REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISC. APPLICATION NO. 96 OF 2015

REPUBLIC……...……..……APPLICANT

VERSUS

THE COMMISSIONER GENERAL

KENYA REVENUE AUTHORITY.....….....….....1ST RESPONDENT

THE MANAGING DIRECTOR

KENYA PORTS AUTHORITY……..…….…….....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

AND

DOCK WORKERS UNION (K).....EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 13th April, 2015 filed on the same day, the applicant herein, **Dock Workers Union (K)**, seeks the following orders:

1. **An order of Certiorari to issue to bring into this court for purposes of quashing and quash the decision of the 1st Respondent herein, Kenya Revenue Authority notice dated 10th March 2015 directing the 2nd Respondent to attach and remit the funds of the applicants herein being the subscriptions from her members to the 1st Respondent.**
2. **An order of mandamus to issue to compel the 1st Respondent, to review the arrears, penalties and interest as contained in its notices, dated 29th January 2012, and 29th January 2015 respectively in terms of the directive from the Principal Secretary, National Treasury and dated 10th February 2014.**
3. **That an order of prohibition to issue to restrain and prohibit the 2nd Respondent from implementing the notice from the 1st Respondent, and dated 10th March 2015 or any other notice issued in respect of the subject matter.**
4. **Costs of this application be provided for.**

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

2. The said application was based on the following grounds:

1. That the decision and actions of the 1st Respondent as communicated through her letter dated 10th March 2015 is *ultra vires* the ***Labour Relations Act, 2007***, Laws of Kenya and the ***Employment Act, 2007***, and the Constitution of Kenya. This was based on the fact that under section 48(2)(b) of the ***Labour Relations Act, 2007***, the monies so deducted in respect of members of a trade union can only be remitted into a specified account of a trade union or in a specified proportions into specified accounts of a trade union and a Federation of a Trade Unions. Therefore to direct the monies so deducted from the members of the applicant herein to be paid into a different account other than that, gazetted by the Minister of Labour to the account of the 1st Respondent herein is *ultra vires* the law. Similarly, pursuant to the ***Employment Act 2007***, the deductions other that statutory or that which has been ordered by the court cannot be made on the wages of an employee without an express written authority to the employer by an employee. To the applicant, the monies so directed by the notice made by the 1st Respondent and directed to the 2nd Respondent are monthly subscriptions from the employees of the 2nd Respondent and they have given written authority to the 2nd Respondent to express deduct and remit their membership subscriptions to the applicant herein and are not aware and have not given any authority to the 2nd Respondent to deduct from their wages monies and remit directly to the 1st respondent. The members of the applicant herein are not responsible and have no contractual obligations between themselves and the 1st Respondent whatsoever to receive their monies. The action therefore of the 1st Respondent to issue a notice to the 2nd Respondent to remit or attach or transfer the monies which are only authorized to be remitted to the union (the applicant herein) where the employees of the 2nd Respondent have voluntarily joined and accepted membership is *ultra vires* the law.
2. It was contended that the decision of the 1st Respondent as communicated to the 2nd Respondent in the said notice dated 10th March 2015 is illegal. As the same purported to attach and remit monies duly directed by an order of the Minister of Labour to a specified account to the 1st Respondent, without any court varying or annulling the said order is in itself unlawful. Further to direct monies dully deducted from the employee's wages, to a specified institution not authorized by the said employees and divert it to an account which the employees have not duly authorized is equally unlawful. To the applicant, the 1st Respondent did not inform or send the purported copies of its notice dated 10th March 2015 to the applicant herein, and as a result breached the law of natural justice which requires that a person should not be condemned unheard. In the applicant's view, the 1st Respondent acted in breach of Article 19(2) which required her to inform the applicant herein that it intends to make a decision which has adverse effects on the applicant herein.
3. The application was also grounded on jurisdiction error. To the applicant, the Kenya Revenue Authority, 1st Respondent herein, wrongfully assumed powers to the effect that reimbursement paid to members of the applicant herein in terms of transport and meals are income due to those members. It failed to recognize the purposive definition of an income that it is money coming in and is at the discretion of the receiver to decide its utilization. But in this case, the monies were directed for specific utilization as provided under section 39 of the ***Labour Relations Act, 2007***. It was contended that the 1st Respondent wrongfully assumed that the union car is a benefit conferred upon the General Secretary and yet the same vehicle is at the disposal and for use for all officials of the applicant's union, just the same way it happens in other institutions.
4. In the applicant's view, the said decision amounted to an abuse of power. It was pleaded that the decision and action of the 1st Respondent to issue a notice to the 2nd Respondent without first responding to the queries raised by the applicant herein through its letter dated 10th February 2015 requiring the 1st Respondent to reconcile the arrears of between 2006 and 2011 which a notice had been given and dated 31st January 2012 and the applicant had made part payment and the latter notice that was issued by the 1st Respondent dated 29th January 2015 which also covered the year 2011 was in itself an abuse of office. According to the applicant, to ignore the letter from the

Principal Secretary dated 10th February 2014 for the 1st Respondent to consider the waiver application made by the applicant and proceed to issue a notice and more particularly to cover the arrears in terms of interest and penalties is in itself abuse of power. It was further an abuse of power to issue a notice to the 2nd Respondent by the 1st Respondent and fail to send a copy which it had indicated and shown on the same notice. To the applicant, the 1st Respondent is a public institution and has a public duty to respond to all queries from the public and when the 1st Respondent ignore the communication from the applicant herein and dated 10th February, 2015 and proceeded to send a secret notice to the 2nd Respondent to attach and remit funds due to the applicant herein is in itself an abuse of power.

5. The applicant further contended that the 1st Respondent acted in breach of the principle of proportionality. To the applicant, the 1st Respondent acted in breach of the fundamental rights of the employees of the applicants herein who also have a right under the law to be paid salaries when due. Further, it ignored to consider the functions, programmes, responsibilities, required of by the members of the applicant and the reasons why they subscribe to the applicants union. To the applicant, the 1st Respondent in its decision and action aforesaid failed to strike a fair balance between the adverse effects of its decision and action of its notice dated 10th March 2011. It was therefore contended that due to lack of proportionality in the decision and actions of the 1st Respondent, the order of certiorari should issue as an appropriate remedy.
6. To the applicant, the 1st Respondent's decision was made in bad faith. According to the applicant, the 2nd Respondent's officers in their said notice, directed that the monies belonging to the applicant from her members be attached and remitted to the 1st Respondent and which decision was being effected quietly by the 2nd Respondent without bringing it to the knowledge of the applicant. Similarly the 1st Respondent purported to have copied the said notice to copy to the applicant but just proceeded to file the said notice with the 2nd Respondent secretly so that the funds of the applicant could be secretly transferred to the 1st Respondent. It was contended by the applicant that the respondents deliberately failed to follow the laid down regulations and law in attaching the funds of the applicant as they were required to wait and remit the funds as provided under the law and seek an order of the court to attach the account of the applicant.
7. The applicant's case was that the actions and decisions of the Respondents as contained in the notice dated 10th March 2015 and minutes made by the Managing Director and other staffs of the 2nd Respondents to attach and remit the funds of the applicant herein goes against the legitimate expectation of the applicant. The applicant expected that the respondents before making a decision which could adversely affect it would bring the same to its attention but the respondents deliberately acted in consultation to defeat the legitimate expectations of the applicant herein.
8. To the applicant, the actions and decisions of the respondents as contained in the notice dated 10th March 05 and the minutes made on it thereto, shows that the respondents are acting unreasonably.

3. According to the applicant, under the general rules of trade unions, the applicant, which is an industrial based Trade Union representing unionisable employees of the 2nd Respondent, negotiates terms and conditions of service for its members. To the applicant, it has members who duly recognize it by signing the membership forms and authorizing deductions of the monthly subscriptions from their wages in accordance with the ***Labour Relations Act, 2007***. It was averred that such deduction shall only be remitted to the bank account gazetted by the Minister of Labour in accordance with the ***Labour Relations Act, 2007*** and that deductions from an employee's wages can only be affected by the employer after that employee has duly authorized the same in writing in accordance with the ***Employment Act, 2007***. The Applicant therefore averred that under no circumstances can deductions be made from the wages of an employee and the same remitted to an institution or organization which has not been duly authorized by such an employee.
4. It was the applicant's case that as a Trade Union, it utilizes and expends its funds in accordance with the ***Labour Relations Act, 2007*** and its registered constitution and has at all material times remitted tax to the 1st Respondent from the wages, salaries and rents, being the Pay As You Earn (PAYE) and income from the Dock Workers Union Building. In the applicant's view, the directive

of 1998 by the then Minister for Finance, **Hon. Simeon Nyachae** to tax all incomes could be the cause of the outstanding misinterpretation of an income.

5. The applicant averred that the funding of its operations is authorized during the Annual conference of the ordinary members where the National Executive Board of the union submits to the members the proposed budget in the month of September each year, before the 31st December each year which is provided for as the end of the financial year for Trade Unions in accordance with the ***Labour Relations Act, 2007***. Accordingly, the activities and programmes of the applicant are run through meetings which meeting are funded for in terms of transport and lunches and the *ex parte* Applicant reimburses the members for these expenditures.
6. It was averred that the Applicant received a letter dated 31st January 2012 from the 1st Respondent, entitled and referenced "COMPLIANCE CHECK DOCK WORKERS UNION-P0006213D" which stated that the *ex parte* Applicant had not complied with some standard checks which letter was accompanied with a tabulation of the tax in arrears. In response to the same, the Applicant on 25th May 2012 wrote a letter to the Senior Assistant Commissioner of the 1st Respondent informing him about the Applicant's commitment to pay the arrears, and applied for waiver of the part of the balance containing penalties and interests. According to the Applicant, it continued to honour its part of the bargain by making payments. On 25th April 2013, the applicant sought from the Commissioner General of the 1st Respondent a review on the interests charged upon the arrears and followed it with another letter on 11th May 2013, to the Minister for Finance requesting for waiver on interest and penalties charged on the arrears and seeking to be allowed to pay only the principal. Further vide a letter dated 23rd September 2013, the Applicant explained to the Cabinet Secretary the difficulty it was facing and the kind of interpretation it held in respect to the taxable income and vide a letter of 6th September 2013 requested the Cabinet Minister for Finance to consider its application for waiver. By a letter of the 30th December 2013 to the Cabinet Secretary, National Treasury, the Applicant reiterated its request for a waiver.
7. The Applicant averred that by a letter dated 10th February, 2014, the Principal Secretary for the National Treasury wrote to the Commissioner of Domestic Taxes a department of the 1st Respondent responsible for collection of domestic taxes to advice on the Applicant's request which had not been acted upon and on 28th November 2014, the Applicant received another letter from the 1st Respondent detailing non compliance and covering new areas which did not form part of the earlier claim. Further, on 25th January 2015, the Applicant received a seven (7) day notice requiring that the *ex parte* Applicant remits a total of Kshs 23,009,838.00 to which the Applicant responded on 10th February 2015, vide a letter to the 1st Respondent detailing its predicament and requesting for an explanation on the new additional arrears.
8. However on the 10th March 2015 the 1st Respondent purportedly acting pursuant to section 96 of the ***Income Tax Act***, wrote to the 2nd Respondent and which letter was purportedly copied to the applicant to attach the member's subscriptions fees due to the *ex parte* Applicant and remit to her directly.
9. The Applicant contended that the appointment of the 2nd Respondent was misconceived and was due to misinterpretation of the law as the 2nd Respondent cannot be appointed as an agent by the 1st Respondent for another body corporate also recognized as an agent by the 1st Respondent and has been acting as such. To the Applicant, the 1st Respondent acted in bad faith and concealed from the *ex parte* Applicant the decision to attach its funds from the source an act which is unlawful. According to it, the ***Income Tax Act*** is not superior to the ***Labour Relations Act, 2007***, under which deductions from the wages of the employees in respect to a Trade Union can only be remitted to the gazetted bank account of the Trade Union. Thus the order to divert the members monthly trade subscriptions to the back account of the 1st Respondent is irregular, unlawful, ultra vires, the law and unconstitutional.
10. The Applicant asserted that the 1st Respondent has a public duty to respond to the queries raised and its ignorance of letter from the Principal Secretary, National Secretary to advice on the application made by the *ex parte* Applicant for waiver dated 10th February 2015 requesting explanation on some arrears queried by the Applicant, demonstrated an act of negligence,

impunity, lack of accountability to the people of Kenya and hence irresponsibility.

11. In the Applicant's view, the employees of the 2nd Respondent have a contract with the 2nd Respondent and not the 1st Respondent, thus the 2nd Respondent before approving the direction or diversion of the members of the *ex parte* Applicant's monthly subscription was required to inform or bring it to the attention of the *ex parte* Applicant.
12. The Applicants reiterated that the wages of an employee can only be deducted and remitted to institutions duly authorized by the employee in accordance with the ***Employment Act, 2007***, save for statutory deductions and deductions which have been directed by an order or judgment of a court.
13. To the Applicant, therefore, the Managing Director of the 2nd Respondent has authorized the irregular and unlawful transfer of the funds which it directed his line manager to implement. It was therefore contended that the Respondents are in the process of infringing on the rights of the *ex parte* applicant to fair application of the law and natural justice.
14. As an institution established pursuant to the law and subject to checks and balances. The Applicant contended that the 2nd Respondent cannot act unilaterally to attach funds of another party who has raised a dispute in respect of the same without dealing with the dispute as to do so is in itself an act of impunity. In the Applicant's view, such attachment requires the involvement of the courts, as the 1st Respondent cannot become a judge in its on case.
15. It was further contended that as the payments were being effected as agreed between the Applicant and the 1st Respondent, the Applicant applied for waiver to the penalties and interests imposed on the withholding tax and which the 1st Respondent considered vide his letter dated 14th December 2013. However, without any notice, the 1st Respondent unilaterally purported to have impeached the agreement on the mode of payment. When the Applicant received another notice from the 1st Respondent in respect to the subject matter dated 29th January, 2015, the Applicant was in the process of ascertaining the validity or the propriety of the payments that had been partly made pursuant to the notice of 31st January 2012 and on account of that, wrote a letter to the 1st Respondent to accord the Applicant more time. Similarly from the audited report exhibited, the compliance reports filed by the 1st Respondent did not reflect on the same.
16. The Applicant averred that though in its letter dated 10th February 2013 it raised pertinent issues relating to the overlap for the year 2011, the same had not been attended by the time when the 1st Respondent directed the 2nd Respondent to execute his order issued on 23rd March 2015.
17. The Applicant asserted that considerations made on the withholding tax, found that the 1st Respondent failed to appreciate the operations of the Applicant and the terms applicable to its honorariums, transport and travelling to form part of the income. The honorariums in themselves, it averred are reimbursements made to the officials attending meeting in terms of fuel and lunches and while entertainment is money spent to purchase sodas, water, snacks during delegates/members meetings. It was therefore contended that had the 1st Respondent appreciated that terms as used in different trades confer different and separate meanings, he could have applied his mind on the subject matter differently.
18. It was therefore the Applicant's position that the payments that were made pursuant to the notice of 31s January 2012 and the demand notice issued on 29th January 2015 did not comply with ***Income Tax Act***, Cap 479 Laws of Kenya and the Applicant will make an application for the refund.

3. It was submitted on behalf of the applicant that the decision made by 1st Respondent to issue notice to appoint 2nd Respondent to collect tax arrears, penalties and interest from the applicant was *ultra vires*. The applicant, in support of this submission relied on section 48(2) and (3) of the ***Labour Relations Act, 2007.***

19. It was submitted that the Minister issued an order to the 2nd Respondent pursuant to section 48(3) of ***Labour Relations Act, 2007*** and accordingly, the 2nd Respondent commenced deductions. The applicant submitted that the 1st Respondent is an Authority established within the Ministry of National Treasury, within the Executive Arm of the Government and that the Authority is under

the direction and supervision of the Cabinet Secretary of the Ministry of National Treasury and all regulations made under the ***Income Tax Act***, Cap 470, Laws of Kenya are the preserve of the Cabinet Secretary. It was submitted that the Minister (Cabinet Secretary) by power conferred upon him by the provisions of section 48(3) of the ***Labour Relations Act***, 2007, vide a gazette notice No. 13960, issued an order to the 2nd Respondent on 20th September, 2012 and directed her to make deductions from the members of the Applicant and pay the same to the gazetted bank account A/C No. 161093-734 at the Barclays Bank of Kenya Nkrumah Road Branch, Mombasa.

20. However, the notice issued by the 1st Respondent to the 2nd Respondent directed the 2nd Respondent to make deductions from the wages of the members of the Applicant and remit the same directly to the 1st Respondent and thereby impeaching or setting aside by the order of the Minister issued on 20th September, 2012. To the applicant, within the structure of the Executive, the position occupied by the Cabinet Secretary (Minister) is higher than that of the 1st Respondent and to purport to set aside the Minister's order issued pursuant to the statutory power conferred upon him by a statute is *ultra vires* the law. It was the Applicant's position that the wages of employees are properties of employees, pursuant to Article 40 of the Constitution of Kenya and under section 17(1) and 19(1) of the ***Employment Act***, 2007.
21. The Applicant submitted that in this case, the members of the Applicant, being employees of the 2nd Respondent and pursuant to section 19(1)(g) of the ***Employment Act***, 2007, directed and/or instructed the 2nd Respondent to make deductions from their wages and remit to the Applicant, yet now the 1st Respondent who has no authority within the meaning of sections 17 and 19 of the ***Employment Act***, 2007 directs that such deduction from the wages of those employees be made and remitted to her. The Applicant relied on section 50(8), (9) and (10) of the ***Labour Relations Act, 2007.***
22. In the Applicant's view, from the readings of the provisions of section 50(9) of the ***Labour Relations Act, 2007***, it was its legislature intention and it was purposed that the money so deducted from the wages of the members of a trade union was protected from being diverted from the account known to the members or the same be diverted by any person for a separate use other than the activities of a trade union. The 1st Respondent is juristic person and as such barred by the provisions of section 50(9) of the ***Labour Relations Act, 2007*** from converting the monies so deducted from the members of the Applicant herein for a separate use and/or including the purported tax arrears, penalties and interests.
23. According to the Applicant, the order issued by the Minister on 20th September, 2012 has neither been challenged nor set aside and when an order subsists and an action has been brought to effect that requires it to be set aside the order shall be set aside first before any action is brought. To the Applicant, from the forgoing, the notice issued on 23rd March, 2015 by the 1st Respondent that purported to have set aside the order of the Minister issued on 20th September, 2012 was *ultra vires* the power of the 1st Respondent and therefore null and void.
24. It was further submitted that the Notice issued on 23rd March, 2015 by the 1st Respondent was unlawful as it purported to have the power of the law to set aside the order issued by the Minister of Labour on 20th September, 2012, pursuant to the statutory power bestowed upon the Minister by section 48 (2) of the ***Labour Relations Act, 2007*** as read with Article 130 of the Constitution of Kenya, that puts the Minister above the 1st Respondent in the hierarchy of the Executive. Further, the 1st Respondent's notice was unlawful as the notice purported to request the 2nd Respondent (Employer) to pay money deducted from the wages of the members of the Applicant (Employees of the 2nd Respondent) to an account that had not been designated by the Minister pursuant to the Gazette notice No. 13960 issued by him on 20th September, 2012 and to apply and use such deductions to pay tax arrears, penalties and interest contrary to the provisions of section 50(9) of the ***Labour Relations Act, 2007***. Further the notice was unlawful as the 1st Respondent directed the 2nd Respondent to devolve the wages of the employees in a manner not so directed by the employees themselves in contravention of sections 17 and 19 of the ***Employment Act, 2007***.
25. The Applicant also contended that the 1st Respondent committed a jurisdictional error. According to it, ***Income Tax Act***, Cap, 470 Laws of Kenya has not defined income at Part 1 of the Act and also the Act does not define trade unions or labour unions instead the Act has defined trade

Association as *"a body of person which is an association of persons separately engaged in any business with the main object of safeguarding or promoting the business interests of those persons*" and business as *"includes any trade, profession or vocation, and every manufacture, adventure and concern in the nature of trade but does not include employment***."** At paragraph 3, ***the Wikipedia, the Free Encyclopedia*** defines a trade union as *"an association or union for maintaining or improving the conditions of their employment***".** It was submitted that from the Act, and the definition of the Trade Unions the Applicant does not specifically fit within the definition of trades for which the Act contemplated taxation which was the position taken by the applicant's General Secretary in his letter to the Minister for Finance and dated 11th May, 2013 in which he explained the emergence of tax regimes within the Trade unions when **Hon. Simon Nyachae** took over but did not bring the same to the attention of trade unions.

26. The Applicant noted that the amendment to the ***Income Tax Act***, Cap 470 laws of Kenya was enacted in 2008 when the ***Labour Relations Act*** had been enacted in 2007 and hence the parliament deliberately made a distinction between trade unions and trade associations. According to it, trade unions are body corporates registered pursuant to section 21 of the ***Labour Relations Act, 2007*** and under section 8 thereof, is mandated to run its programmes, activities and administration independently, which mirrors Article 41 of the Constitution of Kenya. To it, a trade union under the Bills of Right, is a fundamental rights within the values and principles of the Constitution and under section 50(9) of the ***Labour Relations Act***, 2007 and Part I of the ***Income Tax Act***, its funds are precluded from being used for any activities and its activities and programmes are funded from the members subscriptions through the organs of the Applicant as provided in the registered constitutions. These programmes and/or activities include negotiation of wages, work, rules, complaint, procedures, rules governing hiring, firing, promotion of workers; benefits, work place safety and policies. These programmes are funded from the funds received every month from the members' monthly subscriptions.
27. The Applicant submitted that section 31 of the ***Labour Relations Act, 2007*** provides how the officials of Trade union are appointed. Apart from the Secretary General, they are employees in the sector where the trade union is involved and in this case they are employees of the 2nd Respondent save only for the General Secretary.
28. It was contended that from the audited reports exhibited in the further affidavit the vote heads duly funded from the members subscription have been shown and except for the employees of the Applicant and the General Secretary who earns salary and allowances, the rest of the vote head show the funds used to run the programmes and activities of the Applicant herein. These funds are appropriated by the members sitting in the month of September during the Annual conference each year as provided under clause 7 of the Applicant's constitution and clearly show that the Applicant paid legal fees, transport and travels honorarium, entertainments, salary and allowances, bank commissions and many others. However, from the compliance notices issue by the 1st Respondent dated 31st January, 2012 and 28th November, 2014 respectively have declared the services procured by the Applicant which encompass transport and travels, legal fees, entertainment, Honorariums and many others as income. To the applicant, these were services rendered to the Applicant and where the providers of those services were paid hence the Applicant did not receive any profit or gains or benefits from their utilizations and the service providers are expected to have paid V.A.T. To it, these expenses do not fit in the categories of income as provided under section 3(2) of the ***Income Tax Act*** Cap 470, Laws of Kenya which provides that:

"Subject to this Act, income upon which tax is chargeable under this Act is income in respect of

i. ***A business for whatever period of time carried on;***
ii. ***Employment or services rendered;***
iii. ***A right granted to another person for use or occupation of property;***

29. The preliminary of the Act defines a business as *"includes any trade, profession or vocation, and every manufacture, adventure and concern in the nature of trade, but does not include employment"*. The Applicant also noted that the term income has not been defined at part 1 of the ***Income, Tax Act*** and therefore the meaning of income ought to be construed as provided under

section 3 (2) of the Act. Whereas, the 1st Respondent in his compliance notices purported to have applied the provisions on the areas he covered, the Applicant contended that the 1st Respondent's sources of information were unknown to the Applicant. The Applicant does not know the sources of this information. The Applicant has annexed its audited reports for the periods covering 2012, 2013 and 2014. The law required that the 1st Respondent produce his sources of information as that is a public duty.

30. Within the meaning of section 3(2) of the Act, the Applicant is not an association defined by the Income Tax Act, because under the law, the Applicant is a non profit making institution and the application of section 3(2) is only on the wages of its employees and the physical property. Section 39 of the ***Labour Relations Act, 2007*** has provided how the funds of the Applicant should be utilized and section 50 (9) of the ***Labour Relations Act, 2007*** provides a bar to the utilization of the funds of the Applicant. The applicant relied on JR. Misc. Application No. 366 of 2009 **- In the Case of British American Tobacco vs. The Commissioner of Domestic Taxes,** where this court held at it paragraph 63 that the definition of tax should be specific and in a language that is unambiguous to enable the tax payers not to subject themselves to any interpretation.
31. It was submitted that there is not conflict therefore between the ***Income Tax Act*** and the ***Labour Relations Act*** as each one of them is comprehensive and where the one Act wanted to exclude a function of the other, the same have been achieved without any conflict. These are very clear in their constructions, such as under the definition of business; and "association of trades". The ***Income Tax Act***, has clearly excluded trade unions and therefore not causing conflict with sections 39 and 50(9) of the ***Labour Relations Act, 2007***. ***The Labour Relations Act, 2007*** at Part 1 (preliminary) attaches separate and distinct meaning of a trade union from that of trade association as defined at Part 1 of the ***Income Tax Act***, Cap 470 Laws of Kenya. The distinction was purposeful to achieve the intention of the parliament.
32. In support of this position the applicant cited the Canadian Court of Appeal decision of **Thibodieau vs. Air Canada (2014) 3 S.C.R.** at paragraph 10 where the Court held:

"These provisions bear all of the hallmarks of the sorts of provisions that have been found not to conflict. They were enacted for markedly different purposes. They may easily be interpreted in a way that permits them to operate together without absurdity; an "appropriate and just" remedy must not violate Canada" international obligations. The only serious questions is whether the so-called presumption of overlap is rebutted because S. 77(4) of OLA was intended as an exhaustive and exclusive declaration of the court's remedial power such that damages must always be available for breach of the OLA. This position, in my respect view, is untenable"

33. According to the applicant, ***The Labour Relations Act, 2007*** is meant to operationalise the Bill of Rights for employees as provided under Article 41 of the Constitution of Kenya and while the ***Income Tax Act*** was enacted in 2008, long before the Constitution of Kenya, 2010 had not been enacted. The Act therefore must be read in conformity with section 7(1) of the Sixth Schedule of the Constitution of Kenya, 2010. The right to form, join, leave and participate in the programmes and activities of a Trade Union is a fundamental right and cannot therefore be made unattainable by virtue of making it expensive to form and operate as the same would restrict the very right.
34. So when the 1st Respondent misapplied the provisions of section 3(2) of the ***Income Tax Act***, Cap 470 Law of Kenya and purported to impose tax on the activities and programmes of the Applicant herein and proceeded to invoke section 96 of the ***Income Tax Act*** and purported to appoint the 2nd Respondent to execute what he termed tax arrears, withholding of tax, interest and penalties on what were purely expenses and reimbursements, the same clearly fell within the jurisdiction error.
35. It was further submitted by the applicant that the 1st Respondent is a public office and his operations are funded from the consolidated funds. It is a body established within the confine of the constitution of Kenya and as such is answerable to the people of Kenya. He has a public duty to all Kenyans. He received a letter dated 10th February, 2010 which raised queries to the Tax arrears notice dated 29th January, 2015 in relation to the compliance notice dated 28th November, 2014 for the period Jan-10 to Dec 2013 and there was an earlier notice issued on 31st January 2012 and which the notice levied tax arrears, interest and penalties amounting to Kshs

11,193,861. The letter from the Applicant dated 10th February, 2015 raised the questions of overlap and the potential double taxation and further informed the 1st Respondent of its intention to re-evaluate the tax imposed upon it and requested for more time. The 1st Respondent failed to respond to the queries raised by the Applicant instead proceeded to appoint the 2nd Respondent as an agent for the purposes of executing the purported tax arrears, interests and penalties and while aware that the same were incorrect, erroneous and could not be implemented in law. The 1st Respondent has been appointed pursuant to Article 232 of the Constitution of Kenya and has a public to respond to all queries emanating from public in respect of his public functions and when such queries are ignored by him and he proceeds to act in a manner contrary to the provisions of Article 47 of the Constitution of Kenya, such actions shall be checked by this Court.

36. To the applicant, the 1st Respondent as a body corporate and established pursuant to the Kenya Revenue Authority and conferred with the Administrative Authority under section 96 of the ***Income Tax Act***, Cap. 470 laws of Kenya was required under Article 47 (1) (2) of the Constitution of Kenya to carry his administration action in a fair, transparent, lawful and procedural manner. When the 1st Respondent issued the notice to the 2nd Respondent and dated 23rd March, 2015 and which the notice has proposed to be copied to the Applicant and which copy was never served and well aware that it was about to carry an administration action which had an adverse effects on the Applicant and he failed to bring the same to the attention of the Applicant herein, such action breached the fundamental rights of the Applicant to an administrative action which is fair and transparent and contravened the provisions of Article 47 (1) and (2) of the Constitution of Kenya 2010.

37. To the applicant the actions of the 1st Respondent demonstrate abuse of power as the office has failed to answer to the public and to the Minister responsible for its fairs.

38. It was further contended that the 1st Respondent failed to balance his act. He also failed to appreciate that the Applicant is an association formed by voluntary membership and the subscriptions made by the members are appropriated by the same members for specific programmes and activities that in the opinion of those members have direct benefits to them. To the applicant, the 1st Respondent also failed to appreciate that trade unions are formed as a fundamental rights by the employees to allow them advance their economic rights within the labour sector. When he issued the notice to attach the subscriptions of those members and direct their funds for the exclusive use by the 1st Respondent, the same was meant to breach their fundamental rights to negotiate their terms and conditions of service, representation in any employment dispute, procure legal services and the action of the 1st Respondent therefore is meant to deprive the employees of their fundamental rights to representation as provided under Article 22 of the Constitution of Kenya and ILO Conventions 87,98 and 135.

39. It was contended that when the 1st Respondent issued a notice dated 23rd march 2015, it failed to balance that membership to a trade union is voluntary and when those members would fail to get service from the Applicant, all of them may resign and even the attachment of the said funds may at the end not be guaranteed. He further failed to balance that you cannot attaché the entire funds of an institutions which has equal obligations, like payment of salaries of the Applicant's employees. He therefore failed to balance his rights from those of the others. To the applicant, when such lacks of proportionality in the decision and actions made by the 1st and 2nd Respondents have been demonstrated, the orders of Certiorari, Mandamus and Prohibition should be issued as an appropriate remedy.

40. It was the applicant's case that the 1st Respondent concealed from the Applicant the notice dated 10th March 2015, appointing the 2nd Respondent as her agent for the purposes of attaching funds of the Applicant in respect of tax arrears, penalties and interests and without informing the Applicant that he intended to attach her funds. As a Public officer and confirmed with an administrative action and was well aware that his intended action had an adverse effects on the Applicant, he was required by Article 47 (2) of the Constitution to notify the Applicant in advance on his contemplated action.

41. The notice had an effect of paralyzing the programmes and activities of the Applicant and bring it

to a halt and when the 2nd Respondent had similarly received the said notice and also well aware of the provisions of section 50 (8) and (9) of the ***Labour Relations Act***, 2007, that prohibits her from making deductions from the wages of the employees in respect of the union dues and also proceeded to approve the same without bringing to the attention of the Applicant is equally an act of bad faith. Similarly, the 1st Respondent are seized with the provisions of sections 48 and 50 of the ***Labour Relations Act, 2007*** and sections 17 and 19 of the ***Employment Act, 2007*** and yet proceeded to implement an unlawful notice hence their actions were in bad faith and amounted to impunity.

42. It was the applicant's case that it had expected that any action intended by either 1st or 2nd Respondent, as a tax collector in respect of the 1st Respondent and employees in respect of the 2nd Respondent will immediately be brought to the attention of the Applicant. Similarly, the Applicant had legitimate expectation that since the 1st and 2nd Respondents are and public officers appointed and established pursuant to the Kenya Revenue Authority and Kenya Ports Authority Acts, the 1st and 2nd Respondents would always carry and conduct their businesses transparently and taking into considerations all consequential and inconsequential effects of their actions. In this instant, the Respondents had acted in consultation and collusion to defeat the very legitimate expectation of the Applicant and the reasons for which they are established as a public officer and institution respectively.
43. The applicants were of the view that the 2nd Respondent as a primary institution that has direct link/ relationship with the Applicant is well aware of the utilization of the funds of the Applicant. The two institutions have hired a Chairman and Secretary to its Joint Industrial Council (J.I.C) that the Applicant and the 2nd Respondent pay their remuneration on 50% to 50% basis. The purpose of the Joint Industrial Council is to resolve the industrial and Employment disputes. This council as constituted deals with employment disputes as they arise. When the 1st Respondent issued such a notice, she was expected to explain the circumstances under which the said notice should not be implemented including the bar as provided under section 50 (8), (9) and (10) of the ***Labour Relations Act***, 2007.
44. The 1st Respondent as a public officer and also responsible for his employees, should have known that the Applicant as an institution has recurrent expenditures, such as salaries, rents, telephone bills, electricity bills, water bills and etc for its very existence as an entity, it has liabilities and obligations to meet and fulfil. Where the 1st Respondent orders for the attachment of the whole funds of the Applicant from the source and exposes the Applicant to unlawful bankruptcy and force it not to pay salaries to its employees and to close up the operations is at best explained to be an act of unreasonableness.
45. Further, the 1st Respondent should have been alive to the provisions of section 4 of the ***Labour Relations Act, 2007*** and Article 41 of the Constitution of Kenya, that when the Applicant fails to offer services to its members, the same members are at liberty to leave and join other trade unions. In that case, even at best, the notice of attachment will become a cropper. This fortifies the reasons why the parliament prohibited the use of the trade union funds for anything other than the activities of the trade unions in section 50 (9) of the ***Labour Relations Act, 2007***.

1st Respondent's Response

46. In opposition to the application the 1st respondent contended that it is not true that the Applicant herein has at all material times remitted income tax due to the 1st Respondent as alleged. According to it, there was a compliance check that was carried out by the 1st Respondent on the 31st of January 2012 notice of which was issued vide letter dated the 18th of January 2011 (2012) and that upon the audit being carried out, the following were the findings;

i. **That the Exparte Applicant had not been operating PAYE on employees emoluments up to May, 2008**
ii. **The Allowances paid to the Secretary General had never been taxed**
iii. **Honorarium paid to the officials paid to the Officials had not been subjected to tax.**

iv. **Sitting allowance paid to the officials had not been subjected to tax**
v. **There was no proper payroll in place or master roll and the Applicant was advised to maintain one henceforth.**
vi. **In total an amount of Kshs.11,193,861.00 was found to be payable in taxes.**

47. It was the 1st Respondent's case that the Applicant was duly served with a letter of findings dated the same day, the 31st of January 2012, indicating to the Applicant what the compliance check of the 31st of January 2012 had brought to the fore hence it was not true that the figures demanded were plucked from no records. To the contrary, the letter dated the 31st of January 2012 being the notice of compliance check had indicated the books that were to be availed for the compliance check. In the 1st Respondent's view, all the items charged to tax as per the letter of findings were based on the ***Income Tax Act*** an Act which the 1st Respondent as the Revenue Collecting agent of the government is charged with the enforcement thereof.
48. It was averred that in acknowledgement of its non compliance and in acknowledgment of its tax arrears as assessed, the ex parte Applicant vide the letter dated the 12th of March 2012 proposed to settle the tax demanded by making an initial deposit of KShs.2million and thereafter settle the balance by making Forty-eight (48) equal instalments which offer the 1st Respondent rejected informing the Applicant that the proposal was not acceptable and that the outstanding taxes would continue to attract interest as provided for under section 94of the ***Income Tax Act*** Cap 470 laws of Kenya. According to the 1st Respondent, the Applicant neither made any further proposal nor made make any effort to settle the outstanding taxes prompting the 1st Respondent to institute enforcement measures by issuing an agency notice appointing the 2nd Respondent as the tax collecting agent for purposes of collecting the outstanding taxes at the time standing at Kshs.11,193,861.00. In the 1st Respondent's view, it was this that seemed to have awoken the Applicant who vide a letter dated the 25th of May 2012 made a second proposal in which the outstanding taxes were to be settled by an initial amount of Kshs.2million and further gave post-dated cheques for settlement of the balance and pursuant thereto, the Agency Notice that had been issued was lifted. That notwithstanding, the Applicant defaulted in settling the outstanding taxes as they failed to honour the post-dated cheques issued and instead, vide its letter dated the 6th of September 2013, the *ex parte* Applicant applied for waiver of interest and penalties. This Application was considered and in accordance with the limit to the discretion granted to the Commissioner of Domestic Taxes under Section 94(4) of the ***Income Tax Act***, a waiver of up to 32.5% was granted to the Applicant this translating to a waiver of Kshs.1,401,053.00 in penalties and interest. It was disclosed that the Applicant then appealed the Commissioner's decision to grant a 32.5% waiver to the Minister in charge of treasury hence it is not true that the 1st Respondent failed to communicate to the Minister to facilitate the Appeal.
49. According to the 1st Respondent, in granting the waiver of 32.5% the Respondent Commissioner in charge of Domestic Taxes considered several factors which included; physical impediment at the time of non-compliance, cash flow hardships during the year of assessment, professional mishandling, error and inadvertent action among other considerations. In its appeal, the *ex parte* Applicant did not give any other mitigating factors to warrant a grant of full waiver or waiver beyond that which the 1st Respondents Commissioner is under the law empowered to give. The 1st Respondent disclosed that before the Application for waiver of penalties and interests, the *ex parte* Applicant had acknowledged owing the taxes as demanded plus interest and penalties.
50. The 1st Respondent averred that a second compliance check on the ex parte Applicants books of Accounts was carried out by the Respondent and that a Notice of the Compliance check was given vide the letter dated the 28th of May 2014 second compliance check focused on PAYE, withholding tax, and income tax on the Applicant's rental income and a total of Kshs.23,009,838.00 was found to be due and payable. Therefore, while in the first compliance check the only income charged to tax was the secretary General's allowances, the second compliance covered other employees sitting allowances, entertainment allowances and transport allowances and though the second compliance check indicated the period under review was 1st January 2010 to 30th December 2013, no income was charged in respect of 2010 as far as PAYE

initiative is concerned.

51. It was averred that upon being furnished with the tax findings of the second compliance check, the Applicant indicated that it was engaging the expertise of the a tax agent and requested to be granted 30 days within which to review and reply to the tax findings. However, the 1st Respondent replied to this letter indicating that any further extension could only be granted upon making immediate payment of taxes not in dispute and submissions of a late objection in accordance with section 84(2). However, to date no formal objection has ever been received from the Applicant or the said accountant and no payment of taxes has been made so far hence the 1st Respondent had no option but to put in enforcement measures by issues Agency notice to the 2nd Respondent.
52. To the 1st Respondent, the Agency Notice of the 10th of March 2015 was issued legally and after the Applicant had been well informed of the tax findings and granted an opportunity to object to the same. The 1st Respondent contended that:

i. That the ex parte Applicant having admitted to owing the taxes as demanded from the 1st compliance check and went as far as entering into a settlement schedule, the *ex parte* Applicant is estopped from validity of the same or how the same was arrived at.
ii. The *ex parte* Applicant having failed to object to the taxes as assessed in the two compliance checks, the amount as demanded became a civil debt owing and payable to the Commissioner as per provisions of the Income Tax Act.
iii. The instant Application is an abuse of the court process, the *ex parte* Applicant having admitted to and acknowledged its outstanding tax arrears.
iv. In the circumstances the orders sought cannot issue to quash the agency notice dated the 10th of March 2015

53. The 1st Respondent therefore denied that by it issuing the Agency notice to the 2nd Respondent requiring it to remit amounts due to the 1st Applicant will amount to double taxation of the Applicants members since the Agency Notice requires the 2nd Respondent to remit for purposes of recovering the outstanding taxes, amounts that would ordinarily be due from a member to the Applicant. According to it, the Agency Notice does not require or envisage direct deductions of the Applicant members' salaries so as to amount to double taxation of the member. It averred that section 37(1) of the ***Income Tax Act*** Cap 470 obligates an employer paying emoluments to an employee to deduct therefrom, and account for tax thereon, to such extent and in such a manner as may be prescribed and that the agency notice was merely enforcing failure to deduct tax from employees, emoluments and not members contributions.
54. It was the 1st Respondent's case that the Agency Notice does not in any way violate the provisions of the ***Labour Relations Act*** Cap 234 Laws of Kenya and the 1st Respondent was within its purview to appoint the 2nd Respondent as an agent in accordance with section 96 of the ***Income Tax Act***; the 2nd Respondent being the collector and remitter of the members' contributions to the ex parte Applicant. In its view, section 96(2) of the ***Income Tax Act*** Cap 470 spells out persons who may be appointed as agents for purposes of collecting taxes and indeed the 2nd Respondents is such an entity that holds and/or collects money for purposes of depositing into the Applicants said 'Gazetted Bank Account' hence is a proper agent for collections of taxes owing from the Applicant.
55. To the 1st Respondent, it properly applied itself to the law and procedure hence its actions are neither *ultra vires* nor against the rules of natural justice.
56. According to the 1st Respondent, the power issued to the 1st Respondent to issue Agency Notice is obtained under section 96 of the ***Income Tax Act*** (I.T.A) which provides:

"96(1) In this section

"agent" means a person appointed as such under subsection (2)

"appointment notice" means a notice issued by the Commissioner under that subsection appointing an agent;

"moneys" include salary, wages and pension payments and any other remuneration whatever;

"principal" means the persons in respect of whom an agent is appointed

(2) The Commissioner may by written notice addressed to any person

(a) appoint him to be the agent of another person for the purposes of the collection and recovery of tax due from that other person, and

(b) specify the amount of tax to be collected and recovered.

(3) An agent shall pay the tax specified in his appointment notice out of any moneys which may, at any time during the twelve months following the date of the notice, be held by him for, or due from him to, his principal"

57. It was submitted by the 1st Respondent that under the said section, Money is defined to include, salary, wages and Pensions and any other remuneration whatsoever. This means that the money held by the agent on behalf of the principal can include salary, wages or any other sort of remuneration due to the principal. It further cited subsection (3) which provides that the tax to be paid by the agent shall be paid out of *any moneys held by him for, or due from him to his principal*.
58. It contended that to argue that the amount that the 2nd Respondent was required to submit was members' contribution to the Applicant from their salaries and that section 19 of the ***Employment Act*** restricts deductions on salary to statutory deductions only unless the employee directs the employer, is to miss the mark. In this particular case, the 2nd Respondent, Kenya Ports Authority was the appointed agent and is to pay the taxes owing from the Applicant from the amounts that are due to the Applicant from the deductions from the employees. In the 1st Respondent's view, the Agent is to remit the amount that is due to the Applicant from it whatever the source (In this case amounts deducted from the Applicant member's salaries for remittance to the Applicant). It is not amount to be deducted directly from the employees so as to amount to double taxation of the members or to deduction on their salary. The 2nd Respondent is just to remit to the 1st Respondent, those moneys that become available to it ordinarily from its employees (who are members of the Applicant) as contributions to the Applicant. The Applicant has painted a picture of further deductions on the Applicant's members' salaries which is not the case. To it, the argument that the Agency notice offends the provisions of section 48(2) of the ***Labour Relations Act*** and offends the provisions of the ***Employment Act***, depicts the height of misrepresentation of statute and interpretation of statute in a very self-serving manner.
59. To the 1st Respondent, it is clear from a plain reading of the section 48(2) of the ***Labour Relations Act*** Cap 233 that it is the Trade Union that specifies (elects) the account which the money owing to the Trade Union is to be deposited into and it is this account that is gazetted as the account of the trade Union. This is to say that it is the Trade Union that prompts the Minister to gazette the Account. Subsection (3) indeed shows that the same Trade Union can prompt the Minister to give an order directing that money due to the Trade Union be deposited into a different account or go toward the payment of something else. The 1st Respondent therefore disabused the notion that where the account is specified, the same becomes law and no money ought to be remitted elsewhere other than into that account. To it section 48(2) is that the Trade Union ought to have a specific bank account that money due from an employer to it ought to be deposited into. It however does not bar the trade union from meeting other of its financial obligation such as tax. It was therefore submitted that the Agency notice dated the 10th of March 2015 was in order and the same was issued lawfully.
60. On the allegation of the failure to notify the applicant, it was submitted that the Applicant was duly informed of the issuance of the Agency notice and it is with the knowledge that the agency notice had been issued that the Applicant instituted this suit. To the 1st Respondent, it had no responsibility in law to inform the Applicant of the enforcement measures it intended to undertake

to enforce tax already due and owing. This is said especially with the facts of the case where the Applicant had been granted more than enough opportunity to deal with its tax affairs in accordance with the mechanisms under the Act. In this respect it relied on **Mumbi Ngugi J's** decision in Nbi H.C Pet. No. 86 of 2012: **Navcom Ltd vs. Kenya Revenue Authority**.

61. It was therefore submitted that similarly in this particular case, the Applicant having been granted opportunity to deal with his tax affairs and having been aware of the pending tax arrears with the 1st Respondent, the 1st Respondent had every right to enforce the same when it became due and the Applicant cannot claim a violation of its rights.

62. The 1st Respondent explained that two Compliance Checks into the Tax affairs of the Applicants were carried out. The first one was carried out on the 31st of January 2012 and the other in the year 2014. Upon the first compliance check, the Applicant was required to pay taxes found due and owing of **Kshs.11,193,186.00**. This amount was raised from tax not declared on; Allowances paid to the Secretary General, Honorarium paid to officials, sitting allowance paid to the officials and it was also found out that the Applicant was not keeping a proper payroll. The Second Compliance Check concentrated on; Pay as You Earn (PAYE) for employees of the Applicant, Withholding Tax and Income tax on the Applicant's Rental Income. Upon this Compliance Check taxes amounting to **KShs.23,009,838.00** was demanded from the Applicant. With respect to the contention that the 1st Respondent ought not to have charged tax on the Applicant's expenditures on reimbursement on transport, lunch and snacks for its directors as these payments are not income as defined under section 3(2) of the ***Income Tax Act*** but are actually expenses incurred and these expenses are allowed under section 39 of the ***Labour Relations Act***; the 1st Respondent retorted that even from the Applicant's own argument, it is clear that allowances and other benefits were paid to the directors. The Applicant argument thus falls short for the following two reasons: Taxation on allowances is not taxation on gains or profits of the Applicant (Dock Workers Union) but it is rather a demand of amounts that the Applicant ought to have withheld at the time of payment of the allowances and benefits to the directors and other employees. It is demand of tax that ought to be paid by the recipients of the benefits i.e. the directors; however section 37 of ***Income Tax Act*** requires that the employer paying out such monies, ought to withhold the tax on the benefits and remit the same to the 1st Respondent. The 1st Respondent cited section 37(1) which provides that *an employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed* and submitted that it is on the basis of this section 37 that tax was demanded from the Applicant. The 1st Respondent also cited section 16(2) of the ***Income Tax Act*** which provides that:

Notwithstanding any other provision of this Act, no deduction shall be allowed in respect of-

> ***(ii) hotel, restaurant or catering expenses other than for meals or accommodation expenses incurred on business trips or during training courses or work related conventions or conferences, or meals provided to employees on the employer's premises:***
>
> ***(iii) vacation trip expenses except those customarily made on home leave as provided in the proviso to Section 5(4)(a):'***

63. It was the position of the 1st Respondent that the allowances paid were reflecting as such allowances in the Applicants books (reimbursements for travels, accommodation and meals to the directors will also be benefits) and not paid out expenditure for travel and meals which would otherwise be supported by invoices and receipts for direct payments to the suppliers of the service and not to the directors and contended that it was the Applicant's duty to provide that the said allowances were expenses in accordance with section 16(2) and not allowances paid out to the directors and other employees.

64. According to the 1st Respondent, these being judicial review proceedings which are concerned with the decision making process rather than the merits of the decision, the Court ought to take note of the holding in Mombasa C.A.C.A 154 of 2007: **Pili Management Consultants Ltd vs. Kenya Revenue Authority**.

65. The 1st Respondent submitted that the holding emphasised that a taxpayer intending to object to tax assessed ought to object in accordance with section 84 of the Act and it is through that process that a taxpayer can be able to articulate why he disputes to the tax. The Applicant herein, it submitted was served with the results of the first compliance check way back on the 31st of January 2012. The Applicant did not object to the tax as raised. Section 101 of the ***Income Tax Act*** makes is clear that such a demand not objected to amount to demand not paid when due, and the same becomes a debt due to the government. What is even more notable is that instead of objecting in accordance with section 84 of ***Income Tax Act***, the Applicant through its letter dated the acknowledged the tax as assessed and started negotiating on the payment thereof. On that basis the Applicant is estopped from raising issues on that first compliance check.
66. As regards the second compliance check, the Applicant was served with the findings thereof on the 28th of Nov ember 2014. The Applicant upon receipt of the same did not object to the tax assessed in time and it is only on the 10th of February 2015, a period of over 60 days that the Applicant responded to the same indicating that it is engaging the expertise of a tax expert to look at the tax assessed. At the time of writing this letter of the 10th of November 2015, the time limit for objection had lapsed and the 1st Respondent was right in demanding the taxes. The 1st Respondent also granted the Applicant an allowance to file a late objection in accordance with section 84(2) which late objection was never filed.
67. To the 1st Respondent, if the Applicant had filed the objections under the aforesaid section 84, the Applicant would have through the same, raised any issues in objection thereto including the issue of there being an overlap. To the said Respondent, the Applicant cannot now be aided by this court on the issue of the tax as assessed and demanded because this court is not seized of the jurisdiction to undertake such an inquiry into the Applicants tax affairs and is also not presented with the Applicants books of accounts to be able to undertake such an inquiry.
68. With respect to waiver of interest and penalties, the 1st Respondent submitted that judicial review orders of *mandamus* can only issue to compel an institution seized with the legal mandate to make a decision or to take action and that institution has failed to take the said action or to make the said decision. The Applicant herein is seeking orders of *mandamus* to be issued to the 1st Respondent on matters and institutional mandate that the Minister for Finance is seized with. To issue the order of Mandamus sought against the 1st Respondent, would be seeking this court to act in vain. Be that as it may The Income Tax Act gives the mandate to the Commissioner to waive penalty on assessed taxes at section 94(4) of the Act which subsection states as follows;

'(4) The Commissioner may, upon application by a person from whom interest is due under this section, remit the whole or part of any penalty or late payment interest or both such penalty and interest charged under Section 72D up to a maximum of one million five hundred thousand shillings each per person per annum:

Provided that-

a. ***The Commissioner may remit any amount of penalty or late payment interest in excess of one million five hundred thousand shillings with the prior written approval of the Minister; and***
b. ***The Commissioner shall make a quarterly report to the Minster of all penalties and late payment interest remitted during that quarter.'***

69. In accordance with the provisions of the above section, it was submitted that the Commissioner did in fact review the Applicants tax affairs and issued waiver of penalties and interest of up to 32.5% which translated to **Kshs.1,401,053.00** which was the limit that was allowed to the 1st Respondent as per section 94(4) of the Act. To this extent, it submitted that it fulfilled its mandate under the Act. Whereas, subsection (4) proviso (a) further grants powers to the 1st Respondent to waive the whole of penalties and interest but the same is with the approval of the Minister. However, whereas it did forward its review of the Applicant's tax affairs and the considerations given by the Applicant in seeking entire waiver of interest and penalties, the Applicant however had not given any other mitigation to accord them and further waiver than the 32.5% that was

already awarded. However, the Applicant did not fault this decision nor call for quashing of the same. The 1st Respondent's position was therefore that it has already dealt its mandate under the Act with regard to issuance of waiver and to this extent, orders of *mandamus* cannot issue to compel the 1st Respondent to do that which it has already done.

70. It was submitted that what the Applicant is seeking the court to do is to compel the 1st Respondent to exercise its discretion, which the 1st respondent already exercised.
71. To the 1st Respondent, the Applicant has not satisfied this court for the issuance of the orders in Judicial Review sought. The 1st Respondent in assessing the Applicant for tax and issuing the Agency Notice in enforcement of its tax demand neither acted without jurisdiction, unlawfully capriciously nor breached any of the Applicant's rights to fair administrative action or legitimate expectation. According to it, this Application is a mere tactic meant to buy time and curtail the 1st Respondents from carrying collecting taxes owing from the Applicants.
72. This Court was therefore urged to find that this is not a matter rife for issuance of judicial review orders and proceed and dismiss the same with costs.

Determinations

73. I have considered the issues raised by the parties to this application.
74. The application in my view is grounded on the following issues:

1. **Whether the 1st Respondent was legally entitled to issue agency notices in respect of the amount held by the applicant on behalf of its members.**
2. **Whether the payments in question amounted to income for the purposes of Income Tax Act.**
3. **Whether the applicant was entitled to notice before the said agency notice could be issued.**

75. In support of its case that the 1st Respondent is not entitled to legally issue agency notices in respect of the amount held by the applicant on its members, the applicant relied on section 48(2) and (3) of the ***Labour Relations Act, 2007***, which provides as follows:

(2)A trade union may, in the prescribed form, request the Minister to issue an order directing an employer of more than five employees belonging to the union to-

i. ***deduct trade union dues from the wages of its members and***
ii. ***pay monies so deducted***

a. ***Into a specified account of the trade union; or***
b. ***In specified proportions into specified accounts of a trade union and federation of trade unions.***

(3) An employer in respect of whom the Minister has issued an order under Subsection (2) shall commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form "S" set out in the third schedule signed by the employees in respect of whom the employer is required to make a deduction".

76. The Applicant also relied on section 17(1) and 19(1) of the ***Employment Act***, 2007 which provides:

17(1) No employer shall limit or attempt to limit the right of an employee to dispose of his wage in a manner which the employee deems fit, nor by a contract of service or otherwise seek to compel an employee to dispose of his wages or a particular place or for a particular purpose in which the employer has a direct or indirect beneficial interest.

19(1) Notwithstanding Section 17(1), an employer may deduct from the wages of his employee

(g) any amount in which the employer has no direct or indirect beneficial interest and which the employee has requested the employer in writing to deduct from his wages.

77. Further reliance was placed on section 50(9) of the ***Labour Relations Act, 2007***, which according to it provides that ***"Any amount deducted in accordance with the provisions of this part shall be paid into the designated trade union, or employer's organization account within ten days of the deductions being made"*** and section 50 (8) thereof which provides that ***No employer shall (i) fail to comply with an order or a notice issued under this part; (ii) Deduct any money and not pay it into the account designated in the notice issued by the Minister; or (iii) Pay money into an account other than the account designated in the notice issue by the Minister"*** and Section 50 (9) of the same Act, which provides that ***"No person shall (i) Request an employer to pay money deducted in accordance with this section into an account other than the account designated by the minister in the notice or (ii) Use any money deducted in accordance with this section for any purpose other than the lawful activities of a trade union or a trade union federation*** and section 50 (10) of the same Act, provides that ***"An Employer or any person who contravenes the provisions of this section commits an offence".***
78. In the Applicant's view, from the readings of the provisions of section 50(9) of the ***Labour Relations Act, 2007***, it was its legislature intention and it was purposed that the money so deducted from the wages of the members of a trade union was protected from being diverted from the account known to the members or the same be diverted by any person for a separate use other than the activities of a trade union. The 1st Respondent is juristic person and as such barred by the provisions of section 50(9) of the ***Labour Relations Act, 2007*** from converting the monies so deducted from the members of the Applicant herein for a separate use and/or including the purported tax arrears, penalties and interests.
79. The 1st Respondent on the other hand was of the view that a plain reading of the section 48(2) of the ***Labour Relations Act*** Cap 233 that it is the Trade Union that specifies (elects) the account which the money owing to the Trade Union is to be deposited into and it is this account that is gazetted as the account of the Trade Union. This is to say that it is the Trade Union that prompts the Minister to gazette the Account. Subsection (3) indeed shows that the same Trade Union can prompt the Minister to give an order directing that money due to the Trade Union be deposited into a different account or go toward the payment of something else. The 1st Respondent therefore disabused the notion that where the account is specified, the same becomes law and no money ought to be remitted elsewhere other than into that account. To it section 48(2) is that the Trade Union ought to have a specific bank account that money due from an employer to it ought to be deposited into. It however does not bar the trade union from meeting other of its financial obligation such as tax. It was therefore submitted that the Agency notice dated the 10th of March 2015 was in order and the same was issued lawfully.
80. I agree with the 1st Respondent's position that a reading of the relevant provisions section 17 of the ***Employment Act*** as sections 48 and 50 of the ***Labour Relations Act*** Cap 233, bar the unauthorised deductions of the employees wages. The said provisions proceed to provide for the Trade Union to seek the permission of the Minister to deduct monies from the employees' wages for the purposes of the activities of the Trade Union. Once the Minister grants the said permission, an employer in respect of whom the Minister has issued an order is then enjoined to commence deducting the trade union dues from an employee's wages within thirty days of the trade union serving a notice in Form "S" set out in the third schedule signed by the employees in respect of whom the employer is required to make a deduction. The Trade Union is enjoined to have an account into which the monies deducted from its members are to be deposited and once such account is designated the monies so deducted must be paid into that account. Such monies, the law provides can only be for the lawful activities of a trade union or a trade union federation.
81. Therefore those provisions do not bar the disbursements of the sums deducted and already paid into the designated accounts for the said purposes. Payment of taxes which are legally due, in my view would amount to lawful disbursements since where taxes are legally due the Trade Union or the Trade Union Federation would be legally obliged to pay the same.
82. In my view that provision does not expressly bar the disbursement of the sums deposited therein for the purposes of payment of taxes. However, before the sums deducted hit the designated account, it is my view that the same cannot be directed towards any other purpose. In other words the employer is only empowered to deduct the sum from the employee's wages to pay it into the designated account. It is only then that the 1st Respondent can issue an agency notice for the sum

due to it to be remitted by the agent concerned.

83. In this case, it is clear that the 2nd Respondent intended to remit the deductions directly to the 1st Respondent. By issuing the agency notice to the 2nd Respondent for monies which the law barred the 1st Respondent from disbursing otherwise than to a designated account, it is my view the 1st Respondent acted unlawfully. By the operation of the law, its powers to issue agency notices at that time had not accrued. The 1st Respondent has contended that since the applicant had conceded owing taxes, the applicant was estopped from denying the same. The short answer to this contention is that estoppel does not operate against the law since estoppel being an equitable doctrine must follow the law.

84. The next issue would then be whether the payments in question amounted to income for the purposes of ***Income Tax Act***. In other words the Applicant seek a determination whether "transport and travels, legal fees, entertainment, Honorariums and many others" fit in the categories of income as provided under section 3 (2) of the ***Income Tax Act*** Cap 470. A determination of what amount to taxable income, in my view goes to the merit of the dispute. This was the position adopted in Mombasa C.A.C.A 154 of 2007: **Pili Management Consultants Ltd vs. Kenya Revenue Authority** in which the Court expressed itself as follows:

"As the learned trial Judge rightly pointed out, the jurisdiction of a court in judicial review as concerned primarily with the decision making process, not with the merits of the decision. For the Judge to be able to conclude that not 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 the tax. No material was placed before the Judge on that point. In any event Pili had the chance to place that issue before the Commissioner when it made the nil return of income; it failed to do so and was loudly silent over that matter in the superior court. Pili now complains in its grounds of appeal (ground 6) that its rights under Sections 84 to 91A were violated but if Pili had declared the money in the Bank account in the return of income for the year 2004 and stated why that money was not liable to tax, and if the Commissioner had then rejected his position Pili would have been perfectly entitled to invoke the provisions which it now claims were violated. If there was any violation of those provisions as is now alleged, then Pili was wholly to blame for that misfortune....."

85. From this decision it is clear that the issue of whether the subject payments were liable to tax ought to have been determined pursuant to the legal channels provided under the ***Income Tax Act***.

86. That brings me to the issue whether the applicant was entitled to notice before the said agency notice could be issued. On this issue I can do no better than concur with the position adopted by **Mumbi Ngugi J's** decision in Nbi H.C Pet. No. 86 of 2012: **Navcom Ltd vs. Kenya Revenue Authority** in which the learned Judge pronounced herself as follows:

"In the present case, the Petitioner, which states that it has been in operation since 1981, is aware of its rights and obligations with regard to tax. It had received notice of the intended audit, had filed an objection through its agent, and had received a clear notification of the refusal by the Commissioner to accept its objection to the assessment. In the circumstances, I can find nothing that would prevent the issuance of the agency notices, or that requires that the Petitioner appeals first before the Respondent seeks to enforce the recovery of the tax arrears...To hold otherwise would result in a scenario where government business and provision of services to citizens, which are dependent on payment of tax, would be totally frustrated as parties in the position of the Petitioner would cite pending appeals, whether merited or not, as a basis for not paying tax. While there is a duty on the Respondent to be fair and reasonable in executing its mandate of tax collection, where no unreasonableness or violation has been demonstrated its mandate ought not to be frustrated by a party, which has had every opportunity to deal with its tax issues seeks to hide behind an intended appeal to the Local Committee.'

87. A similar contention was raised before **Majanja, J** in **H.C.Misc.Civil Appl. No. 449 of 2001; Republic –vs- KRA; Ex-parte: Total Kenya Limited,** and the learned Judge responded in the following terms:

"I agree with Counsel for the Respondent that the exchange of correspondence in this instance provided the Applicant an opportunity to be heard and to present its case. That opportunity was afforded from the time the first demand was issued on 08th February 2011 and this opportunity was available until at least 04th May 2001."

88. In this case, it is clear that the parties hereto entered into various correspondences before the agency notice was issued. The applicant in fact contested its liability. Accordingly, it cannot be said that the applicant ought to have been notified when the 1st Respondent was moving to issue the agency notice. In my view, for the taxing authority to be compelled to issue a separate notice before issuing agency notice would defeat the very purpose of issuing agency notices. Once the taxes are assessed it is upon the tax payer to take the necessary legal steps to dispute the assessment and if it does not do so within the stipulated period the taxing authority is then at liberty to issue the agency notice without further recourse to the tax payer.
89. In this application one of the remedies the applicant seeks is an order for *mandamus* to issue to compel the 1st Respondent, to review the arrears, penalties and interest as contained in its notices, dated 29th January 2012, and 29th January 2015 respectively in terms of the directive from the Principal Secretary, National Treasury and dated 10th February 2014. The Respondent on the other hand contends that having reached the legal limit for which a waiver can be given, it nolonger has the power to offer any further waiver. Any further waiver can only be extended by the Minister.
90. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an

order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

91. It is clear that the decision whether to review or waive arrears, penalties and interest penalties The 1st Respondent has shown that it has already exercised that power. This Court cannot compel it to undertake further action which the law does not oblige it to take. Apart from that the Court cannot compel it to do so in a particular manner.
92. It was contended that the Applicant ought to have objected to the decision of the 1st Respondent pursuant to provisions of section 84(2) of the ***Income Tax Act*** (Cap 470) instead of instituting these proceedings. Section 84 of the Act provides that:

(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

93. Whereas I appreciate that where there is an alternative remedy available which is not shown to be less convenient, beneficial and effectual, that remedy ought to be resorted to before instituting judicial review proceedings as mandated by section 9(2) of the ***Fair Administrative Action Act***, No. 4 of 2015, in my view the issue here is not whether the assessment was objectionable but whether the 1st Respondent had the authority to issue the agency notice. Whereas the assessment may not be objectionable, the issue is whether the 1st Respondent was legally permitted to issue the agency notice in the circumstances. That in my view is not an issue covered under section 84(2) of the ***Income Tax Act*** in order to bar the Applicant from invoking this Court's supervisory jurisdiction.
94. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240**:

"The respondents' argument that the applicant came to court prematurely without exhausting the internal tax objection process as regards each category of tax, is a serious misdirection because as it has been stated elsewhere in this judgment the issues raised were greater than any of the internal tribunals could handle. The task before the court is not, and has not been that of counting the shillings, it has been one of adjudicating on illegality, the doctrine of *ultra vires*, irrationality, procedural impropriety, Wednesbury unreasonableness, oppression, malice, bias, discrimination and abuse of power. Based on the turning points, outlined above the Court finds that the applicant has demonstrated that the respondents

have acted *ultra vires* their powers to assess and levy tax in relation to the applicant. The act of lumping together assessments whereas the statute provides for separate notices of assessment to be issued and giving a 14 days notice, initially, without the separate assessments, was an act aimed at ambushing the applicant and causing panic. In short it was a malicious act which the respondents were not legally entitled to do – what the respondents were authorized to do as stated in *Somerset* is only what is within their statutory powers. And in the face of this, the respondents still have the courage to fault the applicant in seeking judicial review. I say no, when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."

95. As was held in **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Ltd [1981] UKHL 2** it was held that:

"A taxpayer would not be excluded from seeking judicial review if he could show that the Revenue had either failed in its statutory duty towards him or had been guilty of some action which was an abuse of their powers or outside their powers altogether...I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly...to ensure that there are no favourites and no sacrificial victims"

96. The law is therefore that where there exist an alternative remedy through statutory law, it is desirable that such a statutory remedy ought to be pursued first. I am however alive to the fact that whereas the said principle ought to be upheld, the Court must bear in mind the nature of the dispute before it *viz-a-viz* the jurisdiction vested in the alternative Tribunal. Therefore as was held 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**, where there is a means of redress that is inadequate, the Court should not exercise restraint. The Court however went on to hold 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"."**

97. It is the therefore my view that the 1st Respondent had no power to issue the agency notice before the monies deducted from the applicant's members had been deposited into the designated account and hence the 2nd Respondent was expressly barred from remitting the deduction in any other manner save as directed by the law. Having considered the issues raised in this application, I am satisfied that the Respondent's action of issuing Agency Notices prematurely was irrational and in bad faith and as was held in **Noor Maalim Hussein & 4 Others vs. Minister of State for**

Planning, National Development and Vision 2030 & 2 Others [2012] eKLR:

"If statutory power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations."

98. On that basis the instant Application is merited.

Order

99. Accordingly, I grant an order an certiorari bringing into this Court for the purposes of being quashed the decision of the 1st Respondent herein, Kenya Revenue Authority vide notice dated 10th March 2015 directing the 2nd Respondent to attach and remit the funds of the applicants herein being the subscriptions from her members to the 1st Respondent which decision is hereby quashed. In the premises it is nolonger necessary to issue an order of prohibition in the manner sought. I also find no merit in the prayer for *mandamus*.
100. The applicant will have the costs of this application to be borne by the 1st Respondent.

Dated at Nairobi this 18th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Wanyonyi for Mr Ochieng for the applicant

Cc Mutisya