. Sections 42 and 66 of the VAT Act provides as follows:

"42. Tax invoice

(1) Subject to subsection (2), a registered person who makes a taxable supply shall, at the time of the supply furnish the purchaser with the tax invoice containing the prescribed details for the supply.

(2) No invoice showing an amount which purports to be tax shall be issued on any supply—

(a) which is not a taxable supply; or

(b) by a person who is not registered.

(3) Any person who issues an invoice in contravention of this subsection commits an offence and any tax shown thereon shall become due and payable to the Commissioner within seven days of the date of the invoice.

(4) A registered person shall issue only one original tax invoice for a taxable supply, or one original credit note or debit note, but a copy clearly marked as such may be provided to a registered person who claims to have lost the original….

66. Tax avoidance schemes

(1) Notwithstanding anything in this Act, if the Commissioner is satisfied that—

(a) a scheme has been entered into or carried out;

(b) a person has obtained a tax benefit in connection with the scheme; and

(c) having regard to the substance of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme did so for the sole or dominant purpose of enabling the person referred to in paragraph (b) to obtain a tax benefit, the Commissioner may determine the tax liability of the person who obtained the tax benefit as if the scheme had not been entered into or carried out.

(2) If a determination is made under subsection (1), the Commissioner shall issue an assessment giving effect to the determination.

(3) A determination under subsection (1) shall be made within five years from the last day of the tax period to which the determination relates."

102. The relevant provisions of Section 31 of the TPA provides that:

"(4) The Commissioner may amend an assessment—

(a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or

(b) in any other case, within five years of—

(i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or

(ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment….

(8) When the Commissioner has made an amended assessment, he or she shall notify the taxpayer in writing of the amended assessment and specify—

(a) the amount assessed as tax or the deficit or excess input tax carried forward, as the case may be;

(b) any amount assessed as late payment penalty payable in respect of the tax assessed;

(c) any amount of late payment interest payable in respect of the tax assessed;

(d) the reporting period to which the assessment relates;

(e) the due date for payment of any tax, penalty or interest being a date that is not less than thirty days from the date of the taxpayer received the notice; and

(f) the manner of objecting to the assessment."

103. I have reviewed the evidence provided by the parties and it is noted that the applicants were required to pay the unpaid taxes within seven days. In reading Section 66 of the VAT Act together with Section 31(8) of the TPA, it is clear that the respondents are pursuing the applicants not only for irregular invoices but also for underpaid taxes which means that amended assessments should have been issued prior to the demands, and the proper timeline for the payment of any tax would be not less than 30 days.

104. Moreover, as provided in Section 31(8) of the TPA, the respondents were obligated to inform the applicants of the manner of objecting to the assessment, which they did not do. These procedures are not discretionary as they are expressly provided for under the law.

105. Even if the respondents were demanding for the tax from the applicants under Section 48 of the TPA which allows the Commissioner to demand repayment from a taxpayer of any erroneous refund, Sub-section 2 provides that *"the amount to be paid shall be due on the date set out in the letter of demand which shall not be at least thirty days from the date of service of the letter of demand."* The provision therefore provides a notice period of not less than 30 days.

106. In **Republic v Public Procurement Administrative Review Board & 2 others [2019] eKLR; Nairobi HC Misc. Civil Application No. 187 of 2018** it was postulated that:

> **"29. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness. Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety….**
>
> **67. The ultra vires principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. 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 also established its limits."**

107. An *ultra vires* action is one which is taken either when the administrator does not have the capacity to make a particular decision or take a particular action; or where the administrator has the capacity but fails to follow the laid down procedure for making such a decision or action. KRA was established with the mandate of assessing and collecting revenue, and the administrative enforcement of the laws relating to revenue. Even though KRA has the authority to collect taxes, including unpaid taxes, the exercise of such powers must still be done according to the law.

108. The respondents in exercising their authority failed to follow the proper procedure before making demands for unpaid taxes. By failing to provide the applicants with amended tax assessments, failing to give them not less than 30 days to respond, and not informing them of their option for objecting to the proposed actions, the respondents acted *ultra vires* and failed to follow the due process.

Whether the Respondents violated the rules of natural justice and the Applicants' rights under the Constitution

109. According to Section 4(3) the FAA Act:

> **"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—**
>
> **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
>
> **(b) an opportunity to be heard and to make representations in that regard;**
>
> **(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
>
> **(d) a statement of reasons pursuant to section 6;**
>
> **(e) notice of the right to legal representation, where applicable;**
>
> **(f) notice of the right to cross-examine or where applicable; or**
>
> **(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

110. As already established, the respondents failed to meet the first requirement for fair administrative action as the applicants were not given adequate notice to respond to the tax demand. The respondents were also required to serve each applicant with amended assessments. In my

view, an amended assessment serves as a notice to a taxpayer that the self-assessment tax returns they submitted was incorrect for whatever reason. The procedure of recovering the unpaid tax begins upon the issuance of the amended assessment. Without the amended assessment, the respondents have flouted the whole procedure.

111. The failure by the respondents to provide the applicants with sufficient notice violated the applicants' right to a fair hearing and the short notices actually amounted to a complete denial of that right. The applicants were therefore denied an opportunity to make representations in their favour. The language of the demand notices given to the applicants is an indication of this.

112. The right to a fair hearing under Article 50 of the Constitution of Kenya, or the natural justice doctrine of ***audi alteram partem,*** dictates that an individual who is accused of wrongdoing must be presumed innocent until the contrary is proven; should be informed in detail of the charge against them to allow them to respond sufficiently; should have adequate time and facilities to prepare a defence; should be informed in advance of the evidence the persecution intends to rely on; and should be allowed reasonable access to that evidence. The shortening of the statutory period which the applicants were allowed to object to the tax demands denied them an opportunity to mount defences by way of objections to the demands.

113. In **Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR** it was held that:

> **"57. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, *Halsbury's Laws of England*, 5th Edn. Vol. 61 page 545 at para 640 states:**
>
> > **'The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…*The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases.*' "**

114. The right to be heard, which is a significant requirement, can be met in various ways. In the case of an amended assessment issued by the Commissioner, that right is exercised by the taxpayer through the filing of an objection to the amended assessment. The right is curtailed where the Commissioner shortens the notice period provided by statute. It is clear from the evidence and arguments put before me that the applicants were not afforded an opportunity to be heard or to prepare defences. I concur with the applicants that the respondents failed to afford them an opportunity to be heard thus violating the right to fair administrative action.

115. On the issue of legitimate expectation, I rely on the decision in **Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR** where it was held that:

> **"17. 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. Firstly it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is 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, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. 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."**

116. It was additionally stated in the case of **Republic v Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR** that:

> **"55. It is a requirement that for the doctrine of legitimate expectation to be successfully invoked, the expectation must in the first place be legitimate "in the sense of an expectation which will be protected by law". See R vs. Department for Education and Employment, ex p Begbie [2000] 1 WLR 1115, 1125C-D. This was the view adopted in Royal Media Services Limited & 2 Others vs. Attorney General & 8 others [2014] eKLR where it was held that:**
>
> > **'...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.' "**

117. The applicants' legitimate expectation is a procedural one, as they anticipated that the respondents would follow the laid down procedures by furnishing them with amended assessments and granting them 30 days to respond to the same before the issuance of demand notices. The applicants' legitimate expectation is founded on legal procedure and protected by the VAT Act and TPA as well as the Constitution and the FAA Act. I, therefore, concur with the applicants that their legitimate expectation that the law would be followed in the collection of taxes was violated by the respondents.

118. The applicants also assert that the actions of the respondents were targeted at persons of Asian extraction and companies owned by them thereby confirming discrimination which violates Article 27 of the Constitution. In the case of **Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR** the Court in paragraph 27 referred to the decision in **Peter K Waweru v Republic [2006]**

eKLR where it was held that:

> ***"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to … restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description… Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex … a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."***

119. The respondents submit that it is not only the applicants before this Court who were accused of tax fraud. According to the respondents, the applicants have not demonstrated that other taxpayers issued demand notices similar to those of the applicants were from the Asian community. I agree with the respondents. The applicants claim of discrimination is very casual and not backed by any evidence. The respondents' claim that they acted after carrying out investigations into tax evasion schemes has not been rebutted. If the investigations netted members of one community, then that cannot be used as a reason for concluding that the right against discrimination under Article 27 of the Constitution was violated by the respondents.

120. The applicants also argue that the unreasonable demands for payment within seven days, the loss of reputation and goodwill, and the threats to initiate the recovery of the claimed unpaid taxes violated their rights to property under Article 40 and the economic and social rights under Article 43 of the Constitution. Demand for taxes that are owed by a taxpayer cannot be said to violate constitutional rights. This Court has not determined that the applicants were not involved in tax evasion. What this Court has established is that the law was not followed in the demand for the taxes. There is room for the respondents to demand for the same taxes in compliance with the law. I therefore do not agree with the applicants that their rights under Articles 40 and 43 of the Constitution were violated by the respondents.

Whether the Applicants are entitled to the reliefs sought

121. The applicants have demonstrated that the respondents acted *ultra vires* their mandate and that their right to fair administrative action was violated. They are therefore entitled to appropriate reliefs.

122. Section 11 of the FAA Act enumerates the various reliefs available to right the violation to the right to fair administrative action. The applicants herein are seeking orders of certiorari, mandamus and prohibition which all fall within the purview of said provision. In **Republic v Public Procurement Administrative Review Board & 2 others (supra)** it was held that:

> **"72. Certiorari issues to quash a decision that is ultra vires. Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. 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.**
>
> **73. Since the grant of the orders or certiorari, mandamus and prohibition is discretionary, the court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought..."**

123. The respondents have not shown why the discretion bestowed upon this Court to grant any of the judicial review remedies should not be exercised in favour of the applicants. As I have determined above the applicants have established their case against the respondents. The respondents acted *ultra vires* and violated the applicants' legitimate expectation and their right to fair administrative action. This Court is therefore satisfied that there is a basis for granting some of the orders sought.

124. There was the assertion by the respondents that assessments had been issued and some of the applicants had already filed objections and even appeals before the Tribunal. According to the respondents, issuing orders in this case would interfere with the appeals before the Tribunal. The answer to this argument is found in the decision of **Republic v Registrar of Companies Ex Parte Transglobal Freight Logistics Limited [2008] eKLR** where it was held that:

> **"I therefore hold the view as expressed by Lord Diplock in the CCSU vs Minister for the Civil Service (supra), that the matter being already in court, the decision-maker could not isolate one party. It was the Applicant's legitimate expectation that he would not only be informed of any moves to take away the matter from the court, but that he would also be heard in controverting the proposed decision."**

125. The matter was before the Court by the time KRA purported to issue amended assessments. It is like KRA was admitting to the issues raised by the applicants in the consolidated matters. KRA ought to have come to Court and conceded to its failure to follow the statutory process before issuing the amended assessments. The issue before this Court is the failure to follow the law by the respondents and that failure cannot be corrected by attempting to follow the law after the fact.

Determination and Orders

126. It is my determination that the respondents have acted *ultra vires* and in violation of the applicants' rights by issuing them with demands, and in some cases executing enforcement mechanisms, before granting the applicants an opportunity to be heard. The respondents also failed to follow the procedures set out in the VAT Act and the TPA by failing to provide the applicants with amended assessments. The applicants were asked to act within timelines that were shorter than those provided by the tax statutes hence denying them their statutory right to file objections to the tax demands.

127. It is for the above reasons that the consolidated applications are allowed and an order of certiorari is hereby granted removing into this Court and quashing the decision of the 1st, 2nd and 3rd respondents of demanding VAT through the demand notices sent to the applicants without following due process as laid out in the Value Added Tax Act, 2013, the Tax Procedures Act, 2015, and in contravention with the Constitution. Issuance of orders of prohibition and mandamus in the manner sought by the applicants can only serve to impede the respondents in the execution of their statutory mandates. I therefore conclude that the issuance of an order of certiorari is sufficient in the circumstances of this case.

128. For avoidance of doubt, this judgement is limited to the impugned demand notices and does not apply to the applicants who withdrew from this proceedings prior to the delivery of this judgement. The judgement does not also quash any criminal prosecutions commenced against any of the applicants in regard to the *"missing trader"* fraud.

129. As for costs, I see no reason why they should not follow the event. The applicants in the consolidated petitions are therefore awarded costs against Kenya Revenue Authority.

Dated, signed and delivered virtually at Nairobi this 12th day of November, 2020.

W. Korir,

Judge of the High Court