REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 153 OF 2015

IN THE MATTER OF AN APPLICATION BY KSC INTERNATIONAL LIMITED (IN RECEIVERSHIP) FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE INCOME TAX CHAPTER 470 LAWS OF KENYA, THE VALUE ADDED TAX ACT 2013, THE CUSTOMS & EXCISE ACT CHAPTER 472 LAWS OF KENYA AND THE COMPANIES ACT CHAPTER 486 LAWS OF KENYA

BETWEEN

REPUBLIC…….…….APPLICANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

EX-PARTE: KSC INTERNATIONAL LIMITED (In Receivership)

AND

KENYA COMMERCIAL BANK LIMITED.....1ST INTERESTED PARTY

I & M BANK LIMITED..... 2ND INTERESTED PARTY

BANK OF AFRICA KENYA LIMITED..... 3RD INTERESTED PARTY

JUDGMENT

Introduction

1. By a Notice of Motion dated the 27th May, 2015 the Applicant herein, **KSC International Limited (In Receivership)**, seeks the following orders:

a. **AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the letter dated 7th May 2015 and the notices dated 5th May 2015 and 11th May 2015 issued by the Respondent as well as the Proclamation Letters dated 8th May**

2015 and 14th May 2015 issued by the Respondent's agents Leakey's Auctioneers, and directed at the Applicant.

b. **AN ORDER OF PROHIBITION to prohibit the Respondent, its officers, servants, agents including Leakeys' Auctioneers from attaching, taking away, disposing, alienating or interfering with the Applicant's possession of the items referred to in the Proclamation letters dated 8th May 2015 and 14th May 2015.**

c. **Costs to be awarded to the Applicant.**

Applicant's Case

2. According to the Applicant, on the 18th day of February 2015, the Applicant company was placed under Receivership by the 3rd Interested Party and **Kolluri Venkata Subbaraya Kamasastry** appointed Receiver and Manager of the whole of the property of the Company pursuant to powers conferred upon the 3rd Interested Party by the Debenture dated 5th August 2011. On 13th March 2015, **Samuel Okech Onyango** and **Harveen Gadhoke** were appointed as Joint Receivers and Managers of the Applicant company by the 3rd Interested Party, and by the 1st and 2nd Interested Parties on 20th March 2015, to act along with **Kolluri Venkata Subbaraya Kamasastry**. By way of a demand letter dated 7th May 2015 and served upon the Applicant on 8th May 2015 at the close of business at 4:45pm, the Respondent demanded immediate payment to it of a total sum of Kenya Shillings Two Hundred Twenty Six Million, Seven Hundred Eighty Thousand, Nine Hundred Ninety Eight (Kshs 226,780,998/-) being Corporation Tax, Value Added Tax and Pay As You Earn Tax all inclusive, that was purportedly owing.
3. It was averred that the said demand was issued following an alleged assessment over the period 2010 to 2015 though no demand for payment had been issued by the Respondent to the Applicant prior to 8th May 2015. On the same date and time of 8th May 2015 at the close of business at 4:45pm, the Applicant was simultaneously served at its Head Office, with a Proclamation Notice by the Respondent's agents Leakey's Auctioneers, purporting to have attached and left in the custody of the Applicant, various items whose value was not disclosed or indicated on the proclamation. The authority for distress was stipulated to be based on section 102 of the ***Income Tax Act***, section 18 of the ***Value Added Tax Act*** and section 225 of the ***Excise Act.***
4. It was however contended that the demand for payment and the distress of the Applicant's Assets was illegal under the ***Income Tax Act***, the ***VAT Act***, the ***Excise Act*** and the ***Companies Act***. To the applicant, VAT does not fall under the ***Income Tax Act*** and further, there is no provision for distress under section 18 of the ***VAT Act*** relied upon by the Respondent and indeed, none of the Corporation Tax, VAT or PAYE fall under the ***Customs & Excise Act***.
5. It was the applicant's case that in any event, a distress under section 225 of the ***Customs & Excise Act*** relied upon by the Respondent demands that the items distrained must be kept for a period of fourteen (14) days, and not the ten (10) days issued by the Respondent and its agents Leakeys' Auctioneers. Further, the Respondent's demand and distress were in breach of the ***Companies Act*** Chapter 486 Laws of Kenya since section 95(1) of the said Act demands that any payments (including preferential payments) be made out of the assets coming into the hands of the Receiver.
6. It was contended that the Receivers and Managers were fully seized of the Receivership of the Applicant Company and shall process them in accordance with the provisions of the ***Companies Act***, once they are in receipt of full details of the Respondent's claim. In the applicant's view, since the proclaimed assets are charged to the Interested Parties, by way of a fixed charge, the assets comprised in fixed charges (including the charge over immovable property of the company) are not available to pay preferential debts until the creditors secured by those charges have been paid in full, by virtue of section 95(4) of the ***Companies Act***. To the applicant, the preferential payment of any outstanding taxes in priority would only cover a period of the twelve months leading to receivership (rather than the 5 year period assessed by the Respondent), and would only apply to assets comprised in floating charges as opposed to the fixed charges now held by the Interested Parties.
7. It was therefore asserted that the demand for payment by the Respondent is clearly unlawful and that the Respondent and its appointed Leakey's Auctioneers have on 14th May 2015 issued similar

notices to the Applicant at its Mwatate construction site office, dated 11th May 2015 and 14th May 2015 respectively.

8. The Applicant stated that the Respondent has deliberately violated the principles of natural justice by demanding payment from the Applicant of the large sum of Kenya Shillings KES 226,780,998/- without giving it the opportunity to be heard. Further, the Respondent has deliberately irrationally violated the principles of natural justice by instructing Leakeys' Auctioneers to proclaim and attach the Applicant's assets on 5th May 2105, before giving the Applicant an opportunity to be heard. In addition, the demand for payment and distress procedures initiated by the Respondent are in bad faith, unconscionable and illegal and would be injurious and most prejudicial not only to the Applicant, but also to the interested parties who are secured creditors. Further, the demand for payment and distress procedures initiated by the Respondent are malicious, arbitrarily oppressive and a violation of the rights of the Applicants to a fair hearing, natural justice and fair play yet the Applicant is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, which has not been afforded to it.
9. It was the Applicant's case that the demand letter dated 7th May 2015 has been purportedly issued on the basis of a "conceded amount" when in fact the Applicant has not made any concessions on any purported tax and none has been exhibited. To it, its legitimate expectation that it would address any lawful demand issued by the Respondent has been thwarted because the Respondent had already issued instructions to Leakey's Auctioneers hence the demand by the Respondent and the proclamation action taken by the Respondent's agents Leakey's Auctioneers, is *ultra vires* the provisions of section 95 of the ***Companies Act***. Its case was that the Respondent has abused its powers because it has clearly not taken into account the fact that the Applicant is in Receivership and that the interests of the Interested Parties will be harmed by any attachment of the goods proclaimed by the Respondent's appointed agents Leakey's auctioneers. The sum of Kenya Shillings 476,429,887 Cents 95 was owed by the Applicant to the 3rd Interested Party as at 17th February 2015.
10. In a further affidavit, the applicant contended that it is an insolvent Company and does not have any funds in its Bank accounts. To it pursuant to the provisions of section 311(1)(a) of the ***Companies Act***, the Respondent's claim is subject to the said provisions and acceptance by the Receivers of the Applicant. In any event, the Receivers have no power to deal with unsecured creditors to whom the Applicant is heavily indebted in the sum of KES 22,094,000,000, KES 1,288,000,000 and KES 476,000,000 respectively, who have securities registered against the assets of the Applicant.
11. It was disclosed by the Applicant that as a matter of fact, the Applicant has been certified by the Respondent over the last five years to have complied with all tax, requirements and there really should not be any question of the Respondent turning around and demanding any security before this matter can be determined.
12. It was submitted by the applicant that the decision of the Respondent of levying distress upon the property of the Ex parte Applicant is massively tainted with illegality and irrationality within the meaning ascribed by the Court in **Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300,** where it was held that if either of the three elements; illegality, irrationality or procedural impropriety can be shown, the decision or action of a public body shall be subject to an appropriate judicial review Order.
13. According to the applicant, because we are interpreting various provisions of statute, it is useful to remind ourselves of the principles in their interpretation and in this respect the applicant cited **Sony Holdings vs. Registrar of Trademarks & Another Civil Appeal 37 of 2013**, in which the Court of Appeal (**Githinji, Mwera & Ouko JJA**) addressed themselves on principles of statutory construction by adopting the view of the English court in **Sussex Peerage** Case [1884] 11CI & Fin 85 that:

> **"……the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case best declare the intention of the lawgiver."**

14. According to the Applicant, the first instance of illegality that taints the actions of the Respondent herein is the fact that it purported to levy distress for tax arrears assessed for a period of five years in clear breach of the provisions of section 95 of the ***Companies Act***.
15. It was submitted that the second instance of illegality is under Part VI of the ***Companies Act***, with the relevant provisions relating to preferential payments being found at section 311 of the Companies Act. It was submitted that from the contents of the replying affidavit, it is clear that the Respondent now seeking, quite independently of the receiver in breach of section 95(1) of the ***Companies Act***, to collect the alleged outstanding taxes, and in further breach of Section 311(1) extending to a period in excess of the one year period set by law. Based on section 311(5) thereof it was submitted that the preferential payments rank equally, and abate in equal proportions where the assets are insufficient to meet them. It was therefore the applicant's case that by appointing auctioneers to distrain against the assets of the ex-parte Applicant with absolutely no regard to the rights of the other parties to whom preferential payments apply (including unpaid employees and their NSSF payments), then the Respondents are deliberately flouting the law and causing hardship to the other parties entitled to preferential payments, including the most vulnerable such as employees. To the applicant, only the Receiver is mandated by law to put all these claims together and settle them as guided by the law. Therefore the distraint by the Respondent and its agents is clearly an illegality within the rationale of the ***Pastoli Case (***Supra) and it is submitted that the Court can properly issue Orders of Certiorari in respect of the demand notice from the Respondent dated 7th May 2015 and the Notices of Distress dated 5th May 2015 and 11th May 2015.
16. With respect to the crystallisation of a floating charge, the Applicant relied on ***Kerr on the law and Practice as to Receivers,*** 16th Edition at pages 149, 150.
17. **In the Applicant's view, the interference by the Respondent or its agents with the Receiver's possession of the ex-parte Applicant's assets, is a contempt of Court. It was submitted that there is no difference between receivership and winding up since section 95(1) of the *Companies Act,* specifically incorporates and adopts the provisions of section 311(1)(a) being a provision of Part VI of the Act. In its view, the allegation that tax assessments must be considered even before the secured creditors is false and no statute or authority has been tabled for this proposition. As a matter of fact, this allegation is in conflict with** section 311(5) of the ***Companies Act.***
18. **To the applicant even if the applicant had conceded to owing tax, an allegation it denied, such concession would be invalid and irrelevant in these proceedings and it relied on Nyamu, J's decision in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others HCMA No. 743 of 2006 [2007] KLR 240 at 290**.
19. With respect to the third ground of illegality, it was averred that the statutory basis presented by the Respondent to distrain upon the assets of the ex-parte Applicant, is to be found at pages 8 and 10 of the Exhibit to the affidavit of **Harveen Gadhoke** sworn on 18th May 2015.Page 8 of the exhibit refers to section 102 of Cap 470 ***Income Tax Act,*** section 225 of the ***VAT Act*** cap 476 and section 18 of the ***Customs & Excise Act*** Cap 472.Page 10 of the exhibit then refers to the statutory basis as section 102 of the ***Income Tax Act*** Cap 470, section 16 of the ***VAT Act*** Cap 476 and section 225 of the ***Customs & Excise Act*** Cap 472. However, in the applicant's view, these provisions of law are all different and the ex-parte Applicant has a legitimate expectation to be served and notified of the correct legislation that empowers the Respondent to distrain upon its assets. To demonstrate the magnitude of the problem, while section 225 of the ***VAT Act*** does not exist, section 16 of the same Act clearly relates to issuance of debit and credit notes and has no relevance to distress. Thus, as both the sections cited as constituting authority to distrain under the ***VAT Act***, in fact refer to other sections of law, the purported distraint on the basis of these provisions is null and void.
20. Based on the **Pastoli case** (Supra), **Republic vs. Public Procurement Administrative Review Board & 2 Others Ex-Parte Seven Seas Technologies Ltd Misc. Civil Application 168 of 2014** and **Professor Wade's *Treatise, Administrative Law*** 5th Edition at page 362 it was submitted that in order to determine whether the Respondent acted unreasonably, the question is whether it had the free discretion to levy distress on the ex parte Applicant's property in the circumstances. If it didn't, which is the case in this instance, then it acted unreasonably within the meaning of the ***Wednesbury*** unreasonableness test. In the applicant's view, the bounds of the discretion of the

Respondent cannot be construed only in terms of the ***Income Tax Act***, ***VAT Act*** and ***Customs & Excise Act*** as has been done by the Respondent but those provisions have to be read in tandem with all other laws in Kenya, including the ***Companies Act***. When the Ex parte Applicant went into receivership, the provisions of section 95 (1) took effect and the provisions provide clearly that preferential debts are to be "**paid out** of any assets **coming to the hands of the receiver.** This, in the applicant's view, means that the Respondent must be patient like other preferential creditors and wait for the assets to come into the hands of and be distributed by the Receiver since the Respondent is not entitled to any special treatment.

21. It was therefore submitted that the conduct of the Respondent of levying distress on the assets of the ex-parte applicant, ignores the statutory mandate of the Receiver and is illegal, and unreasonable. The unreasonable actions of the Respondent further have the effect of invalidating the certainty of law, especially the provisions of the ***Companies Act***, which investors rely on before entering dealings with other parties. In this case for example, billions of shillings were lent to the ex parte applicant by the interested parties on the certainty that on the occurrence of an event of default, they would be able to appoint receivers and have their substantial pecuniary interest sufficiently protected. Instead, the interested parties as well as the Ex parte applicant (as well as the other preferential creditors like the employees) have now been met with the unenviable position of being affected to their great detriment, for placing reliance on the certainty of law. To this end, the applicant relied on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) at 290 at 295.
22. By allowing the unreasonable actions of the Respondent to stand, injustice would not only be suffered by the ex parte applicant and its secured creditors but also, certainty of law, the very lifeline of our economy, would be affected. As such, such an action should not be allowed to stand, not only in the interest of the Ex parte applicant and the interested parties, but also in the public interest and in the interest of the county's economy.
23. With respect to procedural impropriety, it was submitted that section 225 of the ***Customs & Excise Act*** requires that upon levying distress, the property so distrained should be kept for a period of **Fourteen (14) days** before they can be sold. However, in breach of this clear provision of the law, the Respondent issued a Notice of Distress under the provisions of section 225 of the said Act and stated that the property would be sold within ten (10) days if the tax claimed was not paid. To the applicant, even if the Notice of Distress was legal, and the evidence shows it was not, it would be a candidate for an order of certiorari and prohibition on the ground of procedural impropriety because while the procedure requires distress to continue for 14 days, the Respondent arbitrarily revised this down to 10 days.
24. It was further submitted that with the Constitution of Kenya 2010 came a new dispensation of requirements on administrative bodies. One of these requirements is provided for under Article 47 of the Constitution which provides for fair administrative action. The court in ***Republic vs. Kenya Revenue Authority ex parte Lab International Kenya Limited*,** **Mombasa High Court, Misc. Civil Application No. 82 of 2010[2011]eKLR noted at page 12 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 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 Article 10(2)(c) demands, "good governance, integrity, transparency and accountability."***

25. *The applicant relied on the decision of* ***Majanja, J*** *in* ***Geothermal Development Company Limited vs. Attorney General & 3 Others*** *Petition 352 of 2012 the need for precision and particularity in notices for demand for taxes and submitted that t*he standard set out in that case was not adhered to by the Respondent. As such the Respondent did not comply with the Constitutional requirement for fair administrative action due to two reasons. Firstly, because it did not spell out the consequences of non-compliance. This prevented the ex parte Applicant from being able to properly anticipate the next step of action or legal steps it could undertake to protect itself against what it perceived as an illegal claim. Secondly, the notice did not set out the

provisions relating to the opportunity provided by law to contest the finding. In fact, an opportunity to contest the finding was not even provided considering the Auctioneers appointed by the Respondent served a proclamation notice the same day, and at the same time as the Notice of Demand. To the applicant, the appalling conduct of the Respondent is testimony to the actions of a public authority acting in complete disregard of well set out requirements for fair administrative action and cited the words of **Majanja, J** at paragraph 58 of his judgment in ***Samura Engineering Limited and Others vs. Kenya Revenue Authority,*** **Nairobi Petition No. 54 of 2011 [2012] eKLR**

26. It was further submitted that a company does not lose its original identity or composition as a corporate body by reason of being placed in receivership and this submission was supported by the holding in **Moss Steamship Company Ltd. vs. Whinney** which was quoted in **Multi Options vs. Kalpana S. Jai Civil Suit 718 of 2008** where it was stated at page 5 that:

> **"This appointment of a receiver and manger over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession of the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."**

27. I was therefore submitted that the Authority submitted by the Respondent in their submissions to the effect that a stranger to an assessment cannot attack an assessment is not applicable to the facts of this case and as such, the contention of the Respondent as to lack of locus on the part of the ex parte Applicant fails as it is without merit. To the applicant the Respondent at paragraph 17.1.1 of its submissions has seriously contradicted itself on this issue by stating that "The fact that the Ex-Parte Applicant is in receivership does not mean that it has lost its corporate identity."
28. It was submitted that since the first receiver was appointed in February, by the date the tax was allegedly conceded, the Directors did not have any power to speak on behalf of the company and relied on **Sergon, J's** decision in **David Bett Langat vs. Stephen Kipkatam Keduiya & 7 Others Winding Cause N1 of 2014** where he stated at page 4 of the Ruling that:

> "**It is trite law that the appointment of receivers and managers has the effect of diluting or taking away the powers of the directors of the company."**

29. Going by the above principle of the Court, it was submitted that it is inconceivable that the directors of the Company could be able to make any promises or concessions on behalf of the company at a time when the company was under receivership. At the point of attaching the property, the proper agent of the company, its very will and authority, was the receiver. The right to be heard was meant to be accorded to him and no one else. This was not granted by the Respondent.
30. On the issue whether the demand by the respondent is *ultra vires* section 95 (1) and 311 of the ***Companies Act,*** it was submitted that this Honourable court did not state in earlier its ruling that section 311 does not apply in this case. The Court only made a general observation that the provisions of section 311 seems to deal with winding up and did not in any way say that it does not deal with receiverships. Further, considering that the comment made by the court was made at a preliminary stage before the substantive matter without the benefit of substantive arguments, it can barely be said that the court pronounced itself finally on the matter as suggested.
31. On the issue whether the orders sought herein can be issued against actions sanctioned by Statute, it was submitted that where a public body fails to adhere to the law in undertaking mandate conferred upon it by statute, as the Respondent has failed to do, then those orders can properly issue. On the issue of availability of alternative remedies, the applicant relied on **Kadamas vs. Municipality of Kisumu (1985) KLR** and **Zakayo Michubu Kibuange v Lydia Kaguna Japheth & 2 Others Civil Appeal No. 31 of 2103** for guidance. In the latter case, the court cited with approval the case of **Shah Vershi Dershi & Co. Ltd vs. The Transport Licensing Board** that:

"... The existence of an alternative remedy does not preclude the applicant from seeking relief by way of certiorari and although it can hardly be said that speedy justice, the object of certiorari has been achieved in this case. The remedy of certiorari appears nevertheless to be speedier than the alternative one of appeal to the appeals tribunal ..."

32. It was therefore submitted that the letter dated 7th May 2015 being notice of demand, together with the notices dated 5th May 2015 and 11th May 2015 issued by the Respondent as well as the proclamation letters issued by Leakeys Auctioneers dated 8th and 14th May 2015 ought to be quashed by issuing an Order of Certiorari as sought. In addition, the Respondent and its officers including Leakeys Auctioneers should be prohibited from alienating or interfering with the Applicant's possession of the items referred to in the Proclamation letters dated 8th May 2015 and 14th May 2014. Consequently, the Notice of Motion dated 27th May 2015 before the Court is deserving of the Orders of Certiorari and Prohibition as sought and prays for the same to be granted with Costs.

The Respondent's Case

33. In response to the application, the Respondent contended that the demand of taxes was pursuant to an audit and the audit findings were communicated to the applicant through a letter dated 10th July 2014. In that letter, audit findings were compiled and classified into five tax heads covered by the audit namely Income Tax, VAT, PAYE, Withholding Tax and Standards Levy. The tax due at this time was Kshs. 748, 359,178.00. The applicant replied to the above audit findings on 14th July 2014 where they sought to clarify some audit issues and at the same time, conceded to Kshs. 226,780,998 of the taxes assessed which is the subject of this suit and the entire proceedings.
34. It was averred that the respondent responded to the applicants queries on 4th August 2014 and proceeded to confirm the tax assessment and demanded the same. The applicant wrote back on 23rd September 2014 and while reiterating its letter dated 14th July, .07.2014 above made objections to the other tax assessments. The respondent wrote to the applicant on 4th March 2015 and asked that the applicant pay the tax it had conceded.
35. According to the respondent, it became aware that the applicant was under receivership and on 23rd March 2015 wrote to the receiver manager of the applicant to register the interest of the respondent for the outstanding VAT, PAYE and Corporation taxes owing. However, Agency Notices to the applicants' agents were issued on 31st March, 2015 in exercise of powers conferred upon the Commissioner of Domestic Taxes by section 19 of the ***VAT Act*** and section 96 of the ***Income Tax Act*** and these agents included I&M Bank, Bank of Baroda, Kenya National Highways Authority, Standard Chartered Bank, UBA Kenya Limited, Kenya Commercial Bank and NIC Bank. On 1st April 2015 the applicant wrote to the respondent undertaking to pay the undisputed conceded principal tax of Kshs. 226,780, 998.00 and asked for a grace period of 12 months within which to pay. On the same day, 1st April 2015 the applicant again wrote two letters to the respondent; one registering its intention to appeal to the local committee and the other asking that the agency notices be suspended. However, the said agents of the applicant wrote back and informed the respondent that they could not comply with the requirements of the agency notices as they had no accounts with credit balances belonging to the applicant and that further the applicant was indebted to the banks. As a result of the above, warrants of distress was issued on 8th May 2015 being a further enforcement tool after the agents replied that no funds were available. This measure was taken to ensure that the conceded tax debt was secured and/or recovered. Before the letter dated 7th May 2015 from the respondent that demanded immediate payment of the conceded tax debt of Kshs. 226,780,998, the respondent had sent a series of demands to the applicant in addition to the correspondence.
36. According to the Respondent, section 102 of the ***Income Tax Act***, and section 18 of the repealed ***VAT Act*** as read with section 68(2) of the ***VAT Act 2013*** allow collection of Tax by distraint. It was its position that the goods distained upon are procedurally and statutorily held for ten (10) days and not 14 as alleged by the applicant.

37. On 11th May, 2015, it was averred that the applicant wrote to the respondent again conceding to tax arrears of Kshs. 226, 780, 998/- and sought to clear the balance of the taxes owing by 12 instalments with the first payment starting 30 days after the receivership is lifted.
38. It was therefore the respondent's position that the distress was done in respect of the conceded principal amount only though the assessment of tax owing was much more as at 30th March 2015 when the final demand for taxes was sent to the applicant, the total tax owing from the applicant was Kshs. 1,341,532,642 i.e. over One Billion Kenya Shillings. It was therefore averred that the Respondents' actions are proper and within the law with the sole aim of ensuring that the government revenue is secured and / or recovered.
39. To the Respondent, as the applicant had not exhausted all available avenues and remedies prior to filing these judicial review proceedings to challenge the tax assessed, the orders sought herein cannot be issued. In its view, the remedy of Judicial Review is not available to Applicant because Judicial Review is not an avenue to pursue an appeal as it is not concerned with the merits of the decision but the decision making process itself. In the respondent's contention, the applicant has not followed the procedure or process taken by the respondent, but instead has challenged the content of the tax assessment, which is outside the realm of this honourable court.
40. The Respondent averred that the amount of Kshs. 226,780, 998/-, is a conceded tax assessment debt and is therefore not subject to further challenge before this court or any other avenue as the same is already a conceded crystallized debt. In light of express tax debt concession by the applicant the orders sought cannot issue and this application is done in bad faith and meant to defeat the respondents' tax demands.
41. Since this Court has already made a finding to the effect that the KSC International Limited is not being wound up, section 311 of the Companies Act has not yet come into play and does not apply to this case. Even if it were to apply, a tax assessment is a preferential debt that must be considered in priority to the secured creditors. It was further contended that the remedy of Certiorari sought is not available to the ex parte applicant, in any event, for the following reasons:
    1. Certiorari cannot, in the absence of bad faith, issue to quash a notice made pursuant to statutory provisions and regulations under an Act of Parliament, more specifically the ***Value Added Tax***, the ***Income Tax Act***, Cap. 470 Laws of Kenya as there is no iota of evidence to show or suggest that the items were distrained upon in bad faith.
    2. There is in fact no justifiable decision made by the Respondent capable of being quashed by the procedure of judicial review as established under the mandatory provisions of Order 53 Rule 7(1) of the civil procedure rules.
    3. Judicial review is concerned, not with the merits of the decision but the decision making process itself, of which no fault can be found with the factors leading to the decision leading to the issuance of the statutory notices and subsequent levying of distress upon the Applicants property.
42. The Respondent contested the availability of the remedy of Prohibition on the ground that the Court is being requested to prohibit an act, which has already taken place, within the confines of its statutory duties as contained in the ***Income Tax Act***, Cap. 470 Laws of Kenya and the ***Value Added Tax***, Cap. 476 Laws of Kenya. Further, **t**he ex parte applicant has no *locus standi* to seek the orders herein or to attack the tax assessment as no tax assessment has been directed at it at all.
43. It was the Respondent's position that a Tax Compliance Certificate:

i. Is an acknowledgement that the Applicant had complied with the requirement to file its tax returns as part of the country's self- assessment system and that the self-assessment is subject to further audit.
ii. Does not prohibit the respondent from carrying out audits on the tax affairs of a company and raising any taxes that are proved to be unpaid.
iii. Is subject to the caveat that the respondent may withdraw the certificate 'if new evidence materially alters the tax compliance status of the recipient".
iv. Is futuristic and is meant to facilitate business.

52. The Respondent therefore prayed that this Court finds that the application herein is without merit and dismiss it with costs to the respondent.
53. It was submitted on behalf of the Respondent that the applicant herein has no locus to institute

these proceedings. To the Respondent, KSC International Ltd, against whom the demands, assessment and distress were made and carried out is a different entity from KSC International Ltd (in liquidation), the applicant herein hence not the proper party to institute these proceedings. In support of this submission, the Respondent relied on **Eastern and Southern Africa Trade Development Bank vs. Kenya Revenue Authority HCCC No. 811 of 2009** in which it was held that:

> **"Apart from the above analysis, it is also apparent that there is no tax assessment which has been directed at the plaintiff in this case. The court is of the considered opinion that it is only a person who has been assessed who has the right to attack the notice which is in issue in this particular case. A stranger to an assessment cannot attack an assessment."**

54. According to the respondent, the conceded taxes of Kshs 226,780,998.00 the subject of these proceedings had crystallised before the receivership took effect, vide the letter dated 14th July, 2014. According to the applicant, it was placed under receivership by the 3rd interested party on 18th February, 2015.
55. According to the Respondents, the applicant was given every opportunity to respond to the audit findings and even exercised the right of appeal and the Respondent has only demanded the taxes which were conceded by the applicant. In light of the correspondences exchanged, it was submitted that there was no breach of the rules of natural justice and reliance was placed on **KAPA Oil Refineries Ltd vs. Kenya Revenue Authority & Others HC Misc. Appl. No. 283 of 2006**.
56. With respect to legitimate expectation, the Respondent submitted based on **Celtel Kenya Ltd vs. The Commissioner of Customs & Excise & Another HC Misc. Appl. No. 165 of 2006** and **Republic vs. Commissioner of Income Tax exp Coastal Bottlers HC Misc. Appl. 1756 of 2005** that the taxes the subject of this dispute were lawfully assessed and demanded and there were no representations and promises made by the Respondents hence its actions were at all times within the confines of the law.
57. To the Respondent, the provisions of section 311 of the ***Companies Act*** only applies in situations where a company is being wound up which is not the position herein. Even if section 311 of the Companies Act were to apply, it was submitted that tax assessments is preferential debt that must be considered even before the secured creditors. In support of this position the Respondent relied on the decision of this Court made herein on 21st July, 2015.
58. According to the Respondent, Tax Compliance Certificate is an acknowledgement that the applicant had complied with the requirement to file its tax returns as part of the country's self-assessment system and that the self-assessment is subject to further audit; does not prohibit the respondent from carrying out audits on the tax affairs of a company and raising any taxes that are proved to be unpaid; is subject to the caveat that the respondent may withdraw the certificate 'if new evidence materially alters the tax compliance status of the recipient"; and is futuristic and is meant to facilitate business.
59. It was submitted that the Respondent complied with all the provisions of Article 47 of the Constitution as well as section 4 of the ***Fair Administrative Action Act***, 2015.Based on **Republic vs. Kenya National Examination Council HC Misc. Appl. No. 266 of 1999**, the Respondent submitted that it would not be efficacious to grant the orders sought herein.
60. This Court was urged not to substitute its discretion for that of the tax authorities. To this end is was submitted that the applicant had not exhausted all the remedies available in law more particularly, under section 32 of the ***Value Added Tax Act*** and sections 82 and 83 of the ***Income Tax Act*** both of which establish an appellate process presided over by tax experts to evaluate the factual details and determine the dispute. In support of this provision, the Respondent relied on **KAPA Oil Refineries Case** (supra) and **Speaker of National Assembly vs. Njenga [2008] 1 KLR 425**.

Interested Parties' Case

52. It was contended on behalf of the interested parties that it is indisputable that, by the appointment

of the receiver and manager, the powers of the directors had ceased. This notwithstanding, by a letter dated 1st April, 2015, **Eshwar Rao & Associates**, Certified Public Accountants, wrote a letter to the Respondent asking for a grace period of 12 months to pay Kshs. 80,506,752.00 which letter was not written by or under the instructions of the receivers and managers of the Applicant and does not purport to have been so written. Despite having acknowledged or become aware that the Applicant was under receivership, the Respondent purported to issue Notice of Distress dated 11th May, 2015 to KSC International Limited, without noting that it was under receivership, to effect that it had distrained the applicant's goods and chattels. The Warrant of Distress was for Kshs. 226,780,998. On the basis of the notice, Leakey's Auctioneers proclaimed the applicant's goods on the same day thereby provoking these proceedings.

53. Based on Article 47 of the Constitution, it was contended that term lawful means conforming to permitted by or authorized by law and that individuals, persons and government shall submit to obey and be regulated by law, and not by arbitrary action. The interested parties contended that according to the United Nations, the rule of law refers to:

> **A principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.**

54. To them, the core of the principle is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of the law publicly made and public administered in the courts as recognised in Article 27(1) of the Constitution. The interested parties relied on section 95(1) of the ***Companies Act***.

55. They contended that where, as here, receiver has been appointed, preferential payments are to be paid in priority to all other debts, and "*shall be paid out of the assets coming to the hands of the receiver*". On the appointment of the receiver, the floating charges crystallized into a fixed charge. The receivers then proceed to realize the assets comprised in the charge and pay out the debts starting with the preferential debts. However section 311 of the said Act provides for the priority of payment and was of the view that since the Respondent had initially and correctly directed its claim through the receivers when it wrote the letter dated 23rd March 2015, it should have thereafter followed up the matter with the receivers so that the alleged tax arrears, which are preferential payments, and therefore have priority to all other debts, paid out of the hands of the receiver. The Respondent by, levying distress, ignored or did not care or consider the above provisions of the ***Companies Act*** as relates to a company which is under receivership but deliberately tried to circumvent the provisions of the ***Companies Act***. To the interested parties, the Respondent's action, whether deliberate or out of ignorance, amounted to illegality and is liable to be quashed.

56. It was further contended that section 311(1) provides that the taxes recoverable are all taxes due from the company at the relevant date and having become due and payable within twelve months next before that date (relevant date) not exceeding in the whole one year's assessment. The respondent is distressing for tax arrears for the period from 2010 to 2013/14 yet it is only entitled to one year's assessment. In this case, the company was placed under receivership on 18th February, 2015. Therefore, the relevant date should be 1 year before that date. It was averred that the respondent has not availed the one year's assessment and, from the material on record, it is not possible for this court to determine how much that amount should be.

57. It was further asserted that since under section 311(5) debts rank equally among themselves and are to be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions, if the court allows the distress to proceed, this provision will have been contravened as the all the preferential debts rank equally. Put differently, by distressing, the Respondent is jumping the queue and this court should not help it do so.

58. With respect to the alleged concession it was contended that both the letters dated 1st April, 2015 and 11th May, 2015 were written by or with the instructions of the director after the company had been placed under receivership and the Respondent had already become aware of this fact. Accordingly, it was contended that the directors' powers had ceased upon the appointment of the

receiver and the purported concession was null and void. In the interested parties' view, section 102 of the ***Income Tax Act*** which authorizes the commissioner to recover tax due by distressing the tax payer's goods and chattels should be read together with the provisions of the ***Companies Act*** which apply when the company is under receivership.

59. It was further contended that closely relating to the legality principle is the principle of legitimate expectation and that the applicant had legitimate expectation that the Respondent would act within the law and reliance was placed on **Republic vs. Kenya Revenue Authority *Ex Parte* Tradewise Agencies [2013] eKLR** in which the decision of **Nyamu J** in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** as well as **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280**.

60. To the interested parties, since the Respondent had issued tax compliance certificates the last one of which is dated 8th May, 2013 and was valid up to 12th May, 2014, the presumption was that the Applicant had complied. The Respondent should therefore have afforded the receivers, who were by then in charge of the company, to be heard as to why despite the tax compliance certificates, the company was still in tax arrears. The receiver had a legitimate expectation, based both on the law and the rules of natural justice that the Respondent would give them a hearing and to make representations before any precipitate action is taken.

61. In the interested parties' view, the Respondent has not shown any evidence that prior to the purported distress, it had withdrawn the certificates of compliance issued earlier on the basis of new evidence.

62. They prayed that the application be allowed as prayed.

Determination

63. The first issue for determination in these proceedings is whether the applicant herein has locus to institute these proceedings. The applicant is KSC International Ltd (in liquidation). It is however contended by the applicant that the tax payer is KSC International Ltd, a different legal entity against whom the demands, assessment and distress were carried out hence the proper party to institute these proceedings. It is not contested that KSC International Ltd went to liquidation. To determine this issue one needs to understand the effect of receivership on a company. In **Queensway Trustees Ltd vs. Official Receiver and Liquidator of Tanneries of Kenya Ltd [1983] KLR 51; [1976-1985] EA 498 Kneller, J** (as he then was) expressed himself as follows:

> **"Where a receiver is appointed…the management and control of the company's assets are taken out of the hands of the directors (and the secretary of the company) though the corporate structure remains and the main officers in the company have their usual statutory duties to discharge e.g. the board could convene a general meeting of the company to put it into voluntary liquidation. It can deal with its assets that are not covered by the security under which the receiver is appointed, and any event, property held by the company in trust for third parties, because it would not be caught by the terms of the security."**

64. In **Republic vs. Registrar of Companies Ex Parte Githungo [2001] KLR 299**, it was held that a receivership does not necessarily bring about the termination of the company's activities or its liquidation. This was the position adopted in **Kienzico Limited vs. Kentaco Taxis Limited HCCC No. 306 of 2005** where the Court held that a company in receivership still has its corporate status intact.

65. In **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others Application No. 2 of 2011 [2012] eKLR**, the Supreme Court expressed itself as hereunder:

> **"The question as to whether the receiver's power to commence or defend proceedings in the name of a company under receivership is exclusive has received judicial attention in foreign jurisdictions. While it remains the position that a receiver and manager supplants the board of directors in the control, management and disposition of the assets over which the security rests, it is also acknowledged that the receiver and**

manager does not usurp all the functions of the company's board of directors. The extent to which the powers of the directors are supplanted will vary with the scope of the receivership and management vested in the appointee. Directors have continuing powers and duties. Their statutory duties include: the preparation of annual accounts; the auditing of those accounts; calling the statutory meetings of shareholders; maintaining the share register and lodging returns."

66. In reaching its decision, the Supreme Court relied on **Hawkesbury Development Co Ltd vs. Landmark Finance Pty Ltd (1969) 2 NSWR 782** and **Newhart Developments Ltd vs. Co-operative Commercial Bank Ltd, (1978) 2 All ER 896, (CA)**, it was held that the power given to the receiver to bring proceedings was an enabling provision so that he could realize the company's assets and carry on business for the benefit of the debenture-holders. The provision did not divest the directors of the company of their power to pursue a right of action if it was in the company's interest and did not in any way impinge prejudicially upon the position of the debenture-holders by threatening or imperilling the assets which were the subject of the charge. The Court further opined that if in the exercise of his discretion, the receiver chooses to ignore some asset such as a right of action, or decides that it would be unprofitable from the point of view of the debenture-holders to pursue it, there is nothing in the case law suggesting that it is not then open to the directors of the company to pursue that right of action if they think that it would be in the interests of the company.
67. It would follow that in case of receivership, part only of the management is placed in the hands of the receivers depending on the kind of the receivership involved and the documents giving rise to the receivership. There are therefore certain duties more particularly the statutory obligations which still vest in the Board of Directors hence the mere fact that the words "in receivership" are added to the name of a company neither changes its status nor makes it a different entity from the Company. This case must be distinguished from the circumstances in **Eastern and Southern Africa Trade Development Bank vs. Kenya Revenue Authority HCCC No. 811 of 2009.** In that case the suit was commenced by the Bank rather than the entity from whom the taxes were being claimed. In those circumstances the Bank had no locus in bringing the said proceedings. These proceedings are however brought by the entity from whom the taxes are claimed and the fact that it is under receivership and its management has somewhat changed does not make it a different entity.
68. On behalf of the Respondent, it was submitted that since the demand, assessment and distress warrants were issues against the tax payer, **KSC International Limited** and not **KSC International Limited (in liquidation)** which is a different entity, the applicant herein has no locus to bring these proceedings.
69. According to the respondent, the conceded taxes of Kshs 226,780,998.00 the subject of these proceedings had crystallised before the receivership took effect, vide the letter dated 14th July, 2014. According to the applicant, it was placed under receivership by the 3rd interested party on 18th February, 2015.
70. In the replying affidavit, the Respondent averred that it became aware that the applicant was under receivership and on 23rd March, 2015 wrote to the receiver manager of the applicant to register the interest of the respondent in respect of the subject taxes. The said concession had however been made on 14th July, 2014. Although the Respondent contends that vide a letter dated 1st April, 2015, the applicant undertook to pay the undisputed conceded principal tax of Kshs 226,780,998.00 the sum which was actually conceded was Kshs 80,506,725. With respect to Kshs 146,274,273.00 the applicant requested that the same be offset against the withholding tax credits in their favour amounting to Kshs 168,189412. This letter was written by **Eshwar Rao and Associates**, as agents for the applicant. By the time the letter was written the applicant was already under receivership and the Respondent was well aware of this fact. There is no evidence that **Eshwar Rao** were instructed by the receivers to make the alleged payment proposal. In fact the receivers have denied knowledge of this fact.

44. That a floating charge crystallises on the appointment of receivers is now trite. As was stated in ***Kerr on the law and Practice as to Receivers,*** 16th Edition at pages 149, 150:

"Nature of floating charge. The appointment of a Receiver with or without powers of management of the undertaking and property of a company is usually made at the instance of debenture holders or other persons having a floating security, with or without a specific charge on part of the property. The nature and effect of a floating security have been discussed at length in many cases; it may be shortly described as an equitable charge on the assets for the time being of a going concern according to their varying condition, which remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge exists intervenes; this he may do, unless otherwise agreed, as soon as he pleases after default…The appointment of a Receiver is one of the events which causes the floating charge to crystallize. The Order operates from the date when the appointment becomes effective. The Receiver becomes entitled to possession of the Company's assets and any interference with his possession is a contempt of Court."

71. Once the receiver was appointed, the floating charges crystallised with the result that the directors nolonger had free hand in deciding on the manner in which the applicant's assets could be disposed of. In **Flagship Carriers Ltd. vs. Imperial Bank Ltd. & 2 Others Nairobi (Milimani) HCCC No. 1643 of 1999, Hewett, J** expressed himself as follows.

"Notwithstanding the appointment of receivers of a company, directors have a residual authority as directors...A provision in a debenture empowering the receiver to bring an action in the name of the company whose assets were charged was merely an enabling provision, investing the receiver with the capacity to bring an action and did not divest the Company's directors of their power to institute proceedings on behalf of the Company provided that the proceedings did not interfere with the receiver's function of getting into the Company's assets or prejudicially affect the debenture holder by imperilling the assets. Furthermore the directors are under a duty to bring an action, which is in the Company's interest because it is in the benefit of the creditors generally, and to pursue that right of action does not amount to dealing with the Company's assets so as to require the receiver's consent or concurrence. Since the plaintiff's action would not stultify the receiver's function of gathering in the assets the plaintiffs are not required to obtain his consent to bring the action...A company in receivership has the right notwithstanding the receivership to contest both the appointment of the receivers and the receivers' acts and defaults...While receivers do in general supplant the board of directors from the control, management and disposition of the assets over which the securities exist, the directors remain as directors within the domestic structure of the company and its shareholders. Their duties to the company continue although divested of their powers to carry out their duties in respect of the charged assets. They are still obliged to call meetings, make returns and keep accounts albeit that much of the information they will need will have to be obtained from the receivers. They have the right to deal with those parts of the company not the subject of the debenture...The directors are obliged to co-operate actively and fully with the receivers (although they may well be paid for their work); to allow the receivers full access to the property charged: to impart to the receivers whatever knowledge and expertise they have which will help the receivers in their primary duty to pay off the debenture holder: to help with the accounts and with whatever explanations and information regarding the pre-receivership business of the company, the receivers require...The directors' powers over the assets of the company, and their powers effectively to commit the company, will have ceased on the appointment of the receiver and will be necessary for him to consider their place in the future of the company under control...The effect of appointment of a receiver on the powers of the directors is to remove from their control all of the assets covered by the charge under which he has been appointed, other than any which may have been excluded by the instrument appointing him. In case of the normal floating charge debenture this will mean all the assets of the company. The corollary of this is that once the assets have been removed from the control of the directors, they have no access thereto and may only enter the company's premises with

the permission of the receiver. They may take no action in relation to the business of the company, which could be construed by third parties as indicating control or ownership of that business...The appointment of the receivers relates solely to the assets and business of the company and in no way interferes with the statutory duties of directors who must continue to fulfil statutory duties such as maintaining the statutory books of the company and therefore they must retain possession of the company's statutory books together with the company seal which are not considered the assets of the company." [Emphasis added].

72. It is therefore clear that once the receivers are appointed the powers of the directors are restricted by the instrument under which the receivers are appointed and they nolonger have the powers to deal with the assets of the company in a manner that is likely to prejudice the interests of the receivers. In a normal floating charge like in the present case, it means that their powers to deal with all the assets of the company are divested and the assets are thereby removed from their control with the result that, they have no access thereto and may only lawfully take action thereon with the permission of the receivers. In particular, they have no power to take any action in relation to the business of the company, which could be construed by third parties as indicating control or ownership of that business.
73. In this case, on 1st April, 2015, **Eshwar Rao & Associates**, Certified Public Accountants, wrote a letter to the Respondent asking for a grace period of 12 months to pay Kshs. 80,506,752.00. That letter, according to the applicant and the interested parties, was not written by or under the instructions of the receivers and managers of the Applicant and does not purport to have been so written. It was on this basis that the Respondent who was aware of the fact of receivership issued Notice of Distress dated 11th May, 2015 to KSC International Limited, for Kshs. 226,780,998. That was the basis of the proclamation by Leakey's Auctioneers.
74. Section 95(1) of the ***Companies Act*** provides as follows.-

Where, either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part VI relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

52. What this provision mandates is that the debts falling under the provisions of Part VI relating to preferential payments to be paid in priority to all other debts, be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures. Therefore for payment to become due, the assets from which payment is sought to be made must have come into the hands of the receiver. In this case the agent who purported to pledge payment to the Respondent was not a receiver and there is no evidence that any assets of the applicant had come into the hands of the receivers. Accordingly, his actions were clearly illegal as they were in excess of the powers retained by the applicants' directors.
53. It was contended by the Respondent that the applicant was given every opportunity to respond to the audit findings and even exercised the right of appeal and the Respondent has only demanded the taxes which were conceded by the applicant hence the issue of violation of the applicant's right to a hearing does not arise. This position would have been tenable had the applicant's legal status not been altered by the operation of the law. In other words, once the receivers were appointed, before the Respondent moved in to distress the applicant's properties, the Respondent's further action had to be subject to the provisions of the law. This position was appreciated by **Muli, J** (as he then was) in **Kahagi vs. Kencity Ltd [1982] KLR 464** where he held that:

"...it has fully been established that where there is a floating charge over the movable property of an execution debtor created by a debenture, the floating charge crystallises on the date of the appointment of the Receiver. The charge becomes a fixed charge over

all movable property of the execution debtor since what happens in the appointment of the Receiver is to crystallise the floating charge, which then becomes a fixed charge...That a distinction should be drawn between goods which have been attached after the appointment of the Receiver and those attached before such appointment. In the former case there appears to be no difficulty because the debenture holder's charge crystallises before the attachment with the result that the debenture holder has interest in priority over the execution creditor who attaches the assets subsequent to the appointment of the Receiver. In such a case, the debenture holder would be entitled to an order stopping the sale or proceeds of the execution creditor...However, there is a point of considerable difficulty with regard to those goods, which are attached before the appointment of the receiver. The property in the attached goods under the warrant of *fieri facias* is bound in the execution debtor and the goods remain in the custody of the law in the hands of the court broker. Before the appointment of the receiver, the machinery of execution by attachment and sale has been put into motion and technically, execution creditor should have priority over the debenture holder whose charge has yet to crystallise... If the attached goods are subsequently sold, before appointment of the receiver although subject to debenture holder's equitable interest, the execution creditor has priority and is entitled to the proceeds thereof. This is because the debenture holder's floating charge has not crystallised and he cannot single out a single asset of the many assets of a going concern. In addition, the debenture does not cover the proceeds of such sale with the result that the execution creditor is entitled to the money...Once the writ of *fieri facias* has commenced before the appointment of the receiver, the execution creditor should have priority. The warrant of *fieri facias* is for attachment and sale of assets of the execution debtor. It is one court process for execution by attachment and sale. If the warrant of *fieri facias* is extended, upon execution of the debtor's assets, the machinery of execution by attachment and sale has commenced and as from that moment, the interest of the parties become paralysed at that point...The criterion is the date on which the debenture holder's charge crystallises, before seizure and sale of the attached goods, then the debenture holder has priority. From the foregoing it would appear that the debenture would rank in priority only if the charge crystallises before the actual seizure. Once the actual seizure has taken place before the charge crystallises, then the execution creditor has priority over the debenture holder...Execution by way of attachment and sale should not be treated as two separate matters. Once the writ of *fieri facias* has issued and executed, the process has commenced and should not be interrupted by the fact that a receiver has been appointed and that the floating charge has crystallised after the actual seizure and before the sale of the goods takes place. Just in this same way the debenture holder cannot have priority over attached goods, which have been seized before the floating charge crystallises on the appointment of receiver but before the sale."

54. It follows that despite the alleged earlier concession by the applicant, once the interested parties' floating charges crystallised before the Respondent exercised its powers under the relevant statutes, its rights over the assets of the applicant was subjected to the provisions of the ***Companies Act***.
55. It was contended by the Respondent that since the applicant is not as yet being wound up, the provisions of section 311 of the ***Companies Act*** are inapplicable. Section 311(1) and (5) of the said Act provides:

(1) In the winding up of a company there shall be paid in priority to all other debts–

(a) all taxes and local rates due from the company at the relevant date and having become due and payable within twelve months next before that date not exceeding in the whole one year 's assessment;

(b) all Government rents not more than one year in arrear;

(c) all wages or salary (whether or not earned wholly or in part by way of commission) of any clerk or servant (not being a director) in respect of services rendered to the company during four months next before the relevant date and all wages (whether payable for time or for piece work) of any workman or labourer in respect of services so rendered;

(cA) all retirement benefits contributions and vested benefits of any clerk or servant of the Company;

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company, or unless the company has, at the commencement of the winding up, under any contract with insurers, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act, being amounts which have accrued before the relevant dates;

(e) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company, all amounts due in respect of contributions payable during the period of twelve months immediately preceding the relevant date by the company as the employer of any person under the National Social Security Fund Act or the Retirement Benefits Act.

(5) The foregoing debts shall–

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

56. The Respondents relied on the decision of this Court made herein on 21st July, 2015 in which this Court dealing with the issue whether or not to direct that the leave ought to operate as a stay was of the view that the said provision only applies to winding up proceedings. At this stage it is important to appreciate the role and the extent of the Court's jurisdiction at that stage of the proceedings. Normally, that decision is made at the stage of leave. At that stage, if the application is ex parte, the Court makes a decision based purely on the material furnished by the applicant without the benefit of the respondent's input. Accordingly such a decision is merely interlocutory and the Court is not bound to arrive at the same finding after hearing the main Motion.
57. In my view, even where the application is heard inter partes, the decision arising therefrom is still not binding. Such a decision is similar to an application for stay under rule 5(2)(b) of the ***Court of Appeal Rules***. Dealing with that rule in **Musiara Ltd vs. Ntimama Civil Application No. 271 of 2003 [2004] 2 KLR 172; [2005] 1 EA 317**, the Court of Appeal **(Tunoi, O'kubasu, JJA & Onyango Otieno, AJA)** held that any decision of the Court under rule 5(2)(b) of the ***Court of Appeal Rules*** is interlocutory and does not necessarily bind the Court hearing the appeal in its determination, or the Superior Court when exercising its jurisdiction in hearing the suit.
58. Section 311 of the Companies Act falls under Part IV of that Act which deals with "Winding Up". The applicant however contends that a reading of section 95 together with section 311(5) would lead to a conclusion that section 311(5) also applies to receivership. In my view the important part of section 95 for the purposes of this argument is that:

"...if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part VI relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for

principal or interest in respect of the debentures."

59. Nowhere does that section import the provisions of section 311(5). It only provides, in my view that preferential payments are to be made out of assets coming to the hands of the receiver. In other words, such payments cannot be made until the assets have come into the hands of the receiver. My position is supported by the holding in **Nightingale Holdings Ltd vs. Muhoroni Sugar Co. Ltd & KCB Kisumu HCCC No. 238 of 2001** that a receiver is under a duty to satisfy the debts owing to the debenture holder, as well as all other debts owing to the company. The issue of preferential debtors will only apply in instances where the company has reached its final stages and in the process of being wound up and at which stage, section 311 of the ***Companies Act*** would apply. Otherwise the receiver can pay the debts that would be owing by the company and then recoup the payments from the assets of the company.
60. I therefore reiterate that section 311 does not apply to receiverships as opposed to winding up.

61. According to the Respondent, Tax Compliance Certificate is an acknowledgement that the applicant had complied with the requirement to file its tax returns as part of the country's self-assessment system and that the self-assessment is subject to further audit; does not prohibit the respondent from carrying out audits on the tax affairs of a company and raising any taxes that are proved to be unpaid; is subject to the caveat that the respondent may withdraw the certificate 'if new evidence materially alters the tax compliance status of the recipient"; and is futuristic and is meant to facilitate business. A "certificate" is defined in ***Black's Law Dictionary***, 9th Edition at page 255 to mean "a document in which a fact is formally attested; a document certifying the bearer's status or authorisation to act in a specified way."

75. The value of the Tax Compliance Certificate was dealt with in **Republic vs. Kenya Revenue Authority *Ex Parte* Tradewise Agencies [2013] eKLR,** where this Court held that the certificate is *prima facie* evidence of compliance and until withdrawn the same is proof of fulfilment of the obligation to pay taxes. In that case the Court appreciated that the Tax Compliance Certificate, being a prima facie evidence of tax compliance, may be withdrawn if evidence to the contrary arises. However, in that turn of events, the rules of fairness under Article 47 of the Constitution mandate that the tax payer be given the reasons for the withdrawal of the certificate and be heard on the issue before the same is withdrawn. I do not buy into the argument that a Tax Compliance Certificate ought to be equated to an acknowledgement stamp that a tax payer has merely submitted returns.

61. The language of the certificate shows that not only has the tax payer fulfilled the obligation to file the relevant tax returns but has paid taxes due as provided under the law. As I have said this latter part is subject to further evidence arising from detailed audit. To do that would amount to equating a certificate to an acknowledgement stamp. If the certificate were to be equated to an acknowledgement stamp there would be no necessity of withdrawing the certificate since its contents would not have any value to the Tax Authority. I do not understand my learned brother, **Justice Korir** in his decision in **Republic vs. Kenya Revenue Authority ex parte Tononoka Steels Ltd HC Misc. Appl. No. 165 of 2014** to have a contrary opinion. In my view his understanding of the ***Tradewise Case*** was correct.
62. Although there was a rider to the certificate, my view is that until the Respondent lawfully exercises its rights under the rider, the certificate must be taken for what it says i.e. that inter alia the taxpayer ***"has fulfilled the obligation… to pay taxes due as provided by the law"***.
63. My view on this issue is informed by the need to achieve certainty in economic sphere. As was appreciated by **Nyamu, J** in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others HCMA No. 743 of 2006 [2007] KLR 240 at 295:**

> **"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of**

certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Certainty of law is a major requirement to business and investment...certainty of law is an important pillar in the concept of the rule of law."

76. The same principle was re-asserted in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** where it was held that:

> **"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."**

64. In this case, it was contended and this contention was not disputed the Respondent had issued tax compliance certificates the last one of which is dated 8th May, 2013 and was valid up to 12th May, 2014. The concession was however made on 14th July, 2014. In those circumstances it cannot be said that the applicant was never afforded a hearing and that the Tax Compliance Certificate cannot be impeached. The applicants must have considered their position, post the issuance of the said certificates and must have realised that the said certificate did not reflect its true tax liability position. Accordingly, I disagree with the position adopted by the applicant and interested party that the said Tax Compliance Certificate ought to be taken as evidence that the applicant was up todate in its tax remittance.
65. The Respondent submitted that in light of the existence of alternative remedies in form of appellate processes this Court ought not to interfere with the Respondent's decision. This Court is well cognisant of the requirement, which has now acquired statutory underpinning vide section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015 which provides:

> ***The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

66. Subsection (3) thereof provides:

> ***The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***

67.. Subsection (4) of the said section however provides:

> ***Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

68. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. This Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 expressed itself on the issue of alternative remedies as follows:

> **"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

69. This position is in tandem with the position in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.
70. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute.
71. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

> **"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..."**

72. It is now a 'cardinal principle that save in the most exceptional circumstances, the judicial review jurisdiction should not be invoked where there is a more *appropriate remedy open to the party seeking it and which* sufficiently covers the situation at hand. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.
73. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. In that regard the words of the Court in **Harrikinson vs. Attorney General of Trinidad and Tobago [1980] AC 265**, as set out hereunder hold true today as they did then:

> **"The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of**

administrative action."

74. The Court concluded thus;

> **"The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

75. I am however aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** that where there is a means of redress that is inadequate, the Court should not exercise restraint. The Court stated that;

> **"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship's words:**
>
> ***"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power.***
>
> ***Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights"."***

76. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In ***Ex parte*** **Waldron [1986] 1QB 824 at 825G-825H,Glidewell LJ** observed that the court should always interrogate relevant factors to be considered when deciding whether the alternative remedy would resolve the question at issue fully and directly.

77. It ought to be appreciated that an appellate process deals with the merits of the decision made as opposed to the process. In this case part of the applicant's case is that the decision of the Respondent was arrived at in breach of the rules of the natural justice as the receivers, the manager of the applicant, who ought to have been afforded an opportunity of being heard were never heard. That is an issue which does not touch on merits of the decision but on the process. It is in fact an Article 47 issue. In my view fundamental rights guaranteed under the Constitution should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in **Belfonte (supra).** In this case, the quantum of taxes payable by the applicant is not in issue. What is in issue is whether the Respondent ought to be permitted to exercise its power to recover the same in disregard of the provisions of the law. In my view that is not an issue for the appellate jurisdiction of the said Appellate Tribunals.

78. Since I have found that section 311 of the ***Companies Act*** does not apply, the issue of the period within which taxes can be recovered by the Respondent is nolonger an issue.

79. With respect to the issue of notices, I also agree with **Majanja, J** in ***Geothermal Development Company Limited vs. Attorney General & 3 Others*** *Petition 352 of 2012:*

"**A notice of the nature issued to enforce collection of taxes must clearly state to be such a notice, state the amount claimed, state the legal provision under which it is made and draw the taxpayers attention to the consequences of failure to comply with the law and the opportunity provided by the law to contest the finding. Such a notice would give the opportunity to any Kenyan to know the case against it and utilise the legal provisions to contest the decision. The right to fair administrative action and the right of access of justice now enshrined in our Constitution demand nothing less."**

80. In this case however, it is not contended that the applicant was not aware of the basis upon which the demand was being made. Accordingly, I decline to find that the citation of the incorrect provisions of the law was fatal to the Respondent's demands for payment of due taxes part of which the applicant had acknowledged before it went into receivership.
81. Having considered the issues raised herein, it is my view and I hereby hold that the Respondent ought to have channelled its claim for taxes through the receivers which taxes ought to be paid in accordance with section 95 of the ***Companies Act***. The receivership of the applicant having taken placed before the Respondent exercised its powers of distraint, the fact that the applicant had conceded that taxes were due from it, did not preclude the Respondent from complying with the law relating to receivership. Accordingly, whereas the Respondent is still entitled to claim the taxes due to it from the applicant, that claim ought to be channelled in accordance with the law. I accordingly associate myself with the decision of **Majanja, J** at paragraph 58 of his judgment in ***Samura Engineering Limited and Others vs. Kenya Revenue Authority,*** **Nairobi Petition No. 54 of 2011 [2012] eKLR that:**

"...Kenya Revenue Authority as the State agency charged with the collection of taxes is bound by the provisions of the Bill of Rights to the fullest extent in the manner in which it administers the laws concerning the collection of taxes. The values contained in Article 10 must at all times permeate its functions and activities which it is mandated to carry out by statute"

82. In the foregoing premises I do find merit in Notice of Motion dated the 27th May, 2015. Whereas this Court appreciates the need for taxes due to be paid, even where the taxes are due and there is no dispute with respect to the same, its collection must be in accordance with the law. As was correctly put by **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra):

"It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due… Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law."

Order

45. Consequently, I grant the following orders:
    a. **An order of certiorari removing to this Honourable Court for the purpose being quashed the the Proclamation Letters dated 8th May 2015 and 14th May 2015 issued by the Respondent's agents Leakey's Auctioneers, and directed at the Applicant which Proclamations are hereby quashed.**
    b. **An order of prohibition prohibiting the Respondent, its officers, servants, agents**

including Leakeys' Auctioneers from attaching, taking away, disposing, alienating or interfering with the Applicant's possession of the items referred to in the Proclamation letters dated 8th May 2015 and 14th May 2015 save in compliance with section 95 of the Companies Act.

c. **As I have found that the issuance of Tax Compliance Certificates do not entitle the applicant to avoid or evade payment of taxes in the circumstances of this case, there will be no order as to costs.**

83. Orders accordingly.

Dated at Nairobi this 22nd day of February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Karungo for the ex parte applicant and holding brief for Mr Musyoka for the 1st interested party.

Ms Odundo for the Respondent

Mr Kahura for Mr Gachuhi for the 2nd interested party

Cc Patricia