REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL CASE NO. 5 OF 2019

KENYA BANKERS ASSOCIATION.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITI.....RESPONDENT

RULING

Introduction

1. This ruling disposes the Respondent's Preliminary Objection filed on 28th May 2019 inviting this court to dismiss these proceedings citing the following grounds:-

*a. **That** the applicant lacks the locus to bring this application against the Respondent as no tax assessment has been issued against it.*

*b. **That** the application does not meet the threshold for judicial review application because it does not challenge any administrative action rather it challenges the law on Value Added Tax on Merchant fees.*

*c. **That** the application is sub judice and amounts to forum shopping since the issues raised are also the same issues pending determination before the High Court, Commercial Division and at the in Tax Appeals Tribunal in the following cases:-*

i. NRB ITA No. 8 of 2018, Barclays Bank of Kenya Limited v Commissioner of Domestic Taxes.

ii. NRB TAT No. 167 of 2018, Kenya Commercial Bank Limited v Commissioner of Domestic Tax.

iii. NBI TAT No. 361 of 361 of 2018, NIC Group and NIC Bank PLC v Commissioner of Domestic Tax.

iv. NRB TAT No. 319 of 2018, Bank of Africa Kenya Limited v Commissioner of Domestic Tax.

v. NRB TAT No. 302 of 2018, Standard Chartered Bank Kenya Limited v Commissioner of Domestic Taxes.

vi. NRD TAT No. 322 of 2018, Commercial Bank of Africa v Commissioner of Domestic Taxes.

vii. NRB TAT No. 137 of 2018, Barclays Bank of Kenya Limited v Commissioner of Domestic Taxes.

*d. **That** the application offends section 9(2) of the Fair Administrative Action Act, section 52(1) of the Tax Procedures Act and sections 12 and 13 of the Tax Appeals Tribunal Act.*

*e. **That** the application is an abuse of court process.*

2. In order to appreciate the basis and substance (if any) of the Respondent's Preliminary Objection so at have a proper perspective, it is necessary to briefly outline the facts which triggered these proceedings. Before doing so, it is in order to describe the Parties in this case.

The Parties

3. The applicant, the Kenya Bankers Association is a registered Trade Union. It is a body corporate with capacity to sue and be sued in its own name. It is the financial sector's leading advocacy group and the umbrella body of the financial institutions licenced and regulated by the Central Bank of Kenya. Its primary function is to look after the interests of its members and where appropriate to make representations or submissions on matters which may have an effect or impact on their business operations. It brings these proceedings in the interests of its members.

4. The Respondent, Kenya Revenue Authority (KRA), is a body corporate with perpetual succession and a common seal established under section 3 of the Kenya Revenue Authority Act,[1] (herein after referred to as the 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

5. The applicant states that its members' business includes providing their customers with various credit and banking facilities among them issuing credit and debit cards to their customers which are used to:- make remittances using mVisa; make payments/purchases; make payments/purchases for goods or services on various channels including points of sale machines; e-commerce; quick Response Code; Near Field Connection or Tap and Pay; and, withdrawal of cash from automated teller machines all of which are collectively referred to as money transfer services facilitated by a scheme which acts as the settlement agent.

6. The applicant states that in the course of money transfer services between different banks certain fees are paid and received, and, that, the Respondent has previously assessed Withholding Tax on such fees on the basis that such fees constitutes royalties. The applicant also states that the High Court has held that such fees does not constitute royalties and is not subject to Withholding Tax.[2]

7. In addition, the applicant states that paragraph 1 of the Third Schedule of the Value Added Tax Act[3] which was in force until 2nd September 2013 exempted various financial services from Value Added Tax, particularly the issue, transfer, receipt or any other dealing with money, including money transfer services, issuing of credit and debit cards, automated teller machine transactions, excluding the supply of automated teller machine and the software to run it and the provision of the foregoing financial services on behalf of another on a commission basis.

8. The applicant further states that paragraph 1 of Part 11 of the First Schedule of the Value Added Tax Act, 2013, which came into force on 2nd September 2013 exempts various financial services from VAT in particular the issue, transfer, receipt or any other dealing with money, including money transfers services, issuing of credit and debit cards, automated teller machine transactions, excluding the supply of automated teller machine and the software to run it and the provision of the foregoing financial services on behalf of another on a commission basis.

9. Further, the applicant states that the Respondent has now raised assessments on its members for VAT on fees paid and received in respect of money transfer services using cards on the basis that the fees are in respect of the provision of services which are not exempt and are in the form of royalty for use of a trade mark in reliance on a decision of the Tax Appeal Tribunal in Appeal Number 114 of 2015, *Barclays Bank of Kenya Limited v The Commissioner of Domestic Taxes*, which is subject of a pending appeal in the High Court of Kenya being Income Tax Appeal No. 8 of 2018 involving Barclays Bank of Kenya Limited only.

10. The applicant and its members maintains that the said fees is in respect of the transfer, receipt and dealing with money, Money Transfer Services, Automated teller machine transactions and the provision of these financial services on behalf of another on a commission basis within paragraph 1 of the Third Schedule to the Value Added Tax Act[4] or paragraph 1 of Part 11 of the First Schedule of the Value Added Tax Act, 2013, hence, it is exempt from VAT.

11. The applicant further states that following the decision of the Tax Appeals Tribunal in Appeal Number 114 of 2015, the Respondent has been progressively raising assessments to VAT on the applicants' members, and, that, each member of the applicant who receives such an assessment is required to object, and, where the objection is rejected, lodge an appeal to the Tax Appeals Tribunal, and, if unsuccessful, appeal to the High Court. The applicant states that these independent steps by its members will lead to multiplicity of suits and possibility of conflicting decisions.

12. In addition, the applicant states that there are five different parties to a money transfer service. *First*, the card holder, who is an individual who accepts a card issued by a financial institution on the terms and conditions set by such financial institution including the payment of fees for the issue of the card. *Second*, the issuing bank, a financial institution that offers cards to individual customers. The issuing Bank is licensed by an international or local scheme to issue co-branded cards in partnership with the scheme. It states that the issuing bank receives an interchange fee each time the cards issued by the issuing bank are used for a payment transaction on the scheme network. *Third*, the

acquiring bank which is a financial institution that offers card payment services. The applicant states that the acquiring bank charges an agreed Merchant Service Commission or Merchant Service fee to the signed up member on each transaction, which is a percentage of the value of the card transaction and is shared as interchange fee amongst the scheme, the issuing bank and the acquiring bank. *Fourth*, the Merchant, which are various shopping outlets both physical and online that have agreed to accept settlement for goods and services through money transfer services, and, that, the Merchants agree to pay the Acquiring Bank an agreed Merchant Service Commission or Merchant Service Fee. *Fifth*, the Scheme, which may be international or local and includes VISA, MasterCard, Union Pay International, American Express, Jcb, Kenswitch, Interswitch who facilitate card payment.

13. Further, the applicant states that the Issuing Bank is licensed by one or more of the Schemes and has contracts with both the Scheme and the Cardholder. It also states that the Acquiring Bank is also licensed by one or more of the Schemes and has contracts with both the Scheme and the Merchant, but not all issuing banks are acquiring banks for the purposes of purchase/payment transactions. Also, the applicant states that the Issuing Bank must have a settlement account with the scheme and, that, settlement between the two banks is done though the scheme.

14. To illustrate the steps in money transfer services using a card, the applicant listed three examples, namely, Physical point of sale card payment transaction, ATM cash withdrawal transaction using card and Card Quick Response Code (QR) push payment transaction and stated that in each one of them, two different banks are involved as issuing and acquiring bank. It also stated that the charges and fees in actual transactions may differ depending on the product type of the card used.

Reliefs sought

15. The applicant prays for the following orders:-

> *a. A declaration that the fees paid and received by the members of Kenya Bankers Association in respect of exempt financial services being money transfer services using credit and debit cards are not subject to Value Added Tax.*
>
> *b. A declaration that the assessments to the Value Added Tax which the respondent has raised on the members of Kenya Bankers Association in respect of the fees paid and received in respect of money transfer service using credit and debit cards are void and should be set aside as an unfair exercise of administrative action by the respondent.*
>
> *c. An order prohibiting the respondent from raising assessments and demanding payment of Value Added Tax from the members of the Kenya Bankers Association in respect of the fees paid and received in respect of money transfer services using credit and debit cards.*
>
> *d. That the costs of the proceedings be paid by the Respondent.*

Determination

16. I will first address the objection that this suit is *sub judice.* Mr. Nyaga, counsel for the Respondent cited section 6 of the Civil Procedure Act[5] and argued that there similar suits pending before the High Court and the Tax Appeals Tribunal, and listed the cases stating the case number and parties. He placed reliance on *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga*[6]which held that it is not the form in which the suit is framed that determines whether it is *sub judice*, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other.

17. The Respondent's counsel also submitted that the issues and the assessment raised in these proceedings are the subject of disputes pending in the earlier listed cases pending before the high court and the TAT. He further argued that the issue of VAT on interchange has been litigated and the Tribunal found that the same is payable, and, the decision is the subject of an appeal in the High Court being *Barclays Bank of Kenya Limited v Commissioner of Domestic Taxes*.[7] He argued that this court cannot grant the prayers sought in these proceedings without delving into the issues pending before in the said appeal and that if the prayers sought are granted they will have the impact of determining the said appeal without hearing it on merit.

18. Miss Kirimi, counsel for the Respondent submitted that the applicant disclosed the existence of the pending appeal, and, it has demonstrated that the Respondent continues to raise assessments on the *ex parte* applicants' members, hence, more objections and appeals are inevitable so as to preserve the position of the individual members.

19. She argued that the Respondent's counsel has not set out evidentiary basis in support of the pending suits. However, she argued that the pendency of the suits demonstrates the applicant's members' apprehension that the problem may lead to multiplicity of suits, a position she stated was appreciated in *Ruturi & Another v Minister of Finance & Another*.[8] It was her submission that the applicant is not a party to any of the appeals referred to. Counsel cited section 14 of the Tax Appeals Tribunal Act (herein after referred to at the TAT Act) and argued that the Civil Procedure Act[9] does not apply to proceedings before the Tax Appeals Tribunal.

20. On the accusation that the applicant is forum shopping, she cited *Hezekiel Oira v The Ethics and Anti-corruption Commission and Director of Public*[10] and argued that the *ex parte* applicant and its members are seeking to avoid multiplicity of suits. It was her submission that the Respondent's proceeded on the premise that this is a tax dispute, yet, from the prayers sought in the application, it challenging the unfairness of the impugned administrative decision.

21. Mr. Nyaga in his Reply argued that the doctrine of *sub judice* is a common law principle which found its way in to the Civil Procedure Code. He relied on *Republic v Registrar of Societies-Kenya & 2 Others ex parte Moses Kirima & 2 Others*[11] which reiterated the tests for *sub judice* and pointed out that in the instant case the applicant does not deny the existence of the suits in the other courts.

22. The argument that the Civil Procedure Act[12] does not apply to proceedings before the Tax Appeals Tribunal is correct but applicable to this case. These proceedings are not before the Tax Appeals Tribunal, but before the High Court, therefore, the said provision is in applicable. The applicant approached this court under the provisions of Order 53 Rule 1 (1) of the Civil Procedure Rules, Sections 4, 7, 8, 9 and 11 of the Fair Administrative Action Act[13] (herein after referred to as the FAA Act), Paragraph 1 of the Third Schedule of the Value Added Tax Act [14](herein after referred to as the VAT Act), Paragraph 1 of Part 11 of the First Schedule of the Value Added Tax Act, 2013 and Article 47 of the Constitution. Having approached this court as aforesaid, the applicant cannot now be heard tr0 argue that the Civil Procedure Act[15] upon which it stands is not applicable.

23. Section 5 of the Civil Procedure Act[16] provides that any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. The operative words in this provision are “expressly” or “impliedly” barred.

24. Section 6 of the Civil Procedure Act[17] expressly provides the that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

25. The *ex parte* applicant’s counsel relied on *Ruturi & Another v Minister of Finance & Another,*[18] to justify the argument that this suit is necessary to avoid multiplicity of suits where each tax payer would be forced to file its suit after the tax assessment. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage:-[19]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)*

26. The ratio of any decision must be understood in the background of the facts of the particular case.[20] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[21] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[22]

27. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[23]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[24] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[25] My plea is to keep the path of justice clear of obstructions which could impede it.

28. The case of *Ruturi & Another v Minister of Finance & Another* cited by the *ex parte* applicant’s counsel challenged the constitutionality statutory provisions. That being the case it was only convenient that one suit be filed. In the instant case, several suits are pending in court filed by different parties who are members of the *ex parte* applicants. The *ex parte* applicant has now moved to this court on behalf of the same applicants citing the same issues during the pendency of the said suits.

29. *The latin term for pending suit is lis pendens. The Black’s Law Dictionary*[26] defines *lis pendens,* as a Latin expression which simply refers to a “*pending suit or action.” The Oxford Dictionary of Law*[27] defines the expression in similar terms. In the context of *Section 6 of the Civil Procedure Act*[28] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

30. The basic purpose and the underlying object of Section 6 is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.[29]

31. The words *"directly and substantially in issue"* are used in contradistinction to the words *"incidentally or collaterally in issue."* Therefore, Section 6 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject- matter in both the proceedings is identical.

32. The question which follows is whether the matters in issue in this case are also directly and substantially in issue in previously instituted suits. The key words in Section 6 are *"the matter in issue is directly and substantially in issue in the previously instituted suit."* The test for applicability of Section 6 is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

33. For section 6 to come into play, the matter in issue in both the suit has to be directly and substantially in issue in the previous. The court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process. This may be done where the tests of *sub judice* apply. As was held by the High Court of Uganda in *Nyanza Garage vs. Attorney General:-**[30]***

> *"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."*

34. For the doctrine of *sub judice* to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

35. The applicant admits the existence of an appeal involving the same issues pending in the High court. In fact, in the Statutory Statement the applicant states that the Respondent has raised assessments on its members for VAT on fees paid and received in respect of money transfer services using cards relying on a decision of the Tax Appeal Tribunal in Appeal Number 114 of 2015, *Barclays Bank of Kenya Limited v The Commissioner of Domestic Taxes*. The applicant further admits that the said decision has been challenged by in the High Court and that the same is the subject of a pending appeal in the High Court of Kenya being Income Tax Appeal No. 8 of 2018. It is common ground that the said appeal involves Barclays Bank of Kenya Limited, a member of the Respondent. The applicant herein is suing on behalf of its members. In addition, it is common ground that there must exist two or more suits filed consecutively. A long list has been provided by the Respondent. Even though the pleadings were not availed, I find no serious contest that the said suits do exist. In fact, the *ex parte* applicant's counsel was clear that the each tax payer is required to contest its assessment individually in court, thus, leading to multiplicity of suits.

36. In addition, it is clear that the matters in issue in the suits or proceedings are directly and substantially the same. The parties in the suits or proceedings are the same. The *ex parte* applicant herein is litigating on behalf of its 47 members, some of whom are parties in the existing suits. The suits are pending in the High Court which has jurisdiction to grant the relief claimed.

37. A cursory look at the prayers sought in this case show that they relate to the same subject matter. However the principle of *sub judice* does not talk about the "prayers sought" but rather *"the matter in issue."* I find that the matters in issue in the suits are substantially the same. In *Re the Matter of The Interim Independent Electoral Commission**[31]*** the Supreme Court cited with approval the an Australian decision where it was held:-[32]

> *"…we do not think that the word 'matter'…means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter…unless there is some right, duty or liability to be established by the determination of the Court…"*

38. It is therefore my view that in determining whether or not *sub judice* applies, it is the substance of the claim that ought to be looked at rather than the prayers sought. This being the position, I find and hold that this suit is *sub judice*.

39. I will next address the ground whether this court is divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism.

40. Mr. Nyaga, the Respondents counsel argued that this suit offends the doctrine of exhaustion and called for its dismissal. He submitted that the applicant is asking this court to make a determination that the assessments and the objection decision issued with regard to VAT on Merchant Service Transaction (Card Scheme) are improper as the services are allegedly exempt financial services as provided under the First Schedule Part 11 of the VAT Act. He argued that the assessments are issued in accordance with section 31 of the Tax Procedures Act[33] (herein after referred to as the TPA Act). He referred to section 2 of the Tax Appeals Tribunal Act[34] (herein after referred to as the TAT Act) which defines an assessment as a tax decision and section 51 which provides that a tax payer who wishes to dispute a tax decision shall first lodge an objection against the tax decision under the said section before proceeding under any other written law. Further, counsel relied on section 52 of the TAT Act which 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.

41. In addition, Mr. Nyaga, argued even if the applicant was the proper person to institute these proceedings, then the first port of call would be the Tax Appeals Tribunal. He submitted that the call for taxes was a tax decision which under section 12 of the TAT Act ought to be challenged before the Tribunal. In this regard, he argued that section 9 (2) of the FAA Act has constricted the gateway to judicial review and cited *Republic v National Environment Management Tribunal Authority*[35] for the holding that where a statute provides for an alternative remedy, it is only in exceptional circumstances that an order for judicial review will be granted.

42. Mr. Nyaga also cited *The Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Chairman, Rent Restriction Tribunal & 99 Others*[36] which held that judicial review proceedings in Kenya is now regulated by the statutory framework in the FAA Act which changed the character and scope of judicial review jurisdiction in Kenya, including introducing mandatory procedural framework stipulating how judicial review jurisdiction is to be invoked.

43. To further buttress his argument, counsel cited *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others*[37] for the holding that where a dispute resolution mechanism exists outside the courts, the same must be exhausted. Counsel also placed reliance on *CMC D Ravena v Kenya Revenue Authority*[38] and *Night Rose Cosmestics (1972) Ltd v Nairobi County Government & 2 Others*[39] for the proposition that the only way out is the exception provided by section 9(4) of the FAA Act.

44. Miss Kirimi argued that these proceedings touch on the operations and workings of the applicant's members. She relied on *Ruturi & Another v Minister of Finance & Another*[40] which emphasized on the convenience of one suit brought by the association as opposed to each member instituting a separate suit.

45. Miss Kirimi responding to the objection that the suit offends the provisions of section 9 (2) of the FAA Act urged the court to consider what mechanisms and remedies are available bearing in mind the *Ruturi case* (supra) which discouraged multiplicity of suits. She submitted that for the mechanism established under the TAT Act to apply, the impugned decision must be a tax decision. It was her position that the issue before this court relates to VAT, and, that, section 50 of the VAT Act was deleted, the effect of which she submitted, is that, there are no tax decisions arising from the VAT Act.

46. In addition, Miss Kirimi cited sections 30, 2, 51 and 52 of the TPA and argued that the rights referred to in the said provisions are vested in the tax payer. She argued that the *ex parte* applicant is not a tax payer, but, only, its individual members are tax payers. In this regard, counsel argued that there is no mechanism or remedy open to the *ex parte* applicant in relation to the matters raised in these proceedings. As a consequence, she argued that the authorities cited by the Respondent on the doctrine of exhaustion are irrelevant.

47. Additionally, she submitted that in the event this court holds that section 9 (2) (3) of the FAA Act applies, then, the applicant applies for exemption under section 9 (3) of the act. She argued that section 9(3) does not stipulate how such an application should be made. Referring to the Court of Appeal decision in *Kenya Revenue Authority, Commissioner of Customs Services and Julius Musyoki v Darassa Investments Limited*[41]counsel argued that the exemption could be given by the court on its own motion or application without stipulating how it could be made. It was her argument that such an application can me made informally at any time, and, if it has to be made formally, the matter should be adjourned to enable a formal application to be made.

48. She further submitted that the special circumstances justifying the granting of the exemption under section 9(4) of the act are the special status of the *ex parte* applicant who represents 47 members of the banking industry and the need to avoid multiplicity of suits based on the principles expounded on the *Ruturi* case.

49. In his rejoinder, Mr. Nyaga cited *Njama Wambugu & 4 Others v Kenya Revenue Authority & 2 Others* which held that the court should be wary of being used as a refuge by tax evaders.

50. The starting point for a proper evaluation of the question of the applicability or otherwise of the doctrine of exhaustion is an analysis of the governing statutory regime. Our Constitution requires a purposive approach to statutory interpretation.[42] In this regard, I find useful guidance in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[43] where Ngcobo J stated that the technique of paying attention to context in statutory construction is now required by the Constitution.

51. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law. [44]The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context,' as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."* ***[45]***

52. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law. [46] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others****[47]*** Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

> *"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

53. The above excerpt is useful while ascertaining the purpose of a statute. This position becomes clear if we read the preamble to the TPA Act which 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 TPA 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 TPA 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.

54. In addition, section 2 of the TPA provides for the object and purposes of the act. It provides that the object and purpose of the Act is to provide uniform procedures for consistency and efficiency in the administration of tax laws, facilitation of tax compliance by taxpayers, and effective and efficient collection of tax. More significant is subsection (2) which provides that unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under the Act shall apply. Subsection (3) provides that the Act shall be interpreted to promote the object of the Act.

55. 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; [48] (b) the Customs and Excise Act;[49] or (c) the Value Added Tax;[50] (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner.

56. 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 contest before me that the decision under

challenge in these proceedings is a tax decision within the said definition.

57. Also relevant is section 12 of the TAT Act. It provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal; Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

58. The foregoing provisions warrant no explanation. The question is whether this suit offends the above provisions.

59. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. There are numerous decisions of this court holding that this doctrine is now of esteemed juridical lineage in Kenya.[51] The doctrine was felicitously stated by the Court of Appeal[52] in *Speaker of National Assembly vs Karume*[53] 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*."

60. Even though the above case was decided before the promulgation of the 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.[54] For example, the Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*[55]as follows:-

> *"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*."

61. The High Court in the *Matter of the Mui Coal Basin Local Community*,[56] stated 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..."*

62. From the above jurisprudence, at least two principles are clear. *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.[57] 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.

63. From the above statutory definitions, it is clear that the decision under challenge is an appealable decision under the TPA. 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).**

64. It is instructive to note the use of the word *shall* in the above provisions. 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.[58]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[59] 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.

65. 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.

66. 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.[60] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is

legally mandatory.[61] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

67. 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.

68. What constitutes exceptional circumstances depends on the facts of each case[62] 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 is heavily borrowed from the South African equivalent legislation, that is, the *Promotion of Administrative Justice Act*,[63] 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 on the subject relevant:-[64]

> *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.*

69. 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.[65] I should perhaps add that there is no definition of 'exceptional circumstances' in the FAA Act, 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.[66]

70. 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.

71. Miss Kirimi cited sections 30, 2, 51 and 52 of the TPA and argued that the rights referred to in the said provisions are vested in the tax payer. I have already highlighted the use of the words *"any person"* in the earlier cited sections which to me are broad enough to cover the applicant. There is no dispute that the contest involves a tax decision. The argument that the *ex parte* applicant is not a tax payer collapses.

72. 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.

73. It has not been established that applying the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of this case suggests otherwise. The provisions are very clear on the jurisdiction of the Tribunal. 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.

74. The second requirement is that on application by the applicant, the court may grant an exemption. It follows that even if the court were to agree with the reasons cited by the applicant, it has a second hurdle to pass, that, it ought to have applied for 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.[67] 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.

75. 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.

76. 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 *ex parte* applicant can show exceptional circumstances to exempt him from this requirement.[68] 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.[69] An internal remedy is adequate if it is capable of redressing the complaint.[70]

77. 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.

78. 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.

79. 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.

80. 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.

81. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court or formally apply for exemption for the court to satisfy itself that the reasons offered satisfy the requirement for exceptional circumstances. This case offends section 9 (2) of the FAA Act. I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail. On this ground alone, this case is dismissed.

82. The other ground cited by the Respondent's counsel is confidentiality of tax payers' details. Mr. Nyaga argued that tax affairs are private issues which can only be contested by the tax payer or the person to whom the decision is made. He argued that the Respondent is estopped from discussing the tax affairs of other persons, including membership of organizations. He cited section 6 (1) of the TPA which requires the Commissioner or any authorized person to protect the confidentiality of the documents or information obtained in the course of administering tax law. To further buttress his argument, counsel cited Article 31 of the Constitution which guarantees the right to privacy. In addition, he submitted that the applicant is not a tax representative or a tax agent as provided under section 15 of the TPA to warrant them to take action on behalf of its members.

83. He also argued that the application is misguided because to be a tax agent, is a matter governed by law and the agent must be registered under section 15 and 16 of the TPA Act, and, that a tax agent must be properly licensed and registered under sections 18 and 19 of the TPA Act, and that the applicant has not shown any Bank nominated him to represent it.

84. Miss Kirimi's rejoinder was that the orders sought are primarily declaratory of the tax status of the fees paid and received by the members of the *ex parte* applicant in relation to card transactions. That being the case, she argued that there is no need to delve into tax details of the tax payers, hence, there would be no breach of confidentiality. To buttress her argument, counsel argued that these proceedings relate to the principles to be applied to the fees paid or received by the *ex parte* applicant's members, not details of individual members.

85. It's true that section 6 of the TPA provides for confidentiality in the following words:-

> *(1) The Commissioner or an authorized person shall, in relation to the administration of a tax law, protect the confidentiality of the documents or information obtained in the course of administering the tax law.*

86. The TAT Act defines a Tax Agent to mean a person acting on behalf of another person on matters relating to tax and is registered as such by the Commissioner. The TPA defines a **"tax agent"** as a person licensed as a tax agent under section 20 which provides that (1) The Commissioner shall issue a licence to an applicant under section 19 if the applicant is a fit and proper person to prepare tax returns, notices of objection, or otherwise transact business with the Commissioner under a tax law on behalf of a taxpayer.

87. The above provision provides the role of a tax agent. The *ex parte* applicant is not preparing tax returns, notices of objection, or

otherwise transact business with the Commissioner under a tax law on behalf of a taxpayer. The *ex parte* applicant moved to this court by way of a judicial review application clearly stating that it brings this suit on behalf of its members and in public interest. It cited among other provisions Article 47 of the Constitution and provisions of the FAA Act. It seeks specific declarations as reproduced earlier. It does not seek to act as a tax agent nor does it seek to be supplied with tax details of its members, hence, the question of confidentiality does not arise. None of the prayers seek to compel the Respondent to divulge confidential detail of a tax payer. It follows that the argument that the *ex parte* applicant lacks the *locus standi* is legally frail.

88. It is safe to state that the said argument flies on the face of our transformative constitution. It ignores that Article 22 of the Constitution opened the door for any person to institute court proceedings either on his own behalf or on behalf of another person citing violation or a threat to of the constitution or the Bill of Rights. Article 48 guarantees the right to access court while Article 258 provides that every person has a right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. I need not mention the supremacy of the Constitution over all other laws and its binding nature decreed in Article 2.

89. Article 47 provides for the right to a fair Administrative Action. This is the article the applicant stands on. 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. Section 7 of the Act provides for grounds for judicial review

90. Article 23 (3) provides the remedies the court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article 22**,** the court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, and invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and *an order of Judicial Review*.

91. Considering the above constitutional provisions and in particular the right to access justice, the question that arises is whether a citizen citing violation of constitutional rights or challenging an administrative action or a decision can be said to lack *locus standi* as submitted in this case. The traditional common law position on *locus standi* was a valid ground for a party to demonstrate capacity to sue. However, no matter how beautiful these common law principles are, they must pass constitutional master. All law must conform to the constitutional edifice. The governing statute and the resultant decision must be interpreted through the prism of Article 47 of the Constitution.

92. Judicial Review in 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. The South African court in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[71]*** *offers useful guidance on the subject. It held* 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 hold 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.

93. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the *locus standi. 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. *Second*, the right to access the court is now constitutionally guaranteed. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3) (f). *Fourth,* **section 7 of** the Fair Administrative Action Act[72] provides that "any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Section **7 (2)** of the act provides for grounds for applying for Judicial Review.

94. 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.[73] 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. 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.

95. The right to approach the court received a seal of constitutional approval, courtesy of Article 48 of the Constitution. This in my view expanded the scope of *locus standi* and opened the door for citizens to approach the court. It follows that the objection based on *locus standi* and confidentiality fails.

96. The other ground cited by the Respondent's counsel is that the applicant's application does not meet the threshold for a judicial review because it does not challenge any administrative action rather it challenges the law on Value Added Tax on merchant service fees. He argued that the applicant does not allege that the Respondent violated the law to warrant the judicial review orders sought, and, that, the issue whether fees paid to banks are royalties and not subject to VAT is not an issue of procedure to warrant the intervention of this court.

97. Miss Kirimi's reaction was that the said ground is an issue to be canvassed at the full hearing as opposed to a ground for Preliminary Objection. Referring to *Republic v The Commissioner of Domestic Taxes Large Tax Payers Office ex parte Barclays Bank of Kenya Ltd* [74] she argued that judicial review is the proper challenge to the Respondent's actions.

98. My understanding of Mr. Nyaga's objection on the above ground is that this application does not disclose judicial review grounds, which to me is a point of law and qualifies to be a ground for Preliminary Objection which if allowed can dispose the suit. The starting point is the pleadings. The substantive application is founded on the Statutory Statement which is verified by the verifying Affidavit. Order 53 Rule 2 of

the Civil Procedure Rules, 2010, in peremptory terms prescribes the contents of a Statutory Statement. It provides that:-

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

99. The *ex parte* applicant's Statutory Statement contains the facts giving rise to the dispute. It does not disclose the grounds upon which the application is premised. The traditional common law grounds are illegality, *ultra vires*, irrationality, unreasonableness, breach of natural justice only to mention but some. The FAA Act which has now entrenched judicial review under the act lists grounds for judicial review at section 7. In addition, section 12 of the act imports the common law principles. As stated above, the above rule requires an applicant to state the grounds in the statutory statement. This was not done, and, to me, the application does not disclose the judicial review grounds upon which it is premised. No illegality has been pleaded at all. I find and hold that this ground of objection succeeds.

100. Lastly, Mr. Nyaga submitted this case is a clear forum shopping in order to defeat the appeals filed at the High Court and Tax Appeals Tribunal, which, he argued is abuse of court process. He implored the court to consider the effect of granting the orders sought and relied on Republic *v Sacc Societies Regulatory Authority ex parte Joseph Kiprono Maiyo & 3 others* [75]which defined what constitutes abuse of court process.

101. Miss Kirimi in her rejoinder referred to *Republic v The Commissioner of Domestic Taxes Large Tax Payers Office ex parte Barclays Bank of Kenya Ltd* ***[76]***and *Republic v The Commissioner of Domestic Taxes (Large Taxpayers Office) ex parte Barclays Bank of Kenya Limited* [77] and argued that the TAT is a subordinate tribunal and it is not at liberty to depart from the High Court decisions. She argued that each member of the applicant is assessed separately, but the applicant's desire is to have a speedy determination of what if any tax liability attaches to the fees. In addition, counsel referred to *Republic v The Commissioner of Domestic Taxes (Large Taxpayers Office) ex parte Barclays Bank of Kenya Limited* [78]and argued that the judge saw no difficulty in dealing with the second application.

102. The issue under consideration is a direct invitation to this court to determine whether this suit is an abuse of court process. It is admitted there exists an appeal that is yet to be determined which raises the same issues. There is also a long list of other related cases pending in the commercial division of the High Court and also before the Tax Appeal s Tribunal. It is common ground that the cases not only cite the same issues as raised in this case, but they involve members on whose behalf these proceedings are brought.

103. It is perfectly understood where each member of the *ex parte* applicant is issued with a tax assessment it is entitled to challenge in court. That is perfectly in order since each individual member has an inherent right to challenge the tax assessments or tax decisions. But when during the pendency of such suits the *ex parte* applicant now claiming to sue for and on behalf of its member's files a suit challenging the same issues the subject of the individual member's pending suits, then there is a problem. This is because a determination one way or the other in this suit will impact on the pending suits, and, that is where the question of abuse of court process comes in.

104. I have severally stated that[79]it is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[80] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

> ***(a)*** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
>
> ***(b)*** *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
>
> ***(c)*** *Where two similar processes are used in respect of the exercise of the same right.*
>
> ***(d)*** *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
>
> ***(e)*** *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.* ***[81]***
>
> ***(f)*** *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
>
> ***(g)*** *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*
>
> ***(h)*** *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.* ***[82]***

105. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[83]A litigant has no right to purse *paripasua* two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of

justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.[84]

106. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[85] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[86]

107. Turning to this case, the *ex parte* applicant is carefully presenting the same issues being litigated by its members in various suits which are actively pending in court which is un-acceptable. I have already in the first issue held that this suit is *sub judice*. The suit presents a sad scenario of not only having parallel proceedings on the same issues involving the same parties but also a great risk of this court granting orders which may impact on the pending cases. It follows that this suit falls within the ambit of what constitutes abuse of court proceedings enumerated above.

Conclusion

108. Having concluded, as I have herein above this this suit is *sub judice,* that it offends the doctrine of exhaustion, that it does not disclose the judicial review grounds, and lastly that it is ab abuse of court process, I find and hold that the Respondents Preliminary Objection dated 27th May 2019 succeeds. Accordingly, I allow the Respondent's Preliminary Objection and dismiss this suit with costs to the Respondent.

Right of appeal

Dated, Signed and Delivered at Nairobi this **19th** day of **December** 2019

John M. Mativo

Judge

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[1] Cap 469, Laws of Kenya.

[2] See *Republic v The Commissioner of Domestic Taxes Large Tax Payers Office ex parte Barclays Bank of Kenya Ltd* {2012} e KLR and *Republic v The Commissioner of Domestic Taxes (Large Taxpayers Office) ex parte Barclays Bank of Kenya Limited* {2015} e KLR.

[3]Cap 476, Laws of Kenya.

[4] Ibid.

[5] Cap 21, Laws of Kenya.

[6] {2013} e KLR.

[7] NRB High Court ITA No. 8 of 2018.

[8] {2001} 1 EA 253.

[9] Cap 21, Laws of Kenya.

[10] {2018} e KLR.

[11] {2017} e KLR.

[12] Cap 21, Laws of Kenya.

[13] Act No. 4 of 2015.

[14] Cap 476, Laws of Kenya.

[15] Cap 21, Laws of Kenya.

[16] Cap 21, Laws of Kenya.

[17] Ibid.

[18] {2001} 1 EA 253.

[19] As observed in *State of Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967

[20] *Ambica Quarry Works vs. State of Gujarat and Ors*. MANU/SC/0049/1986

[21] Ibid.

[22] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[23] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr*. (Citing Lord Denning).

[24] Ibid

[25] Ibid.

[26] *8th Ed.*

[27] *5th Ed.*

[28] Cap 21, Laws of Kenya

[29] *National Institute of Mental Health & Neuro Sciences v C. Parameshwara*, (2005) 2 SCC 256.

[30] HCCS No. 450 of 1993.

[31] Constitutional Application No. 2 of 2011 {2011} eKLR.

[32] In Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 {1921} 29 CLR 257.

[33] Act No. 29 of 2015.

[34] Act No. 40 of 2013.

[35] {2011} e KLR.

[36] {2018} e KLR.

[37] {2015} e KLR.

[38] High Court Civil Application No. 471 of 2018.

[39] {2018} e KLR.

[40] {2001} 1 EA 253.

[41] {2018} e KLR.

[42] For examples of a purposive approach to statutory interpretation, see *African Christian Democratic Party v Electoral Commission and Others* {2006} ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 25, 28 and 31; *Daniels v Campbell NO and Others* {2004} ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[43] {2004} ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[44] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[45] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[46] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[47] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[48] Cap 470, Laws of Kenya.

[49] Cap 472, Laws of Kenya.

[50] Cap 476, Laws of Kenya.

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

[52] Ibid.

[53] {1992} KLR 21.

[54] Ibid.

[55] {2015} eKLR.

[56] {2015} eKLR.

[57] Ibid.

[58]*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).

[59] Ibid.

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

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

[62] 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).

[63]Act 3 of 2000.

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

[65]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.

[66] 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.

[67] 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]

[68] *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).

[69] Ibid para 44.

[70] Ibid paras 42, 43 and 45.

[71] *2000 (2) SA 674 (CC) at 33.*

[72]Act No 4 of 2015.

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

[74] {2012} e KLR.

[75] {2017} e KLR.

[76] {2012} e KLR.

[77] {2015} e KLR.

[78] {2015} e KLR.

[79] See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016.

[80]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

[81] *Jadesimi v Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

[82](2007) 16 NWLR (319) 335.

[83] Justice Niki Tobi JSC of Nigeria.

[84] See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016.

[85]Ibid.

[86] Ibid.