REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO.251 OF 2014 (J.R)

IN THE MATTER OF: AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI & PROHIBITION BY INTERACTIVE GAMING AND LOTTERIES LIMITED.

IN THE MATTER OF: DEMAND NOTICES OF ASSESSMENT OF VALU ADDED TAX, INCOME TAX & WITHHOLDING TAX

BETWEEN

REPUBLIC……..……..…….APPLICANT

AND

KENYA REVENUE AUTHORITY…..…….....…….…..RESPONDENT

EXPARTE;

INTERACTIVE GAMING & LOTTERIES LIMITED.

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd July, 2014, the *ex parte* applicant herein, **Interactive Gaming & Lotteries Limited,** (also referred to as "IGL") seeks the following orders:

1. **THAT an Order of Certiorari be issued to remove to this Honourable Court for the purposes of being quashed the Respondent's decision contained in the Notice of Assessment of Value Added Tax, Withholding Tax & Income Tax dated 17th June 2014.**
2. **THAT an Order of Certiorari be issued to remove to this Honourable Court for the purposes of being quashed the Respondent's decision contained in the Notice of Assessment of Value Added Tax dated 17th June, 2014 transferring the Applicant's tax affairs from Nairobi to Meru.**
3. **THAT an Order of Prohibition be issued to prohibit the Respondent, whether by themselves, their servants, agents and/or whomsoever from in any way executing and/or enforcing the Respondent's decision contained in the Notice of Assessment of Value Added Tax, Withholding Tax & Income Tax dated 17th June 2014 or issuing any agency notices in respect thereof.**
4. **THAT the costs of this Application be borne by the Respondent.**

Ex Parte Applicant's Case

2. According to the applicant, by a Plaint filed in the High Court Commercial Case No. 115 of 2011 the Plaintiff filed a suit against **Flint East Africa Limited** (hereinafter referred to as "Flint"), **Safaricom Limited** (hereinafter referred to as "Safaricom") and **Kenya Revenue Authority** (hereinafter referred to as "KRA") the Respondent herein. At paragraph 10 of the said Plaint, the Applicant contended that from the lottery proceeds, Safaricom was entitled to deduct various Government taxes and remit to the Respondent. The Respondent filed a Defence and contended that the funds held by Safaricom should be paid to them on account of outstanding taxes owed to the Respondent by **Flint**.
3. It was averred that following conclusion of the trial of all the issues including the Respondent's claim for taxes, the court delivered its judgment on 30th April 2014 in which the Court found inter alia that from the evidence on record it was clear that the claim by the 3rd Defendant, KRA in respect of the 1st Defendant's liability to pay taxes to KRA was against the 1st Defendant and not against the Plaintiff. The Plaintiff in the above case was the Applicant in this matter which was struck out by court on 24th June 2014.
4. It was averred that notwithstanding that no judgment was entered against the Respondent in the aforesaid suit, they rushed to court by way of an Application for stay seeking to stop Safaricom from releasing the funds to the Plaintiff. To the applicant it is noteworthy that it has taken the Respondent more than 3 years since the said suit was filed before making the fictitious tax claim. It was disclosed that in what is clearly an afterthought and with a view to defeat the aforesaid judgment, the Respondent on 20th June 2014 dropped the said notices at the Applicant's Advocates offices, for alleged outstanding tax with respect to V.A.T for Kshs. 299,101,799, withholding tax arrears of Kshs. 37,805,963 and Income Tax of Kshs.26, 135,295 which notices were issued notwithstanding the Respondent's express admission that they had no tax claim against the Applicant. To the Applicant, the sole intention of the Respondent in issuing the said notices is to lay a basis for issuance of agency notices to Safaricom so that they can unlawfully recover their fictitious tax claim from the Applicant's funds.
5. It was the Applicant's case that since it was incorporated on 17th September 2010 it could not owe taxes on 31st December 2010. In any event, the lottery that gave rise to the funds held by Safaricom was run in December 2010 and January 2011 yet they are being assessed VAT even before they were incorporated.
6. According to the Applicant, Safaricom Limited deducted Value Added Tax and Withholding Tax at source and remitted it directly to **KRA** hence the outrageous claim for alleged VAT arrears and Withholding Tax is baseless. It was further contended that it was absurd and illogical that an amount of Kshs. 139,132,851.94 held by Safaricom Limited could accrue VAT arrears of Kshs. 299,101,799.
7. According to the Applicant, whereas the notice of assessment refers to reasons given in the schedule to the notice, none was provided hence the assessment was therefore without any foundation, was unreasonable and irrational. Equally, the demand for income tax was without foundation and did not disclose the basis for the income and was in any case fictitious. To the Applicant, the Respondent's decision to transfer its tax affairs from Nairobi to Meru without the consent, notification or authority of the Applicant was wholly unreasonable and besides, it was illogical how the Applicant's V.A.T affairs can be transferred to Meru yet it was registered in Nairobi and its business operations were based in Nairobi.
8. It was averred in addition that the *ex-parte* Applicant was incorporated for the sole purpose of running a lottery that became the subject matter of court proceedings in HCCC No. 115 of 2011 Commercial & Admiralty Division Nairobi and that this fact was admitted by the Respondent in those proceedings. To the Applicant therefore, its revenue was limited to proceeds received from mobile telephone operators following determination of HCCC 115 of 2011 and HCCC 281 of 2011. It was averred that before the said cases could be determined and hence the ownership of the lottery proceeds, financial statements on the same could not be prepared. However immediately upon determination of the primary suit HCCC 115 of 2011, on 30th April 2014, the Applicant filed with the Respondent a return for income/corporation tax for the year 2011, 2012 and 2013 on 10th June 2014, so that as at the 17th of June 2014 when the Respondent issued the impugned notice of estimated assessment for Income Tax, they had already received the Applicant's income tax return and the allegation that **IGL** is a non – filer is incorrect. It was disclosed that the financial

statement clearly showed that the Applicant incurred a loss of Kshs. 3,060,311 for the year ended 31st December 2011 and carried forward to 31st December 2013. However, no reference was made to the said return before **KRA** issued its purported notice of assessment of Income Tax for Kshs. 26,135,295.00.

9. It was therefore the Applicant's case that in view of the aforesaid documents, there cannot be any reasonable basis for the income tax notice of assessment. In any case, the Respondent did not disclose the source documents that allegedly formed the basis of their assessment. To the Applicant the Respondent's allegation that it relied on undisclosed third party records to issue the said assessment notices is outrageous in light of its categorical assertion in HCCC 115 of 2011, that it was not claiming any taxes from the Plaintiff in that matter, which is the Applicant herein. To the Applicant, attempt to now circumvent that previous position and issue outrageous tax demand is unlawful, grossly unreasonable, irrational and smacks of ill - motive. It was disclosed that the deponent of the said concession was the Respondent's witness in the said High Court case and therefore was aware that the Respondent did not have any tax claim against the Applicant. It was the Applicant's position that the Respondent's claim was similarly caught up by the doctrine of issue estoppel and/or res-judicata in view of the express court findings on the same in the above case and as such was illegal.
10. The Applicant averred that it is a separate corporate entity from **Flint** and could not therefore be liable for **Flint's** tax obligations which, in any case, were also cleared of any tax liability by court in the above decision. On the same ground, it was contended that the notices of assessment for VAT and Withholding Tax were equally outrageous and in bad faith since in the aforesaid judgment Safaricom in their own affidavit confirmed that the amount of Kshs. 139,132,851.94, they admitted they held on account of the lottery was exclusive of VAT and withholding tax. To the Applicant, in view of Safaricom's own admission as **KRA's** tax withholding agents, they retained the said taxes for direct remittance to **KRA**. As such, if any VAT and withholding tax were not remitted by **Safaricom**, their authorized agent, **KRA** has recourse against them in law.
11. According to the Applicant, the mere existence of an alternative remedy is not bar to pursuit of Judicial Review remedies. Besides, any other alternative remedy in statute is unsuitable as the objection taken on the said notices is in the process/manner in which the decision to issue the same was made by **KRA** and not the merits. According to the Applicant, the decision to issue the said impugned notices cannot lie for the reasons;

    1. It contravenes express findings regarding **IGL's** tax liability status in a judgment of court delivered in HCCC No. 115 of 2011 and it is therefore unreasonable, arbitrary and in bad faith.

    2. It ignores the return filed by **IGL** regarding its Income Tax status and the evident loss incurred in promotion of the lottery.

    3. It ignores the admission by Safaricom, **KRA's** own tax-withholding agent that Safaricom had deducted VAT and withholding tax and remitted to **KRA**.

    4. There is no disclosure by **KRA** of the documents relied on or the basis upon which they issued the said notices of assessment of tax and it is therefore irrational.

    5. The cumulative tax claim for VAT, Withholding Tax and Corporation Tax is Kshs. 363,043,057/-which cannot possibly accrue from a revenue of Kshs. 139,132,851.94.

12. It was averred that the lottery proceeds that were determined as belonging to IGL were pursuant to invoices raised by **Flint** as **IGL** PRSP agent which invoices were never settled and the funds thereof were ordered to be held by Safaricom pending hearing of the said case. Since the VAT payable on account of the said invoices was admittedly withheld by Safaricom for transmission to **KRA**, it cannot be correct that **IGL** was charging VAT to Flint and no such evidence has been disclosed by **KRA**. According to the Applicant, there was no professional fees payable to **Flint** by **IGL** on account of use of their software and no evidence has been attached. Besides, the 2/- per SMS awarded to **Flint** by court in HCCC No.115 of 2011 was the only charge payable to Flint as **IGL's** PRSP agent. In any event, the court in its judgment in HCCC No. 115 of 2011 ruled that

KRA was not claiming any taxes from **IGL** and **KRA** has not disclosed any where in their Replying Affidavit that the said position had changed. To that extent, the matter having been concluded by court, no fresh cause of action can be commenced by KRA in respect of the same taxes.

Respondent's Case

13. In response to the Application, the Respondent averred that the Applicant ran an SMS based lottery between 1st October to 14th December 2010 named *Mzalendo Bora Lottery* promotion, with Interactive Media Services (IMS) being contracted as the Premium Rate Service Provider (PRSP) for this lottery. That Interactive Media Services (IMS) was the PRSP agent, while the Ex-parte Applicant was the lottery owner. This agreement (KA 1) between the ex-parte Applicant with Interactive Media Services (IMS), Registration No. C90047, showed that the lottery was to begin on 1st October 2010 for a period of 90 to 105 days and the lottery was given the service number 6868, with the rate per SMS at Kshs.50. This relationship was terminated voluntarily and thereafter on 7th December 2010, the ex-parte Applicant signed a subsequent Memorandum of Understanding with **Flint** for a second lottery to begin on 14th December 2010 using a short code 6969.
14. According to the Respondent, for the second lottery, the participants were charged KShs.69 per sms which would be received by the mobile operator. From this amount, the mobile operator would deduct its share at source while the PRSP agent was entitled to 2/= and the lottery owner would get the rest. It was explained that the Premium Rate Service Provider (PRSP) would get 38.33/= of which the 2/= would be deducted by the PRSP agent, hence the ex-parte Applicant would get 36.33.The PRSP agent would invoice the mobile operator, the lottery owner would then invoice the PRSP agent and payment would be made 45-60days of the invoice date.
15. It was averred that in May 2010, **Flint** partnered with Safaricom Ltd to run the competition on a SMS based lottery by the name **Shinda Smart Competition** through SMS code 6969. The competition gave cash prices amounting to Kshs 90,000,000 over a period of 90days, equivalent to Kshs 1,000,000 per day. In December 2010, **IGL** provided the **Shinda Smart 2 Lottery promotion** in collaboration with **Flint**. In that lottery, **Flint** acted as a Premium Rate Service Provider (PRSP) agent and was entitled to 2/= per SMS which promotion started on 14th December 2010 and gave away cash daily with a grand prize of a Jeep Wrangler valued at Kshs 13 million at the end of the program. The lottery ended on 17th January 2011 when the Betting Control and Licensing Board revoked **Flint's** licence.
16. It was averred by the Respondent that on 31st January 2011, estimated assessments were issued to **Flint** which covered the period between May 2010 and November 2010 and agency notices were issued to **Safaricom** and **Ecobank Ltd** to recover the taxes established. In the year 2011, **IGL** sued **Flint**, **Safaricom** and the Respondent for the amounts held by **Safaricom** claiming that the money held by Safaricom belonged to them in which case the Court in ruled that indeed the money held by Safaricom belonged to the Applicant as they had proven that they were the lottery owners and were therefore entitled to 139m. However, the Respondent's records show that **IGL** does not file tax returns contrary to sections 52B(b) and 54 of the ***Income Tax Act***. The Respondent added that the Ex-parte Applicant is a non filer and the Court having ruled that the income accruing from the lottery and held by **Safaricom** belonged to the Applicant, the Respondent issued estimated tax assessments in accordance with Sections 73 (1) and 73 (3) ***Income Tax Act***.
17. It was however contended that the law provides for a dispute resolution mechanism for tax assessments issued by the Commissioner since section 84 of the ***Income Tax Act*** grants the ex-parte Applicant a right to object to the assessments within 30 days which right was clearly outlined in the notice of assessments. It was therefore the Respondent's contention that the ex-parte Applicant's application was premature and mis-informed as the ex-parte Applicant should have exhausted the dispute resolution mechanism provided for by law.
18. According to the Respondent, under section 35 of the ***Income Tax Act***, withholding tax was charged on the basis of professional fees that are usually paid by the owner of the lottery for maintenance of the software used by the Premium Rate Service Provider (PRSP). Whereas, the ex-

parte Applicant is registered for VAT, it but does file returns with the Respondent as required by law, though it was charging VAT in its invoices to the Premium Rate Service Provider (PRSP) but not remitting the same to the Respondent contrary to sections 6 and 9 of the Act and the Seventh Schedule to the ***VAT Act*** prompting issuance of assessments by the Respondent.

19. It was further disclosed that from the Respondent's investigations the ex-parte Applicant does not seem to have a physical address and there is no record of an office or employees. To the Respondent, if the money held by Safaricom on their behalf is paid to the Applicant, the Respondent may not have the means of recovering the tax and there is a genuine apprehension that the Ex-parte Applicant can very easily close their operations and/or open a new company. It was reiterated that the ex-parte Applicant and its director, **Bashir Adil Ali**, are non filers and that though the Company was registered in 2010 while the director in 2005, to date neither have filed a return of income and on the face of it, they have no intention of doing so.
20. It was the Respondent's case that **Flint** and **IGL** seem to have been incorporated /registered for the sole purpose of running the lottery and that the only reason they exist today is because their money is still being held by a third party and that this is evidenced by the quick exit of the directors of **Flint** once an assessment was made against the company. The Respondent reiterated that due to the informal business operations, the lack of a business premises and lack of records, it is difficult to assess the ex-parte Applicant on the basis of their records hence the Respondent has to rely on third party records and information to raise the estimated tax assessments.
21. According to the Respondent, the matter before the court is a fresh cause of action and the court never barred and neither determined the tax liability of the ex-parte Applicant since the judgment in the previous suit was in favour of **Flint** and not the ex-parte Applicant.
22. It was submitted on behalf of the Respondent that Judicial Review is a remedy of last resort and where another statutory procedure lies then the same ought to be followed before resort to Judicial Review. According to the Respondent, since the Assessment notice arose from the Respondent carrying out an assessment in line with section 73 of the ***Income Tax Act*** section 84 of the Act provides for statutory procedure to be followed on receipt of an Assessment notice and a dispute resolution mechanism for tax assessments by the Commissioner. In this case, it was submitted that the Applicant had not demonstrated with precision to this court that Judicial Review is a more effective and convenient remedy than the statutory laid down dispute resolution mechanism. To the Respondent, judicial review is not the appropriate and efficacious way of resolving the dispute herein. The Applicant has not demonstrated what exceptional circumstances existed in its case which would remove it from the procedural mechanisms set out in the statute.
23. According to the Respondent, where there is an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted. The Court was urged to look carefully at the suitability of the statutory appeal in the context of this case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. The Applicant was therefore accused of having ignored a well laid down statutory procedure hence abusing the court process. In support of this position, the Respondent relied on **Speaker of the National Assembly –vs- Njenga Karume's Nrb. C.A.C.A. No. 92 of 1992, Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291, Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012**, **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004**, and **Republic vs. National Environment Management Authority [2011] eKLR**, in which it was appreciated that it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.
24. According to the Respondent, in this case, the Applicant is challenging an assessment of taxes which is not cast in stone but there is statutory provision to prefer and objection and an appeal thereafter. While embarking on these processes, the taxes are usually stood over pending determination of the same. The Commissioner, Local Committee (then) and the Tax Tribunal (now in operation), are most suitable in the context of this case to determine the real issues in dispute herein. In support of our case, Respondent relied on the decision in the case of **Republic**

vs. Commissioner for Income Tax & another Ex-Parte Stockman Rozen (K) Limited [2015] eKLR.

25. It was therefore submitted that in the circumstances, this is a proper case that warrants exercise of the courts discretion by directing the Applicant to exhaust the statutory available remedies in resolving the dispute, before approaching this court for judicial review remedies.
26. It was further submitted that Judicial Review is a discretionary remedy and the court has a wide discretion to issue orders in Judicial Review. However this discretion is limited. Indeed even the ***Law Reform Act*** at section 8(1) limits such of the courts discretion. The Respondent relied on **Reid vs. Secretary of State for Scotland [1999] 2 AC 512, Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155**, **High Court Misc Civil Application No. 1025 of 2003, R vs. Judicial Service Commission** and **Nrb. H.C.J.R. Misc App No. 374 of 2006 Kenya Revenue Authority Exparte Yaya Towers,** the Court was urged to look at the issues raised by the Applicants to see whether those issues fall within the scope of Judicial Review and call for the court to exercise its supervisory jurisdiction over the respondent. However in the Respondent's view, the Application before the court is one that is not within the scope of Judicial Review since the Applicant is calling upon this court to delve into the merits of the statutory decision made by the Respondent yet as shown above, there is another forum in which the decision the Respondent is seeking to be quashed on its merits, can be examined. To the Respondent, the Applicant has not demonstrated to this court in its supplementary affidavit that the process/manner in which the decisions to issue the notice of assessment was outside its statutory mandate save for making averments. The Respondent asserted that it is important to note at this juncture that this judicial review process is not an Appeal process and the Applicant ought not be allowed to use this to ventilate its appeal.
27. With respect to irrationality or unreasonableness, it was submitted that it is not mere unreasonableness which would justify the interference with the decision of the Respondent under the circumstances and that to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. The Respondent's position was that the assessment cannot be termed as unreasonable, outrageous to meet the test for grant of the judicial review orders sought in light of the provisions of section 73 (2) and if the Applicant was aggrieved by the assessment it had a right to object as provided herein above.
28. On the issue that the Respondent had categorically admitted in previous proceedings that it was not claiming any taxes from the Applicant herein, it was submitted that the Respondent was not aware of Applicant's role in the lottery business and that the judgement was a confirmation, hence the assessments. To the Respondent, the application of the doctrine of estoppel and/or *res judicata* does not arise since the liability to pay taxes crystallized with the determination of the civil suits and it was on the basis of the determinations' that informed the Respondent of the parties' tax liabilities.
29. On the issue as to whether the Respondent should pursue Safaricom being its withholding agent, the Respondent submitted that the issue that needs to be addressed isn't whether or not Safaricom remitted the withheld VAT. It is whether the Applicant did submit its returns. To the Respondent, all the decisions made by it were reasoned decisions and were well within the mandate of the Respondent provided by the various provisions of the law cited and relied on **Republic vs. Kenya Power & Lighting Company Ltd & Another [2013] eKLR** to the effect that the law places the onus on the ex-parte Applicant to demonstrate that the decision of the Respondent was so absurd that no sensible person could ever dream that it lay within the powers of the authority. On the contrary, there was a clear basis for the decision of the Respondent. The application, it was contended should fail on that score. Based on **Professor Wade's** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475** it was submitted that:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

30. It was submitted that taking into account the well laid down judicial principle that Judicial review is concerned with the decision making process and not the merits of the decision and further that the Applicant having the right to object to the said decision, which procedure the Applicant has failed to take up and/or ignored, this court is in the circumstances obliged not to look at the merits of the Respondents decision to issue notices to demand taxes from the Applicant as that is the duty of another forum. It was asserted that the determination of HCC 115 of 2011, served to determine the Applicant as the lottery owners and therefore entitled to Kshs. 139 million. This sum of money constituted income and had outstanding tax obligations hence the Respondent's action. Since at the time the assessments were issued, the Applicant had not filed its returns, it was contended that the Respondent acted within the law in issuing the said assessments. It was submitted that in exercising its discretion, the Respondent was neither based its decision on an error of the law nor acted in bad faith, but relied on the strict interpretation of Section 73 of the ***Income Tax Act*** in raising the assessments.

On the issue of transfer of its tax affairs, it was contended that nothing had been demonstrated before this court to substantiate that allegation. The fact that the assessment notice indicates Meru as the VAT District Office does not necessarily mean that the tax affairs have been transferred there hence the second prayer in the main motion is without merit and should accordingly be dismissed.

In conclusion, it was submitted that the Respondent's decision to issue assessment notices was neither arrived at in defiance of logic and/or acceptable moral standards, to warrant quashing under the limb of irrationality and/or unreasonableness by this Court. It was the Respondent's submission that the ***Income Tax Act*** grants it the discretion to assess taxes as it did under the circumstances of the Applicant's case and that this discretion was exercised judicially and within the statutory framework in issuing the assessment notices. To the Respondent the Applicant thus running to this court is only but an attempt to hide behind this court's protection and frustrate the Respondent from recovering taxes properly accruing from it. The Court was therefore called upon to observe that the Applicant had knowingly avoided a statutory procedure and forum to ventilate its issues arising from the Respondents' assessment. Such is the level of abuse of judicial processes that the Applicant is prepared to go to, to avoid payment of taxes, it was contended. The Court was urged to abhor such abuse and dismiss the Applicants Application.

Determinations

31. I have considered the issues raised in this application by way of affidavits, Statement of Facts, grounds and submissions by the respective parties.
32. The Applicant's case is that in light of the judgement of this Court in Nairobi High Court Commercial Case No. 115 of 2011 filed by the Applicant herein against **Flint**, **Safaricom Limited** and **Kenya Revenue Authority** (hereinafter referred to as "the Civil Case") delivered on 30th April 2014, the Respondent's decision to demand payment of taxes from the Applicant was an afterthought made with a view to defeat the aforesaid judgment.
33. It is however important to understand the judgement in that case arose out of an interpleader proceedings under section 60 of the ***Civil Procedure Act***, Cap 21 Laws of Kenya as read with Order 34 of the ***Civil Procedure Rules*** commenced by way of a Notice of Motion dated 11th May, 2011 filed by Safaricom in which Safaricom disclosed that it was in possession of a sum of money which was being claimed by IGL, Flint and KRA and that Safaricom had no claim therein while the said three parties were claiming the same.

34. From the judgement in the said civil case, **KRA's** witness testified that "**KRA** was however not concerned about the revenue for the time when the parties signed the MOU and it was not claiming taxes from the Plaintiff". This contention was based on the fact that in the said civil case, the Court found that **KRA's** witness had admitted that the Applicant was not liable to **KRA** in taxes. From the evidence on record, the Court found that in the said proceedings, **KRA's** claim for payment of taxes to **KRA** was against Flint and not against **IGL**. In that case, the Court was clear in its mind that it was only concerned with what was due to the parties from the subject lottery.
35. From the foregoing it is clear that in the proceedings in the civil case, **KRA** was not making any claim for taxes against **IGL**. That however is not the same thing as saying that **IGL** did not owe **KRA** any sums in form of taxes. In other words the issue of the amount, if any owed to **KRA** by **IGL** was never determined in the said proceedings. It is therefore my view that **KRA** cannot by virtue of the said judgement be barred from making a claim for taxes against **IGL**. The law as restated in **Niazsons (K) Limited vs. China Road & Bridge Corporation (Kenya) [2000] eKLR**, by the Court of Appeal is however that there can be no estoppel against statute.
36. It is therefore my view that the judgement in the civil case did not have the effect of barring **KRA** from claiming any taxes from **IGL** if the same were due. What was appreciated in the said judgement was that **KRA** was not making any claim against **IGL** for taxes due in the said proceedings.
37. It was submitted on behalf of the Respondent that Judicial Review is a remedy of last resort and where another statutory procedure lies then the same ought to be followed before resort can be made to Judicial Review. According to the Respondent, since the Assessment Notice arose from the Respondent carrying out an assessment in line with section 73 of the ***Income Tax Act*** section 84 of the Act provides for statutory procedure to be followed on receipt of an Assessment notice and a dispute resolution mechanism for tax assessments by the Commissioner. In this case, it was submitted that the Applicant had not demonstrated with precision to this Court that Judicial Review is a more effective and convenient remedy than the statutorily laid down dispute resolution mechanism.
38. Section 84 of the ***Income Tax Act***, CAP 470 of the Laws of Kenya provides:

(1) A person who disputes an assessment made upon him under this Act may, by notice in writing to the Commissioner, object to the assessment.

(2) A notice given under subsection (1) shall not be a valid notice of Objection unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within thirty days after the date of service of the notice of assessment; but if the Commissioner is satisfied that owing to the absence from Kenya, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving the notice within that period and there has been no unreasonable delay on his part, the Commissioner may, upon application by the person objecting, and after deposit by him with the Commissioner of so much of the tax as is due under the assessment under section 92, or such part thereof as the Commissioner may require, and the payment of any interest due under section 94, admit the notice after the expiry of that period and the admitted notice shall be a valid notice of objection:

Provided that the objection made within the thirty days shall not be valid unless it is accompanied by a return of income together with all the supporting documents, where applicable.

(3) A person aggrieved by the refusal of the Commissioner to admit a notice of objection under subsection (2) may, on depositing with the Commissioner if he so requires, the whole or such part as the Commissioner may require of the amount of tax assessed under the assessment to which objection is made and on paying any interest due under section 94, appeal against the refusal to a local committee, whose decision shall be final.

(4) All the provisions of this Act relating to appeals against assessments shall, so far as they are applicable and subject to the finality of the decision of the local committee, have effect with respect to an appeal under subsection (3), and the local committee hearing the appeal may

confirm the decision of the Commissioner or may direct that the notice concerned shall be a valid notice of objection.

39. It is therefore clear that the Applicant herein, **IGL**, had the option of objecting to the assessment of the tax allegedly due from it to the **KRA**. It was however, the Applicant's view that the mere existence of an alternative remedy is not bar to pursuit of Judicial Review remedies. Besides, any other alternative remedy in statute is unsuitable as the objection taken on the said notices is in the process/manner in which the decision to issue the same was made by **KRA** and not the merits.
40. In this case however, the Applicant contends that there is no tax due from it to **KRA**. The law is now trite that the determination of whether taxes are due and if so how much, is not a matter for the judicial review Court. The question whether a judicial review court is the proper forum to deal with the issue whether or not taxes are due and if so how much has been the subject of judicial decisions in this jurisdiction. As was held by the Court of Appeal in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007**:

"As the trial Judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili's account at the Bank was or was not liable to tax. No material was placed before the Judge on that point... it was not the role of the superior court nor of this Court to determine the correctness or otherwise of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004."

41. I similarly associate myself with the decision of **Korir, J** in H.C. Misc. Civil Application No.36 of 2011; **Republic vs. Kenya Revenue Authority; Ex-Parte: Bata Shoe Company Limited**, where the Court confronted with the issue whether certain payments made by the Ex-parte Applicant to a Procurement Centre (CFS) were costs associated with design of production and hence should be brought to charge under the fourth Schedule of ***EACCMA*** that deals with valuation held:

"The Applicant appears to be urging this Court to determine that the payments made to CFS were buying commissions…What the Applicant is asking this Court to do may be done by an appellate court. Acting as urged by the Applicant would be a usurpation of the Respondent's powers. The Respondent is mandated in law to assess tax and it should be allowed to do its work. Even if the Court decides to be the taxman, it does not have in its possession the documents presented to the Respondent by the Applicant in support of its claim that whatever it paid CFS were buying commissions. I therefore reject the Applicant's application in relation to the service charges/buying commissions."

42. In other words the issue whether or not tax is due and payable ought to be left to the statutory bodies and Tribunals as opposed to a judicial review Court since such issues go to the merit of the decision rather than the process.
43. In my view specialized bodies established under statutes ought to be given the leeway to conduct their proceedings freely without unnecessary interference by the Court. Where such bodies are acting within their jurisdiction, the Court only ought to step in to ensure that the proceedings are being conducted fairly. This position was appreciated by the Court of Appeal in **Kenya Pipeline Company Limited V Hyosung Ebara Company Limited & 2 Others (2012) e KLR** where the Court expressed itself as follows:

"**The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity…S.98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procuring entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the review board is obviously better equipped that the High Court to handle**

disputes relating to breach of duty of the procuring entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with. Having regard to the wide powers of the Review Board we are satisfied that the High court erred in holding that the Review Board was not competent to decide whether or not the 1st respondent's tender had met the mandatory conditions. The issue whether or not the 1st Respondent's tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it. In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of natural justice of that the decision was irrational. The Judicial review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly. The High Court erred in essence in treating the Judicial Review Application as an appeal and in granting review orders on the grounds which were outside the scope of Judicial Review jurisdiction".

44. It ought to be appreciated that judicial review is a remedy of last resort. As was held by 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:

"…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."

45. It was similarly held 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. It was however appreciated that it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

46. 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. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

47. Therefore 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 other words the Court ought to consider whether the alternative remedy is less convenient, beneficial and effectual. That was also the position in the English case of *Ex parte* **Waldron [1986] 1QB 824 at 825G-825H,** where **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.

48. It is now therefore a cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. 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.
49. Section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015 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.

50. 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).

51.. 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.

52. 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. In this case I am not satisfied that the remedy under section 84 of the ***Income Tax Act*** would not have appropriately addressed the Applicant's grievances. In any case, if the decision made thereunder were unsatisfactory, the Applicant would have been at liberty to pursue an appeal therefrom.
53. In this case, as no reason has been advanced for the failure to invoke the available statutory remedies before invoking this Court's jurisdiction, I find that this application is misconceived and incompetent and the same is struck out with costs.

Dated at Nairobi this 25th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nganga for the Applicant

Mr Chaballa for the Respondent

Cc Mutisya