REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. 61 OF 2012

IN THE MATTER OF:

AN APPLICATION BY MIDWORLD ENTERPRISES INTERNATIONAL LIMITED, FOR ORDERS OF CERTIORARI AND PROHIBITION

=AND=

IN THE MATTER OF:

THE VALUE ADDED TAX ACT (CAP 476) LAWS OF KENYA

=BETWEEN=

REPUBLIC..APPLICANT

=AND=

MIDWORLD ENTERPRISES INTERNATIONAL LIMITED.....EX-PARTE APPLICANT

=AND=

KENYA REVENUE AUTHORITY...RESPONDENT

=AND=

THE COMMISSIONER FOR INCOME TAX....................................INTERESTED PARTY

JUDGMENT

Introduction

1. The cause of action in this application arises from an Order for Settlement of Case under Section 55 of the VAT Act made by the Commissioner for Domestic Taxes against the Ex-parte Applicant, in which the Commissioner compounded offences and fined the Ex-parte Applicant a sum of Ksh. 500,000/=. This order was reiterated through communication from the Commissioner to the Ex-parte Applicant on the 20th of June, 2012 and on the 11th of July, 2012. Aggrieved by the process by which the order was arrived at, the Ex-parte Applicant lodged this Application.

The Application

2. By a Notice of Motion dated 27th July, 2012 supported by an affidavit sworn on the same day by one JOYCE KAMAU the Director of the Ex-parte Applicant pursuant to leave granted on 18th July, 2012 upon an Ex-parte Chamber Summons, Statement and Verifying Affidavit annexed as **'J.K 1'**) the Ex-parte applicant sought judicial review orders of Certiorari and Prohibition as follows:

1. That this Honourable Court be pleased to grant a writ of Certiorari to bring to this court for purposes of being quashed the decision of the Respondent made on 20th June, 2012 in exercise of its public duty under the Value Added Tax cap 476 laws of Kenya demanding payment from the Ex parte Applicant of a 'fine' in the total sum of Ksh.500,000/=.

2. That this Honourable Court be pleased to issue an order of Prohibition directed to the Respondent prohibiting him from enforcing the

said decision or demanding the said payment from the Ex parte Applicant.

3. The facts relied upon by the Ex parte Applicant are as follows:

i. On 19th May, 2011, the Ex-parte Applicant purchased an Electronic Tax Register (ETR) machine – serial number ZK023174 from M/s Data Reliability Network (delivery note No. 23469 annexed as **'J.K 2'**).

ii. Joyce Kamau the Director of the applicant avers that the ETR Machine was tested on the date of delivery and found to be fiscalised and capable of producing Z receipts (copies of Z receipts produced by the said machine on the date of delivery annexed as **'J.K 3'**).

iii. On the 23rd April, 2012, the Respondent's agents visited the Ex-parte Applicant's premises, found one Millicent Gathoni, an accountant and questioned her on the affairs of the company.

iv. She was away on official duties and that the newly appointed accountant requested the Respondent's agents to make an appointment with her on the 26th April, 2012, which request was declined and an order made to produce the records of the ETR machine on the 25th April, 2012 (said order to appear before the Commissioner, serial no. 0752 annexed as **'J.K 6'**).

v. On the 23rd April, 2012, in a bid to extract information from the Ex-parte Applicant's room steward and Accountant, the officers of the Respondent intimidated the employees of the Ex-parte Applicant, which intimidation was captured on CCTV and which, with leave of the Court, would be presented in court.

vi. She further avers that on the 24th April, 2012, the Accountant and the company auditor visited the Respondent's offices with all required documents but were turned away (monthly Z reports extracted from the ETR machine also annexed as **'J.K 4'**).

vii. On or about the 25th April, 2012 the Respondent served an Order for settlement of cases imposing a fine of Ksh 500,000/= on the Ex-parte Applicant (serial no. 0644 annexed as **'J.K 5'**).

viii. On the 30th April, 2012 the Ex-parte Applicant sought to book an appointment for its Directors with the Respondent but was turned away by the latter's employees.

ix. On the 4th May, 2012, she wrote a letter to the Interested Party seeking his intervention in the matter (copy of letter annexed as **'J.K 7'**).

x. On the 20th June, 2012, the Interested Party replied to Joyce Kamau's letter dated 4th May, 2012 to the effect that the Commissioner's opinion was that the fine was imposed legally and ought to be paid (copy of said letter annexed as **'J.K 8'**).

xi. On instructions the applicant's advocates on the 27th June, 2012 wrote a letter to the Interested Party asserting that the fine had been pre-maturely imposed in light of the proviso to Section 55 of the VAT Act (copy of said letter annexed as **'J.K 9'**)

xii. On the 11th July, 2012 the Interested Party issued a second notice to the Ex-parte Applicant to furnish the fine within 7 days or risk further legal action (copy of said letter annexed as **'J.K 10'**)

xiii. On the 15th October, 2012, one JOHN MACHINJI, a Revenue Officer 11 at the Domestic Taxes Department of the Respondent, through P.M Matuku, Advocates swore a Replying Affidavit.

RESPONSES

Respondent's response

4. The response was sworn by John Machinji who averred as follows in his replying affidavit:

a) The Respondent's officials had visited the premises of the Ex-parte Applicant on the 23rd April 2012 for a routine check and inspection of ETR machine compliance as provided by Section 31 (1) of the VAT Act.

b) On the material date it was established that the Ex-parte Applicant was using a non-fiscalized ETR machine that was not generating Z reports as required under Regulation 6 of the Value Added Tax (Electronic Tax Registers) Regulations 2004.

c) The Respondent's official issued a summons to appear before the Commissioner on the **25th April, 2012.**

d) That the summons was acknowledged and signed by one Millicent Gathoni, an

accountant of the Ex-parte Applicant.

e) That the Ex-parte Applicant through the said accountant acknowledged its omission with regard to compliance with ETR Regulations and sought to settle the matter under Section 55 of the VAT Act.

f) Further that upon the said admission and request and upon the authority of the Commissioner under Section 3 (3) (a) of the VAT Act, compounded the offence and imposed a fine in accordance with Section 39 of the VAT Act and Regulation 9 of the Value Added Tax (Electronic Tax Registers) Regulations 2004.

g) That under Section 55 (2) (e) of the VAT Act, an order for settlement as issued in the present case is final and shall not be subject to appeal.

SUBMISSIONS

The Ex-parte applicant's submissions

Whether the Order for settlement of cases under Section 55 of the VAT Act was validly issued.

5. The **Ex-parte Applicant** through its counsel submitted that the Order was not validly issued because:

a) While the Order lists the offences as **"use of non-fiscalised ETR machine and Failure to generate Z receipts"** (both) in contravention of Section 39 of the Act.

The said Section 39 provides:

"39. Any person who fails to comply with-

a) The conditions of the Sixth Schedule or Seventh schedule;

b) Any regulation made under Section 58; shall be guilty of an offence."

The Ex-parte Applicant submits that the above provisions do not support the alleged offences, as they do not set out the offences. In reference to the order and Section 39 of the Act which is alleged to have been contravened, one cannot tell whether the two offences are provided for under the Sixth Schedule, Seventh Schedule or Regulations under Section 58; if the latter then which of the numerous different categories of Regulations made under Section 58 are being referred to.

The Respondent therefore failed to inform the Ex-parte Applicant the specific Condition or Regulation contravened to enable her know the offence committed and the penalty provided for under the law so that it could understand and weigh its options within the provisions of the law, in effect denying the Ex-parte Applicant the opportunity to exercise an informed decision.

The Ex-parte Applicant was entitled to full information on the case against her and to be given a reasonable opportunity to present a response as was held in ***Geothermal Development Company Limited v. Attorney General and 3 others*, [2013] eKLR**

b) Even a further examination of the Sixth Schedule, Seventh schedule or Regulations made under Section 58 shows that the offences listed by the Commissioner in the Order for settlement of cases under section 55 of the VAT Act, to with **"use of non-fiscalised ETR machine and Failure to generate Z receipts"** are not provided for as offences at all.

As it is, the Ex-parte Applicant submits that there was no way of knowing which Regulation(s) the Commissioner was operating under, whether they were under the Act, whether a fine or forfeiture was provided for and sum of the fine if provided for and whether the sum was exceeded or not in the Commissioner's Order. The Respondent's agent charged the Ex-parte Applicant with non-existent offences or offences not provided for by the Act, any Regulations or Schedules made under it.

c) The purported Order provided *"I hereby compound the offences in accordance with Section 55 of the Act and order to pay a sum of Ksh 500,000/= in penalty prescribed by Section 39 and LN 110'*

The Ex-parte Applicant submits that while it has already established that Section 39 does not prescribe any penalty but establishes offences ONLY when read together with another (unspecified) provision, LN 110 – as put forth in the Order is not known of which year it was or the specific provision or regulation under it being referenced. As such, the Ex-parte Applicant or anyone else, could not understand the offence committed, if provided in law and the penalty prescribed.

Whether the Order was issued in contravention to the proviso to Section 55 of the Act.

6. The Ex-parte Applicant submits that the Commissioner acted in breach of Section 55 (1) of the V.A.T Act. Further counsel urged that the applicant never admitted an offence in writing and never requested the Commissioner to compound the offence and thus the Respondent did not have the powers to proceed as he did. As for the admission and request to compound (**JM-2)** in the respondent's replying affidavit, it cannot qualify as an admission and a request to compound because:

a) It was made under duress. The Respondent's agents harassed and intimidated the Ex-parte Applicant's employees in the absence of the (Managing) Director, refused pleas to wait for the Director or the supplier of the ETR machine and instead ordered one

Millicent Gathoni, an Accountant, to sign an admission on behalf of the Ex-parte Applicant. These facts as stated were never specifically denied by the Respondent in its Replying Affidavit sworn on 15th October 2012 and therefore remain unchallenged and undisputed.

b) The offences allegedly admitted to and the ones in the Order do not tally. The Order lists offences as: **"use of non-fiscalised ETR machine and failure to generate Z receipts"** while the (request) admission in the Respondent's Replying Affidavit shows one Millicent Gathoni purportedly did **"admit having committed the offence of: 1) Failure to display VAT Certificate at the premises 2) failure to produce daily Z report 3) Am guilty on fiscalisation of ETR devices".** The Ex-parte Applicant thus submits that the Respondent's agents compounded and penalized the Applicant for offences that its agent had not admitted to.

c) As per the heading of Section 55 of the VAT Act, "Power of the Commissioner to compound offence by **agreement,"** there is a presumption that both parties must come to an agreement, with the party making the admission and request doing so freely and with full understanding and authority. The circumstances of the proceedings show that this was not the case. The admission was given under duress by an accountant who had already confessed that she did not have an understanding of the matters at hand and it was not written out freely but filled in on a form customized by the respondent, making it not free and unequivocal.

Furthermore the accountant is not a person authorized under the Companies Act or in law to commit or bind a company by signing documents on its behalf. The act of signing the (request) admission meant that a non-appealable order with the character of a decree or order of the High Court would ensue with dire consequences on the Ex-parte Applicant.

Section 41(2) of the VAT Act reads:

"41(2) *Where an offence under this Act has been committed by a body corporate, every person who at the time of the commission of the offence, was a director, general manager, secretary, or similar officer of the body corporate, or was acting or purporting to act in such a capacity, shall also be guilty of the offence unless he proves that the offence was committed without his consent or knowledge and that he exercised all diligence to prevent the commission of the offence that he ought to have exercised having regard to the nature of his functions in that capacity and in all circumstances."*

Section 41(2) shows that the Accountant is not a person contemplated to be liable for the offences of a company, and there is nothing to suggest that the Accountant was acting on behalf of the Director or that she was purporting to have the authority to bind the company. She requested for an appointment on behalf of the Director and was turned down.

d) The proviso is very clear that the person must **first admit** the offence **then request** the Commissioner to compound the offence. The form crafted by the Respondent, which the accountant purportedly signed is titled **"Request for settlement of a case under section 55 of the Value Added Tax Act (Cap 476)."** As such, in consideration of the circumstances there was no admission prior to the request, and therefore the Commissioner contravened the provision of Section 55 of the Act.

Whether the Respondent provided adequate information relating to the offence

7. The Ex-parte Applicant submits that in the Replying Affidavit, the Respondent averred that the applicant contravened Regulation 6 of the Value Added Tax (Electronic Tax Registers) Regulations 2004, which information was never provided to the Ex-parte Applicant at any time in the proceedings and which information made its first appearance in the said Replying Affidavit. Even so, the regulation provides:

"*6. A user of a register shall prepare daily, monthly and annual reports, which reports shall set out-*

(i) The date of the report and the period for which it applies;

(ii) The name and address of the user of the register;

(iii) The VAT identification number of the user of the register;

(iv) The unique identification number of the electronic tax register obtained under regulation 5 (b);

(v) The total amount of sales in respect of the period covered by the report;

(vi) The total amount of tax paid in respect of the period covered by the report"

The Ex-parte Applicant submits that the Respondent did not say how or which specific paragraph (s) of the above the Applicant contravened as neither the regulation nor any of its paragraphs were quoted or provided in the Order for settlement or even the letters of 20th June, and 11th July, 2012 written by the interested party.

Whether the Respondent failed to present the Ex-parte Applicant an opportunity to present its case.

8. The Ex-parte Applicant submits that in the 23rd April, 2012 when the Respondent's agents went to its premises they found a steward whom they questioned as the Director was away on other duties. The newly employed accountant requested a meeting on the Director's behalf on the 26th, April 2012, which request was turned down and a demand made for the records of the ETR machine to be produced on the 25th, April 2012. On the 24th of April, 2012, the accountant and the Ex-parte Applicant's Auditor visited the offices of the Respondent to

argue their case but were turned away and on 25th April, 2012 the Accountant was compelled to sign the request to compound the offences. The Respondent refused to allow the Ex-parte Applicant a few more days to avail the supplier of the ETR machine or someone else qualified to answer its questions and upon an irregularly obtained request proceeded to compound the offences and fine the Ex-parte Applicant even though the Respondent did not stand to be prejudiced by allowing the Applicant the time and an opportunity to present its case.

Those factors are not denied in the replying affidavit of John Machinji sworn on the 15th October, 2012 and therefore remain undisputed. The Ex-parte Applicant further wrote to the Respondent on the 4th May, 2012 and 20th June, 2012 but on both occasions the Respondent refused to reconsider its decision or offer reasons whereof and instead reiterated the finality of the fine.

9. The applicant further urged that the Respondent's decision to fine the Ex-parte Applicant is null and void for being procedurally *ultra vires.* The proviso to section 55 (1) mandates that the exercise of the commissioner's power should be preceded by a written admission of the Commission of an offence and a request by the person so admitting to the Commissioner to deal with the offence under that section. The Commissioner based his actions on a purported admission by the Accountant of the Ex-parte Applicant which alleged admission cannot qualify as such since:

a) It was obtained under duress.

b) Person not authorized under law to bid the Ex-parte Applicant granted it.

c) It was not given freely and unequivocal but was given in a form customized by the Respondent.

d) It was given for offence that are non-existent under the Act.

e) The alleged offences do not tally with those contained in the subsequent Oder by the Respondent.

f) It was not a written submission, just a request to compound

The proviso in question is mandatory and the Commissioner therefore failed to follow the properly laid down procedure, resulting in a decision that cannot be legal.

10. The Commissioner contravened the rule of natural justice in his handling of the matter. The Act enjoins him to, while discharging his functions under it, act fairly and apply the rules of natural justice. He failed to inform the Ex-parte Applicant of the offences committed, the law contravened and the penalty thereto despite the fact that the applicant *"was entitled to full information on the case against him and to be given a reasonable opportunity to present a response"* ***Geothermal Development Company Limited v. The Attorney General and 3 others,*** [2013] eKLR and *"the person should know the nature of the accusation made, secondly, that he should be given an opportunity to state his case and that the tribunal should act in good faith"* ***Bryne v. Kinematograph Renters Society Ltd.*** [1958] 2 ALL ER 579 at 599.

11. The respondent and the interested party refused to give the Ex-parte Applicant an opportunity to be heard by refusing to wait for the Director or the supplier of the ETR machine who were the only ones well equipped to answer the pertinent questions and further refused to hear the Ex-parte Applicant's agents on the 24th April, 2012 and refused to adjourn the proceedings. "*Opportunity to adequately prepare duly defend oneself may at times make it inevitable that proceedings be adjourned … denial of an adjournment will result in denial of the right to be heard …" as observed in* ***Judicial Review and Law Procedure and Practice: Peter Kaluma (Law Africa)*** p. 184**.**

12. The applicant's further attempts to reason with the Commissioner through the letters of 4th May, 2012 and 20th June, 2012 were not accepted. The respondent and the interested party refused to consider the contents of the letters and/or offer reasons for his refusal to reconsider their decision. He displayed unreasonableness through his refusal to fully explain the legal provisions and offences, refusal to hear the Ex-parte Applicant agents, refusal to wait for the Director of the Ex-parte Applicant and/or supplier for a few days, refusal to offer reasons for his apparent unreasonableness and lack of good faith on his part. His decision is therefore amenable to be quashed as *"the purpose of the order of certiorari is to ensure that an individual is given a fair hearing by the authority to which he is subjected and since such fair hearing was not given, the matter was amenable to quashing by the court …"* ***Republic v Minister for Local Governing and another Ex-parte Mwahima*** [2002] 2 KLR 557.

13. The Commissioner acted in bad faith in the course of the proceedings when he:

a) Charged the Ex-parte Applicant with offences not provided for under the law, or if provided for, failed to disclose the specific provisions of the Law.

b) Obtained an admission and request to compound through duress.

c) Proceeded to compound alleged offences without a properly given admission.

d) Refused to allow an adjournment to allow the Ex-parte Applicant to prepare itself.

The Respondent's submission

14. In response, the Respondent filed written submissions principally contending that in the circumstances of the case, the orders for judicial review may not issue because in arriving at the decision and demanding the fine of Ksh. 500,000/= from the Ex-parte Applicant, the respondent followed the law as it is, acted within the law and acted in a reasonable manner. The respondent set out the factual background as

follows:

I. On the 23rd of April, 2012, the Respondent's officials conducted a routine inspection for Electronic Tax Register Compliance on the Ex-parte Applicant under section 31 (1) of the VAT Act which provides:

> *"31 (1) An authorized officer may, at all reasonable times, enter without warrant any premises upon which any person carries on business, or in which he has reasonable grounds to believe that a person is carrying on business, in order to ascertain whether this act is being compiled with [whether on the part of the occupier of the business premises or any other person) and on entry may-*
>
> *a) Require the production of and may examine, make and take copies of, any record, book, account or other document kept on the premises relating, or appearing to relate to the provision of any taxable supply;*
>
> *b) Take possession of and remove any record, book, account or other document which he has reasonable ground for suspecting to be, or to contain, evidence of the commission of any offence under this Act;*
>
> *c) Require the occupier of the premises or any person employed therein to answer questions relating to any record, book, account or other document, or to any entry therein, or to render such explanations, and give such information, in respect of the business concerned as the authorised officer may require for the exercise of his functions under this Act;*
>
> *d) Require any safe, container, envelope or other receptacle in the establishment to be opened;*
>
> *e) At the risk and expense of the occupier of the premises, open and examine any package found therein;*
>
> *f) Take and retain without payment such reasonable samples of any goods as he may think necessary for the exercise of his functions under this Act."*

II. The inspection established that the Ex-parte Applicant was using a non-fiscalised ETR machine which was not generating Z reports as required under Regulation 6 of the Value Added Tax (Electronic Tax Registers) Regulations 2004 which provides;

> *"6. A user of a register shall prepare daily, monthly and annual reports, which reports shall set out-*
>
> *i. The date of the report and the period for which it applies;*
>
> *ii. The name and address of the user of the register;*
>
> *iii. The VAT identification number of the user of the register;*
>
> *iv. The unique identification number of the electronic tax register obtained under Regulation 5 (b);*
>
> *v. The total amount of sales in respect of the period covered by the report;*
>
> *vi. The total amount of tax paid in respect of the period covered by the report."*

III. As a result of the non-compliance with Regulation 6, the Respondent's officials issued the Ex-parte Applicant's Accountant with summons to appear before the Commissioner on the 25th April, 2012. The summons were issued in accordance with section 31(2) of the VAT Act that provides;

> *"31 (2) Where an authorized officer enters any premises, in exercise of the powers conferred by subsection (1), he may take with him such persons, as he considers necessary for the carrying out of his functions under the Act."*

IV. The Ex-parte Applicant through its Accountant admitted its failure to comply with ETR Regulations and sought to settle the case under section 55 of the VAT Act. Subsequently the Accountant signed the requisite form VAT 78B on the 25th of April, 2012 as agreement authorizing the Commissioner of Domestic Taxes to compound the offence and impose a fine.

Section 55 provides as follows:

> *"55. Power of the Commissioner to compound offences by agreement*
>
> *(1) The Commissioner may where he is satisfied that a person has committed an offence under this Act in respect of which a penalty of a fine is provided or in respect of anything is liable to forfeiture, compound the offence and may order that person to pay such a sum of money not exceeding the amount of the fine to which he would have been liable if he had been prosecuted and convicted for the offence, as he may order anything liable to forfeiture in connection therewith to be condemned:*
>
> *<u>Provided that the Commissioner shall not exercise his power unless the person admits in writing that he has committed the offence and requests the Commissioner to deal with the offence under this section.</u>*

(2) Where the Commissioner makes an order under this section –

a) The order shall put into writing and shall have attached to it the request of the person to the commissioner to deal with the matter; and

b) The order shall specify the offence which the person committed and the penalty imposed by the Commissioner; and

c) A copy of the order shall be given to the person if he so requests; and

d) The person shall not be liable to further prosecution in respect of the offence except with the express consent of the Attorney General; and unless that consent has been given, if a prosecution is brought it shall be a good defence for that person to prove that the offence with which he is charged has been compounded under this section; and

*e) **Subject to paragraph (d), the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree of the High Court**."*

V. The respondents employee or agent John Machinji, on the authority of the Commissioner under section 3 (3) (a) of the VAT Act compounded and imposed a fine in accordance with section 55 of the VAT Act and Regulation 9 of the Value Added Tax (Electronic Tax Registrar) Regulations 2004. It was based on the allegation that the Ex-parte's employee had admitted the offence. The said regulation provides as follows:

"*9. Any person who fails to comply with these Regulations shall be guilty of an offence and **shall be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both."***

The order for settlement under section 55 of the VAT Act is of the nature of a consent order and that is why under subsection (2) (e) such an order is said to be final and not subject to appeal.

15. The respondent further contended that they followed the law and they never exceeded their jurisdiction to warrant the issuance of judicial review orders. In making the demand which was and remains reasonable within the law and it did not constitute any irrationality. The Ex-parte Applicant was accorded its natural right of a hearing through its accountant-Millicent Gathoni. They did not abuse their powers nor did they act in excess of statutory power *malafide* with a view to oppress, vex, embarrass and or harass the Ex-parte Applicant. The Ex-parte Applicant by paying the fine of Ksh. 500,000/= will suffer no harm or loss in excess of the taxes which are legitimate due from it.

16. They relied on **Re Preston** [1985] 1 A.C 835 where their Lordships of the House of Lords outlined the circumstances under which a taxpayer may seek judicial review of a decision taken by the Revenue Commissioners. At page 851 paragraph 'H' whereof it was pointed out:

"*The Commissioners have their statutory powers and duties, the exercise of which can be challenged by the process of judicial review only if certain principles of general application are met. The tax payer must show either a failure to discharge their statutory duty to him or that they abused their powers or acted outside them"* as per **Lord Scarman**.

17. The respondent submits that the ex-parte applicant has not shown that the Respondent and the Interested Party failed to discharge a statutory duty to it or that in an attempt to discharge such a duty the Respondent abused its powers or acted outside them. At page 852 paragraph 'G' Lord Templeman stated:

"*Judicial review should in principle be available where the conduct of the Commissioner in initiating such an action would have been equivalent, had they not been a public authority, to a breach of contract, or a breach of representation giving rise to an estoppel. Such a decision could be an abuse of power."*

At page 862 paragraph 'C' **Lord Templeman** stated;

"*The Commissioners may decide to abstain from exercising their powers and performing their duties on grounds of unfairness, but the Commissioners themselves must bear in mind that their primary duty is to collect, not to forgive, taxes and if the Commissioner decided to proceed, the Court cannot in absence of exceptional circumstances decide to be unfair that which the Commissioner by taking action against the tax payer have determined to be fair. The Commissioners possess unique knowledge of fiscal practices and policy. The Commissioners are inhibited from presenting full reasons to the court for their decisions because of the duty of confidentiality owed by the Commissioners to each and every taxpayer.*

The Court can only intervene by judicial review to direct the Commissioners to abstain from performing their statutory powers if the Court is satisfied that "the unfairness" of which the Applicant complains renders the insistence by the Commissioners on performing their duties or exercising their powers an abuse of power by the Commissioners."

18. The Respondent submitted that none of the above happened nor had been committed to warrant the Court judicial authority to fault the decisions of the Kenya Revenue Authority (Respondents) or those of the Interested Party. The respondent urged that the Notice of Motion dated 27th July, 2012 be dismissed with costs to them and the Interested Party.

Further ex-parte's applicant's submission

19. In reply to the respondent's Submissions, the ex-parte applicant responded that they were not making use of a non-fiscalised ETR machine which was not generating Z reports as required by Regulation 6 of the *VAT (Electronic Tax Registers) Regulation 2004* – there is no evidence that this information was supplied to the Ex-parte Applicant at any point during the course of the Proceedings that are the subject of the present Application. The Commissioner mentioned the Regulation in question for the first time in the replying affidavit and the oral submission in court. There was no admission made and if there was any that was made then it was invalid. In regard to the respondent's reliance on the case in ***Re Preston,*** supra, it has been ably demonstrated that the respondent abused its powers under the Act**.** In response to the respondent's submission that the Ex-parte Applicant does not have access to judicial review because an alternative remedy is available, it is submitted that it is now settled law that the remedy of judicial review is indeed available in appropriate cases, such as this, even where the is an alternative legal or equitable remedy, citing ***David Mugo t/a Manyatta Auctioneers v Republic****,* CA No. 265 of 1997; ***Kadamas v Municipality of Kisumu*** [1985] KLR 970; ***Bahaj Limited v. Abdo Mohamed and Another,*** CA No. 97 of 1998. Unreported; ***Peter Kaluma*** ibid at p. 285; ***Shah Vershi Devshi and Co Ltd v The TLB*** [1970] EA 631; and ***Republic v NEMA & 2 others Ex-parte Greenhills Investment Ltd and 2 others*** [2006] 2 KLR 485.

Issue for Determination

20. The issue that arises for determination in this judicial review proceedings is the circumstances for the exercise by the Respondent if its powers to compound an offence in settlement of cases under section 55 of the Value Added Tax Act Cap 476 Laws of Kenya

DETERMINATION

21. As a rule of law principle, there can be no valid exercise of power or, put another way, power to act contrary to statute or in excess of power granted by statute. Due process of the law set in the statute must be followed.

22. I respectfully agree with the principles of judicial review in ***tax*** matters as set out in the House of Lords decision in ***Re. Preston,*** supra, that-

> "*[1] The Inland Revenue Commissioners (IRC) were amenable to the process of judicial review;*
>
> *[2] a tax payer could challenge a decision taken by the commissioners in exercising their statutory powers and duties if he could show that they had failed to discharge their statutory duty towards him or that they had abused their powers or acted* ***ultra vires****; [and]*
>
> *[3] That unfairness in the purported exercise of a power could amount to an abuse or excess of power if it could be shown that the commissioners had been guilty of conduct equivalent to a breach of contract or breach of representation."*

23. I also agree with the decision of the Kenya Court of Appeal in ***Kadamas v. Municipality of Kisumu*** [1985] KLR 970 that -

> "*Prohibition lies not only for excess of jurisdiction but also for* ***departure from rules of natural justice.*** *The High Court in deciding whether or not to grant an order of prohibition would not be fettered by the availability of an alternative remedy…"*

24. Before a valid exercise of power under section 55 of the Act is possible, the ingredients of an offence under the Act for which a fine is prescribed must be demonstrated. Otherwise its exercise in vacuum amounts to pretended power which is invalid. The power of the Commissioner under section 55 of the Value Added Act for the compounding of offences does not crystallize until in accordance with the provision there exists the following:

> *1. A finding by the Commissioner that a* ***person*** *has committed an offence under the Act in respect of which a penalty of a fine is provided or in respect of anything is liable to forfeiture;*
>
> *2. The sum of money to be paid* ***must*** *not exceed the amount of the* ***fine*** *to which he would have been liable if he had been prosecuted and convicted for the offence;*
>
> *3. The person who has committed the offence* ***must*** *admit* ***in writing*** *that he has committed the offence; and*
>
> *4. The person* ***must*** *request the Commissioner to deal with the offence under this section.*

25. Where, as here, the person alleged found guilty of the offence is a corporation, the admission and request for the Commissioner to deal with the offence under section 55 rather than through prosecution in Court must be done by an authorized officer of the corporation. Company Law recognizes a director or secretary or other authorized officer of the corporation as having authority of the company to bind it. Section 34 of the Companies Act, 2012 applicable to this matter provides for contracts by a company as follows:

> **"*34. Form of contracts***
>
> *(1) Contracts on behalf of a company may be made as follows—*
>
> *(a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith,* ***may be made on behalf of the company in writing signed by any person acting under its authority, express or implied;***

(b) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied.

(2) A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto. (3) A contract made according to this section may be varied or discharged in the same manner in which it is authorized by this section to be made."

There was no evidence that the company authorized the accountant who signed the alleged admission and request for compounding of the offence, expressly or by implication.

26. Even section 41 (2) of the Value Added Tax Act recognizes the limitation of the company officers who are capable of binding and being liable for actions of the company when it prescribes, as regards the liability of the company as follows:

"(2) Where an offence under this Act has been committed by a body corporate, every person who, at the time of the commission of the offence, was a director, general manager, secretary, or other similar officer of the body corporate, or was acting or purporting to act in that capacity, shall also be guilty of the offence unless he proves that the offence was committed without his consent or knowledge and that he exercised all diligence to prevent the commission of the offence that he ought to have exercised having regard to the nature of his functions in that capacity and in all circumstances. [Act No. 7 of 2002, s. 30.]"

27. As regards the Summons for the appearance before the Commissioner on 25th April, 2012 Order 5 Rule 3 of the Civil Procedure Rules, which by virtue of section 89 applies to all proceedings of a civil nature, provides for service in the case of a corporation as follows:

"[Order 5, Rule 3.] Service on a corporation.

3. Subject to any other written law, where the suit is against a corporation the summons may be served —

(a) On the secretary, director or other principal officer of the corporation; *or*

(b) If the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) —

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation."

28. Whilst I would readily agree that service upon an accountant of a corporation is good service for purposes of summonses both under Order 5 Rule 3 of the Civil Procedure Rules above, and for purposes of the Value Added Tax Act, I do not agree that an admission and request for compounding of the offence with the effect of compromising the tax payer's right to a fair trial before the Court through compounding procedure of section 55 of the Value Added Act could be executed by an officer other than the officers recognized by Company Law as representing the company so as to constitute an act of the company.

29. In addition, section 55 of the Value Added Tax Act on the Commissioner's powers of compounding an offence being in the nature of alternative dispute resolution must depend on the consent of the parties. Such consent must be given an officer of the corporation in case of a corporation or by duly authorised agent such as an advocate. There was no evidence that the accountant was a duly authorized for purposes of giving consent to the waiver of the applicant's right to fair trial for the alleged offences guaranteed under Article 50 of the Constitution. As a party who seeks to rely on the alleged consent by request for compounding, the respondent had the evidential burden of proof under section 109 of the Evidence Act to prove the accountant's authority to enter a valid admission and request for compounding, which burden it did not discharge. I would find in acting on the powers under section 55 of the Act without the necessary ingredients of a valid admission of the offence and request for compounding by an authorized officer of the suspect corporation, the respondent acted *ultra vires* or outside the statutory power, and his action is subject to quashing by an order of Certiorari.

Breach of the Rules of Natural Justice on Fair Hearing

30. Even if the accountant could be taken as a proper officer to represent a corporation for purposes of entry of admission and request under section 55 of the Value Added Tax Act, the charge herein made against the company did not have sufficient detail as regards the offence and the penalty to allow the company through its representative to make an informed choice between a prosecution in court or the Commissioner's compounding procedure of section 55 of the Act.

31. There was no evidence that the Regulation 6 of the Value Added Tax (Electronic Tax Registers) Regulations 2004 and the penalty for breach thereof under Regulation 9 was brought to the attention of the company any time before the purported compromise of the offence leading to the compounding of the offence and imposition of a 'fine' of Ksh.500.000/-. In these circumstances, the Court must find that in his pretended exercise of the powers under section 55 of the Value Added Tax Act, the Commissioner's representative was in breach of the rule of natural justice as to fair hearing in failing to give the full detail of the charges against the company and prescribed penalty therefor to

permit informed choice between the full-scale court trial of the charges and a compounding of the offence under section 55 of the Act.

32. It may be that had the company been made aware of the heavy penalty of Ksh.500,000/- prescribed under Regulation 9 of the Regulations, it may have opted for a full trial on the merits of the charges before a court of law rather than allowing the Commissioner to deal with the alleged offence under section 55 of the Act.

33. In addition, the Respondent summoned the Ex parte Applicant to attend the Commissioner on 25th April 2012 and refused the Ex parte Applicants request for hearing on the 26th April 2012 when its director and the supplier of the ETR machine would have attended to respond to the issues raised in the charges against the company. It would appear to the Court that the Respondent was unfair in his dealing with the ex parte applicant by failing to grant the request for a hearing date when the applicant would respond to the charges and in bamboozling the accountant into admitting the charges. The Court must find on this count that the respondent were in breach of the rule of natural justice as to fair hearing, and in accordance with ***Kadamas,*** supra, agree that the judicial review order of certiorari and prohibition are available. Indeed, as observed by **H.W.R. Wade & C.F. Forsyth 10th ed. 2009 Administrative and Constitutional Law** at p. 512: -

> ***"Although a prohibitory order was originally used to prevent tribunals from meddling with cases over which they have no jurisdiction, it was equally effective, and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had some power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by a prohibitory order".***

There exists no alternative remedy under the Value Added Tax Act because, in accordance with section 55 (2) (e), an order of the Commissioner under the section shall be *"shall be final and not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court."* The Court does not, however, agree that the existence of alternative remedy is a bar to judicial review for excess of jurisdiction or ***ultra vires.*** See **H.W.R. Wade & C.F. Forsyth, Administrative Law, 9th ed. 2004 at p. 703** that:

> ***"In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on the merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal which has already been emphasized. The only qualification is that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal,"***

34. On the evidence before the Court, I am not able to find that unreasonableness within the ***Wednesbury Principles*** (see ***Associated Provincial Pictures House Ltd v. Wednesbury Corp***. [1947] 1 KB 223) and bad faith are demonstrated in the purported exercise by the Commissioner herein of the power under section 55 of the value Added Tax Act.

35. It would appear that in the matter before the court, the decision of the Respondent may be impugned on the two grounds of error of law and breach of the rule of natural justice in the formulation of **Lord Roskill** in the House of Lords decision in ***CCSU v. Minister for the Civil Service*** (1984) 3 ALL ER 935, 953 as to the evolution of judicial review along three separate grounds as follows:

> ***"The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury Principles (see Associated Provincial Pictures House Ltd v. Wednesbury Corp. (1947) 1 KB 223). The third is where it has acted contrary to what are often called 'principles for natural justice'. As to this last, the use of this phrase is hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly...."***

The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had "a reasonable expectation" of some occurrence or action preceding the decision complained of and that that "reasonable expectation" has not in the event been fulfilled."

Orders

36. Accordingly, for the reason set out above, the Ex parte Applicant's Notice of Motion herein is granted as prayed.

37. There shall be no order as to costs.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 30th DAY OF April 2018.

E.K.O.OGOLA

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JUDGE

Appearances:

M/S Kanyi J. & Co. Advocates for the Ex-Parte Applicants.

M. P. M. Matuku Advocate for the Respondent and the Interested Party.