



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISC. APPL. NO. 420 OF 2012**

**IN THE MATTER F AN APPLICATION BY FIVE FORTY AVIATION LIMITED FOR  
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CIVIL AVIATION ACT**

**AND**

**IN THE MATTER OF THE CIVIL AVIATION (CHARGES FOR AIR NAVIGATION  
SERVICES) REGULATIONS, 2011**

**AND**

**IN THE MATTER OF THE CIVIL AVIATION (CHARGES FOR AIR NAVIGATION  
SERVICES) REGULATIONS, 2012**

**ANF IN THE MATTER OF CUSTOMS AND EXCISE ACT CAP 472 LAWS OF KENYA**

**AND IN THE MATTER OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT  
ACT, 2004**

**AND IN THE MATTER OF AGENCY NOTICES REF-CSD/ED/59/D1769 DATED 20<sup>TH</sup>  
NOVEMBER 2012 ISSUED TO DIAMOND TRUST BANK LIMITED, KENYA COMMERCIAL  
BANK LIMITED, EQUITY BANK LIMITED AND BARCLAYS BANK OF KENYA LIMITED**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE KENYA CIVIL AVIATION AUTHORITY....2<sup>ND</sup> RESPONDENT**

**THE MINISTER FOR TRANSPORT.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**EXPARTE: FIVE FORTY AVIATION LIMITED**

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 7<sup>th</sup> December, 2012, the *ex parte* applicant herein, **Five Forty Aviation Limited**, seeks the following orders:
  1. An order of Certiorari does issue to bring the High Court the 1<sup>st</sup> Respondent's decision of 25<sup>th</sup> September 2012 contained and reflected in a letter dated 25<sup>th</sup> September 2012 issued by the 1<sup>st</sup> Respondent to the Applicant, to impose a penalty of 2% under and by virtue of the provisions of Section 225A of the Customs and Excise Act Cap 472 Laws of Kenya on the sum of Kshs 67,296,437.60 for every month the payment had not been made.
  2. An order of certiorari does issue to bring the High Court the 1<sup>st</sup> Respondent's decision of 25<sup>th</sup> September 2012 contained and reflected in a letter dated 25<sup>th</sup> September 2012 issued by the 1<sup>st</sup> Respondent to the Applicant, to take legal and other enforcement measures aimed at recovery of the sum of Kshs 67,296,437.60 as against the Applicant under the provisions of the East Africa Customs Management Act, 2004 including Section 89(2) thereof.
  3. An order of certiorari does issue to bring the High Court the decision of the 1<sup>st</sup> Respondent contained and reflected in the Agency Notice Ref. CSD/ED/59/D1769 dated 20<sup>th</sup> November 2012 issued by the 1<sup>st</sup> Respondent to Diamond Trust Bank Limited declaring the said bank to be the sole agent of Five Forty Aviation Limited and requiring the said bank to pay the Commissioner, Customs Services Department the sum of Kshs 101,455,818/-, being principal duties, penalties and late payment interest allegedly due by Five Forty Aviation Limited for the purpose of being quashed and the said Agency Notice is hereby quashed.
  4. An order of certiorari does issue to bring the High Court the decision of the 1<sup>st</sup> Respondent contained and reflected in the Agency Notice Ref. CSD/ED/59/D1769 dated 20<sup>th</sup> November 2012 issued by the 1<sup>st</sup> Respondent to Kenya Commercial Bank Limited declaring the said bank to be the sole agent of Five Forty Aviation Limited and requiring the said bank to pay the Commissioner, Customs Services Department the sum of Kshs 101,455,818/-, being principal duties, penalties and late payment interest allegedly due by five Forty Aviation Limited for the purpose of being quashed and the said Agency Notice is hereby quashed.
  5. An order of certiorari does issue to bring the High Court the decision of the 1<sup>st</sup> Respondent contained and reflected in the Agency Notice Ref. CSD/ED/59/D1769 dated 20<sup>th</sup> November 2012 issued by the 1<sup>st</sup> Respondent to Equity Bank Limited declaring the said bank to be the sole agent of Five Forty Aviation Limited and requiring the said bank to pay the Commissioner, Customs Services Department the sum of Kshs 101,455,818/-, being principal duties, penalties and late payment interest allegedly due by Five Forty Aviation Limited for the purposes of being quashed and the said Agency Notice is hereby quashed.
  6. An order of Certiorari does issue to bring the High Court the decision of the 1<sup>st</sup> Respondent contained and reflected in the Agency Notice Ref. CSD/ED/59/D1769 dated 20<sup>th</sup> November 2012 issued by the 1<sup>st</sup> Respondent to Barclays Bank of Kenya Limited declaring the said bank to be the sole agent of Five Forty Aviation Limited and requiring the said bank to pay the Commissioner, Customs Services Department the sum of Kshs 101,455,818/-, being principal duties, penalties and late payment interest allegedly due by Five Forty Aviation Limited for the purpose of being quashed and the said Agency Notice is hereby quashed.
  7. An order of prohibition does issue to restrain the 1<sup>st</sup> and or 2<sup>nd</sup> Respondent from collecting, levying and or recovering the sum of Kshs 101,455,818/- or any part thereof from Five Forty Aviation Limited, whether as principal duties, or penalties or late payment interest or otherwise howsoever.
  8. The costs of the instant application be provided for.

### Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by **Nixon Ooko**, a director of the applicant herein on 23<sup>rd</sup> November, 2012.
3. According to the deponent, on 5<sup>th</sup> August 2011, the 3<sup>rd</sup> Respondent published Legal Notice No. 100 of 2011, **Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011** made on 19<sup>th</sup> July 2011 (hereinafter referred to as the 2011 Regulations) in which Regulation 3 thereof provided that:

1. **There shall be paid to the authority by the owner of an aircraft making a flight in the Flight Information, and airspace in Kenya outside the Flight Information Region the charges prescribed in respect of air navigation services provided by the Authority.**
2. **The charges shall be paid in respect of each flight in the Flight Information Region, and airspace in Kenya outside the Flight Information Region of an aircraft at the rates and in the manner determined and notified by the Minister**

4. It was further deposed that the said 2011 Regulations provided in Regulation 5 that any charges to be paid would constitute a debt to the 2<sup>nd</sup> Respondent and if any amounts due and demanded by the 2<sup>nd</sup> Respondent remained unpaid beyond the time specified for payment, the 2<sup>nd</sup> Respondent would recover the same using legal means. Consequently on 26<sup>th</sup> September 2012, the 2<sup>nd</sup> Respondent published an AIP No. 6/11 in accordance with the 2011 Regulations in which it prescribed Regulatory Fees and Charges for Air Navigation Services under Schedule A and B to the AIP No. 6/11 respectively which were to be effective from 1<sup>st</sup> November 2011.
5. It was deposed by the deponent that the Charges for Air Navigation Services and Regulatory Fees prescribed by the 2<sup>nd</sup> Respondent on 26<sup>th</sup> September 2012 had been determined arbitrarily, without due consultations and were irrational, unreasonable and excessive. Consequently, the stakeholders in the aviation industry remonstrated with the 3<sup>rd</sup> Respondent over the adverse effects the Charges for Air Navigation Services and Regulatory Fees prescribed by the 2<sup>nd</sup> Respondent on 26<sup>th</sup> September 2012 would have to their businesses and the 3<sup>rd</sup> Respondent acknowledged the stakeholder's complaints and directed the 2<sup>nd</sup> Respondent to hold consultative meetings with the stakeholders to discuss the implementation of the Charges of Air Navigation Services and Regulatory Fees prescribed by the 2<sup>nd</sup> Respondent on 26<sup>th</sup> September 2012 with a view to proposing a way forward.
6. It was averred that the stakeholders analysed various options available for financing the operations of the 2<sup>nd</sup> Respondent and proposed reviewed regulatory charges, air navigation service charges and passenger service charges which would enable the 2<sup>nd</sup> respondent raise substantial funds to finance both the provision of Air Navigation and Regulatory Service and the stakeholders recommended that there be constituted by the 3<sup>rd</sup> Respondent a committee on charges and services delivery to advise on charges, fees and performance in the industry. The said committee it was averred comprised of representatives from the Ministry of Transport, the 2<sup>nd</sup> Respondent, the Kenya Association of Air Operators, Kenya Airways, Kenya Airports Authority, Air Operators Committee and the International Air Transport Association (IATA). Thereafter, the 2<sup>nd</sup> Respondent published a Report of Review of Regulatory Charges which took into account the views of the stakeholders and in particular the committee on charges and service delivery. In the meantime, the Air Operators Committee advised the stakeholders to continue paying charges for Air Navigation Services and Regulatory Fess based on the rates prescribed by the 2<sup>nd</sup> Respondent under AIC Nos. 10/98, 3/99, 7/00, 9/00, 10/00, 6/02 and 8/05 respectively and accordingly, the Applicant paid for the charges in respect of the Air Navigation Services offered by the 2<sup>nd</sup> Respondent based on the AIC Nos. 10/98, 3/99, 7/00, 9/00, 10,00,6/02 and 8/05 previously issued by the 2<sup>nd</sup> Respondent which payments amounting to the sum of Kshs 16,295,134.50 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents accepted without any objection or reservation whatsoever.
7. It was deposed that in the meanwhile, the provisions of the 2<sup>nd</sup> Respondent's Report of Review of

- Regulatory Charges were adopted by the 3<sup>rd</sup> Respondent who on 5<sup>th</sup> October 2012 published Legal Notice No. 110 of 2012, **Civil Aviation (Regulatory Fees and Charges for Air Navigation Services) Regulations, 2012** (hereinafter referred to as the 2012 Regulations) which prescribed the Regulatory Fees for services offered by the 2<sup>nd</sup> Respondent and Charges for Air Navigation Services offered by the 2<sup>nd</sup> Respondent with effect from 1<sup>st</sup> November 2012 and revoked the 2011 Regulations.
8. However on 25<sup>th</sup> September 2012, the 1<sup>st</sup> Respondent wrote to the applicants advising the applicants that they had an outstanding balance in respect of Charges for Air Navigation Services of Kshs 67,296,437.60 for the period of November 2011 to August 2012 and that although consultative meetings between the Air Operators and the 2<sup>nd</sup> Respondent to review the charges and fees which had become effective from 1<sup>st</sup> November 2011 were going, there was need to abide by the provisions of the 2011 Regulations until such time as the same would be reviewed.
  9. Consequently, the 2<sup>nd</sup> Respondent demanded payment by the Applicant of the sum of Kshs 67,296,437.60 within 14 days from 25<sup>th</sup> September 2012 in default of which a penalty of 2% would accrue on the principal amount for every month the payment had not been made under and by virtue of the provisions of Section 225A of the **Customs and Excise Act** Cap. 472 Laws of Kenya. The 2<sup>nd</sup> Respondent further informed the applicant that Section 89(2) of the **East African Community Customs Management Act** (hereinafter referred to as the EACCMA) empowered the 2<sup>nd</sup> Respondent to take legal and other enforcement measures aimed at recovery of the sum of Kshs 67,296,437.60.
  10. According to the deponent, the applicant attempted conciliation with the 2<sup>nd</sup> Respondent over the issue of the alleged outstanding Air Navigation Charges amounting to Kshs 67,296,437.60 and on 15<sup>th</sup> November 2012, wrote to the 2<sup>nd</sup> Respondent further to the meeting between the parties on 13<sup>th</sup> November 2012 informing the 2<sup>nd</sup> Respondent *inter alia* that the 2011 Regulations pursuant to which it was claiming the outstanding sums had been revoked vide the 2012 Regulations and the applicant believed the outstanding sum in respect of Air Navigation Charges to be Kshs 5,866,255/- in respect of the months of August 2012 and September 2012. The applicant further offered the 2<sup>nd</sup> Respondent a proposal to settle the outstanding Air Navigation charges in respect of August 2012 on 23<sup>rd</sup> November 2012 and that of September 2012 on 7<sup>th</sup> December 2012. The applicant subsequently established that what is in fact due and owing to the 1<sup>st</sup> Respondent is the sum of Kshs 14,590,993.20 which according to the applicant it intend to honour in due course.
  11. However, on 20<sup>th</sup> November 2012, the 2<sup>nd</sup> Respondent served Agency Notices Ref. CSD/ED/59/D1769 allegedly issued by the 2<sup>nd</sup> Respondent under the powers conferred upon it under and by virtue of the provisions of Section 131 of the EACCMA upon Diamond Trust Bank Limited, Kenya Commercial Bank Limited, Equity Bank Limited and Barclays Bank of Kenya Limited respectively and declared the said financial institutions to be the sole agents of the Applicant and required each of them to pay the Commissioner, Customs Services Department the sum of Kshs 101,455,818/-, allegedly being principal duties, penalties and late payment interest allegedly due by the Applicant, from any monies which may within the following 12 months from 20<sup>th</sup> November 2012 be held by the said Banks for, or due by them to the Applicant in the manner set out in the said Agency Notices. The 2<sup>nd</sup> Respondent further required the banks aforesaid to confirm to it availability of funds to facilitate processing of Payments Authorization Forms (F147).
  12. It was the applicant's case the Regulatory Fees and Charges for Air Navigation Services under Schedule A and B to the AIP No. 6/11 respectively prescribed by the 2<sup>nd</sup> Respondent on 26<sup>th</sup> September 2012 to be effective from 1<sup>st</sup> November 2011 were determined by the 2<sup>nd</sup> Respondent arbitrarily, without due consultations, are excessive, irrational and unreasonable within the Wednesbury's principle of unreasonableness and consequently, the Regulatory Fees and Charges for Air Navigation Services under Schedule A and B to the AIP NO. 6/11 respectively prescribed by the 2<sup>nd</sup> Respondent on 26<sup>th</sup> September 2012 are illegal, null and void and of no legal effect. Alternatively, the Regulatory Fees and charges for Air Navigation Services under Schedule A and B to the AIP 6/11 respectively prescribed by the 2<sup>nd</sup> Respondent on 26<sup>th</sup> September 2012

- constitutes a debt to the 2<sup>nd</sup> Respondent whenever the same is demanded by the 2<sup>nd</sup> Respondent from the applicant and the same remains unpaid beyond the time specified for payment. Consequently, the 2<sup>nd</sup> Respondent may recover the same using due process of law in the manner set out in the provisions of the 2011 Regulations.
13. According to the deponent, the Applicant legitimately expected that during the period from November 2011 and August 2012, the 2<sup>nd</sup> Respondent would levy charges in respect of the Air Navigation Services offered by it based on the AIC Nos. 10/98,3/99,7/00,9/00,10,00,6/02 and 8/05 respectively.
  14. It was contended that by reason of the matters set out hereinabove, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are stopped from levying collecting and recovering charges in respect of the Air Navigation Services offered by the 2<sup>nd</sup> Respondent based on the provisions of the law revoked the 2011 Regulations and that the 1<sup>st</sup> Respondent's decision of 25<sup>th</sup> September 2012 to impose a penalty of 2% under and by virtue of the provisions of Section 225A of the **Customs and Excise Act** Cap. 472 Laws of Kenya on the sum of Kshs 67,296,437.60 for every month the payment had not been made is *ultra vires* the provisions of the **Civil Aviation Act** Cap 394 Laws of Kenya, including Section 8C thereof and the now revoked 2011 Regulations.
  15. To the applicant, the 1<sup>st</sup> Respondent's decision of 25<sup>th</sup> September 2012 to take legal and other enforcement measures aimed at recovery of the sum of Kshs 67,296,437.60 as against the Applicant under the provisions of the EACCMA including Section 89(2) thereof is *ultra vires* the provisions of the **Civil Aviation Act** Cap. 394 Laws of Kenya, including Section 8C thereof and the now revoked the 2011 Regulations. It was contended that the 1<sup>st</sup> Respondent's decision aforesaid decisions of 25<sup>th</sup> September 2012 was made without jurisdiction, was illegal, null and void and of no legal effect. Similarly, the measures taken by the 1<sup>st</sup> Respondent on 20<sup>th</sup> November 2012 to issue Agency Notices pursuant to the powers conferred upon it under and by virtue of the provisions of Section 131 of the EACCMA contravene the principle of proportionality.
  16. It was further contended that the 1<sup>st</sup> Respondent's decision of 20<sup>th</sup> November 2012, to issue Agency Notices Ref. CSD/ED/59/D1769 upon Diamond Trust Bank Limited, Kenya Commercial Bank Limited, Equity Bank Limited and Barclays Bank of Kenya Limited respectively purportedly under the powers conferred upon it under and by virtue of the provisions of Section 131 of the EACCMA is *ultra vires* the provisions of the **Civil Aviation Act** Cap 394 Laws of Kenya, including Section 8C thereof and the now revoked the 2011 Regulations.
  17. According to the deponent, the 1<sup>st</sup> Respondent conduct to recover charges otherwise due under the provisions of the **Civil Aviation Act** Cap 394 Laws of Kenya as though the said charges constitute customs and excise duties within the meaning of the term under the provisions of the **Customs and Excise Act** Cap 472 Laws of Kenya and the EACCMA respectively constitutes abuse of the powers conferred upon the 1<sup>st</sup> Respondent under the said provisions of law. To the applicant, the 1<sup>st</sup> Respondent has frustrated the legislative purpose set out under of the **Civil Aviation Act** Cap 394 Laws of Kenya, the **Customs and Excise Act** Cap 472 Laws of Kenya and the EACCMA respectively.
  18. It was submitted that by holding consultations the 2<sup>nd</sup> Respondent admitted that the earlier publication was without consultation, contrary to the rules of natural justice and in violation of the ex parte applicant's right to an administrative action which is procedurally fair under Article 47(1) of the Constitution hence the provisions of the 2011 Regulations ought to be construed with alterations, adaptations, qualifications and exceptions necessary to bring them in conformity with the Constitution in particular Article 47 of the Constitution. It was therefore submitted that the 2011 Regulations are null and void due to non-consultation and being in violation of Article 47(1) of the Constitution and the Respondent cannot recover from the ex parte applicant the sum of Kshs 101,455,818/- .
  19. It was submitted on behalf of the applicant that by holding consultations with stakeholders after the publication of the AIP No. 6/11 on 26<sup>th</sup> September, 2012, is an acknowledgement that its decision was made without due consultations, contrary to the rules of natural justice and in violation of the ex parte applicant's right to administrative action under Article 47 of the Constitution.
  20. It was submitted that by virtue of section 7 of the Sixth Schedule to the Constitution, the

- provisions of the repealed **Civil Aviation Act** and in particular section 3 thereof and Legal Notice No. 100 of 2011, made on 19<sup>th</sup> July, 2011 ought to be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the Constitution of Kenya particularly Article 47 of the Constitution.
21. It was submitted that it was unlawful for a public authority to act in a way which is incompatible with a fundamental right under the Bill of Rights and that the provisions of Legal Notice No. 100 of 2011 must be given effect in a way which is compatible with the right to fair administrative action which include consultation, notice or hearing and requirements of natural justice and that consultation must be carried out with open mind though the same are not binding on the decision maker.
  22. It was therefore submitted that Legal Notice No. 100 of 2011 was null and void ad of no legal effect hence the 1<sup>st</sup> and 2<sup>nd</sup> respondents could not recover from the ex parte applicant Kshs 101,455,818 and a prohibition ought to issue.
  23. With respect to the agency notices, it was submitted that the 1<sup>st</sup> Respondent's decision of 25<sup>th</sup> September, 2012 was ultra vires the provisions of the **Civil Aviation Act** Cap 394 Laws of Kenya including section 8C thereof and the now revoked **Civil Aviation (Charges for Air Navigation Services) Regulations**, 2011. According to the applicant, the 1<sup>st</sup> Respondent cannot recover air navigation charges as though the same are customs duty under either the **Customs and Excise Act** Cap 472 or EACCMA, 2004. It was submitted that the 1<sup>st</sup> Respondent's decisions of 25<sup>th</sup> September, 2012 defeated the legislative intent set out under the 2011 Regulations.
  24. According to the applicant it legitimately expected that during the negotiations the Regulations, 2011 would not apply hence the 1<sup>st</sup> Respondent's decision contravene the principle of [proportionality since there are other means of recovery of the debt hence the said action amounted to an abuse of power.

### **1<sup>st</sup> Respondent's Case**

25. In response to the application, the 1<sup>st</sup> Respondent filed a replying affidavit sworn by **Alfred Nzoka Kathonde**, a Senior Revenue Officer of the 1<sup>st</sup> Respondent herein on 13<sup>th</sup> May, 2013.
26. According to the deponent, his duty as officer in charge of Debt Management are the collating of outstanding taxes, rising demands of the same and enforcing payment of outstanding debts.
27. Section 4A of the **Air Passenger Service Charge Act** Cap 457, it was contended gives the 1<sup>st</sup> respondent power to appoint, collect and account for Air Passenger Charge imposed by Cap 475. In the deponent's view, based on section II(4) of the **Kenya Revenue Authority Act**, Cap 469 (also referred to as the **KRA Act**) the 1<sup>st</sup> respondent, Commissioner of Customs in administering the Air passenger Service Charge was acting in accordance with duly and legally donated statutory powers as mandated by law more so as Part II of the First Schedule to the **KRA Act** Cap 469 also provides that the **Civil Aviation Act** Cap 394 is one of the written laws that the 1<sup>st</sup> respondent can administer and section 8(c)(1) of the **Civil Aviation Act** Cap 394 donates to the Minister the power to make regulations as regards fees.
28. Pursuant to the provisions of Section 61(2) and in order to give effect to the provisions of Section 61(3) of the **Civil Aviation Act**, on 12<sup>th</sup> September 2011, the 2<sup>nd</sup> Respondent published and Aeronautic Information Circular (AIC) No. 6/11 (white 109) stating the charges for Air Navigation Services and Regulating fees effective 10<sup>th</sup> November 2011. In his view, the Air charges were prescribed by law and the 1<sup>st</sup> Respondent was exercising its statutory mandate in the collection of the taxes and that the 1<sup>st</sup> Respondent was neither present nor invited to participate in any meetings held to review the charges imposed by statute. Further the Report of the Review of Regulation charges could not override statutory charges.
29. The Air operator's advice that stakeholders continue to pay Air Navigation Services based on the Rates prescribed by the 2<sup>nd</sup> Respondent under AIC Nos. 10/98, 3/99/7/00/9/100, 10/00/6/02 and 8/05 respectively was not backed by law. In any event there is no proof of such advice and even if there was the committee could not oust the express provisions of law.
30. While admitting that the provisions of the 2<sup>nd</sup> Respondent's Report of Review of Regulatory

- Charges led to publication on 5<sup>th</sup> October 2012 of Legal Notice No. 110 of 2012 and that the same revoked the 2011 Regulations, it was contended that Legal Notice No. 100 of 2011 was in effect on November 2011 to 5<sup>th</sup> October 2012 when it was revoked hence it was in force from 5<sup>th</sup> August 2011 pursuant to section 27(1) of the **Interpretation and General Provisions Act**, Cap 2 of the Laws Kenya.
31. It was contended that the 2<sup>nd</sup> Respondent received the payments and total amount made by the Applicant without prejudice to receiving the legal duty owed under the 2011 Regulations and that the 2<sup>nd</sup> Respondent is mandated by Sections 5 of the **Kenya Revenue Authority Act**, Cap 469 (hereinafter referred to as the **KRA Act**) as read together with Part II of the second schedule to the Act to be an agent of the Government and it will not reject any payment made in satisfaction of taxes owing. According to the deponent, the law does not bar the 2<sup>nd</sup> Respondent from enforcing the provisions of the 2011 Regulations in regard to the increased payment and that on September 25<sup>th</sup> 2012, the Applicant was informed by the 1<sup>st</sup> Respondent of the need to abide by the law by paying the taxes owed vide the demand letter and that on November 2012 the 2<sup>nd</sup> Respondent issued Agency Notices to the Applicant pursuant to Section 131 of the EACCMA in respect of the amount covered by the period November 2011 to August 2012.
32. The 2<sup>nd</sup> Respondent's position was that it did not make any legal promise, or representation to the Applicant that it would not enforce the taxes set out in the 2011 Regulations which undertaking could in any event not have had the backing of the law as there can be no estoppels in the face of express statutory provisions. It was therefore contended that an order of Certiorari cannot lie as against the 2<sup>nd</sup> Respondent as there has been no illegality, or breach of natural justice.
33. It was submitted on behalf of the 1<sup>st</sup> Respondent that the Legal Notice No. 100 of 2011 having been published was law and should have been obeyed. It was submitted based on **Republic vs. KRA ex arte Aberdare Freight Services Ltd Nbi Civil Appl. No. 946 of 2004**, that there can be no breach of legitimate expectation or estoppel in the face of express statutory provisions.
34. It was submitted that section 5(1) of the **KRA Act**, Cap 469, gives the 2<sup>nd</sup> Respondent the legitimate powers to collect and receive revenue while section 131(1) of EACCMA and the **Customs and Excise Act** provide for issuance of Agency Notices hence the actions of the Respondents were lawful and not ultra vires. According to the 1<sup>st</sup> Respondent there was no frustration of legislative intent and the principle of proportionality was not contravened.
35. In the absence of illegality or breach of the rules of natural justice, it was submitted that the orders sought could not issue.

### **2<sup>nd</sup> Respondent's Case**

36. On the part of the 2<sup>nd</sup> Respondent a replying affidavit was filed sworn by **Cyril Simiyu Wayongo**, its legal officer on 26<sup>th</sup> March, 2013.
37. According to him, in exercise of his powers under Section 8C of the **Civil Aviation Act**, on 5<sup>th</sup> August 2011, the 3<sup>rd</sup> Respondent herein, being the Minister responsible for matters relating to civil aviation made and published in the Kenya Gazette the 2011 Regulations" and pursuant to the provisions of Section 6I (2) of the **Civil Aviation Act**, and in order to give effect to the provisions of Section 6I (3) of the **Civil Aviation Act**, on 12<sup>th</sup> September 2011, the Authority published the **Aeronautical Information Circular (AIC) No. 6/11 (White 109)** clearly stating that the Charges for Air Navigation Services ("ANS Charges") and Regulatory Fees under the 2011 Regulations would be effective from 1<sup>st</sup> November 2011. Having become effective on 1<sup>st</sup> November 2011, the ANS Charges and Regulatory Fees would, in law, be applicable until they were revoked or suspended via a publication in the Kenya Gazette and the same were revoked with the coming into force of the 2012 Regulations on 1<sup>st</sup> November 2012.
38. It was deposed that the revised charges for ANS Charges and Regulatory Fees prescribed in the 2011 Regulations were based on a clear need and the lack of sufficient finances by the Authority to fund its infrastructural development costs and/or carry out its statutory functions and mandate under the **Civil Aviation Act**.
39. The deponent however deposed that following complaints by civil aviation industry stakeholders

regarding the revised ANS Charges and Regulatory Fees published under the 2011 Regulations, on 31<sup>st</sup> January 2012, the Authority accorded the stakeholders audience and opportunity to be heard on their representations and/or complaints regarding the 2011 Regulations and to this end, on 31<sup>st</sup> January 2012, the Authority convened an in-house meeting at which it resolved to convene a meeting with the industry stakeholders, including the Ex parte Applicant, to sensitize the industry on the revised ANS Charges and Regulatory Fees and to address pertinent issues arising out of their implementation. Pursuant to a resolution of the said in-house meeting, on 9<sup>th</sup> February 2012, the Authority convened an aviation stakeholders' consultative meeting at the East African School of Aviation at which the Applicant was represented and the stakeholders meeting resolved *inter alia* to review the Air Navigation Services and Regulatory Fees respectively and to appoint two committees of not more than 11 persons to develop practical and implementable solutions and to report to a meeting of all the stakeholders. Subsequent stakeholders' meetings were held on 21<sup>st</sup> and 23<sup>rd</sup> February 2012 and in all the above stakeholders' meetings, the Applicant was represented. However, none of the stakeholders' meetings resolved to stay and/or put on hold the implementation of the ANS Charges and the Regulatory Fees prescribed under the 2011 Regulations nor did the Authority by way of any Aeronautical Information Circular revoke or replace AIC No. 6/11 (White 109) which circular had commenced the application of the ANS Charges and Regulatory Fees prescribed under the 2011 Regulations. Accordingly, the 2011 Regulations and the Aeronautical Information Circular (AIC) No. 6/11(White 109) remained in force until they were revoked.

40. It was contended that since the Authority is the only body under the **Civil Aviation Act** mandated to impose, levy and charge for Air Navigation Services, the Air Operators Committee is not a body statutorily mandated to advise, authorize and/or issue directions regarding implementation or stoppage thereof of ANS Charges and Regulatory Fees. The deponent, however confirmed that the Authority received the payments (Kshs.16,295,134.50/=) made by the ex parte Applicant without prejudice to any action to recover accrued amounts under the 2011 Regulations and that there is nothing in law that bars the Authority from enforcing the provisions of the 2011 Regulations as the said Regulations came in force on 1<sup>st</sup> November 2011 and remained in force until they were revoked with the coming into force of the 2012 Regulations on 1<sup>st</sup> November 2012.
41. While reiterating the position taken by the 1<sup>st</sup> Respondent, it was contended that all the actions attributed to the Authority were in fact performed by the 1<sup>st</sup> Respondent and that Authority is aware of the said actions and approves of them to the extent that the 1<sup>st</sup> Respondent acted within the law and in its mandate to collect revenues for and on behalf of the Authority.
42. That in response of paragraph 31 of the Verifying Affidavit, the Authority avers that it did not make any representation or promises or acted in any manner as to give rise to any form of *estoppel* hence the order of *Prohibition* sought by the Applicant to restrain the Authority and the 1<sup>st</sup> Respondent herein from collecting levying and or recovering the sum of Kshs.101, 455, 818/= does not lie against the Authority and urge this Honourable Court to dismiss the Application herein with costs.
43. It was submitted on behalf of the 2<sup>nd</sup> Respondent that the revised charges for ANS Charges and Regulatory Fees prescribed in the 2011 Regulations were not arbitrary, unreasonable or irrational but were based on clear need and the lack of sufficient finances by the Authority to fund its infrastructural development costs and/or carry out its statutory functions under the repealed Act.
44. It was submitted that the 2011 Regulations were effective until they were revoked by the 2012 Regulations hence the Authority was bound to apply the same. As the Authority did not make any decision or representation to the Applicant or to any other stakeholder that the 2011 Regulations were suspended and as the purported representation came from a body other than the Authority, it was submitted that legitimate expectation was inapplicable as the said principle cannot operate outside the law.

### **Determinations**

45. I have considered the application, the affidavits filed, the submissions and the authorities cited.
46. The applicant's case as I understand it is hinged on the fact that the Legal Notice No. 100 of 2011,

***Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011*** made on 19<sup>th</sup> July 2011 was arbitrary, unreasonable or irrational as the same was made without consultation with the stakeholders in the industry hence there was a breach rules of natural justice contrary to the provisions of Article 47 of the Constitution. It is not in doubt that the said Regulations, 2011 were in force until they were revoked by the publication on 5<sup>th</sup> October 2012 of Legal Notice No. 110 of 2012, ***Civil Aviation (Regulatory Fees and Charges for Air Navigation Services) Regulations, 2012*** (hereinafter referred to as the 2012 Regulations) which prescribed the Regulatory Fees for services offered by the 2<sup>nd</sup> Respondent and Charges for Air Navigation Services offered by the 2<sup>nd</sup> Respondent with effect from 1<sup>st</sup> November 2012.

47. In these proceedings no orders have been sought against Legal Notice No. 100 of 2011, ***Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011***. The orders which this application is directed against are in effect decisions which were made with a view to implementing the said legal notice which the applicant allege was published in contravention of Article 47 of the Constitution. In other words the applicants are seeking to challenge the decision giving effect to that Legal Notice which is not the subject of these judicial review proceedings. In the light of that fact the actions or decisions taken with a view implementing or giving effect to the Legal Notice cannot be the subject of these judicial review proceedings. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

**“Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law.”**

48. In my view without seeking a decision directed at the Regulations, 2011, it would be futile to grant orders challenging actions taken pursuant to the said Legal Notice. The applicant in my view ought to have sought an appropriate relief in appropriate legal proceedings seeking a declaration that the said Legal Notice was unlawful and pursuant thereto seek nullification of all the consequential actions which are the subject of these proceedings.

49. The applicant however contend that the Respondents, by their actions of negotiating with the stakeholders and subsequently replacing the Regulations, 2011 with Regulations, 2012 must be taken to have waived its rights under the Regulations, 2011 hence the decision to fall back on them went against the applicant’s legitimate expectations.

15. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held that:

**“ Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way...”**

50. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held:

**“The general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims.....Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that in judging a case a judge should achieve**

justice, weigh the relative “strength of expectation” of the parties. For a legitimate expectation to arise the decision must affect the other person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker not to be withdrawn without giving him first an opportunity of advancing reasons for contending that they should be withdrawn.....A representation giving rise to legitimate expectation must however be based on full disclosure by the applicant. Thus where he does not put all his cards face up on the table it would not be entitled to rely on the representation. In this case any legitimate expectation has clearly been taken away firstly by the conduct of the applicant and the provisions of the Statute Act and therefore there is no discretion.”

51. It follows that the concept of legitimate expectation cannot operate against the law. Legitimate expectation as the phrase indicates must be legitimate and cannot be based on actions which are patently illegal. As was held in **Republic vs. Kenya Revenue Authority & Another ex parte Kronos LCS Centre East Africa Limited [2012] eKLR:**

**“Legitimate expectation can only operate inside and not outside the law. One can only rely on legitimate expectation when the law has been complied with. Where taxes have not been paid then the Applicant cannot rely on the principle of legitimate expectation to avoid payment of taxes.”**

52. Whereas it is true that a person may acquire legitimate expectation from the conduct or express promises made by an authority, the words of *DE Smith Woolf and Jowell* in *Judicial Review of Administration Action, 5<sup>th</sup> Edition pg. 566*, ought to be taken into account to the effect that:

**“Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims.”**

53. In this case, the question that arises is whether the Respondents did promise or conduct themselves in a manner which gave rise to a legitimate expectation on the part of the applicant that the 2011 Regulations would not be enforced. There is no allegation that there was an express promise. The applicant however contends that the fact that the Respondents acceded to negotiate was an implicit indication that the 2011 Regulations would not be enforced. I am not satisfied that the mere fact that a party accedes to negotiate without more necessarily leads to the conclusion that the decision being negotiated will not be enforced. There must be evidence that the said person did evince an intention not to enforce the said decision. In this case I am not satisfied that the Respondents did either expressly or by implication evince an intention not to enforce the 2011 Regulations. As was held in **Coastal Bottlers Limited vs. Commissioner of Domestic Taxes [2008] eKLR:**

**“The letter relied upon does not contain any promise that the Respondent would act in a certain way nor is the letter evidence of a practice that the Applicant would expect to continue and which the Respondent failed to follow.”**

54. The applicant further relied on the advice of the Air Operators Committee to stakeholders to continue paying charges for Air Navigation Services and Regulatory Fees based on the rates prescribed by the 2<sup>nd</sup> Respondent under AIC Nos. 10/98, 3/99, 7/00, 9/00, 10/00, 6/02 and 8/05. It was not contended that the said Committee had the powers to bind the Respondents. As was held in **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012** “such an expectation arises where a *decision maker* has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including

that a hearing will be held before a decision is taken).” It therefore means that the representation must emanate from either the decision maker or from someone with the authority to bind the decision maker. A decision maker cannot be bound by a representation made by a third party. In this case, no attempt was made to show the binding effect on the Respondents of the advice given by the Air Operator’s Committee.

55. It was further submitted that the Respondents ought to have resorted to other means of recovery of the tax other than by way of issuance of agency notices. Section 5(2)(a)(ii) of the **Kenya Revenue Authority Act**, Cap 469 provides that:

**“In the performance of its functions under subsection (1), the Authority shall:**

a. **Administer and enforce-**

ii. **The provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all the revenue in accordance with those laws.**

56. Section 131 of the EACCMA on the other hand provides:

**1) The Commissioner may, by written notice addressed to any person (in this section called the agent) appoint that person to be the agent of another person (in this section called the principal) for the purposes of collecting duty due under this Act from the principal where the Commissioner is satisfied that the agent—**

**(a) owes or is about to pay money to the principal;**

**(b) holds money for or on account of the principal;**

**(c) holds money on account or some other person for payment to the principal;**

**(d) has authority from some other person to pay money to the principal;**

57. Although the applicant alleges that the Respondents acted *ultra vires* the provisions of the **Civil Aviation Act** Cap 394 Laws of Kenya, including Section 8C thereof and the now revoked 2011 Regulations I am not satisfied that the Respondents’ actions were without or in excess of jurisdiction. As was held in **Republic vs. Kenya Sugar Board & 2 Others exp the Commodity House Ltd e[2007] KLR:**

**“KRA is an agency of the Government of Kenya under the general supervision of the Minister for Finance as provided for under Section 5 of the Kenya Revenue Authority Act... The principal agency for maintaining that predictability and certainty in the collection of revenue and the enforcement of the mutual tariff regime is the Kenya Revenue Authority, and unless such body overreaches its mandate in terms of the enabling statutes (under the Schedule to the Kenya Revenue Authority Act, Chapter 469, Laws of Kenya) and in this case, the Customs and Excise Act, Chapter 472, Laws of Kenya and the East African Community Customs Management Act, 2004, (and KRA has not overreached its mandate in the matters of these applications) there is no basis in law for an order of prohibition.”**

58. In this case I have similarly considered the legislation guiding the operations of the Kenya Revenue Authority and the allegations made herein and I am not satisfied that the Respondents or the Kenya Revenue Authority did overreach its mandate. The mere fact that the Respondents could resort to other legal means to recover the taxes due other than by way of agency notices

does not necessarily render their actions liable to being quashed.  
59. I hold that Legal Notice No. 100 of 2011, ***Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011*** made on 19<sup>th</sup> July 2011 was valid and binding until the same was revoked on 1<sup>st</sup> November 2012 vide Legal Notice No. 110 of 2012, ***Civil Aviation (Regulatory Fees and Charges for Air Navigation Services) Regulations, 2012*** published on 5<sup>th</sup> October 2012. Therefore any taxes which were payable before the revocation of ***Civil Aviation (Charges for Air Navigation Charges) Regulations, 2011*** ought to have been paid in accordance with the said Regulations.

**Order**

60. In the premises I find no merit in the Notice of Motion dated 7<sup>th</sup> December, 2012 which I hereby dismiss with costs to the Respondents.

**Dated at Nairobi this 16<sup>th</sup> day of January, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Ngugi for the 1<sup>st</sup> Respondent***

***Mr Malonza for the 2<sup>nd</sup> Respondent***

***Cc Patricia***