REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 117 OF 2017

In the matter of an application by Sanofi Aventis Kenya Limited for Judicial Review orders of Certiorari and Prohibition

and

In the matter of the Tax Procedures Act

Between

Republic.....Applicant

versus

The Commissioner General,

Kenya Revenue Authority.....Respondent

And

Sanofi Aventis Kenya Limited.....*Ex parte* applicant

JUDGMENT

The parties

1. The applicant is a limited liability registered under the Companies Act.[1] It is a wholly owned subsidiary of Sanofi-Aventis Participants incorporated in France. Its main business includes the registration, promotion and marketing of pharmaceutical products on behalf of non-resident related entities within the East African Region.

2. The Respondent is the Commissioner General, Kenya Revenue Authority (KRA), a body corporate with perpetual succession and a common seal established under section 3 of the Kenya Revenue Authority Act,[2] (herein after referred to as the KRA Act). Pursuant to section 5 of the act, KRA under the general supervision of the Minister, is an agency of the Government for the collection and receipt of all revenue. Under sub-section (2) of the said section, in the performance of its functions under subsection (1), the Authority shall—

a) administer and enforce—

i. all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;

ii. the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;

b) to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and

c) to perform such other functions in relation to revenue as the Minister may direct.

Factual Matrix and legal foundation of the application

3. The applicant states that the Respondent audited its business for the period between January 2012 to June 2015, and, by a letter dated 28th June 2016, the Respondent notified the applicant its Notice of Preliminary Findings detailing a VAT liability of Ksh. 197,065,433/= inclusive of penalties and interests. The applicant states that by a letter dated 11th July 2016, it informed the Respondent that it had misunderstood its business operating model and misinterpreted the law. However, vide a letter dated 9th November 2016, the Respondent made a tax decision assessing the applicants tax at Ksh. 198, 548,926/= being VAT and interests.

4. In addition, the applicant states that it objected to the said decision within 30 days as provided under section 51 (11) of the Tax Procedures Act,[3] (herein after referred to as the TPA), and, that, the Respondent was required to make an objection decision within 60 days from the date of objection failing which the objection stood as allowed. The applicant states that by a letter dated 6th February 2017, the Respondent delivered the purported objection decision affirming its tax decision dated 9th November 2016. The applicant states that having objected on 6th December 2016, the Respondent was required to have made its objection decision on or before 4th February 2017. The applicant states that the Respondent's objection decision dated 6th February 207 was time barred and of no legal consequence having been made outside the statutory period i.e. 63 days after the applicant had lodged its Notice of Objection.

5. Also, the applicant states that by a letter dated 21st February 2017, the Respondent demanded settlement of the above sum within 7 days in default, enforcement action would be taken. It states that the said demand has no legal basis because under section 51 (11) of the TPA, its objection was allowed by operation of the law.

6. In addition, the applicant states that by letters dated 16th February 2017 and 23rd February 2017, KPMG Ltd on the applicant's instructions wrote to the Respondent informing it that the objection decision dated 6th February 2017 was time barred as it had not been made within 60 days as provided by section 51(11) of the TPA, but the Respondent never responded to the said letter. The applicant states that since the Respondents decision dated 6th February 2017 was time barred, the threatened enforcement action is *ultra vires* and void *ab initio.*

Reliefs sought

7. The applicant prays for the following orders:-

> *a. An order of certiorari to quash the Respondent's decision dated 6th February 2017 demanding the payment of Ksh. 198,548,926/=.*
>
> *b. An order of prohibition prohibiting the Respondent, its servants and or agents from demanding the payment of Ksh. 198,548,926/= as assessed or at all and from commencing any enforcement action against the applicant for the recovery thereof.*
>
> *c. Costs to be awarded to the ex parte applicant.*

Respondent's Replying Affidavit

8. Loyford Kubai, an officer appointed under section 13(3) of the KRA Act swore the Replying Affidavit dated 12th April 2017. He averred that under Part 1 of the KRA Act, the Respondent administers among others the Value Added Tax Act[4] (VAT Act) and the TPA under which this dispute falls. He deposed that he was personally involved in the audit review of the applicant's tax and that in the course of performing its functions under the KRA Act, the Respondent issued the applicant with a Notice of Intention to Audit under the Income Tax Act[5] and section 30 of the VAT act vide a letter dated 3rd August 2015 for an in-depth audit of the applicants tax issues for the years of income 2012, 2013 and 2014.

9. He averred that subsequent to the said Notice, the Respondent commenced the audit and upon conclusion, the findings of the audit were communicated to the applicant via a letter dated 28th June 2016. He deposed that the Respondent established a VAT liability of Ksh. 197,065,433/= and explained to the applicant how the tax liability was arrived at. He stated that the applicant responded through its tax agents objecting to the findings vide a letter dated 11th July 2016. In addition, he averred that in the course of the audit, the Respondents officers engaged the applicant in various discussions and or meetings with a view to resolving the issues which arose during the audit.

10. Mr. Kubai also deposed that by a letter dated 9th November 2016, the Respondent communicated to the applicant its final position confirming a tax liability of Ksh. 198,548,926/= inclusive of penalty and interest. He stated that the Respondent generated a tax assessment for the said sum and notified it of its right to appeal. He deposed that instead of appealing, the applicant objected again to the Respondent's decision vide its letter of 6th December 2016, but, the Respondent vide a letter dated 6th February 2017 reiterated its letter dated 9th November 2016. He averred that the applicant wrote on 16th February 2017 indicating that since the commissioner did not make a decision within 60 days, it considered the objection as allowed under section 51 (11) of the TPA.

11. Mr. Kubai also stated that the Respondent vide a letter dated 21st February 2017, notified the applicant's tax agents that their objection dated 11th July 2016 had been dealt as per letter dated 9th November 2016. Further, he deposed that the applicant was informed of its right to appeal, but he failed to appeal within the stipulated period. He averred that the arrears were properly demanded, and, that, the objection was dealt with as per the law.

12. Lastly, he averred that the applicant approached the court pre-maturely in that he did not exhaust the dispute resolution mechanism laid down by the statute and added that judicial review does not deal with merits of a decision.

Respondent's Further Affidavit

13. In his further affidavit dated 20th November 2017, Mr. Kubai reiterated his earlier affidavit and averred that the Respondent notified the applicant about the finality of its decision. He deposed that instead of appealing as advised, the applicant filed another objection dated 6 th December 2016 and requested for a meeting which was scheduled for 31st January 2017. However, the said meeting was moved to 6th February 2017, and, after the meeting, the Respondent by a letter dated 6th February 2017 reiterated its earlier decision dated 9th November 2016, hence, the argument that the decision was not made as per section 52(11) of the TPA is wrong.

Issues for determination

14. Upon considering the parties diametrically opposed positions, I find that the following issues distill themselves for determination:-

a. Whether this suit offends the doctrine of exhaustion of remedies.

b. Whether the impugned decision is tainted with illegality.

c. Whether the applicant is entitled to any of the orders sought.

a. Whether this suit offends the doctrine of exhaustion of remedies.

15. The applicant's counsel relied on *Silver Chain Limited v Commissioner Income Tax & 3 others*[6] which held as follows: -- (a) in revenue matters it is unusual to apply for judicial review because there are well established procedures provided under the law; (b) the fact that there is an alternative procedure provided does not mean that an application for judicial review should never be made, even though it should be made as a last resort. In addition, counsel relied on *Republic v Commissioner of Customs, Kenya Revenue Authority*[7] for the holding that where there is no decision made, the the remedy under the act would be less effectual.

16. In addition, the applicant's counsel argued that sections 8 and 9 of the Law Reform Act[8] and Order 53 of the Civil Procedure Rules, 2010 which provide for Judicial Review have not been repealed. He cited section 12 of the Tax Appeals Tribunal Act[9] (herein after referred to as the TAT act) and argued that the Tax Appeals Tribunal is a forum for appeals. He referred to section 20(2) of the TAT Act and argued that the Tribunal has the status of a subordinate court while the Law Reform Act[10] and the Fair Administrative Action act[11] (herein after referred to as the FAA act) confer Judicial Review powers to the court. He went further to argue that "the judicial review envisaged in section 9(1) of the FAA act is different from the review contemplated in section 9(2) of the same provision."

17. Counsel proceeded to explain the differences between an appeal and a review[12] and argued that the instant dispute is purely a matter of statutory interpretation as to whether the Respondent made the objection decision within time, which does not require the specialized knowledge of the Tribunal. To buttress his argument, he cited *Gauteng Gambling Board v Silver Star Development*[13] for the proposition that it is a constitutional imperative that an administrative action must be lawful and submitted that the impugned decision was invalid. He further relied on *Republic v Kenya Revenue Authority ex parte M-Kopa Limited*[14] and *Republic v Commissioner of Customs Services ex parte Unilever Kenya Limited.*[15]

18. The question of the doctrine of exhaustion was first raised by Mr. Kubai in his Replying Affidavit. He deposed that the applicant approached the court pre-maturely because he did not exhaust the dispute resolution mechanism laid down by the statute.

19. The Respondent's counsel in her written submissions referred to sections 51(1), 3 and 52 (1) of the TPA act and argued that the impugned decision was an appealable decision under the act, and, therefore not a matter for judicial review court. In her oral highlights counsel referred to section 9 of the FAA act and argued that the said provisions are mandatory, hence, the applicant ought to have filed its appeal at the TAT.

20. 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. 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.

21. The preamble to the TAT act 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; [16] (b) the Customs and Excise Act;[17] or (c) the Value Added Tax;[18] (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner.

22. Section 3 of the TAT act establishes a Tribunal known as the Tax Appeals Tribunal 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 valid contest before me that the decision under challenge in these proceedings is a tax decision within the said definition. 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, may appeal to the Tribunal; Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

23. The foregoing provisions warrant no explanation. The contested decision falls within the above definition. The other argument propounded by the applicant was that since the decision was made on the 63rd day, that is, outside the 60 days provided under the law there was no decision at all. I will address this argument later, for now it is sufficient to state that the impugned decision was an appealable

decision within the above definition. First, I will address the doctrine of exhaustion of administrative remedies.

24. The doctrine 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. This doctrine is now of esteemed juridical lineage in Kenya.[19] It was felicitously stated by the Court of Appeal[20] in *Speaker of National Assembly vs Karume*[21] in the following words:-

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

25. Even though the above case was decided before the promulgation of 2010 Constitution, many Post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution.[22] For example, the Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others*.[23] It stated that:-

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

26. The High Court added its voice to the doctrine in the *Matter of the Mui Coal Basin Local Community*,[24] thus:-

> *"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 J.B. Ojwang' has felicitously called an "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 creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."*

27. At least two principles are clear from the above case law. *First*, 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.[25] 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.

28. From the statutory definitions discussed earlier, the decision under challenge is an appealable decision under the TPA act. 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**. Also relevant is sub-section **(3)** which 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).**

29. As highlighted earlier, the applicant's counsel made a desperate attempt to differentiate between an appeal and a review. I find the said differentiation legally flawed, legally frail, misleading and irrelevant for two reasons. *First*, in support of the argument, counsel cited pre-2010 authorities which essentially discuss the scope of judicial review jurisdiction as opposed to an appellate jurisdiction. *Second*, counsel's argument ignored the fact that the doctrine under discussion applies where the enabling statute provides for a dispute resolution mechanism. The statute does this by either establishing a tribunal as in the instant case where appeals are filed as opposed to the appellate jurisdiction of a court. Alternatively some statutes governing bodies provide for review or an appellate mechanism. Examples are University Statutes or decisions which are appealable to the Minister. It is this statutory dispute resolution mechanism that is referred to in section 9 of the FAA act. *Third*, after exhausting the mechanism so established, an aggrieved person can approach the High Court either by way of an appeal or Judicial Review.

30. Back to section 9 of the FAA act, it is instructive to note the use of the word *shall* in the said section. 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.[26]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[27] 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.

31. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute. The Supreme Court of India pointed out on many occasions that 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.

32. 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 denote obligation.[28] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[29] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

33. A proper construction of section **9(2) & (3)** of the FAA act leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by 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 flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

34. The applicant's counsel argued that since the decision was made on the 63rd day, outside the permitted period, no decision was made. This argument sounds attractive. But it collapses on two fronts. *First,* it was an appealable decision made under the act. Therefore, the only way out was for the applicant to apply for an exemption citing exceptional circumstances if at all they existed.

35. What constitutes exceptional circumstances depends on the facts of each case[30] 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[31] is heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance. Flowing from the foregoing conclusion, I find that the following points from a leading South African decision relevant:-[32]

> *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 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.*

36. Additionally, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, 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.[33] I should perhaps add that there is no definition of 'exceptional circumstances' in the FAA Act,[34] but this court interprets exceptional circumstances to 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. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[35]

37. 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. As stated above, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case. 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 appellate tribunal has developed a rigid policy, which renders the requirement for exhaustion futile.

38. It has not been established that applying the dispute resolution mechanism would have been 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. It has not been shown that the mechanism is not effective nor has it been demonstrated that the applicant cannot obtain an effective remedy from the Tribunal. The applicant ought to have challenged the legal competency of the alleged "late" decision at the Tribunal.

39. The second requirement is that on application by the applicant, the court may grant an exemption. My reading of the law is 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. The person 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.[36] Section **9(4)** of the FAA act 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.

40. The law is that Section **9(4)** of the FAA act postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. 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. No competent application was presented before this court to determine the question whether or not the *ex parte* applicant demonstrated exceptional circumstances; nor do I see any exceptional circumstances in the circumstances of this case.

41. 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.[37] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[38] An internal remedy is adequate if it is capable of redressing the complaint.[39]

42. As stated earlier, no argument was advanced before me that the internal remedy is not effective. There was no suggestion that the remedy under the act does not offer a prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. Lastly, there was no suggestion, even in the slightest manner that the internal remedy is inadequate and incapable of redressing the complaint.

43. 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. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it.

44. 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.

45. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. A reading of the act shows that the Tribunal is clothed with jurisdiction to determine the dispute.

46. The applicant's counsel attempted to justify the failure to exhaust he said mechanism by arguing that sections 8 and 9 of the Law Reform Act[40] provide for the judicial review jurisdiction of this court. To buttress his argument, he argued that the said provisions are still in our law books.

47. The above argument is legally frail and unsustainable. It fails on two grounds. *First,* the argument suggests that there exists two systems of judicial review, one based on the common law, entrenched in sections 8 and 9 of the Law Reform Act.[41] *Second,* a system based on the Constitution. This argument has been judicially discounted and extinguished as I will demonstrate shortly.

48. The said argument fails to appreciate that to give effect to Article **47**, Parliament enacted the FAA act. Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. As stated earlier, the impugned decision falls within the ambit of the above definition. Section 7 (1) of the FAA act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to— (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. The section also proceeds to lay down the grounds for review at subsection (2).

49. Section 12 of the FAA act provides for the application of principles of common law in the following words: - "this Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice."

50. Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that all law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.

51. All law must conform to the constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act[42] and Order **53** of the Civil Procedure Rules must be conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed[43] *"All statutes must be interpreted through the prism of the Bill of Rights."* The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution.

52. From the provisions of the law enumerated above, it is beyond doubt that Judicial Review is now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[44]*** that *"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed*

under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts." The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control. This sound proposition of the law extinguishes the applicant's advocate's argument which attempted to suggest the existence of two systems of judicial review.

53. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights.

54. As I stated in *Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another* ***[45]*** court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.[46] Time has come for our courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

55. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.[47]

56. In view of my analysis of the provisions of section 9 of the FAA act, the jurisprudence cited and the circumstances of this case, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court. It follows that this case offends the letter and spirit of the provisions of section **9 (1) (2) (3) (4)** of the FAA act. The applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the FAA act. Put differently, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. On this ground alone, this case is dismissed.

57. The above finding notwithstanding, I will proceed to examine the merits of the case.

b. Whether the impugned decision is tainted with illegality

58. The applicant's counsel cited the definition of a tax decision under section 3 of the TPA and the definition of an objection decision under section 51 (8) of the act and argued that tax laws should be strictly construed. He submitted that in the event of any ambiguity, it must be resolved in favour of the tax payer. Counsel relied on *Republic v Kenya Revenue Authority ex parte Bata Shoe Company (Kenya) limited*[48] for the holding that statutes should be given their ordinary meaning.

59. He further argued that the Respondent acted *ultra vires* by making further demands from the applicant based on the tax decision dated 9th November 2016. He argued that the objection decision was communicated 63 days late, hence, the decision was time barred by dint of section 51 (11) of the TPA. It was his submission that the objection stood allowed after the 60th day by operation of the law.

60. Further counsel argued that the letter dated 28th June 2016 was not a tax decision as envisaged under the law. He argued that it was written a notice of audit findings and not an assessment notice. He placed reliance on *Republic v The Commissioner of Customs Services ex parte Unilever Limited*[49] and *Republic v Commissioner of Custom Services ex parte Tetra Pak Limited*[50] where the court dealing with the East African Customs Management Act was categorical that if a decision is not communicated within the 30 days provided under the act, then the application is deemed as allowed.

61. In addition, the applicant's counsel placed reliance on *Rahab Wanjiru Njuguna v Inspector General of Police & Another*[51] in which the court citing previous decision reiterated the grounds for judicial review which are illegality, irrationality and procedural impropriety. He further cited *Republic v Commissioner of Customs Services ex parte Tetra Pak* for the proposition that non-compliance with statutory procedures set out in the act taints what would have been an otherwise lawful decision with illegality and procedural impropriety which invites the courts intervention.

62. On computation of time, the applicant's counsel cited section 57 of the *Interpretation and General Provisions Act*[52] and argued that the act expressly uses the phrase *"unless the contrary intention appears*" and argued that the tax statutes contains a contrary intention and provide strict penalties where tax is not paid in time. He referred to section 77 of the TPA which provides that if tax is paid electronically, the due date remains as specified in the relevant provision, and added that nothing prevented the Respondent from submitting the decision electronically. To buttress his argument, counsel cited Article 27 of the Constitution which provides for equality before the law and submitted that the Respondent should not be treated differently when it comes to computation of time. To further buttress his argument on the strictness with which the tax statutes should be construed, counsel relied on *Commissioner of Income Tax v Phoenix of east Africa Assurance Company Limited.*[53]

63. The Respondents counsel cited section 51(11) of the TPA and argued that the date of the objection was 9th December 2016, and, that, the objection decision was made on 6th February 2017. She added that the 60th day was Saturday 4th February 2016. Counsel invoked section 57 of the *Interpretation and General Provisions Act*[54] on computation of time and argued that the last day was an excluded day.[55] Counsel relied on *Republic v Public Procurement and Asset Disposal Review Board & 4 Others ex parte Knieriem BV*[56] for the holding that the provisions of the *Interpretation and General Provisions Act*[57] applies across board.

64. Where a particular number of days is prescribed in the Interpretation and General Provisions Act[58]without there being any exclusion of the application, either in express terms or by necessary implication, the natural inference would be that the Legislature intended the section to apply. However, the scope of the act is limited to the computation of days.[59] It does not apply to the calculation of such time when such

time in any other unit than days is expressed.[60]

65. Section 57 of the *Interpretation and General Provisions Act*[61] provides for computation of time as follows:-

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

> *(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;*
>
> *(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;*
>
> *(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*
>
> *(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*

66. A proper construction of the above provision leaves no doubt that in reckoning of number of days, when any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

67. All the legislature has done is to mention the first day and the last day, and has left it open to the courts to determine which is which. It follows, therefore, that the first and the last days are to be established solely by reference to the language of the statutory provision under consideration and with due regard to the circumstances of each particular case.

68. Section 57 decrees that if the time or day for doing anything or for any proceeding expires on or falls on a Sunday or public holiday, it shall be considered as done or taken in due time if it is done or taken on the day next following the Sunday or public holiday. Mr. Justice E. Cameron[62] commenting on a similarly worded section stated:-

> *"Since the statutory method involves the exclusion of the first day and the inclusion of the last, it is "the converse of the [ordinary] civilian method of computation." It has also been suggested that the statute's provisions relating to the exclusion of Sundays and public holidays where the last day of a period expressed in days falls on a Sunday or a public holiday, being "at variance with the common law," must for that reason be restrictively interpreted…. None of the cases that have declined to apply statutory calculation relies on the presumption against statutory intrusion on the common law and the Supreme Court of Appeal has held that in the absence of repugnancy, the interests of legal certainty require that the statutory method be applied. Furthermore, such repugnancy must not be readily assumed."(Emphasis added)*

69. When reckoning days in a statutory provision a court is enjoined to apply the provisions of section 57 of the *Interpretation and General Provisions Act*[63] unless there is something in the language or context of the particular provision repugnant to such provision or unless a contrary intention appears therein. Having regard to all the factors in this case the applicant has not established, and I have not been able to find, anything either in the language or context of section 51(8) of the TPA or any of the Tax statutes to suggest that the application of section 57 would lead to a repugnancy justifying a departure from the method of computation prescribed in the *Interpretation and General Provisions Act*.[64] In the interests of legal certainty such departure is not readily to be assumed by the court.

70. The applicant's counsel drew a parallel with the provisions of the tax laws which prescribe deadlines when taxes are due and payable and provide penalties for default and argued that in the same vein, where the Respondent fails to render a decision within the time prescribed, there ought to be consequences. Unfortunately, the said argument flies on the face of section 57 which expressly provides for computation of time. The contrary intention can only be construed from the enabling statute but cannot be inferred as counsel seems to suggest. Had Parliament intended the applicant's argument to be the position, nothing prevented it from expressly stating so in section 51 (11) of the TPA. The only consequence permitted by the act is that the objection is deemed as allowed. As for computation of time, the governing statute is the Interpretation and General Provisions Act.[65]

71. The primary rule of interpretation is that the words of a statute must be interpreted in their ordinary, literal meaning. But where to give the words their ordinary meaning would lead to an absurdity so glaring that the legislature could not have contemplated it, or to a result contrary to the intention of the legislature as shown from the context or otherwise, the court may so interpret the language of the statute as to remove the absurdity, and give effect to the intention of the legislature.

72. In the present case the governing statute provides for 60 days. The computation is to be found in words of section 57 of the act which is very clear and unambiguous. This court is bound to interpret the words of section 57 in their ordinary, literal meaning. It is quite clear that there is nothing to stop the court from applying the proper rules of interpretation as long as they do not cause absurdity so glaring that it could never have been the intention of the legislature to do so.

73. In any event, it is not clear how the 63 days were arrived at. A simple arithmetic shows me that in December 2016 from 9 th to 31st gives us **22** days excluding the first day, January 2017 gives us a total of **31** days while February 2017 gives us 6 days. The aggregate is 59 days

which were to lapse on 7th February 2017. The computation of the days by both parties appear to be incorrect.

74. The other argument sustained by the applicant's counsel was that since the decision was rendered outside the prescribed period, it was tainted with illegality.

75. 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 administrative 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 courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[66]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.

76. In *Council of Civil Service Unions v. Minister for the Civil Service*[67] 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*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality*.[68]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. His Lordship explained the term *"Irrationality"* by succinctly referring it as*"unreasonableness"* in *Wednesbury* Case.[69] 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.

77. The role of the court in such cases was well stated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[70]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. 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, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

78. 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 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.

79. The *ultra vires* principle is based on the assumption that court intervention 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 established its limits.

80. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established.

81. I find no contest that the enabling statute confers mandate upon the Respondent to undertake the audit as they did. I find that the audit was communicated and a final decision was made and communicated in writing to the applicant. The applicant never appealed. There is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the process. I am conscious of the ever-flexible duty of a public body to act fairly. However, fairness must be decided on the circumstances of each case. The applicant kept on seeking clarifications after the decision was communicated even after it was informed in writing about its right to appeal.

82. Regard must be had to the facts as a whole in the context of the applicable legislation and the principles involved; and compliance with legal requirements which involves a consideration of the degree of compliance with the law. Tax laws prescribe a time limit for appeal after a decision is made. Essentially, a failure to appeal will result in enforcement action. As a general principle, an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. My reading of the Act is that it does not grant the Respondent any discretion when evaluating compliance with the law unless the requirements imposed are immaterial, unreasonable or unconstitutional.

83. Therefore, it is my holding that the impugned decision was made in a manner that is in conformity with the enabling statutes. Put differently, the applicant has *not* demonstrated that the Respondent acted *ultra vires*.

c. Whether the applicant is entitled to any of the orders sought.

84. The applicant's counsel relied on *Kenya National Examinations Counsel v Republic ex parte Geoffrey Gathenji Njoroge*[71] and *Pastoli*

v Kabale District Local Government Council & Others,[72] decisions which restated the scope of judicial review jurisdiction.

85. The Respondent's counsel cited *Republic v Secretary County Public Board & Another ex parte Hulbai Gedi Andille*[73] and *Republic v Kenya Revenue Authority ex parte Abdalla Brek Said t/a Al Amry Distributors & 4 Others*[74] on the scope of judicial review jurisdiction and argued that Judicial review does not deal with merits.

86. *This case presents an opportunity to this court to restate the function, scope and nature of Judicial Review remedies and the test for granting such remedies.* In Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. 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'.

87. Judicial Review is about the decision making process, not the decision itself. The role of the Court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

88. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji**[75]***:-

"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. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant....."

89. An administrative or quasi-judicial decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

90. There is nothing to show that the Respondent exceeded its statutory powers. The decision has not been shown to be illegal or *ultra vires* or outside its functions. No abuse of such powers has been alleged or proved. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

91. *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.

92. The applicant also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any body, tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such body, tribunal, corporation, board or person. A *prohibiting* order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a *prohibiting* order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the tax decision has not been established.

93. 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, or where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or legally discharge its legal mandate, or where the judge considers that an alternative remedy could have been pursued. *First*, in this case, the *ex parte* applicants ought to have subjected itself to the appellate process stipulated in the TPA and TAT act instead of invoking the Judicial Review jurisdiction of this Court and challenge the outcome if aggrieved.

Disposition

94. In view of my analysis herein above, I find and hold that this suit offends the doctrine of exhaustion of remedies provided in a statute. It follows that the applicant's application for Judicial Review orders offends the mandatory provisions of section 9 (3) (4) of the Fair Administration Act.[76]

95. In addition, and without prejudice to the above, the applicant has not established any grounds for this court to grant the Judicial Review Orders of *Certiorari* and *Prohibition*.

96. The upshot is that the applicant's application dated **20th** March 2017 is hereby dismissed with costs to the Respondent.

Orders accordingly.

Signed, dated and delivered at Nairobi this 26th day of November 2019

John M. Mativo

Judge

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[1] Cap 486, Laws of Kenya. NOTE: This act was repealed by the Companies Act, Act No. 17 of 2015.

[2] Cap 469, Laws of Kenya.

[3] Act No. 29 of 2015.

[4] Act No. 35 of 2013.

[5] Cap 470, Laws of Kenya.

[6] {2016} e KLR.

[7] {2014} e KLR.

[8] Cap 26, Laws of Kenya.

[9] Act No. 40 of 2013.

[10] Cap 26, Laws of Kenya.

[11] Act No. 4 of 2015.

[12] Citing *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Saracen Media Limited* {2018} e KLR.

[13] 2005 (4) SA 67.

[14]{2008} e KLR.

[15] {2012} e KLR.

[16] Cap 470, Laws of Kenya.

[17] Cap 472, Laws of Kenya.

[18] Cap 476, Laws of Kenya.

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

[20] Ibid.

[21] {1992} KLR 21.

[22] Ibid.

[23] {2015} eKLR.

[24] {2015} eKLR.

[25] Ibid.

[26]*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).

[27] Ibid.

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

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

[30] 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).

[31] Act No. 4 of 2015.

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

[33] 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

[34] Act No. 4 of 2015.

[35] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[36] 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]

[37] *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).

[38] Ibid para 44.

[39] Ibid paras 42, 43 and 45.

[40] Cap 26, Laws of Kenya.

[41] Cap 26, Laws of Kenya.

[42] Cap 26, Laws of Kenya.

[43]*Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and* [2000]

[44] *2000 (2) SA 674 (CC) at 33.*

[45] {2018} e KLR.

[46] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[47] *Republic v Speaker of the Senate & another Ex parte Afrison Export Import Limited & another* (Supra).

[48] {2014} e KLR.

[49] {2012} e KLR.

[50] {2012} e KLR.

[51] {2013} e KLR.

[52] Cap 2, Laws of Kenya.

[53] {2015} e KLR.

[54] Cap 2, Laws of Kenya.

[55] Counsel relied on *Kyule Makau v Dominic Musei Ikombo* {2015} e KLR.

[56] {2016} e KLR.

[57] Cap 2, Laws of Kenya.

[58] Cap 2, Laws of Kenya.

[59] See also *Joubert v Enslin* 1910 AD 6, 37-38.

[60] See *Nair v Naicker* 1942 NPD 3 at 5*; Muller v New Zealand Insurance Co. Ltd* 1965 (2) SA 565(D) at 571E.

[61] Cap 2 Laws of Kenya.

[62] **LAWSA** Second Edition Vol.27 at para 287.

[63]Cap 2 Laws of Kenya.

[64] Ibid.

[65] Ibid.

[66] 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.

[67] {1985} AC 374.

[68] 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

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

[70] {2015} eKLR.

[71] Civil Appeal No. 266 of 1996.

[72] {2008} 2 EA 300.

[73] {2015} e KLR.

[74] {2016} e KLR.

[75] {2014} eKLR.

[76] Act No. 4 of 2015.