



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 364 OF 2007

(Coram: Odunga, J)

REPUBLIC.....APPLICANT

VERSUS

THE MINISTER OF FINANCE.....1ST RESPONDENT

THE COMMISSIONER-GENERAL

OF THE KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE COMMISSIONER FOR

DOMESTIC TAXES.....3RD RESPONDENT

EX PARTE: KENNETH KIPLAGAT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 13th April, 2007, the *ex parte* applicant herein, **Kenneth Kiplagat**, seeks the following orders:

1. That an order of certiorari do issue to remove into this court and quash the decision of the Minister of Finance dated the 16th October, 2006 denying waiver of interest and penalties to the applicant.
2. That an order of certiorari do issue to remove into this court and quash the decisions of the Kenya Revenue Authority dated the 09th November, 2006 and 07th September, 2006 purporting to demand from the applicant payment of interest and penalties.
3. That an order of mandamus do issue directed to the Minister of Finance, the Commissioner-General of the Kenya Revenue Authority and the Commissioner of Domestic Taxes compelling the said persons to waive all interest and penalties in respect of the applicant in respect of all accounting years prior to and including the financial year 2004.
4. An order of prohibition do issue directed at the Commissioner-General of the Kenya Revenue Authority and the Commissioner of Domestic Taxes in respect of both income tax and value added tax prohibiting the claiming of any penalties interest or any other payment from the applicant in respect of all accounting years prior to and including the financial year 2004.
5. That this Honourable Court be pleased to declare that the Income Tax Act and the Value Added Tax Act and all legislation governing the Kenya Revenue Authority are null and void in respect of all clauses and provisions that impose penalties and interest on unpaid fee notes inconsistent with the express provisions of the Advocates Act regarding the charging application and computation of penalties and interest.
6. The costs of this Application be provided for.

Ex Parte Applicant's Case

2. According to the applicant, an Advocate of the High Court of Kenya and a partner in the firm of **M/s Okoth and Kiplagat Advocates**, he is registered with the Kenya Revenue Authority (KRA) as an Income Tax payer under PIN No. A001597484N and as a VAT registered payer under VAT No. 0106042T.

3. According to the Applicant, by a decision dated the 13th March, 2003 made by the KRA vide an agency notice addressed to the Deposit Protection Fund (DPF), KRA declared that the applicant was indebted as at that date to KRA to the tune of Kshs 18,773,826.00. Pursuant to the said Agency Notice, the DPF through Reliance Bank Limited (In Liquidation) remitted the said sum of Kshs 18,773,826.00 directly to KRA and upon full satisfaction of all taxes due to it by the Applicant, KRA cancelled the Agency Notice vide its letter dated the 11th April, 2003 and the Applicant was relieved of all liability for tax payment for all years prior to and including the tax year 2003.

4. However by a legal notice dated the 2nd July, 2003, the KRA demanded to have an in depth audit review of the Applicant's accounts for the years 1996 to 2001 income years and vide a legal notice dated the 11th September, 2003 the KRA assessed the Applicant to pay the sum of Kshs 11,308,419 in respect of additional tax, additional interest and additional penalty for the income years 1996, 1997, 1999, 2000 and 2001. Notwithstanding the said demand, by a letter dated 17th October, 2003, the KRA informed the Applicant that the Applicant had emerged the "**Top Taxpayer under the Individual Taxpayers**" category and that the Minister for Finance was extending an initiation to the Applicant to receive an award in that regard at a special function to be held at Grand Regency Hotel on the 21st October, 2003 on which day the Applicant was presented with a trophy shield as the "**Individual Top Taxpayer Winner 2002/3**". By a letter dated 28th October, 2003, the Applicant confirmed to the Kenya Revenue Authority that the principal tax had now been paid directly from the DPF and sought waiver of interest and penalties in respect of the Applicant's accounts for accounting years prior to and including the accounting year 2003.

5. According to the Applicant, vide a Tax Compliance Certificate dated 30th July, 2004, the KRA confirmed that the Applicant's firm had fulfilled the obligation to pay taxes as per the **Exchequer and Audit (Public Procurement) Regulations, 2001** and could therefore participate in public tenders. It was further disclosed that by a letter dated 16th August, 2004 the KRA on the instructions of the Applicant's firm wrote to the DPF declaring that the partners of the said firm owed the KRA the principal tax of Kshs 18,813,670.00 and requested that any fees due to the firm be remitted directly to the KRA and an Agency Notice was issued to that effect. Accordingly the DPF vide a letter dated 1st December, 2004 remitted directly to the KRA the said sum of Kshs 18,813,670.00 as directed receipt of which the KRA acknowledged by a letter dated 3rd December, 2004 in full payment of all tax due by the applicant and cancelled the Agency Notice that had been issued by the DPF. It was therefore contended by the applicant that all taxes due to the KRA in respect of all the accounting years prior to and including the year 2004 were all paid and the DPF remitted to the Applicant the surplus sum of Kshs 1,875,985.15 being the unclaimed portion of the monies due to the Applicant and for which the KRA had no claim to. This position was further confirmed by the letter dated 10th December, 2004 by the applicant whereby the applicant sought the waiver of any interest and penalty as contained in the then subsisting amnesty.

6. By a letter dated 31st August, 2006 the KRA, in reference to the Applicant's letter dated 28th October, 2003, informed the applicant that the applicant's request for waiver of penalties and interests was being referred to the Minister for Finance for consideration. However by a letter dated 7th September, 2006, the KRA made another demand for payment of tax arrears in respect of the years 2001, 2003 and 2004 within fourteen days. In a letter dated 16th October, 2006, the Minister for Finance, without disclosing any reasons therefor, replied to the KRA's letter dated 31st August, 2006 stating that on 4th October, 2006, the Applicant's request for waiver of interest and penalties had been declined and directed that the matter be closed as no appeal would be considered.

7. According to the Applicant, since he had not indicated that he intended to lodge an appeal, the Minister's response was clearly anticipatory, biased and was a clear abuse of discretion and was arrived at without affording him an opportunity of being heard.

8. Subsequently vide a letter dated 9th November, 2006, the KRA demanded for payment of Kshs 19,153,399.00 within seven days and in response thereto, the Applicant vide a letter dated 20th November, 2006 expressed surprise at the clear abuse of office to achieve an aim that was contrary to statute by ignoring all tenets of natural justice.

9. According to the applicant, the actions of the Minister of Finance and the KRA are inconsistent with the representations made, certificates issued and statutory declarations made. In his view, the evidence shows that the Applicant acted on clear representations by KRA, received distinguished and public commendation for honouring tax payments and compliance and received certificates confirming that all taxes had been paid and that no outstanding taxes were due for the period including the accounting year 2004. Accordingly, the applicant took advantage of the tax amnesty then in force as a result of which all interests and penalties stood waived. It was his position that by reopening the old claims and reneging on clear written representations and certifications the Respondents are in serious breach of the Applicant's constitutional rights as the Applicant acted on the certifications, written representations and reasonable assurances of the Respondents.

10. The Applicant therefore contended that he would suffer immense prejudice if the said certifications, written representations and reasonable assurances are reneged upon. The Applicant further averred that the provisions of the **Income Tax Act** and the **Value Added Tax Act** were clearly violated by the Respondents and that the Respondents' actions are clearly ultra vires the said Acts and that their actions amount to infringement of the Applicant's constitutional rights. In addition the said actions of the Respondents are arbitrary, unreasonable and amount to a serious abuse of power being unconstitutional acts and in breach of the rules of natural justice hence the orders sought herein.

11. The Applicant faulted the Respondents' action on, inter alia, grounds that the Respondents applied the law in a blatantly discriminatory, illegal and unconstitutional manner in suggesting that the amnesty applies only to persons who had never made any tax payments at all or any tax disclosures while those who had made tax disclosures before the amnesty period could not enjoy any relief. In his view such application of the law had the effect of punishing tax payers who had made bona fide and honest disclosures but rewarded the tax cheats who have over the years refused to pay any tax whatsoever hence was a blatantly discriminative, illegal and unconstitutional law and ought to be struck out. It was further contended that the said actions were in breach of the principle of proportionality in that they failed to maintain a

proper balance between the adverse effects of their decisions would have upon the rights, property and interests of the applicant and the statutory purpose they were required to fulfil.

12. It was the Applicant's case that whereas he is, by reason of the provisions of the Advocates Act, restricted to applying a penalty on all unpaid fee notes at the rate of 9% per annum, under the provisions of the **Income Tax Act**, the Respondent is required to recognise as income all amounts which have been received by the Applicant or invoiced by the Applicant whichever is earlier. It was therefore contended by the applicant that the obligation to recognise as income, invoiced amounts irrespective of whether or not the invoiced amounts have been paid, against which the VAT Tax is due and payable on the 20th day of each month, and to subject such amounts to interest and penalty under the said **Income Tax Act** at rates inconsistent with the rates allowable under the **Advocates Act** is unconstitutional, unreasonable and ultra vires the **Advocates Act** since the Applicant has no means by which he can compel clients who have been invoiced to meet the said penalties and interests imposed by the **Income Tax Act** as the clients are afforded a complete defence by reason of the provisions of the **Advocates Act**, which further allows clients to challenge any invoiced amount and to require the same to be subjected to taxation. It was therefore the Applicant's case that since the process by which legal charges and invoices are to be determined are not recognised by the provisions of the **Income Tax Act** which levies penalties and interests on undetermined amounts contrary to the provisions of the **Advocates Act**, the process was unreasonable, illegal and unconstitutional taking of property contrary to section 75 of the retired Constitution of Kenya.

13. According to the applicant, he has always taken the view that he would declare his income as required by law and disclose every fee note and invoice raised and recognise the same in his accounts whether he has been paid or not with the express expectation that he would seek waiver of all interest and penalties on unpaid fee notes and invoices.

14. It was submitted on behalf of the applicant that since all his taxes up to and including the year 2004 within the amnesty period and that the evidence presented in that regard is unequivocal, he is accordingly entitled to a full waiver of penalties and interest. He contended that the respondents have not denied or answered his averments and depositions. It was therefore submitted that by failing to afford him waiver of interest and penalties, the respondents were acting in a selective and discriminatory manner in the application of the tax waiver provisions in clear violation of the equal protection safeguards in the Constitution. Citing Article 27 (1) of the Constitution, it was submitted that the Constitutional imploration is to the effect that no person should be prejudiced or suffer any disadvantage on account of the application of any law. It was argued that the respondents proceed on the illegal premise that a person who has paid all his taxes before the amnesty period should nonetheless pay penalties and interest but that a person who has avoided paying taxed before the amnesty period is entitled to a full waiver of penalties and interest.

15. It was submitted that the Supreme Court of Sri Lanka adjudicated on this point in **Nihal Sri Ameresekere vs. AttorneyGeneral**. It was submitted that the Sri Lankan authority indicates the manner in which political dispensation influences the structuring of tax amnesties and the effect such amnesties have on other tax payers and that in striking down the Sri Lankan tax amnesty, the Sri Lankan Supreme Court was re-emphasizing the importance of keeping tax matters above partisan political consideration. To the applicant, it is clear from the manner in which the applicant has been treated that other concerns other than legitimate tax consideration were at play in the determination of the applicant's affairs. Further, the Minister's statement aforesaid was a clear indication of the prejudice and partisan political consideration the applicant is complaining about. It was submitted that unless sanctioned by this court, tax authorities and tax measures will be manipulated to victimize persons who are perceived to be of a different political persuasion or belonging to a community which is not in favour. Thus the tax authorities could be used to punish persons or communities perceived to be a threat to the status quo or entrenched privileged commercial interests. In this regard reliance was placed on **R v. Somerset County Council ex parte Fewings [1995] 1 ALL ER 513** at page 524.

16. On legitimate expectation, it was submitted that the evidence illustrates elaborate sequence of events and undertakings. That KRA gave unequivocal and clear undertakings to the applicant and did not at any stage enter any caveat or reservation with regard to the said undertakings. That by a letter dated 3rd December, 2003 addressed to the Director, Deposit Protection Fund and copied to KRA, it acknowledged that all monies it had demanded had been fully paid and the applicant acknowledged the said letter. It was submitted that the Deposit Protection Fund owes the applicant more money than KRA was demanding and KRA forwarded the balance of the monies by a letter dated 1st December, 2004. It was submitted that KRA proceeded to cancel the Agency Notice it had issued to the Deposit Protection Fund. The applicant raised the question whether KRA could reinvent and revive a tax claim on the basis that the applicant was owing tax when KRA had cancelled the Agency Notice it issued in the year 2004. It was argued that KRA is estopped from asserting any claim inconsistent with the position it had taken previously in advising the applicant that the agency notice had been cancelled and that there was no other or further tax due. It was stated that KRA has never advised the applicant that he was not eligible for waiver of penalties and interest under the 2004 tax amnesty. That KRA did not answer the applicant's letter dated 10th December, 2004 in which the applicant unequivocally put down the terms of the understandings reached between KRA and him. In this regard, the applicant cited **Keroche Industries Limited v. KRA & Others Nairobi Misc. Civil Application No. 743 of 2006**.

17. It was submitted that following the payment of all the taxes due to KRA the applicant applied for a Tax Compliance Certificate and was promptly issued with the said certificate on 30th June, 2004. Citing section 13(10) (d) of the **Exchequer and Audit (Public Procurement) Regulations, 2001** it was submitted that a Tax Compliance Certificate is confirmation that the holder has fulfilled their obligations to pay taxes and cannot be issued to a person against whom tax liabilities remain outstanding. The tax liability being demanded here is not assessed on the basis of self-assessment but is the product of an in-depth tax audit conducted by KRA on the applicant's accounts hence it is not permissible for the respondent to assert that there are other interpretations which apply in addition to what the certificate and the **Exchequer and Audit (Public Procurement) Regulations, 2001 state**. It was further submitted that the said regulations categorically state that the certificate is evidence that the holder of such a certificate has fulfilled their obligation to pay taxes and the regulations do not say that they have complied with self-assessment or that the applicant has filed returns. It was submitted that there is no statutory form of the certificate and the certificate is crafted and designed by KRA and nothing would have been easier than inserting a qualification to the effect that the certificate is not confirmation that the holder has paid their taxes but is a provisional indication based on self-assessment filing. To the applicant, the law obliges the Respondents to adopt the interpretation that favours the applicant and that this is the general rule in the interpretation of tax legislation and this position has been reiterated in many judicial decisions. The applicant in this regard cited **Commissioner of Income Tax v. Westmont Power (K) Ltd., Nairobi High Court Income Tax Appeal No. 626 of 2002** at page 3.

18. It was submitted that the correspondence exchanged between KRA and the applicant read together with the certificate of compliance leave no doubt in the mind of any reasonable person that the applicant had completely and faithfully discharged all his tax liabilities.

Therefore KRA cannot many years later be permitted to suggest that what it lead the applicant to believe was not true and that the certificate of compliance was a mere piece of paper with no force of law when in actual fact certificate is issued under clear a provision of law, being **Exchequer and Audit (Public Procurement) Regulations, 2001**, and a certificate issued pursuant to the said provision must be deemed to mean what it says.

19. According to the applicant, his tax affairs in this case relate directly to the conflicting provisions of the law and the manner in which different laws affect recognition of income for accounting purposes. The history of the matter, he stated could be traced to the applicant's letter to KRA dated 28th October, 2003, from which narrative, the applicant's tax liabilities stem from the application of the **Value Added Tax Act** and the **Income Tax Act** both of which are in serious conflict with the **Advocates Act** and the **Advocates (Remuneration) Order**. He expounded that while under section 13(1A) of the **Value Added Tax Act**, an advocate must recognize in his accounts income relation to his services once work is done and when a fee note is raised or when a fee note is paid, whichever happens first, meaning that an advocate must pay tax on work done in a particular quarter whether his client has paid for the services or not and failure to remit the said tax would result in the application of the penalty and interest; an advocate is however guided by a completely separate and conflicting law with regard to the charging of fees thus the **Advocates (Remuneration) Order**, specifically, paragraph 13.

20. The applicant concluded that once an advocate has rendered services and raised a fee note is not binding on a client as such a client has an option of asking for the taxation of such a fee note or invoice. It was submitted that the applicant has honoured the provisions of the **Value Added Tax Act** and **Income Tax Act** by recognizing all fee notes raised during the respective accounting periods even when the fee notes have not been paid as the settlement of a fee note is not a condition to the declaration of income. The applicant explained that he was raising the unconscionable results of the faithful application of the two statutes in respect of how advocates operate.

21. To him, the inconsistency is further compounded by paragraph 7 of the **Advocates (Remuneration) Order**. It was submitted that the applicant was being forced to pay income tax and VAT on monies that had clearly not been received but had to recognize these unpaid fee notes as income because the **Value Added Tax Act** and the **Income Tax Act** demanded that this was the proper way to record the applicant's income. It was submitted that the conflict makes the application of the law unreasonable, defeats the legitimate expectations of the applicant and offends the general rules applicable to the interpretation of tax laws.

22. The applicant in conclusion submitted that the respondents have not countermanded the applicant's factual narrative which narrative demonstrated that he had been diligent and honest about his tax affairs and had been given an award by the KRA for the diligence and honesty and that the evidence showed that the applicant assigned his fees to KRA and had not earned any benefit from the practice of law as most of his income went to pay for penalties and interest on monies that had not come to the applicant.

1st Respondent's Case

23. In response to the application, the 1st Respondent, the **Minister for Finance**, stated that he received an application for waiver of penalties and interest on unpaid taxes from the Applicant that was forwarded through the 2nd and 3rd Respondents.

24. According to the 1st Respondent, he is vested with the power to waive penalties and interests on unpaid taxes by section 72(1) of the **Income Tax Act** Chapter 470 Laws of Kenya, if satisfied that owing to absence from Kenya, sickness or any other reasonable cause the person making such an application was prevented from furnishing the return or giving notice within the required period, the Commissioner may at any time remit the whole or any part of the additional tax up to a maximum of five hundred thousand shillings per person per annum; and that the Commissioner may remit any additional tax in excess of five hundred thousand per annum with the prior written approval of the Minister herein being the 1st Respondent.

25. According to the 1st Respondent, he declined to grant the Applicant the waiver of interest and penalties as he was not convinced that the Applicant met the criteria in which one would be granted the waiver as laid down in section 72(1) of the **Income Tax Act**, Cap 470. According to the 1st Respondent, the Act does not state that the 1st Respondent must give reasons as to why he has waived or failed to waive penalties and interest on unpaid taxes since he is required to exercise his powers and discretion to either reject or allow such applications made through the 2nd and 3rd Respondents.

2nd and 3rd Respondents' Case

26. It was the 2nd and 3rd Respondents' case, in response to the application, that the Applicant is registered as taxpayers vide Personal Identification Number A001597484N issued under the **Income Tax Act** cap 470 and is also registered under the **Value Added Tax Act** Cap 476.

27. It was the 2nd and 3rd Respondents' view that the Applicant's contention as can be deduced from the pleadings and documents is in respect of the Application of the provisions of the **Income Tax** and the **Value Added Tax Acts** regarding unpaid additional taxes, attendant interests and penalty applicable which the 3rd Respondent levied, computed and demanded to be paid after the Minister for Finance declined to grant waiver of the accrued interest and penalty for both the Applicant's income tax for the years of income 1996 to 1999. The 2nd and 3rd Respondents however confirmed that in the intervening period between 2002 and 2009 the Applicant paid taxes through remissions of funds by the Deposit Protection Fund (DPF) after the 3rd Respondent had issued Agency Notices under the relevant provisions of the **Income Tax Act** and the **Value Added Tax Act**. However the 3rd Respondent denied and rebutted the assertions by the Applicant that the issuance on 30th July 2007 of a Tax Compliance Certificate was an indication that the Applicant had been audited and found not to be owing taxes as the Certificate instead indicated that under self-assessment the Applicant had complied and that the 3rd Respondent has to verify the assessment contained in the return through an audit for confirmation of full payment of taxes.

28. According to the 2nd and 3rd Respondents, the issuance of tax clearance is meant to facilitate business to persons who want to render

services or supply goods to the Government rather giving a clear bill that the Applicants are up to date in payment of taxes. The 2nd and 3rd Respondents averred that there is no specific complaint against them whose duty it is to assess and collect tax as provided in the relevant laws of Parliament.

29. It was averred that the 3rd Respondent on 28th October 2003 received the *Ex-parte* Applicant's application for waiver of penalties and interest on his unpaid taxes which were imposed under sections 72(1), (72c, 72D, and 94(1) of the **Income Tax Act**. However, the 3rd Respondent has up to a limit of Five Hundred Thousand Shillings (500,000.00) that he can waive for penalty or interest and forwarded the application with recommendation for waiver and the 1st Respondent exercised his powers and discretion and rejected the application which was communicated to *Ex-parte* Applicant.

30. Based on legal advice, the 2nd and 3rd Respondents contended that that the issuance of a tax clearance certificate did not create any legitimate expectation for not paying taxes as can be seen from the face of the certificate as the tax obligation is created pursuant to the provisions of the Constitution vide section 99 and statutes creating revenue collection measures and there is no violation or discrimination of the *Ex-parte* Applicant's rights at all.

31. It was therefore the 2nd and 3rd Respondents' case that the motion filed by the *Ex-parte* Applicant is intended to delay the collection of the additional taxes not paid and the same is an abuse of the Court process.

32. It was submitted on behalf of the Respondents that though the *Ex parte* indeed made an application for waiver, a recommendation was forwarded to the Minister for Finance to consider the Application, a discretionary power bestowed to the Minister who can grant or refuse it. In this respect the Respondents relied on section 15 of **Value Added Tax Act**.

33. Based on the said provision, the Respondents submitted that the Minister must be allowed to exercise his discretion. In this case, they noted that the Notice of Motion does not seek to compel the Minister to exercise his power under section 15 of the Act.

34. According to the Respondents, in the event that the Minister decides to exercise his discretion and grant the waiver for additional taxes, the *Ex- parte* Applicant has the recourse for seeking a Refund of taxes or a credit to offset on any tax bills vide section 24 of the Act and sections 94 and 123A of the **Income Tax Act Chapter 470**.

35. According to the Respondents, the tenets of Judicial Review Proceedings for Orders of Certiorari and Prohibition have now been settled in Kenya to the effect that an order certiorari is made to correct an administrative action which goes against the train of the statute under which the decision is made and that judicial review is concerned with, not the correctness or otherwise of the decision made, but the decision making process as laid down in a statute. In this respect the Respondents referred to the Court of Appeal's decision in **Nakuru Civil Appeal No. 234 of 1995: The Commissioner of Lands -versus- Kunste Hotel Limited** at page 9 where the Court quoted the case of **Chief Constable of North Wales Police versus Evans [1982], WR.1155** and submitted that in this case it was submitted that the impugned decisions namely the refusal to grant waiver is a matter of discretion to the Minister and that the fair treatment and hearing of the party complaining has clearly been shown to be that the Minister considered the application for waiver of additional taxes and declined to grant it. The Minister need not arrive at the correct decision in the circumstances. The other Respondents who are agents of the Minister then proceeded to enforce the law as it is. A demand was made before the Agency Notice was issued within the limits of statute.

36. As regards the relief for an order of prohibition, it was submitted that in this matter it is misplaced for it amounts to obtaining an order of injunction. As it were, the prayer is directed to the future and what is under attack has already taken place. If the Order is granted as prayed, it will amount to prohibiting tax collection and administration in respect of the *Ex- parte* Applicant up to the future even when then it is not disputed or legitimately due.

37. It was therefore submitted that both reliefs are outside the parameters and purview of the foundation in which they are granted and the same should be dismissed.

38. As regards the prayer for the order of mandamus, it was submitted that the tax statutes mandate the Respondents to tax every citizen equitably and that the mere refusal to grant a tax waiver which does not meet the criteria for granting waiver is no good ground to issue an order of mandamus. It was therefore submitted that this is not a fit case for the court to intervene and indeed from authorities cited, it is apparent that there cannot be legitimate expectation from a case of waiver of additional tax.

39. It was the Respondents' submissions that the law does not compel the Minister to waive interest and penalties and interest on taxes since the law is clear that the Minister has a discretion to either waive or decline to waive the said interest and penalties. It was therefore submitted that an order of mandamus cannot issue in those circumstances. Since the decision was well within the jurisdiction of the Minister and the decision was fair and did not go against the rules of natural justice, it was similarly submitted that the order of certiorari cannot issue.

40. The Respondents therefore prayed that this matter be dismissed and the Respondents be allowed to perform the statutory duty of assessing, collecting and accounting for the revenue that the government seriously needs to run its affairs.

Determinations

41. I have considered the issues raised in this application by way of affidavits, Statement of Facts, grounds and submissions by the respective parties.

42. Section section 15 of **Value Added Tax Act** provides that:

“15. (1) Where any amount of tax remains unpaid after the date on which it becomes payable under section 13, an interest equal to three per cent per month or part thereof of such unpaid amount shall thereupon forthwith become due and payable.

(2) Any interest charged under subsection (1) shall, for the purposes of this Act relating to the collection and recovery of tax, be deemed to be tax; and any interest which remains unpaid after becoming due and payable under subsection (1) shall attract further interest equal to three per cent per month or part thereof.

Provided that the interest chargeable under this subsection shall not exceed one hundred percent of the tax originally due.

(3) The Commissioner may, upon application by a person from whom any interest is due under subsection (1) or (2), grant remission of the whole or part of the interest due, if satisfied that such remission is justified, and shall make quarterly reports to the Minister on the remission granted under this subsection:

Provided that where the amount of interest due exceeds one million five hundred thousand shillings, the remission shall be subject to the prior written approval of the Minister.

(4) Upon receipt of an application under subsection (3), the Commissioner shall, where the applicant has paid the principal tax in full, suspend the charging of the interest pending the determination of the application.

(5) Where the remission under subsection (3) is not granted or is granted in respect of only part of the interest, the balance of the interest shall become due and payable within ninety days of the determination of the application.

(6) If the balance of the interest payable under subsection (5) remains unpaid after the expiry of the specified period, a surcharge at the rate of two percent per month or part thereof shall forthwith be due and payable.

43. It is therefore clear that the said provision gives the Commissioner the power, upon application by a person from whom any interest is due, to grant remission of the whole or part of the interest due, if satisfied that such remission is justified. However, where the interest due is in excess of one million five hundred thousand shillings, the remission shall be subject to the prior written approval of the Minister.

44. As regards the power of the Minister to grant remission, reliance was placed by the 1st Respondent on section 72(1) of the **Income Tax Act** which provides as follows:

(1) A person who, in relation to a year of income, fails—

(a).....

(b) to furnish a provisional return of income or to give a notice to the Commissioner as required by section 53 shall, for each month or part thereof from the commencement of the failure up to the date on which the Commissioner makes a provisional assessment for the year of income under section 74(3), or an assessment under section 73, whichever is the earlier, be charged with additional tax equal to three per cent of the normal tax in the provisional assessment or assessment, as the case may be:

Provided that—

(i) if the Commissioner is satisfied that owing to absence from Kenya, sickness or any other reasonable cause the person was prevented from furnishing the return or giving notice within the required period, the Commissioner may at any time remit the whole or any part of the additional tax up to a maximum of five hundred thousand shillings per person per annum; and

(ii) the Commissioner may remit any additional tax in excess of five hundred thousand shillings per person per annum with the prior written approval of the Minister; and

(iii) the Commissioner shall make a quarterly report to the Minister of all additional tax remitted during that quarter.

45. It is therefore clear that the said provision deals with a failure to furnish a provisional return of income or to give a notice to the Commissioner as required by section 53 which applies where the person has not received a notice under subsection (1) within the period specified in subsection (2)(a). In that event the Commissioner has the power to grant a remission of the whole or any part of the additional tax up to a maximum of five hundred thousand shillings per person per annum. Any sum in excess of the said amount would require the prior written approval of the Minister.

46. In this case it is clear that the Minister declined to grant the said remission and it is the Respondents' case that not only was the Minister entitled to do so but he was under no obligation to justify his said decision. In other words, the Respondents' position is that the Minister's discretion or power in that respect is unfettered. That view, with due respect is clearly erroneous. To hold that a member of the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. The current position regarding the exercise of discretion must now be considered in light of Articles 10 and 47 of the Constitution.

47. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

48. The position is re-enacted in section 4(1) and (2) of the *Fair Administrative Action Act, 2015*.

49. It was therefore held in Mbs HC Misc Appl. No.82 of 2010 - Republic and Kenya Revenue Authority ex-parte L.A.B. International Kenya Limited that:

“The common law, in its evolution, has defined the rules of conduct for a public authority taking a public decision, entrusting the overall control-jurisdiction in the hands of the Courts of law, but for Kenya, such a general competence of the Courts is now no longer confined to the terms of statute law and subsidiary legislation, but has a fresh underwriting in the Constitution of Kenya, 2010, Article 47, which imposes a duty of fair administrative action, and [Art.10(2) (c) demands good governance, integrity, transparency and accountability.”

50. With respect to Article 10 of the Constitution which provides for the National Values and Principles of Governance, and in this respect the Court of Appeal in Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014 held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

51. In my view therefore the notion of executive unfettered discretion in matters which adversely affect the right or fundamental freedom of a person no longer has a place in the current constitutional dispensation. It is in this respect that I understand **Majanja, J’s decision in Dry Associates Ltd vs. Capital Markets Authority and Another – Petition No. 328 of 2011** in which he held that:

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law...but is to be measured against the standards established by the Constitution.”

52. In this case the Minister’s decision, as transmitted to the KRA was couched in the following terms:

“After due consideration, the Minister for Finance on 14/10/2006 declined to grant waiver of interest and penalties for Dr. Kiplagat Peter Kenneth. Please note that the Minister (sic) has further directed that this matter be closed. No appeal will, therefore, be considered.”

53. There is no indication as to what the “due consideration” alluded to above entailed. Section 6(4) of the *Fair Administrative Action Act, 2015* provides that:

Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

54. I must appreciate that there is a difference between judicial review and an appeal. The South African Constitutional Court in Sidumo vs. Rustenburg Platinum Mines Ltd [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) while cautioning against the blurring of the distinction between appeal and review, nevertheless acknowledged that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. The same Court in Duncanmec (Pty) Limited vs. Gaylard NO and Others (CCT284/17) [2018] ZACC 29 at paragraphs 41 and 42 was of the view that:

“[41] So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.

[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

[43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.”

55. Section 2 of the *Fair Administrative Action* defines “administrative action” to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) 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;

56. The same section defines “administrator” as “a person who takes administrative action or who makes an administrative decision.” Section 3 on the other hand provides that:

(1) This Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

57. It is not in doubt that the decision whether or not to grant a person remission on taxes affects that person’s legal interest and is therefore an administrative action. The Minister was therefore under a statutory and constitutional obligation to furnish the applicant with his reasons for denying the remission aforesaid. It is therefore incorrect for the Respondents to contend that he was not under any obligation to give reasons for his decision. Long before the advent of the Constitution of Kenya, 2010 and the *Fair Administrative Action Act*, the Court in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, expressed itself as follows:

“The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law...The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts...The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law...It is clear that both sections 187(1) and (4) require the Minister to be “satisfied”. It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him...”

58. It is clear in this case that the Minister appreciated that there were certain factors which he was required to consider hence his statement that he arrived at his decision after “due consideration”. What he considered is however not disclosed and in the absence of such disclosure, the Court can only conclude that he either did not have any basis for arriving at the said decision or that he considered irrelevant matters both of which vitiate his decision. My view is supported by the decision of Lord Denning in **Breen vs. Amalgamated Engineering Union [1971] All E.R. 1148**, where he held as follows:

“It is now settled that a statutory body which is entrusted by Statute with discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other or what you will, still it must act fairly. It must in a proper case give chance to be heard.”

59. A decision arrived at without disclosing the reasons therefor can at best be described as an arbitrary decision. In this respect in **S vs. Makwanyane [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)** at para 156 it was held by the South African Constitutional Court that:

“Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.”

60. It has been said time and again that a decision which is arbitrarily taken cannot stand the test of fairness. In the words of Chaskalson, Woolman and Bishop in *Constitutional Law of South Africa, Juta, 2nd ed. 2014, page 49*:

“Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension.”

61. More importantly however, the Applicant’s position was that in the circumstances of this case, the Minister was under an obligation to grant the remission to the Applicant and he had no discretion in the matter. The facts leading to this belief, which facts were not disputed by the Respondents are that vide a Tax Compliance Certificate dated 30th July, 2004, the KRA confirmed that the Applicant’s firm had fulfilled the obligation to pay taxes as per the *Exchequer and Audit (Public Procurement) Regulations, 2001* and could therefore participate in public tenders. Further, by a letter dated 16th August, 2004 the KRA on the instructions of the Applicant’s firm wrote to the DPF declaring that the partners of the said firm owed the KRA the principal tax of Kshs 18,813,670.00 and requested that any fees due to the firm be remitted directly to the KRA and an Agency Notice was issued to that effect. Accordingly the DPF vide a letter dated 1st December, 2004

remitted directly to the KRA the said sum of Kshs 18,813,670.00 as directed receipt of which the KRA acknowledged by a letter dated 3rd December, 2004 in full payment of all tax due by the applicant and cancelled the Agency Notice that had been issued by the DPF. It was therefore contended by the applicant that all taxes due to the KRA in respect of all the accounting years prior to and including the year 2004 were all paid and the DPF remitted to the Applicant the surplus sum of Kshs 1,875,985.15 being the unclaimed portion of the monies due to the Applicant and for which the KRA had no claim to. This position was further confirmed by the letter dated 10th December, 2004 by the applicant whereby the applicant sought the waiver of any interest and penalty as contained in the then subsisting amnesty.

62. The applicant's argument was premised on a tax amnesty which was declared under section 123A of the **Income Tax Act** which provided as follows:

Notwithstanding any other provisions of this Act, the Commissioner shall refrain from assessing or recovering penalties and interest in respect of any year of income ending on or before the 31st December, 2003 where—

(a) the tax is paid; and

(b) the returns, or amended returns, containing a full disclosure of the previously undisclosed income, are submitted, on or before the 31st December, 2004;

Provided that this section shall not apply in respect of any tax if the person who should have paid the tax—

(i) has been assessed in respect of the tax or any matter relating to the tax; or

(ii) is under audit or investigation in respect of the undisclosed income or any matter relating to the undisclosed income.

63. A similar provision appears in section 14A of the **Value Added Tax Act**, Cap 476 save that the operative date thereunder is 11th June, 2004. The said provision states that:

(1) Notwithstanding any other provision of this Act, the Commissioner shall refrain from assessing or recovering any additional tax, penalties, or fines in respect of any tax that was due before the 11th June, 2004 where –

(a) The tax is paid; and

(b) All returns, amended returns, which should have been submitted in respect of the tax are submitted, on or before 31st December, 2004.

Provided that this section shall not apply in respect of any tax if the person who should have paid the tax-

(i) Has been assessed in respect of the tax or any matter relating to the tax; or

(ii) Is under audit or investigation in respect of the tax or any matter relating to the tax.”

64. What this provision provided was that the Commissioner was barred from assessing or recovering penalties and interest in respect of income for the period prior to 31st December, 2003 and 11th June, 2004 respectively as long as the principal tax was paid and the returns, or amended returns, containing a full disclosure of the previously undisclosed income, were submitted, on or before the 31st December, 2004. However, this amnesty was inapplicable to persons who had been assessed in respect of the tax or any matter relating to the tax or those who were under audit or investigation in respect of the undisclosed income or any matter relating to the undisclosed income.

65. In the applicant's case the evidence on record which is undisputed is that he had paid the principal tax by 31st December, 2004. It is not contended that by that date there was any nondisclosure of the previously undisclosed income. His problem seems to stem from the fact that he had been assessed in respect of the tax. What the amnesty meant was that any person who had defaulted in the payment of taxes and who had not been assessed could proceed to make returns or amend his returns, pay the principal tax and would not be under obligation to pay any interest and penalties. On the other hand those who had paid the principal tax but had already been assessed would not benefit from the said amnesty. To put it bluntly the tax defaulters were entitled to enjoy the amnesty as long as they had not been assessed while those who were tax compliant would not enjoy the same benefit as long as they had been assessed. The Applicant contends that this application of the law was discriminatory.

66. Article 10 of the Constitution provides as follows:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) *The national values and principles of governance include—*

(a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

(b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*

(c) *good governance, integrity, transparency and accountability; and*

(d) *sustainable development.*

67. Therefore in either enacting, applying or interpreting any law or making or implementing policy decisions, all persons including State organs, State officers, public officers, are under a constitutional obligation to adhere to the principle of non-discrimination. As was appreciated by the South African Constitutional Court in **President of the Republic of South Africa vs. Hugo [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (Hugo) at para 41:**

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievements of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.”

68. What then amounts to discrimination? The *Black’s Law Dictionary* defines discrimination as follows:

“The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” [Emphasis added].

69. *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics while *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as:-

“A particular form of differentiation on illegitimate ground.”

70. In **Peter K. Waweru vs. Republic [2006] eKLR** discrimination was defined in the following terms:

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

71. Similarly in **Andrews vs. Law Society of British Columbia (1989) 1 SCR 321, Wilson J.**, defined discrimination as a:

“distinction which whether intentional or not but based on grounds relating to personal characteristics of individual group (which) has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.”

72. In this case it is clear that the amnesty withheld or limited access to advantages available to those taxpayers who had neither paid nor been assessed the principal taxes from persons of the Applicant’s class who had paid the principal taxes but had been assessed.

73. However in his decision in **Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J** (as he then was) held:

“The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification...The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including (a) the nature and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and

non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”... The law does not prohibit discrimination but rather unfair discrimination.”

74. Similarly the South African Constitutional Court in Minister of Home Affairs vs. Fourie [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 60 held that:

“Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human dignity requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma.”

75. Section 27 of the Constitution provides as follows:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

76. From the foregoing it is clear that where the law extends benefits such as tax amnesty, every person is entitled to equal benefit of such amnesty since every person is equal before the law which equality includes the full and equal enjoyment of all rights and fundamental freedoms including Equality and freedom from discrimination. However discrimination is acceptable and legitimate where it is meant to pursue a legitimate aim such as affirmative action to deal with factual inequalities and is reasonable in the light of its legitimate aim. In that event there would be discrimination but not unfair discrimination which is what is unlawful.

77. However as was observed by the South African Constitutional Court in Prinsloo vs. Van der Linde [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25:

“In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.”

78. In Minister of Finance vs. Van Heerden [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (Van Heerden) para 27 it was held that:

“It is . . . incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but ‘situation-sensitive’ approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.”

79. At para 37 was held that:

“When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.”

80. In this case the Respondents have not attempted to rationally justify why this clearly discriminatory provision was enacted. The factors to be considered by the Court where there is an allegation of discrimination were enumerated in Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000 cited in Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR, in which the court stated:

“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right

to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”

81. I associate myself with the position adopted by the Sri Lankan Supreme Court in Nihal Sri Ameresekere vs. Attorney General cited by the Applicant that:

“It is our opinion, based upon the preceding analysis that, the provisions contained in the Inland Revenue (Special Provisions) Act No. 10 of 2003, as amended are inconsistent with Article 12 (1) of the Constitution which guarantees to every person equal protection of the law in that it granted immunities and indemnities to persons who have contravened the laws that have been referred to and thereby defrauded public revenue, causing extensive loss to the state.”

82. It may be argued that since the matter revolves around fiscal policy, such decisions should be left to the Executive and the Courts should not interfere. My view is however that adopted by the decision of Shivashanker Bhat, J. in the Karnataka High Court in J. Seetha Rama Sastry vs. the State of Karnataka, 199 ITR 588 at p. 596 in which he pronounced himself as hereunder:

“In this field of fiscal legislation, very rarely, Courts interfere being aware of the magnitude of the problems to be solved by the State. But does this mean that the citizens of this country should always surrender their fundamental right to equality in favour of the State’s power to tax? Should the Court hesitate to strike down a fiscal law solely on the ground that the revenue of the State would suffer? Should the role of the Courts as the guardian of the fundamental rights of the people be held confined to non-fiscal spheres only? Glaring inequalities resulting from any legislation cannot be allowed to impinge the equality rights.”

83. It is therefore my view and I hold that proviso (i) to section 123A of the *Income Tax Act* which had the effect of denying the people falling in the Applicant’s class the benefit of the amnesty was unconstitutional and void to that extent. The Applicant was therefore entitled to the amnesty as a right and the Minister had no discretion in the matter.

84. The Applicant has also contended that the obligation to recognise as income, invoiced amounts irrespective of whether or not the invoiced amounts have been paid, against which the VAT Tax is due and payable on the 20th day of each month, and to subject such amounts to interest and penalty under the said *Income Tax Act* at rates inconsistent with the rates allowable under the *Advocates Act* is unconstitutional, unreasonable and *ultra vires* the *Advocates Act* since the Applicant has no means by which he can compel clients who have been invoiced to meet the said penalties and interests imposed by the *Income Tax Act* as the clients are afforded a complete defence by reason of the provisions of the *Advocates Act*, which further allows clients to challenge any invoiced amount and to require the same to be subjected to taxation.

85. It is clear that with respect to levying of interest on invoices from advocates to clients, the provisions of *Income Tax Act* are at variance with the provisions of the *Advocates Act*. Whereas under the former interest accrues as soon as the clients are invoiced, in the latter case, an invoice is not the final determination of the fees to which an advocate is entitled as the said invoice may be subject to taxation which may either enhance the fees or reduce the same. It is therefore my view that whereas an invoice is a prima facie evidence of the fees to which an advocate is entitled from his client, it is not the final determination of such fees and in the event that the process of taxation downgrades the invoiced raised, the advocate would be entitled to a refund of the interest and penalties levied on the figure over and above the taxed amount.

86. Similarly there is a conflict between the rate of interest an advocate is liable to pay under the *Income Tax Act* and the provision for the same under the *Advocates Act*. In my view to subject the Advocate to payment of interest rate at 14% when he can only recover 9% from his client is unfair.

Order

87. Having considered the issues raised in this application I issue the following orders:

- a) **An order of certiorari removing into this court and quashing the decision of the Minister of Finance dated the 16th October, 2006 denying waiver of interest and penalties to the applicant.**
- b) **An order of certiorari removing into this court and quashing the decisions of the Kenya Revenue Authority dated the 09th November, 2006 and 07th September, 2006 purporting to demand from the applicant payment of interest and penalties.**
- c) **An order of mandamus directed to the Minister of Finance, the Commissioner-General of the Kenya Revenue Authority and the Commissioner of Domestic Taxes compelling them to waive all interest and penalties in respect of the applicant in respect of all accounting years prior to and including the financial year 2004.**
- d) **An order of prohibition directed at the Commissioner-General of the Kenya Revenue Authority and the Commissioner of Domestic Taxes in respect of both income tax and value added tax prohibiting them from claiming of any penalties or interest from the applicant in respect of all accounting years prior to and including the financial year 2004.**

e) A declaration that the Respondents are only entitled to levy interest on invoices raised by advocates at the rate of 9% or such other rates as provided under the Advocates Act.

88. Orders accordingly.

Dated at Nairobi this 19th day of October, 2018

G V ODUNGA

JUDGE

Delivered in the presence of: