REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 138 OF 2014

IN THE MATER OF: THE INCOME TAX ACT, CAP, 470 OF THE LAWS OF KENYA

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 OF THE LAWS OF KENYA

IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT CAP 469

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE OF COURT TO INSTITUTE JUDICIAL REVENUE PROCEEDINGS AGAINST THE KENYA REVENUE AUTHORITY AND THE HONOURABLE ATTORNEY GENERAL OF KENYA BY WAY OF ORDERS OF PROHIBITION AND MANDAMUS

BETW7+EN

KENYA MEDICAL ASSOCIATION HOUSING

CO-OPERATIVE SOCIETY LIMITED ……………………….APPLICANT

AND

THE HONOURABLE ATTORNEY GENERAL…....…...1ST RESPONDENT

KENYA REVENUE AUTHORITY …………….............2ND RESPONDENT

JUDGMENT

1. The exparte applicant in this matter is Kenya Medical Association Housing Co-operative Society (KMAHCS) which, vide Notice of Motion dated 22nd April 2014 seeks from this court the following Judicial Review Orders:

> 1. An order of prohibition do issue to prohibit the respondent Kenya Revenue Authority (KRA) from collecting monies from the applicant's bankers and agents pursuant to the Agency notices dated 29th January 2014 and 3rd February 2014;
>
> 2. An order of Mandamus do issue to compel the respondent (KRA) to reconcile the applicant's tax accounts pursuant to the Agency notice dated 29th January 2014 and 3rd February 2014;

3. An order of Mandamus do issue to compel the respondent (KRA) to reconcile the applicant's tax accounts pursuant to the Agency notices dated 29th January 2014 and 3rd February 2014;

4. That costs be provided for.

2. The Notice of Motion was filed under Order 53 Rules 3 (1) and 4(1) of the Civil Procedure Rules pursuant to leave to apply granted on 8th April 2014 to file the substantive motion within 15 days from date of orders for leave. The motion was filed within the stipulated period.

3. The Notice of motion is predicated on the grounds that:

1. The applicant has to the best of its knowledge and through its accountants remitted income tax to the respondent;

2. The respondent has written to the applicant's bankers and agents and purporting to issue notices pursuant to Section 96 of the Income Tax Act Cap 470 when there is no tax due or payable to the respondent;

3. That those notices are arbitrary as they are inconclusive as the income tax if any has been paid in full;

4. That those notices have been issued without hearing the applicant;

5. That there are no taxes owing to the respondent and the agency notices by the respondent in issue in this suit directly are adversely affecting the applicant;

6. The operations of the applicant will indeed come to a standstill if the agency notices are acted upon;

7. The respondent's action is motivated by irrelevant considerations that are repugnant to public policy.

4. The application is further supported by a statement of facts, verifying affidavit and exhibits filed in support of the application for leave and the submissions as filed on 15th May 2014 and list of authorities filed on 17th June 2014.

5. In the statement of facts and verifying affidavit, the applicant avers and deposes through its chairman Mr Hezra Odondi Opere that the applicant has through its accountants on various occasions intimated to the respondent that it has settled all income tax and amounts due and that therefore the respondent's claim for additional tax payments is unjustified and unmerited and in the circumstances it's not the fault of the applicant not to have paid any tax.

6. Further, that the applicant has always been ready to pay any tax due and that the respondent's action is motivated by irrelevant considerations that are repugnant to public policy and against fair competition.

7. It is also averred that the respondents decision is illegal and in excess of the Commissioner's mandate provided in the income Tax Act Cap 470 Laws of Kenya; that the decision is arbitrary as no tax is due; that the decision is against the rules of natural justice as the applicant was never given an opportunity to be heard before the agency notices were sent to its agents and or bankers; and that the agency notices are oppressive and blatant breach of the law and that the actions and or proceedings are only meant to intimidate the applicant.

8. The applicant also avers that the actions of the respondent are in breach of the applicant's legitimate expectations to be treated fairly and after due process has been followed and as a result the

applicant's business stands to suffer irreparable damage owing to its business capital being withheld illegally.

9. In the verifying affidavit of Hezra Odondi Opere who is the applicant's chairman, he deposes that as far as he is concerned, no tax is due and or owing to the respondent from the applicant and that in any event, the applicant has paid more money to the respondent than is actually due. That despite several demands to the respondent to reconcile its accounts, it was ignored hence the agency notices are unwarranted.

10. The respondent opposed the application for Judicial Review Orders of Prohibition and Mandamus sought by filing a replying affidavit sworn by Loyford M Kubai sworn on 5th November 2014 deposing that he is the Assistant Manager within the respondent Domestic Taxes Department – medium and small taxes payers office.

11. That while carrying out compliance checks from the respondent's system, the respondent's officers noted that the applicant had tax arrears totaling kshs 9,908,405 on their income tax register as shown by the copy of ledger for the applicant.

12. That the applicant was issued with a demand notice dated 1st March 2013 for the said amount payable within 14 days but no response was received and that after a reminder vide notice dated 20th August 2013 the applicants agent/accountant Mr Kasii of Nyenge and Company Associates visited the respondent's offices for discussions after which he promised that the applicant would make some payments towards the demanded tax.

13. That nonetheless, no payment was received prompting the respondent to send a 4th reminder notice dated 16th September 2013. That thereafter, a number of meetings were held between the applicant's agents and the respondent's officers on how the demanded tax was arrived at and that on 20th November 2013 another demand notice was send by the respondent to the applicant followed by demand notice of 16th January 2014 but that no response was forthcoming from the applicant hence the issuance of agency notices to the applicant's bankers and property managers.

14. That it was after the agency notices were issued that the applicant's accountants Nyenge and Associates visited the respondent's offices on 17th February 2014 and together with the respondent, tabulations of outstanding taxes were done from 1993-2011 amounting to shs 2,268,612 which is the interest and penalties. That thereafter the applicants accountants wrote a letter dated 20th February 2014 to the respondent, disputing the taxes owed and requested for a fresh demand notice.

15. That although the applicants claimed that they had cleared all outstanding tax and wanted a waiver of penalties and interest, they never provided original receipts of the payments for reconciliation purposes. Further, that on 28th March 2014 the applicant paid shs 608,884 by cheque as balance of the principal tax due and that despite the respondent requesting for pay-in slips for shs 600,000 allegedly mis-posted to withholding tax account instead of corporation tax, the applicant has refused to submit the said slips to enable the respondent validate the payment before transferring the credit.

16. It is further deposed that the applicant's refusal to submit receipts and slips had hindered reconciliation and outstanding data corrections and credit transfers but that shs 5,540,705 was owing hence the agency notices issued were in accordance with Section 96 of the Income Tax Act in the enforcement of taxes due and owing by the exparte applicant.

17. That before demands were made and thereafter the respondent has given to the applicant every opportunity to be heard and seek clarification in regard to the demands for outstanding taxes.

18. That the respondent has already done what it is mandated to do under the Income Tax Act and

hence Mandamus cannot issue since the agency notices were issued pursuant to the law after several demand notices bore no fruit.

19. That there is no statutory duty which the respondent has failed to perform in order for this court to compel it to perform.

20. Further, it is deposed that prohibition cannot issue against the respondent since the court cannot prohibit what has been sanctioned by statute to wit- issue of agency notices for purposes of enforcing compliance with the Revenue Laws and for purposes of safe guarding Government Revenue.

21. That the applicant is seeking for the determination relating to the merits with which the decision was executed.

22. That although the applicant admitted owing taxes to the respondent, it has failed to pay and has not produced evidence of payments made hence it cannot seek to impeach the assessment and to lift the agency notices raised in respect of the tax assessment through Judicial Review process.

23. That there will be substantial loss to the Government if the orders sought are granted and that the application is in bad faith and completely lacking in merit, only fit for dismissal with costs.

24. Both parties' advocates filed written submissions. In the applicant's submissions (skeletal) dated 14th May 2014 and filed in court on 15th May 2014, the exparte applicant reiterates the grounds, statement of facts, verifying affidavit and relies on the bundle of documents exhibited in support of its position as reproduced in this ruling.

25. The applicant maintains that the agency notices were unwarranted since it does not owe any tax arrears and that it tried through numerous letters, to resolve the issues with the respondent to no avail. In addition, it is submitted that the applicant has paid excess tax to the respondent than what is claimed as shown by the tabulation for the years 009-2,370.967; 2010-1,944,725, 2011-5,627,746; 2012-734,482; 2013-499,000 and 2014 -608,884 all totaling shs 11,785,804.

26. That the demand notice dated 18th February 2014 claims that no taxes were paid in 2011 and 2012 which is misleading and inaccurate and should not be relied on as a basis of seeking tax payments from the applicant as it is tainted with numerous misguided arithmetical errors. It is submitted that the respondent's actions are arbitrary as they are inconclusive as the income tax if any has already been settled in full.

27. The applicant's counsel further submitted that the principles of natural justice were violated by the respondent's failure to give the applicant an opportunity to be heard before the agency notices were sent to its agents and or bankers. Further, that the said agency notices are oppressive and in blatant breach of the law and hence the actions or proceedings by the respondent are only meant to intimidate the applicant.

28. The applicant further submitted that the respondent had breached the applicant's legitimate expectation to be fairly treated and after due process has been followed and as a consequence, its business stands to suffer irreparable damage owing to its business capital being withheld illegally.

29. The applicant prayed for the orders sought. A list of 2 authorities was filed on 17th June 2014 but no reference was made to any of the filed authorities in the submissions, as to their relevance.

30. In the written submissions dated 5th November 2014 and filed on 6th November 2014 the respondent reiterated what is contained in its replying affidavit sworn on 5th November 2014 by Loyford M. Kubai, and framed 5 issues for determination.

31. On the first issue of whether the actions of the respondent to carry out compliance checks and

demand issuing a for all outstanding taxes was illegal and in contravention of the Income Tax Act Cap 470 Laws of Kenya, it was submitted that Section 96(2) of the Income Tax Act empowers the respondent to issue agency notices for recovery of taxes due and owing, and in enforcing the demand notices which were issued to the applicant following proper assessment of taxes due in accordance with the Income Tax Act. Further, that paragraph 12 of the Income Tax PAYE Rules provides that for purposes of the recovery of tax which an employer would have been liable to pay under Rule 10 had he complied with the provisions of these Rules, that employer shall be deemed to have been appointed an agent of his employee under Section 96 of the Act.

32. It was also submitted that the applicant had not proved arbitrariness, unfairness, inconsistency and any capricious acts of the respondents. Reliance was placed in **HCC Miscellaneous Application 1119/2007 Match Masters Ltd Vs Kenya Revenue Authority Customs Department** where it was held that***: it is not clear that the impugned decision cannot be said to have been made irrationally or unreasonably given that it was based on audit findings and the applicant was clearly made aware of the basis of the decision.***

33. It was further submitted that there was no legitimate expectation by the applicant and that legitimate expectation has to be claimed within the law. Reliance was placed on Republic **Vs Director of Immigration Services Exparte EJM & Another [2014].**

34. On the second issue of whether the applicant's right to fair administrative actions was infringed by the respondent it was submitted that fairness in the light of Article 47 of the Constitution must be taken into account in the context of the case which includes a determination of the nature of the proceedings and the statutory regime or architecture as was held in **HC Miscellaneous Civil Application 283/2006 KAPA Oil Refineries Ltd Vs Kenya Revenue Authority, Commissioner of Income Tax, and Commissioner of Value Added Tax & Commissioner of Domestic Taxes** where the court held, inter alia:

> ***"I find that there is no evidence to prove that any of the above grounds. Orders of certiorari cannot issue because the impugned decision is within the law, or that the applicants were denied natural justice because there was protracted correspondences s between the parties before the applicants came to court, there is no evidence that the respondent abused its powers or discretion or that the decision arrived at is absurd that it lacks logic. All grounds must fail."***

35. It was submitted that the long correspondence from the respondent to the applicant was impressing upon the applicant to comply with no avail.

36. On the third issue of whether the orders sought are tenable, it was submitted that this application misapprehends the jurisdiction of this court under Order 53 of the Civil Procedure Rules in that: Prohibition orders cannot issue against the respondent to prohibit it from doing what the statute has sanctioned it to do. Therefore, that the respondent was only acting within the law by issuing agency notices for purposes of enforcing compliance with revenue laws and for purposes of safeguarding Government revenue. Reliance was placed on the **Republic Vs Kenya National Examinations Council HC Miscellaneous Application 266/99** where the court held that:

> "***Only an order of certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."***

37. It was further submitted that an order of Mandamus being an order to compel a statutory body to perform its statutory mandate cannot issue in this case as the applicant has not demonstrated to the court the duty that the respondent has failed to perform.

38. That Judicial Review does not extend to the merits with which the decision was executed, but only extends to the decision making process of which no fault in issuing agency notices has been

pointed out in this case.

39. Further, that the applicant is guilty of non disclosure of facts leading to the issuance of the agency notices hence the application is an abuse of the court process.

40. That the applicant admitted owing taxes and even applied for waiver of penalties and interest and that it has failed to prove that it paid all taxes which claim is in bad faith and only intended to frustrate, delay and defeat the collection of taxes which are due and owing to the government of Kenya hence the application should be dismissed with costs.

Determination.

41. Having considered all the material on record comprising the application for leave, the Notice of Motion, grounds, statement of facts, verifying affidavit and exhibits, as well as the replying affidavit and its exhibits; and taking into account the written submissions by the parties' advocates and the authorities both statutory and case law relied on, I find the following issues due for determination.

> ***1) Whether the applicant is entitled to the Judicial Review Orders of Mandamus and prohibition as prayed for in the application.***
>
> ***2) What orders should this court make?***
>
> ***3) Who should bear the costs of Judicial Review proceedings?***

42. On the first issue of whether the applicant is entitled to the Judicial Review Orders sought in the Notice of Motion dated 22nd April 2014, it is important to first set out the principles upon which judicial review orders can issue and therefore the scope thereof. The case of **Kenya National Examination Council Vs Republic Exparte Geoffrey Gathenji Njoroge CA** 266**/96** is instructive. In that case, the Court of Appeal stated that:

> " ***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 some particular thing therein specified which appertains to his or their office and is on 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 of enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that made of redness is less, convenience, 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 as whom the obligation is laid, a mandamus cannot command a duty in question to be carried out in a specific way. These principles mean that an order of mandamus compel 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 had 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 wrongly performed i.e. that the duty has not been performed according to the law, then mandamus is a wrong remedy to apply for because, like an, order of prohibition, or order of mandamus cannot quash what has already been done."***

43. According to **Halsbury's Laws of England 4th Edition paragraph 58,59 page 116;**

> ***"Courts have an inherent jurisdiction to review the exercise by public bodies or officers***

of statutory powers impinging an legally recognized interests. Powers must be exercised fairly, and must not be exceeded or abused.

Moreover, the repository of a statutory power or duty will be required genuinely to discharge its functions when the occasion for their performance has arisen."

The superior courts have a somewhat similar inherent jurisdiction over inferior courts and tribunals. If such a body has exceeded or acted without jurisdiction or has failed to act fairly or in accordance with the rules of natural justice, or if it has committed an error of law in reaching a decision, its decision may be set aside.

Alternatively, a tribunal may be prohibited from violating the conditions precedent to a valid adjudication before it has made a final determination. A tribunal wrongfully refusing to carry out its duty to hear and determine a matter within its jurisdiction may be ordered to act according to law."

44. On the nature of Judicial Review, the learned authors above at paragraph 58 state that:

" Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or performs who carry out quasi- judicial functions or who are charged with the performance of public acts and duties. This jurisdiction was originally denied from the common law, and was exercised by the issue of the prerogative writs of Mandamus, certiorari and prohibition, but it now conferred and regulated by stature and rules of court.

Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself. It is thus different from an ordinary appeal. The purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected. It is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. Unless the restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power. That is so whether or not there is a right of appeal against the decision on the merits. The duty of the court is to confine itself to the question of legality. Its concern is with whether a decision making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached, or abused its powers. The grounds upon which administrative action is subject to control by Judicial Review have been conveniently classified as threefold. The first ground is illegality; the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. The second irrationality namely Wednesbury unreasonableness. The third is procedural impropriety……

On an application for Judicial Review, the court has power to grant a quashing order (formerly known as an order of certiorari), a prohibiting order(formerly known as an order of prohibition) or a mandatory order (formerly known as an order of mandamus). In addition the court has power, in specified circumstances, to grant a declaration or an injunction, or to award damages where the claimant seeks an injunction or a declaration in addition to a prerogative remedy, he must use the Judicial Review procedure."

45. From the above authoritative writings, and applying the principles set out therein to this case, the concern of this court in this matter, is the credibility of the decision making process which led to the impugned decision in subject of these Judicial Review proceedings. The court can only intervene where the decision making process by the respondent Kenya Revenue Authority is wanting.

46. Going by the facts of this case, the questions that must be answered in the first issue are:

i. Whether the decision by the respondent to issue agency notices to the applicant's bankers and agents was made in breach of the rules of natural justice;

ii. Whether the respondent violated the applicant's legitimate expectations;

iii. the said decision was illegal, irrational and or lacked procedural impropriety; and

iv. Whether the respondent acted in excess of its statutory powers in arriving at the decision of issuing agency notices to the applicant's bankers and property agents.

47. The onus/burden of proving to this court that the challenged decision was arrived at in blatant violation of the rules of natural justice; or that the decision was irrational, illegal or that the respondent exceeded its statutory powers vested in it lies on the applicant who must discharge that burden in order to succeed in its application, by availing tangible and credible evidence or demonstrate the illegality or irrationality or unreasonableness of the respondent's decision including abuse of power.

48. On the allegation that the respondent breached rules of natural justice by failing to give the applicant a hearing before issuing agency notices it is worth appreciating that the rules of natural justice are fundamental rules which are a cushion to ensure public bodies do not make decisions at their whims to the detriment of those affected. In **Ridge V Baldwin [1963] 2 ALL ER 66 at page 81** Lord Reid stated that:

> ***"Time and again in the cases I have cited it has been stated that a decision given without regard to the principle of natural justice is void."***

49. And in **General Medical Council Vs Spackman [1943] 2 ALL ER 337 at 345** Lord Wright stated that:

> ***" If the principles of natural justice are violated in respect of any decision it is indeed, immaterial, whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared to be no decision.***

50. In **Nairobi HC Miscellaneous Application 480/2008, Republic vs Minister for Local Government and County Council of Maragwa Exparte Councilor Paul Mugeithi Joel,** Nyamu J (as he then was) observed that:

> ***" The right to hear the other side is not necessarily a right to personal hearing before the body making the decision, what is vital in such a situation is to ensure that the party to be adversely affected by the decision is timely informed of the substance of the case it has to meet which must be reasonably and clearly formulated such a party who stands to be prejudiced should be given a reasonable opportunity to present its case".***

51. In the instant case, the applicant avers that it was compelled to institute these proceedings after the respondent served agency notices upon the applicant's agents and bankers. The notices are dated 29th January 2014 and 3rd February 2014 demanding for shs 8,974,707 being tax arrears and penalties purportedly owed by the applicant to the respondent.

52. applicant also avers that the issue of tax arrears had been discussed on numerous occasions between the two parties but that there was no consensus as the respondent had refused to address various concerns and explanations on assessment of tax directed at them by the applicant. It is also averred that the respondent never gave the applicant an opportunity to be heard before the agency notices were send to its agents and bankers and that the agency notices are oppressive and in blatant breach of the law and intended to intimidate the applicant.

53. In support of its application and contentions, the applicant annexed several correspondence between it/its agent (auditor) Nyenge and Company Accountants and the respondent covering the period 2009, demands for tax dated 18th February 2014, payment advises and receipts and cheque for the years 2009, 2010, 2011, 2012, 2013 and 2014.

54. To counter those averments the respondents contended that prior to the issuance of the Agency notices, the respondent gave to the applicant personal hearings through its agent Nyenge and Company Accountants and that they also issued demand notices including reminders which the applicant refused to respond to. The notices are marked LMK2 dated 1st Mamrch 2013, LMK3, (reminder) dated 20th August 2013; (LMK4) 16th September 2013; (LMK5) 2 0th November 2013; 16th January 2014 (LMK6); LMK 6 16th January 2014 (immediate demand letter) all for 9,908,405.

55. The applicant has not made any specific denial of receiving those demand notices and or reminders. On 20th August 2013, after issue of KMK2 tax demand, it is noted that Mr David Kasii an agent of the applicant went to see the respondent's officials in connection with the demanded tax and promised to make some payments the following week. There is no denial of that fact by the applicant.

56. In addition, Annexture LMK 11 shows that the applicant's agent Nyenge and Company Accountants through Mr David on behalf of the applicant met Ms Daria an official of the respondent on 11th February 2014 and the two had a lengthy discussion over the issue of tax arrears demanded by respondent from the applicant and some tabulations were done. In that discussion, it emerged that the applicants thought that they were exempt from the tax hence the arrears. Again, that consultative meeting and hearing has not been denied by the applicant.

57. In my humble view, on the evidence available , I am unable to find that the applicant was denied the right to a hearing before the agency notice were issued. There is also no evidence that the respondent abused its powers or discretion or that the decision to issue agency notices was absurd, irrational or lacked logic.

58. The impugned decision to issue agency notices was reached after according the applicants sufficient hearing through its agent Nyenge and Company Accountants and the several demand notices between 2013 and 2014 culminating into the immediate demand letter.

59. There is no evidence by the applicant that it ever responded to those demand notices issued by the respondent since 2013.

60. The only question would be whether the said agency notices were issued within the legal parameters. Section 96 of the Income Tax Act Cap 470 Laws of Kenya stipulates that (2) The Commissioner may write 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.***

61. I find that the respondent in issuing agency notices, having first given several demand notices to the applicant and having held personal discussions with the applicant's agent Nyenge and Company Accountants, which facts are not denied by the applicant, acted within the law and was therefore justified in issuing the agency notices.

62. Albeit the applicant claims that it settled all the taxes due and that it infact over paid the said taxes according to its own calculations, the applicant has not challenged the respondent's deposition and averments that the applicant was asked to provide to the respondent original receipts for payments and or pay-in slips to enable reconciliation to take place, which request was never acceded to by the

applicant.

63. Accordingly this court is unable to believe the applicant's theory that it had cleared all the tax arrears and that it had even over paid the same and that therefore the agency notices were arbitrary, oppressive and or intended to intimidate the applicant and scuffle its business operations. I further do not find any material to justify the claim that the respondent in issuing those agency notices acted irrationally, unreasonably or in excess of its statutory powers.

64. From the several demand notices and reminders send to the applicant by the respondent and to which no response was received from the applicant, and from the one on one consultations held between the applicant's accountants and the respondent's officials, I am satisfied that the applicant was made aware of the basis of the decision to issue agency notices which is grounded in Section 96 of the Income Tax Act Cap 470 Laws of Kenya. In **Board of Education V Rice [1911] AC. 197 at page 182** Lord Loreburn L.C.(cited with approval by Nyamu J (as he then was in the matter of **Paul Mugeithi Joel Vs Minister for Local Government & Another [2008] e KLR** stated that:

> ***"When an administrative agency is formulating a decision circumstances to which the principles of natural justice are applied, it need not observe the strict procedure of a court of law.***

65. The learned Judge quoted the decision by Lord Loreburn L.C. as follows:

> "In ***such cases the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer oath and need not examine the witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their ………"***

66. In my humble view, the applicant has equally failed to demonstrate that the decision to issue agency notices is such that no such a person or body properly directing itself on the relevant law and acting reasonably could have reached that decision (see **Associated Provincial Pictures Vs Wednesbury Corporation [1948] 1KB 223** per Lord Green MR).

67. The respondent in this case, having accorded the applicant a hearing on the tax arrears, and having issued several demand notices and reminders for the said taxes due, in my humble view, when it eventually issued the agency notices, that was the last resort and I find that the applicant has not demonstrated that the decision to issue agency notices was unreasonable or unjustified.

68. The other question for investigation is whether the respondent in issuing the agency notices exceeded its statutory powers. Every public body or administrative agency derives its powers from the statute and therefore is under a duty to act within the statutory provisions. Any decision taken in excess of jurisdiction is void for want of jurisdiction and is a ground for court intervention by way of Judicial Review.

69. But as I have stated above, the respondent, in my humble view, and is not disputed, acted within the confines of Section 96 of the Income Tax Act after giving sufficient notice to the applicant of the taxes due. The applicant has not come out clearly to state what kind of hearing it expected to be accorded before the agency notices were issued to its agents and bankers. The applicant has also failed to demonstrate that the respondent in issuing the agency notices acted in bad faith and in a manifestly unreasonable manner.

70. The applicant has also not demonstrated that the respondent in arriving at the decision that it did, that of issuing agency notices, it failed to take into account relevant factors or that it based its decision on irrelevant factors and which relevant or irrelevant factors they were, in order to invite

this court's intervention in issuing Judicial Review orders sought (see **Republic V Ministry of Planning and Government another exparte professor Mwangi Kimenyi Nairobi HCC Miscellaneous Application 1769/2003.**

71. The applicant has not demonstrated that there exists a different procedure for recovery of taxes due and that the respondent failed to utilize that procedure.

72. The applicant also claimed that the respondent violated the applicant's legitimate expectation to be treated fairly and after due process has been followed and as a result the applicant's business stands to suffer irreparable damage owing to its business capital being withheld illegally. As earlier stated, the decision to issue agency notices was not shown to be guided by unreasonableness or bad faith or illegality or with procedural impropriety. Apart from making those sweeping statements that the demand notices for tax arrears were inaccurate and that they are misleading and tainted with misleading arithmetical errors and that therefore the actions by the respondent are arbitrary as they are inconclusive; as the income tax if any has already been settled, the applicant did not demonstrate how it was unfairly treated. In **Halsbury's Laws of England 4th Edition VOL 1(1) paragraph 92** it is stated as follows regarding legitimate expectations:

> ***" A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation, or from consistent past practice. In all the instances the expectation arises by reason of the conduct of the decision maker, and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded……"***

73. From the facts of this case and the submissions on record by the applicant, there is absolutely no evidence that the applicant was denied the right to fair administrative action, or that it was promised by the respondent some form of benefit and which promise the applicant relied and or acted upon and that later, the respondent resiled from the representation or promise, to the detriment of the applicant, which would amount to acting malafides and an abuse of power.

74. There is no evidence of any fair bargain between the applicant and respondent which the respondent had or was seeking to thwart, this being a principle of fairness for this court to uphold the expectation as being legitimate, as was the case in **Keroche Industries Ltd Vs Kenya Revenue Authority and 5 Others [2007] 2 KLR.**

75. Although the applicant highlighted parts of the authorities filed as being applicable to this case, the **Keroche Industries Ltd** (supra) case can be distinguished from this case in that in the said case, the court found that the charging of tariff was illegal as there was no enabling law permitting the back dating of the charged tariff and moreso, there was evidence that the respondent had issued a composite demand of arrears based on duty not already due, disregarding the fact that the applicant was up to date with payments under the exiting tariff 2404; and that according to evidence gathered from the respondents own documents, the applicant was entitled to a refund yet the respondent went on an expedition to come up with an illegal formula to defeat the refund claim which the court found to be great abuse of power on the part of the respondent.

76. In this case, the applicant has failed to demonstrate that the respondent acted in a particular manner as would amount to abuse of power, or being unreasonable or irrational or acting unfairly.

77. With the unrebutted depositions by the respondent that the applicant simply refused or ignored to avail evidence of pay-in slips and receipts for verification of its claim that the payments it made had been wrongly credited to withholding tax instead of Corporation Tax, this court is unable to find, on the evidence available, that the applicant had cleared all outstanding tax arrears and or that it had even over paid the said tax; and that the respondent had disregarded that fact in demanding for tax arrears; and that in issuing the agency notices it acted arbitrarily malafides oppressively, biased, discriminately and an abuse of power.

78. In the same vein, I find that the **Matiba V Republic [1995- 1998] 1 EA** case cited by the applicant though relevant on the issue of the right to be accorded an opportunity to be heard, is not applicable to this case where I have found that on the material available, the respondent, before issuing agency notices to the applicant, accorded the applicant an opportunity to be heard and there is no evidence that the respondent acted arbitrarily in arriving at the decision to issue agency notices for collection of the taxes due from the applicant pursuant to Section 96 of the Income Tax Act Cap 479 Laws of Kenya.

79. Furthermore, it is the view of this court that the matter of ascertaining a person's total income or corporation tax is set out in the Income Tax Act (See Section 3 of the Act) and not for this court to examine the merits or otherwise of what the respondent assessed. The jurisdiction to determine whether or not the tax as assessed and tabulated by the respondent is accurate lies in the civil courts to order for reconciliation accounts.

80. This court, vested with Judicial Review jurisdiction must act with circumspection not to encroach on the statutory obligations of public authorities and as a result paralyze their operations unless it is demonstrably shown that the public authority has, in making its decision, overreached.

81. Turning to the actual prayers sought by the applicant in the notice of motion dated 22nd August 2014, I am reminded that Judicial Review Orders are discretionary in nature and scope and the court may decline to grant them even if deserved particularly if the court is of the view that there are more efficacious remedies in the circumstances of the case.

82. In the instant case, the applicant has sought an order of prohibition to prohibit the respondent from collecting monies from the applicant's bankers and agents pursuant to the agency notices dated 29th January 2014 and 3rd February 2014 respectively. I have already found that the applicant has not demonstrated the illegality, irrationality or procedural impropriety on the part of the respondent in issuing the agency notices. I have also found that the applicant has not demonstrated the illegality, irrationality or procedural impropriety on the part of the respondent in issuing the agency notices. I have also found that the applicant has not demonstrated that there is absolutely no taxes due and owing to the respondent from the applicant for the period under review as assessed and demanded. I have further found that the applicant has not demonstrated that some form of legitimate expectation due to it has been violated or denied by the respondent's decision of issuing agency notices; In addition, I have found that the applicant has not shown that the respondent in issuing the agency notices acted in excess of jurisdiction and or abused its powers to warrant this court to intervene.

83. Having so found, I also observe that the applicant never sought for any Judicial Review Orders of certiorari to bring into this court for purposes of quashing the decision of the respondent to issue agency notices or to collect taxes from the applicants bankers and agents;

84. According to **Halsbury's Laws of England 4th Edition, Reissue VOL 1(1) page 2012 paragraph 109**, it is observed that:

> " ***The order of prohibition is an order issuing out of the High Court directed to an inferior court or tribunal or public authority which forbids that court or tribunal, or authority to act in excess of its jurisdiction or contrary to law. Prohibition is employed for the control of inferior courts, tribunals and public authorities. Prohibition is concerned with decisions of the future. Prohibition will issue to prohibit a determination in excess of jurisdiction error of law on the face of the record or breach of the rules of natural justice."***

85. The Court of Appeal in **Kenya National Examination Council Vs Republic, Exparte Geoffrey Gathenji Njoroge**(supra) interrogated the applicability of the relief of prohibition in the following manner

> "What ***does an order of prohibition do and when will it issue? It 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 law 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 cause, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings."

86. In this case, I have found that the respondent, in issuing out agency notices was acting within its mandate as stipulated in Section 96 of the Income Tax Act Cap 470 and that it had not acted in excess of that mandate. Further, that it had prior to issuing those agency notices, accorded the applicant a fair hearing and issued several demands and reminders for the tax due; and that there was no breach of the rules of natural justice.

87. Accordingly, and as correctly submitted by the respondent's counsel, the court, in the circumstances of this case is unable to prohibit that which is sanctioned by the statute, to issue agency notices to enforce compliance with Revenue laws and for purposes of safe guarding Government Revenue, where there is no evidence of abuse of power or irrationality or procedural impropriety.

88. In the end, I decline to grant the Judicial Review order of prohibition sought in the notice of motion. I dismiss that prayer for probation.

89. The applicant also sought two orders of Mandamus to compel the respondent to reconcile the applicant's tax account pursuant to the agency notices dated 29th January 2014 and 3rd February 2014; and to compel the respondent to lift the Agency Notices, restraining the respondent from enforcing the said agency notices dated 29th January 2014 and 3rd February 2014.

90. Starting with the latter prayer, which seeks to compel the lifting of the agency notices already issued and to restrain the respondents from enforcing the said agency notices, the law is clear as set out in the case of **KNEC Vs Exparte R. Geoffrey Gathenji Njoroge and 9 Others** (supra) that

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

91. In this case, as per the above authorities, there is no prayer for certiorari and even if there was such a prayer, there is no demonstration that the respondent acted without or in excess of jurisdiction or that it failed to comply with rules of natural justice.

92. Moreso, only an order of certiorari would issue to quash the decision already made to issue agency notices which are meant to enforce collection of tax revenue. An order of Mandamus cannot be a substitute to certiorari or prohibition orders. No such orders of certiorari are sought in these proceedings.

93. On the other hand, Mandamus order would not be available to the applicant to compel reconciliation of the applicant's accounts pursuant to the agency notices issued, as the applicant claims that it paid all the taxes due and that it had overpaid. Furthermore, the work of reconciliation of those accounts, it was not shown, to be one of the statutory duties that the respondent is obliged to perform and that it had refused to perform that duty prompting these Judicial Review proceedings. The case of **KNEC Vs Exparte Geoffrey Gathenji and 9 Others** (supra) remains instructive on the scope and efficacy of an order of Mandamus, citing **Halsbury's Laws of England 4th Edition VOL 1 at page 111 paragraph 89** that:

" ***The order of Mandamus is of a most extensive remedial nature, and it 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 nay be done, in all cases where there is specific legal right and 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 redness is less convenient, beneficial and effectual."

94. At paragraph 90 on " the mandate", the same learned authors state that:

> ***"The order must command no more than the party against whom the application is made 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."***
>
> ***What do these principles mean? They mean that an order of Mandamus will compel 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 had a legal right to expect the duty to be performed….."***

95. The question I Must pose is whether the Kenya Revenue Authority owes a duty to the applicant to reconcile the applicant's tax accounts pursuant to the agency notices issued to the applicant's bankers and agents dated 29th January 2014 and 3rd February 2014.

96. From the record, the applicant has not made any attempt to specify which Section of the law imposes that duty on the respondent to reconcile the applicant's tax accounts. In addition, the applicant's pleadings do not allege that the respondent has refused to perform that statutory duty of reconciling the applicant's tax accounts and or that the applicant had a legal right to expect that legal duty of reconciling the applicant's accounts to be reconciled or be performed and which refusal to perform is to the detriment of the applicant hence, necessitating this court's intervention to compel the respondent to perform that duty.

97. In my humble view, the act of reconciling tax accounts is a general duty implied in the statute, to enable the respondent calculate taxes due and therefore an order of Mandamus cannot require it to be done at once since reconciliation of accounts is a continuous process.

98. In addition, Mandamus cannot compel the lifting of the agency notices issued. Only an injunction or a declaration can restrain or prohibit implementation of the agency notices.

99. For all those reasons, I find that the applicant has not satisfied this court that it deserves the Judicial Review orders of prohibition and Mandamus as sought. Accordingly, the Judicial Review Notice of Motion dated 22nd August 2016 is hereby dismissed. I order that each party bears its own costs of these Judicial Review proceedings.

Dated, signed and delivered in open court at Nairobi this 20th day of September 2016.

R.E. ABURILI

JUDGE.

In the presence of:

Mr Abong for the exparte applicant

Mr Mbaye for the Respondents

CA: Adline