REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NUMBER 46 OF 2017

IN THE MATTER OF AN APPLICATION FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI,

PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE

ACTION ACT, 2015

AND

IN THE MATTER OF THE VALUATION FOR RATION ACT

CAP 266 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE RATING ACT CAP 367 OF THE LAWS OF KENYA

REPUBLIC.....APPLICANT

VERSUS

THE NAIROBI CITY COUNTY.....RESPONDENT

EX PARTE: THE REGISTERED TRUSTEES OF SIR ALI MUSLIM CLUB

JUDGEMENT

Introduction

1. By a Notice of Motion dated 14th February, 2017, the ex parte applicant herein, **The Registered Trustees of Sir Ali Muslim Club**, seeks the following orders:

> 1. **That an Order of Prohibition do issue to forbid the Nairobi City County, the Respondent herein from unilaterally levying unlawful rates in the sum of Kenya Shillings Nine Million Four Hundred and Ninety Seven Eight Hundred and Forty Two (Kshs. 9,497,842/-) against**

the Applicants who are the lawful owners of the property known as Land Reference Number 209/2330 situate in Ngara area within the Nairobi City County.

2. **That an Order of Certiorari do issue to remove into this Honourable Court and quash the decision of the Nairobi City County contained in its Property Rates Payment Request dated 12th January, 2017 wherein the Respondent demands and unilaterally levies an unexplained and unjustified colossal sum of Kenya Shillings Nine Million Four Hundred and Ninety Seven Eight Hundred and Forty Two (Kshs. 9,497,842/-).**

3. **That an Order of Certiorari do issue to remove into this Honourable Court and quash all the prior unilateral proceedings leading to the decision of the Respondent contained in its Property rates Payment Request dated 12th January, 2017 and in particular all other similar previous decisions based on those proceedings.**

4. **That an Order of Prohibition do issue to forbid the Respondent from increasing or continuing to levy the increased or any unilaterally increased land rates penalties and interest against the Applicant without following the due process set out in particular without giving the Applicant fair hearing as contemplated in Article 47 of the said Constitution as well as the provisions of the Fair Administrative Actions Act.**

5. **That a declaration do issue that the Nairobi City County has no jurisdiction to unilaterally levy increased land rates against the Applicant in relation to Land Reference Number 209/2330 or any individual rates payer without giving the affected party a hearing and without allowing public participation prior to such increment.**

6. **That Judicial Review Order of Mandamus do issue directing the Respondent to levy property rates in respect to Land Reference Number 209/2330 as provided for under Chapter 266.**

7. **That any further and such orders as the Court will deem fit to grant.**

8. **That the costs of and incidental to this Application be paid by the Respondent**

***Ex Parte* Applicant's Case**

2. According to the applicants (hereinafter referred to as "the Club"), it is a non-profit making Sports Club established with the main objective of being a non-residential Sports Club. It proceeded to exhibit a copy of the Title document in respect of Land Reference Number 209/2330 (hereinafter referred to as "the suit property"). According to the Club, the respondent's valuation of the suit property for purposes of the ***Valuation for Rating Act*** Cap. 266 of the Laws of Kenya is Kshs. 152,000/- and the Respondent has been levying land rate in respect thereof at 34% of Kshs. 152,000/- which equals to Kshs. 51,680/- and in the year 2017 the rate is 25% of the unimproved Site Value amounting to Kshs 38,000/-.

3. The Club averred that it has been paying faithfully, the land rates due to the Respondent in respect of the suit property and exhibited copies of demands for land rate by the Respondent to the Club and receipts for payments of the said rates.

4. It was however averred that on 23rd November 2015 the Respondent issued a Rates Demand purporting to show that a balance of Kshs. 4,224,075/- was brought forward from the year 2015, that interest of Kshs. 530,159/- was due, in addition to claiming land rates of Kshs. 51,680/- for the year 2016. According to the Club, for the year 2016, it paid a sum of Kshs. 51,680/- which was lawfully due in respect of the suit property and annexed a copy of the land rates payment receipt dated 25th February, 2016. It was averred that on 25th August, 2016 the Respondent issued a Property Rates Payment Request to the Club stating that certain sums whose particulars are given hereinbelow were due:

a) Land rates penalties Shs. 219,476

b) Land rates arrears (principal) Shs. 4,224,075

c) Land rates current year Shs. 1,741,310

Bill total amount Shs. 6,184,861

5. It was the Club's case that this was the first time that it came to know that the Annual Rates were increased to Kshs 1,741,310/-. To the Club, the said Property Rates Payment Request dated 25th August, 2016 is contradictory for stating that the outstanding amount is Kshs. 8,160,144/- and further that the Annual Rates amount due is Kshs. 51,680/-.

6. It was deposed that on 12th January, 2017 the respondent demanded from the Club land rate penalties of Kshs. 3,494,457/-, and land rates arrears (principal) of Kshs. 5,965,385/- totalling 9,459,842/- (less Kshs. 38,000/- which is the land rate lawfully due).

7. According to the Club, it does not owe the respondent arrears for land rates and thus no penalties can be due to the respondent from the Club. Despite this, the Club was 'visited' by two gentlemen from the Respondent's Debt Collection Unit namely one **Kiambi** and another **George Omondi** demanding a payment of the sum of Kshs. 9,497,842/- as rates and penalties in 12th January, 2017 and issuing threats to ground the operations of the Club. The Club asserted that its funds are limited and if it is forced to pay the sums demanded by the Respondent, the Club's operations will be disrupted severely and gravely disadvantage its members.

8. Since there is no amendment to the Valuation Roll in respect of the suit property, the applicant was by its learned counsel, **A. B. Shah Esq** that the Respondent is bound to levy land rate according to the ***Valuation for Rating Act*** and the ***Rating Act*** and not arbitrarily. Based on the same counsel's advice the Club believed that the sums claimed by the Respondent through the Rates Demand dated 23rd November, 2015, the Property Rates Payment Request dated 25th August, 2016, and the Property Rates Payment Request dated 12th January, 2017, apart from what is lawfully due, are illegal, null and void and have no force of law as the same were issued in violation of Part II of Chapter 266 on amendment of Valuation Rolls, depriving the Club's the right to object to a draft supplementary roll, and the right of appeal under the same Act. It was further contended that the said decision was made in bad faith and calculated to prejudice the rights of the Club, *inter alia* freedom of association, the right to property, and the right to a fair hearing. The Respondent's conduct, it was claimed was illegal, unreasonable, unfair and it is blatant abuse of power.

9. The Club disclosed that upon enquiry it was informed by the Respondent's Officers that the higher rates imposed on it are as a result of a unilateral increment of the payable Annual Rates from Kshs 51,680/- to Kshs. 1,741,310.00.

10. On behalf of the Club it was submitted that pursuant to the provisions of section 3 of the ***Rating Act***, Chapter 267 of the Laws of Kenya, the Respondent herein, the Nairobi City County, has a right to levy rates on all properties situate in the City which Levy is supposed to be based on the unimproved site value of each property. At all times, the unimproved site value assessed by the Respondent in respect of the Applicant's aforesaid property was the sum of Kshs 152,000/- on the basis of which the Respondent assessed the amount of land rates payable by the Applicant at the sum of Kshs 51,680/- per annum. This sum, according to the Club represents 34% of the aforesaid unimproved site value of Kshs 152,000/- which is the rate applicable to all the properties in the Respondent County.

11. The Applicant contended that on 23rd November, 2015 the Respondent unilaterally issued a demand Notice purporting that there was an outstanding land rates balance of Kshs 4,224,075/- in which Notice, the Annual Rates payable is still indicated as remaining at Kshs 51,680/- which, obviously, raises confusion as there is no explanation regarding how the said sum of Kshs. 4,224,075/- was arrived at.

These acts of the Respondent are repeated in its Rates Demand to the Applicant for the years 2016 and 2017. However, the rates Demand for the year 2016 which is dated 25th August, 2016, shows, for the first time, that the basis of the revised higher rates is that the Annual Rates payable, which had always been Kshs 51,680/-, had been increased to Kshs 1,741,310/- a figure contradicted by the Respondent's Rates Demand for the Year 2017 where the Rates payable reflects that the revised Annual Rates payable as Kshs 38,000/- and not the alleged Kshs 1,741,310/-.

12. It was submitted that in the replying affidavit, the Respondent conceded that it has unilaterally increased the Annual Rates payable by the Applicant from Kshs 51,680/- to Kshs 1,741,310/- and falsely claimed that the Applicant was previously exempt from paying Rates. However the Club's name does not appear in the list of property owners who were previously exempt from paying Rates exhibited by the Respondent though there appears a name similar to that of the Applicant, i.e **Sir Yusuf Ali Sports Club** – which is an entirely different entity with no connections at all to the Applicant. It was therefore submitted that the Respondent has, obviously, billed the Applicant on a mistaken believe that the Applicant is on the list of the entities that were previously exempt from paying rates. To the contrary, the Applicant has at all material times paid annual rates to the Respondent in the sum of Kshs 51,680/- as billed by the Respondent.

13. It was the Club's case that the position adopted by the Respondent that the Rates that the Respondent has previously demanded from the Applicant and which the Applicant has always paid promptly were on the basis and with respect to the Club and not the whole of the property was a bare allegation and had no basis in law as it is not supported by any document from the County Government which is the custodian of such documents. To the contrary, the Rates Demands attached to the Applicant's Notice of Motion clearly show that the Demands are in respect of Land Reference Number 209/2330 and not a portion thereof. The provisions of the Rating Act are clear that land rates are assessed and paid on the basis of a parcel of land and not buildings. This theory being raised by the Respondent for the first time in this case, is an afterthought and is an invention of the Respondent which has no basis in law. The Respondent has not offered any documentary evidence to support its claim that the Applicant has not been paying Land rates in respect of a portion of the aforesaid property. The Applicant has never been exempt from paying Rates as alleged in Paragraphs 27 – 29 of the Replying Affidavit. To the contrary, the Applicant is up to date in so far as paying the Rates lawfully due and demanded are concerned.

14. It was further submitted that the Respondent's Statement that the unimproved site value of the Applicant's property has been increased from Kshs 152,000/- to Kshs 5,121,500/- has no basis in law and no law has been cited by the Respondent to support the same. In any event, no document or documents such as valuation report has been attached to the Affidavit to support the increment. In any case, any increment of Rates can only be in relation to a location in the County and not individual properties as appears to be the case here. There is no valuation report attached to the Affidavit which would indicate the criteria used to make the adjustment alleged. It was contended that the allegation that the Respondent has a discretion to increase the Rates is baseless. The Respondent has not cited any law to support the same as none exists. The Respondent has failed to show the process and criteria followed by the Respondent to increase the Rates.

15. In support of the submissions the Club relied on Article 47 of the Constitution (2010) section 4(3)(b) and (g) of the ***Fair Administrative Action Act***. The Club also relied on the decision of the Court of Appeal in **Suchan Investments Ltd vs. The Ministry of National Heritage & Culture & 3 Others** (**Civil Appeal Number 46 of 2012**).

16. It was the Club's submission that whilst purporting to increase the rate from Kshs. 38,000/- or Kshs. 51,680/- to Kshs. 1,741,310/- the Respondent never gave any invitation Notice or information of such increase and went ahead to revalue the property at Kshs. 5,121,500/-, the Respondent went ahead, of its own, to levy rates based on a valuation of Kshs. 5,121,500/-. Accordingly, the County Government of Nairobi never gave the Applicant an opportunity to be heard in relation to its unilateral increase of both the rates and the unimproved site value of the Club's land.

17. In this regard the Club relied on paragraph 37 of the **Suchan Investments** case (supra) where the

Court cited the case of **Leiyagu vs. I.E.B.C. & 2 Others** and held that:

> "**The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law."**

18. It was submitted that it was incumbent upon the respondent to follow strictly the procedure provided in two National Acts, namely, the ***Valuation for Rating Act*** Cap 266 and the ***Rating Act*** Cap 267 and not to violate Part II of Cap 266 on amendment of Valuation Roll(s). By not doing so the respondent deprived the Club of its right to object to a Draft Supplementary Roll, right to argue out before a Valuation Court and right to appeal to the High Court as provided for in the said Acts.

19. The Club asserted that it has (through its Trustees) a proprietary right in the Club lands yet it was never given an opportunity to be heard on the purported increase of the value of its property and hence the rates. In fact there is no scintilla of evidence that the Respondent gave any opportunity to the Applicant to be heard prior to the astronomical increase of land value and hence the rates. The principle of *audi alteram partem* was not observed.

20. It was the Club's case that the contents of the replying affidavit disclose that the purported increase of values (and hence rates) was totally an in-house matter as no resolution was shown to exist. It was the Club's case that rates (being taxes) cannot be back-dated as alleged in the Replying Affidavit.

21. Based on the **Suchan Investments** case (supra), it was submitted that a Judicial Review Court has all the powers to put right an administrative act of an authority which affects the rights of persons as happened in this case. To the Club, there was nothing wrong in seeking an exemption which was never considered by the Respondent.

22. It was therefore the Club's position that the purported increase of the value of the Club's property and hence Rates ought to be reviewed by this Court for the reasons set out under section 7(2) of the ***Fair Administrative Action Act***.

Respondent's Case

23. The application was opposed by the Respondent.

24. According to the Respondent, the devolution of power and the establishment of a devolved system of governance was the greatest innovation ushered in by this constitutional dispensation. It is the glue that holds together our social fabric as a people by ensuring an equitable sharing of the national cake, amongst other ideals enumerated in Article 174 of the Constitution. To the Respondent, the importance of having reliable sources of revenue for the effective governance and delivery of services by County Governments as highlighted in Article 175 (b) cannot be over-emphasized.

25. It was contended that Part 2 of the 4th Schedule to the Constitution of Kenya lays down in no uncertain terms the numerous functions of County Governments which invariably would require heavy financing. Further, the fact that a government such as the Respondent has a public duty to facilitate inter alia the social and economic development of its area of jurisdiction cannot be over-stated and such a heavy responsibility cannot be met without reliable sources of revenue. It was its position that in order to buttress this calling and duty to effectively administer county governments the Constitution of Kenya in Article 209 empowers the devolved units to impose rates and taxes and most relevant to this suit, the Constitution of Kenya in Article 210 of the Constitution qualifies this power to impose or order exemption from paying taxes by adding that it must be pursuant to particular legislation.

26. According to the Respondent, in the old constitutional dispensation, units of local government were under the patronage and supervision of the Minister for Local Government and that pursuant to this for instance, the ***Valuation for Rating Act***, (Cap. 266) in section 27 provided for exemptions from valuation for purposes of rating of certain properties. And that the Respondent, just like the other 46 devolved units in the Republic of Kenya, inherited within its jurisdiction inter alia properties that prima facie seemed

exempt by its predecessor from paying certain rates, as evidenced by amongst others, previous recordings in their statements of account.

27. It was deposed that **Sir Ali Muslim Club** (hereinafter referred to as the club), on whose behalf the Ex-parte Applicant has brought this application, occupies land the size of 3.39 Hectares, allegedly for non-profit making sports activities and the ex-parte applicant has during the administration of the Respondent's predecessor, the City Council of Nairobi, been paying rates only with respect to the building of the club, while remaining exempted from paying rates with regard to the 3.39 Hectares of land under its possession which land has never been valued for purposes rating.

28. According to the Respondent, local government units were required by section 12 of the ***Rating Act*** (Cap. 267) to ensure the equitable distribution of rates within their area of jurisdiction and the same letter and spirit of the provision of the ***Rating Act*** (Cap. 267) is in keeping with article 10 of the Constitution of Kenya which enjoins the current devolved units of government to adhere to the principles of equity and equality in their administration. While alluding to the provisions of section 7(1) of the Transitional and Consequential Provisions of the Constitution of Kenya the Respondent contended that it would be propagating inequality in its rating policy amongst its over 4 million residents by unjustifiably endorsing such exemptions contrary to Article 27 (1) and (4) of the Constitution of Kenya. In its view, such blanket exemptions are no longer tenable under this constitutional dispensation.

29. It was in any case averred that the Ex-parte applicant has not demonstrated to this Court any public record of waiver or exemption with the name of **Sir Ali Muslim Club** in it as required by Article 210(2) (b) of the Constitution of Kenya. Furthermore no such legal notice or principles governing such designations as contemplated under section 27 (1) and (2) of the ***Valuation for Rating Act*** (Cap. 266) have been adduced before this Court.

30. It was averred that after being served with demand notes by the Respondent for defaulting on properly calculated rates, the ex parte applicant applied to be exempted from valuation for purposes of rating as contemplated under section 27 of the ***Valuation for Rating Act***.

31. The Respondent reiterated that devolved units are required to raise revenue and have resources enough to run and provide the numerous services to its residents as contemplated under part 2 of the 4th schedule of the Constitution of Kenya and cited the decision of **Mutunga CJ** in the Supreme Court case of **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** thus:

> **[186] Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units…"**

32. The Respondent relied on Article 185 of the Constitution of Kenya, and averred that the legislative authority of a county is vested in, and exercised by, its county assembly and the county assembly is empowered to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the fourth schedule. To it, under Article 209(1) (a) of the Constitution, a county is empowered to impose property rates. To this end it was disclosed that the Respondent's County Assembly has since enacted the ***Nairobi City County Finance Act, 2013*** for purposes of levying property rates pursuant to which the County Executive Committee exercised its discretion and passed a resolution on 21st August, 2015 doing away with the blanket exemptions in terms of paying rates for Private Members Clubs, Private Schools and Private Hospitals.

33. According to the Respondent, Sir Ali Muslim Club falls under the category of Private Members Club,

which do according to the Respondent's assessment, derive profits from its activities and members' subscriptions, hence having the ability to inter alia maintain such prime land under its ownership and equipment for sports in good shape.

34. It was revealed that pursuant to the County Executive Committee's resolution the Respondent proceeded to bill certain properties enlisted in the said memo for purposes of paying rates and Sir Ali Muslim Club, appeared as number 10 on the list, with the total land of 3.395 Hectares being included in its total valuation, thereby changing its Unimproved Site Value from Kshs. 152,000.00 to Kshs. 5,121, 500.00. This major shift was effected on the 25th of August 2015 and the new value back-dated to 11th December 2013 after the ***Nairobi City County Finance Act 2013*** came into operation. The figure of Kshs. 2,534,445 appearing on the Statement of Account as rent arrears on 25th August 2015 is therefore a total of arrears adding right from 11th December 2013, using the new Unimproved Site Value. Additionally, the club continued to be slapped with penalties by the Respondent for default on rates payment hence the total amount on penalties as appearing on the statement of account is now at Kshs. 4,031,421.00.

35. In the Respondent's view, the decision to value the 3.395 Hectares was not, legally speaking, a positive decision that required much deliberation; neither was it pursuant to a non-existent law, ultra-vires nor irrational; It is therefore not a decision requiring the supervisory role of the Judicial Review Court. Its position was that the County Executive Committee simply exercised its discretion to value and bill this land, pursuant to its roll to implement laws passed by the County Assembly made to facilitate and finance the tasks put under county governments by the Constitution of Kenya. In this respect, the Nairobi City County Finance Act, 2013 is relevant.

36. The Respondent contended that the Courts have on several occasions made themselves clear as to the extent they can go towards supervising a decision-maker in public office. In support of its case the Respondent cited **Nairobi HC Petition No. 486 of 2013, Nairobi Metropolitan PSV SACCOS Union limited & 25 Others Versus County of Nairobi & 3 Others.**

37. Reliance was also placed on the Court of Appeal case of **Municipal Council of Mombasa versus Republic, Ex parte Umoja Consultants Ltd, Nairobi Civil Appeal No. 185 of 2001** and it was contended that the Ex-parte applicant is in effect inviting this Court to delve into the reason why the County Executive Committee decided to rate the 3.395 Hectares of land that Sir Ali Muslim Club which decision is simply pursuant to the County's role as envisaged under Article 209 (1) (a) of the Constitution of Kenya. If anything, the Respondent continues to use the 1982 valuation roll yet the value of land has obviously greatly appreciated since then.

38. It was lamented that though the Club had received several demand notices, it had not attempted to seek clarification with the Chief Valuer of the Respondent over contested rates in order to receive fair administrative action. According to the Respondent, it offers, on notice every year a generous 90-100% waiver on penalties/interest on outstanding rates but the Ex-parte applicant has never approached any relevant office of the Respondent for such a service. To the Respondent, this Court while exercising the jurisdiction of Judicial Review is not an appellate Court that would delve into the merits of the decision made but would instead be concerned with the process leading up to the decision. Based on section 9 (2) of the ***Fair Administrative Actions Act*** No. 4 of 2015 it was disclosed that several rate payers in Nairobi City County, whether aggrieved by its decision or for any other legitimate reason, approach the relevant offices of the Respondent and get the necessary clarifications, reprieve, pardon and in some cases even waivers regarding rates. It was its position that the matter can still be settled under the internal mechanisms available. Relying on section 9(1) of the ***Fair Administrative Actions Act*** it was contended that the Ex-parte applicant seems to have been aggrieved by the decision of the Respondent dated 12th January, 2017 communicated through its Property Rates Payment Request wherein the Respondent levied Kenya Shillings Nine Million, Four Hundred and Ninety Seven Thousand, Eight Hundred and Forty Two (Kshs. 9,497,842) yet the first stark payment request was made close to two years ago pursuant to the rating of 25th August 2015. Since then, the Ex-parte applicant has continued to receive several payment requests and demands reflecting both outstanding rate figures and accruing penalties. The Ex-parte

applicant, curiously, decides to file the present application on 14th February, 2017, close to two years after the change of rates figures.

39. It was therefore averred that this application can only reasonably be looked at as an abuse of the court process and a way of circumventing or delaying the payment of rates, a constitutional obligation imposed on all Kenyans for inter alia the effective delivery of social services and amenities.

40. In the Respondent's view, the orders as sought by the Ex-parte applicant have already been overtaken by events and as is reflected on statement of account of Plot No: 209/2330 wherein the Ex-parte applicants now owe the Respondent more than Ten Million, Thirty Four Thousand, Eight Hundred and Six (Kshs. 10,034,806).

41. It was disclosed that the ***Nairobi City County Finance Act, 2013*** from which the Respondent premises its action received validation by this very court for allowing public participation in **Republic vs. Nairobi City County Ex-Parte Pius Omollo & 6 others [2015] eKLR.**

Determinations

42. I have considered the foregoing.

43. The first issue I wish to deal with is the scope of judicial review remedies. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

44. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

45. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action.

46. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs.**

Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.

47. Whereas the general position is that in judicial review, the Court is only concerned with the process through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as hereunder:

> 55**. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**
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> 56. **Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.**
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> 57. **In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters**

which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. **The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.**

48. **The Court in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** expressed itself as follows:

"So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by anybody of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law." The Court while citing the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** further stated that: **"… like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of** *ultra vires* **and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of** *Donoghue vs. Stephenson* **in the last century…"**

49. In this **case**, the ex parte applicant's case, if I understood it well was that the manner in which the Respondent arrived at the decision to enhance the rates payable by the applicant in respect of the suit property did not pass the fairness test as required under Article 47 of the Constitution as read with the provisions of the ***Fair Administrative Action Act***. It was not, as the Respondent has taken it, that the Respondent has no power to levy taxes on the suit property.

50. No-one doubt the fact that the Constitution places on the Respondent and the other devolved units in the Country onerous tasks of providing certain services to the populace and these services necessarily require resources both financial and human. Therefore the Constitution itself empowers the devolved units to impose taxes in their various areas of jurisdiction in certain areas for certain services in order to meet their constitutional obligations. However in doing so certain principles must be adhered to. The most obvious one in my view is to be found in Article 210 of the Constitution which provides as follows:

No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

51. It is therefore clear that before any tax is imposed there must be in place a legal instrument in form of

legislation authorising the levying of the same. Apart from that Article, Article 10 of the Constitution which proclaims the National Values and Principle of Governance provide 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.***

52. In my view the process of determining what is payable in respect of what property is a policy decision made in the process of applying legislation. It must therefore accord to the principles in Article 10 which require the authority concerned to adhere to the rule of law. What then does the "rule of law" connote? **In Republic vs Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478**, it was held that:

> **"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong…or which infringes a man's liberty…must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."**

53. In the English case of **Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531** it was held that:

> **"The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."**

54. In **Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] Eklr, Emukule, J** expressed himself as hereunder:

> **"The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to**

conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action."

55. The majority decision of the Supreme Court while addressing itself to the necessity of adhering to the rule of law in **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & Others** Petition No. 1 of 2017 at paragraph 394 expressed itself as hereunder that:

> **"It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution."**

56. In a nutshell, the rule of law also allows for predictability of actions by public bodies and the fact that law would be uniformly and objectively applied. Part of our Constitution (Article 10) asserts that transparency and accountability are some of the hallmarks that define the rules that bind a state organ. Since the rule of law enforces minimum standards of fairness, both substantive and procedural it follows that before a decision adverse to the interest of a person is made, that person must be accorded a hearing as stipulated in Article 47 of the Constitution as read with sections 4 and 7 of the ***Fair Administrative Actions Act***.

57. That this is so was appreciated by the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR,** in which the Court of Appeal 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."**

58. It is therefore clear that in making a decision whether legislative or on matters of policy the rule of law which encompasses compliance with the rules of natural justice must be adhered to. I agree with **Lenaola, J** (as he then was) in **Nairobi HC Petition No. 486 of 2013, Nairobi Metropolitan PSV SACCOS Union limited & 25 Others Versus County of Nairobi & 3 Others** (supra) that:

> **"…a Court cannot enter into the arena of deciding what fee is reasonable, convenient or proper to be levied. That is the exclusive jurisdiction of the 1st and 2nd Respondents. This Court will only intervene if the Petitioners had demonstrated that in charging the parking fees, the Respondents have violated the existing law or acted in contravention of the law."**

59. However where the process of arriving at a particular fee is challenged, this Court must investigate the fairness of that process and where it is found to be wanting has the obligation and duty to set aside or quash the decision arising therefrom.

60. In this case the Respondent took the position that the applicant had been exempted in the past from paying taxes. This position is however repudiated by the applicant who has exhibited documents proving that it was in fact paying the rates as lawfully required. The applicant has in fact contended that its name does not appear in the list of the entities that were exempted from paying the said levies. A perusal of the memo exhibited as PM-6 to the replying affidavit in fact confirms the ex parte applicant's contention since the name that remotely resembles that of the applicant is that of **Sir Yusuf Ali Sports Club**.

61. In my view the Respondent clearly failed to appreciate the fact that the ex parte applicant herein was not the entity described as **Sir Yusuf Ali Sports Club**. Had an opportunity been afforced to the ex parte applicant before the decision was made, it would have become clear to the Respondent that it was barking the wrong tree as it were. The Respondent's decision was therefore clearly irrational.

62. It was the Respondent's view that the decision to value the 3.395 Hectares was not, legally speaking, a positive decision that required much deliberation; neither was it pursuant to a non-existent law, ultra-vires nor irrational; It is therefore not a decision requiring the supervisory role of the Judicial Review Court. Its position was that the County Executive Committee simply exercised its discretion to value and bill this land, pursuant to its role to implement laws passed by the County Assembly made to facilitate and finance the tasks put under county governments by the Constitution of Kenya. In my view a decision reviewing the value of land cannot be undertaken arbitrarily since it may impose a higher tax liability than the previous one. A decision, it has been stated is a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. See **Public Administration, A Journal of the Royal Institute of Public Administration, by PH Levin, at page 25.**

63. Clearly the act of revising the value of the suit land upwards was an act which generated a commitment on the part of the Respondent towards the imposition of an equally enhanced tax liability on the part of the ex parte applicant. Whereas the imposition of tax generally on the suit property cannot be termed as a decision since it is an implementation of legislation, the decision with respect to the value of the land the subject of taxation is a separate decision which cannot be undertaken arbitrarily.

64. In this case there is no evidence that the ex parte applicant was afforded an opportunity of being heard before the decision enhancing the value of the suit property was arrived at by the Respondent.

65. Therefore based on both irrationality and violation of the rules of natural justice, I find merit in this application.

Order

66. Accordingly the orders that commend themselves to me are:

> **1. An order of certiorari is hereby issued removing into this Court to quash the decision of the Nairobi City County contained in its Property Rates Payment Request dated 12th January, 2017 wherein the Respondent demanded and unilaterally levied the sum of Kenya Shillings Nine Million Four Hundred and Ninety Seven Eight Hundred and Forty Two (Kshs. 9,497,842/-) which decision is hereby quashed.**
>
> 2. **An order of prohibition is hereby issued forbidding the Nairobi City County, the Respondent herein from unilaterally levying unlawful rates in the sum of Kenya Shillings Nine Million Four Hundred and Ninety Seven Eight Hundred and Forty Two (Kshs. 9,497,842/-) against the Applicants in respect of the property known as Land Reference Number 209/2330 situate in Ngara area within the Nairobi City County.**

67. Having granted those reliefs it is my view that the other prayers sought in the Motion are unnecessary.

68. The applicant will however have the costs of these proceedings to be borne by the Respondent.

69. It is so ordered.

Dated at Nairobi this 17th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ongicho for Mr A B Shah for the applicant

Mr Marende for Prof Ojienda for the Respondent

CA Ooko