REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 312 OF 2011

IN THE MATTER OF: An application by Jaffer Mujtaba Mohamed for Judicial Review orders under Order 53 of the Civil Procedure Rules, 2010, and Sections 8 and 9 of the Law Reform Act Chapter 26 of the Laws of Kenya for Orders of Mandamus Certiorari and Prohibition.

IN THE MATTER OF: Section 78, 84, 88, 92 and 96 of the Income Tax Act (Chapter 470 of the Laws of Kenya).

IN THE MATTER OF: The decision by the Senior Assistant Commissioner, Investigations and Enforcement Department S/Region of the Kenya Revenue Authority contained in a letter dated 24th November 2011 in respect of additional assessment notice for the years 2007 and 2009 purporting to exercise his powers under Section 77 of the Income Tax Act and by letter dated 25th November 2011 purporting to exercise his powers under Section 96 of the Income Tax Act and Section 19 of the VAT Act by appointing Diamond Trust Bank Kenya Limited, Mombasa Branch, as its Agent to collect the sum of Kshs.180,000,000/= allegedly being tax due and arising from additional assessment against the said Jaffer Mujtaba Mohamed.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

EXPARTE – JAFFER MUJTAB MOHAMED

JUDGEMENT

1. By a Notice of Motion dated 20th December, 2011, the *ex parte* applicant herein, **Jaffer Mujtab Mohamed,** seeks the following orders:

> **1) THAT this Court do issue an order of *Certiorari* to remove into this Honourable Court the decision of the Kenya Revenue Authority through the Senior Assistant Commissioner Investigations & Enforcement Department S/Region by letter dated 24th November, 2011 and enclosing additional assessments of income tax for the years 2007 and 2009 dated 25th**

November 2011, duly stamped by the Senior Assistant Commissioner Southern Region making an additional assessment of income tax in the sum of Kshs.90,000,000 for the year 2007 and similar sum for the year 2009 respectively against the applicant and that this Honourable Court be pleased to quash the same.

2) <u>THAT</u> this Court do issue an order of *Certiorari* to remove into this Honourable Court a decision by the Kenya Revenue Authority through the Senior Assistant Commissioner Investigations & Enforcement Department S/Region contained in a letter dated 25th November 2011 appointing Diamond Trust Bank, Mombasa Branch the agent of the Applicant under Section 96 of the Income Tax and Section 16 of the VAT Act, to collect the amount of additional tax due from the Applicant and that this Honourable Court be pleased to quash the same.

3) <u>THAT</u> this Court do issue an order of Prohibition directed to the Respondent prohibiting it from collecting monies held on behalf of the Applicant by Diamond Trust Bank, Mombasa Branch, or any other person or agent that the Respondent may appoint as the agent of the applicant for purposes of collecting the tax alleged to be due pursuant to the additional assessment.

4) <u>THAT</u> this Court do issue an order of *Mandamus* compelling the Respondent to provide written reasons and grounds upon which the additional tax assessment in the sum of Kshs.180,000,000 as communicated in the letter dated 24th November 2011 aforesaid has been made.

5) <u>THAT</u> the costs of and occasioned by this Application be provided for.

6) Costs of this application be provided.

<u>Ex Parte Applicant's Case</u>

2. The same application was based on the Statement filed on 6th December, 2011 and was supported by the applicant's verifying and replying affidavits sworn on 6th December, 2011 and 23rd July, 2012 respectively.

3. According to the applicant, with effect from the 1st of January 2006, he was employed by Grain Bulk Handlers Limited as a Business Development Director and in April 2009, he was appointed the Managing Director of the said company a position he held as at the time of the swearing of the affidavit.

4. He deposed that during the period of his employment, he had not been engaged in any other business and, apart from the emoluments and benefits to which he was entitled under his contract of employment, he did not have any other source of income. He averred that he had at all times made his Tax Returns as is required under the ***Income Tax Act*** for which the requisite tax had been remitted by his employers.

5. However, on the 27th of July 2011, he received a letter from the Respondent requiring him to produce for its examination, his personal bank account statements, including loans and credit/debit cards statements, Personal Income Tax Annual Returns and any other document that would affect his tax liability. He accordingly, proceeded to instruct his tax advisor, S. K. Kamau of Kungu & Company CPA (K) to submit to the Respondent the documents that it required and the said advisor wrote to the Respondent submitting the applicant's tax returns for the years 2007 – 2010 and the bank statements in respect of both his Kenya Shilling and US Dollar accounts held in Prime Bank Limited.

6. It was deposed that neither the applicant's said advisor nor the applicant received any further communication from the Respondent save for two meetings held between his advisor and the Respondent's representatives on 10th November 2011 and 17th November 2011 respectively in which the Respondent advised the said agent that it was studying the documents and would revert.

7. By letter dated the 24th November 2011, the Respondent wrote to the applicant forwarding additional tax assessment notices dated 25th November 2011 related to alleged undeclared income for tax purposes.

8. According to the applicant, the first additional assessment notice in respect of the year 2007 alleged that he had earned and not declared Kshs.300,000,000 in business and Kshs.15,867,688 and was therefore required to pay additional tax of Kshs.90,000,000 yet in 2007 he was residing in Dubai where he only earned an income as Director and was only present in Kenya on occasions to attend to company business.

9. The second additional assessment notice in respect of the year 2009 on the other hand alleged that he had earned and not declared Kshs.300,000,000 in business and Kshs.31,918,736 and was therefore required to pay additional tax of Kshs.90,000,000 yet in 2009, he was appointed the Managing Director of Grain Bulk Handling Limited, and transferred his residence to Kenya hence his only source of income was from his employment and again for that year, he did not receive any income from business of self-employment.

10. The applicant averred that though he was aggrieved by the said additional tax assessment, before he could file his objection thereto, his bankers, Diamond Trust Bank, Mombasa received an Agency Notice under Section 96 of the ***Income Tax Act*** and Section 19 of the ***Value Added Tax Act*** requiring him to pay, to the Commissioner, Kshs.180,000,000.00 being tax allegedly due and owing form him.

11. According to the applicant, under Section 86 of the ***Income Tax Act***, the person served with an additional assessment notice has a right of appeal to the Local Committee within 30 days of such service and a further right of appeal to the High Court. Further section 88 of the ***Income Tax Act*** clearly provides that an additional assessment notice only becomes final when no notice of objection has been given; or a notice of objection has been given and (i). the assessment has been amended under Section 85 (2); or (ii). a notice has been served under Section 85(3) but no appeal has been brought against it; or (iii).the assessment has been finally determined on appeal.

12. He contended that the additional assessment notices served upon him on 25th November 2011 are therefore not final because the 30-day appeal period had not expired and the assessment had not been finally determined on appeal. The notices, according to him, cannot therefore form the basis for the issuance of an agency notice under Section 96 of the ***Income Tax Act***.

13. He therefore averred that in the circumstances, the Commissioner's decision is *ultra vires*, procedurally irregular, an abuse of power and goes against the principles of natural justice. Further, the additional assessments upon which the agency notice is predicated is also not supported by any reasons, grounds or evidence and are in the circumstances, irrational, unreasonable and abuse of power.

14. It was therefore the applicant's case that the Commissioner's decision was unconstitutional is tainted with unreasonableness and is abuse of the statutory process under the ***Income Tax Act.***

15. He explained that loss of grain by importer is a usual occurrence worldwide and has nothing to do with anything out of the normal business, shipping, storage and handling risks and any loss suffered by any importer attributable to my company has a remedy in civil action.

16. It was the applicant's contention that whereas it is true that the Respondent requested the ex-parte Applicant to provide copies of the documents referred to in the the affidavit of **Mr. Idow**, following the request, he instructed his office to comply and furnish the said documents through his tax agent Kungu & Company. However, while compiling the documents, and unknown to the applicant, his personal assistant furnished bank statements in respect of his active bank accounts but did not furnish copies of bank statements of his closed accounts as she thought that for purposes of the Respondent's needs, what was required were copies of statements of active bank accounts. The applicant therefore contended that he never held any account in which proceeds from sale of grain was deposited in as he did not trade in grain on his own account.

17. He asserted that in making the additional tax assessment that has formed the basis of these

proceedings, the Respondent did not call upon him or request him to give explanation with regard to the deposits in Co-operative Bank Limited and had they done so, he would have been able to show them that the said deposits were not from taxable income. To him, in making an additional tax assessment based on the deposits at the banks the Respondent states were not declared, the Respondent acted capriciously, arbitrarily and callously and without any regard to the ex-parte Applicant's right to a fair administrative action. Further, in purporting to exercise discretion as permitted by the ***Income Tax Act***, the Commissioner has not acted judiciously and has acted without a basis.

18. It was submitted by **Mr. Chacha Odera**, learned counsel for the applicant that there is a need to receive representations from the tax payer before the agency notice could be issued. In the impugned notice, it was submitted that it was alleged that the taxpayer had not declared Kshs 300 million in business and over Kshs 15 million in respect of self-employment. The tax authority made additional assessment of Kshs 90 million in the year 2007. As for the year 2009, it was contended by the Respondent that the applicant had not declared Kshs 300 million in business and over Kshs 31 million in self-employment thereby attracting additional taxes of Kshs 90 million. However when the applicant came to Court on the ground of arbitrary assessment the respondent sought to justify their figures by listing alleged undeclared deposits for 2007 and 2009.

19. It was submitted that the basis of the assessment as contended by the Respondent confirmed arbitrary and capricious conduct since there was no correlation between the deposits and the assessment. In learned counsel's view, even if the amount of tax was Kshs 2.6 million, it cannot come to Kshs 300 million.

Respondent's Case

20. In response to the application, the respondent filed a replying affidavits sworn by **Abdulkadir Idow**, and **Daniel Wanyoike** both officers within the Investigations an Enforcement Department with the respondent on 26th April, 2012, 10th September, 2012 and 11th February, 2013.

21. According to them, the Respondent received vital information through the informer that the *ex-parte* Applicant had hidden away huge amounts of funds in certain bank accounts. Relying on Section 133 of the ***Evidence Act***, Cap 80, they deposed that for security considerations the identity of the informer is privileged and need not be disclosed.

22. It was deposed that the Respondent had since June 2011 been investigating importation of grains into the Country to confirm the compliance status of the major players in the grain sector among whom was Gain Bulk Handlers Limited. The said investigations covered all taxes and included the Directors of the Grain Bulk Handlers Limited of which the *ex-parte* Applicant is a Business Development Director.

23. It was deposed that Grain Bulk Handlers Limited owns and operates a specialized dry bulk discharge and handling terminal for grain imports located at Kilindini Port, Mombasa and that its facilities comprise a vessel handling facility, a bulk transit terminal, a bulk storage terminal, bagged warehousing and local transportation. According to intelligence reports by the Respondent most of the millers lost up to 1.5% of their annual consignment while the consignment is being handled at Grain Bulk Handlers Limited.

24. The findings of investigation by the Respondent, it was contended established that most importer of grains through Grain Bulk Handlers lost between 0.5 to 1.5% of the consignment while at Grain Bulk Handlers Limited; that the importers cannot claim the loss from the insurance companies as only a loss of above 1.5% of the total consignment is paid by the insurance companies; and that the records at Grain Bulk Handlers Limited which include records of payments made to loaders and transporter actually indicated that while importers received less quantity, the records at Grain Bulk Handlers Limited indicated that they had received the full consignment. Further investigation established that the pilfered grains are then sold through brokers to other users.

25. It was deposed that subsequent investigations revealed that the brokers sold the grains and deposited some of the proceeds in bank accounts, some of which belonged to the *ex-parte* Applicant. As part of the investigation, the *ex-parte* Applicant was on 27th July 2011 required to avail for purposes of scrutiny

personal bank statements including loans and credit cards statements; personal income tax annual returns; and any other documents that may affect his personal tax liability. Pursuant thereto, on 25th October 2011, the *ex-parte* Applicant availed Tax Returns for the years 2007 to 2011 and P9A and Bank Statements for accounts No.5311427018 (in Kenya Shillings) and 0311427016 (in Kenya Shillings) in the names of **Zainab Meghji** and/or **Mujtab Jaffer** domiciled at the Imperial Bank, Mombasa Branch. However, the accounts in which the funds from the sale of grains were deposited were never disclosed by the *ex-parte* Applicants which accounts were at Co-operative Bank (Account No.112044030000), Nkrumah Road, Mombasa and Diamond Trust Bank (Account No.205076012), Mombasa Branch.

26. According to the deponents, upon going through the Applicant's tax file, it was discovered that he failed to declare in his tax returns for the years 2007 and 2009 the amount which was hidden in Co-operative Bank and upon further investigation and request to Co-operative Bank, the Respondent obtained bank statements showing total deposits of Kshs.2,623,950.00 and Kshs.56,675,000.00 for the period of 2007 and 2009 respectively while the deposits at Diamond Trust bank A/C No.205076012 in the name of *ex-parte* Applicant for the period 2011 was **18,912,416.**

27. In addition, having known the deposits, the Respondent looked at the *ex-parte* Applicant's individual returns and found that the *ex-parte* Applicant did not declare in his 2007 and 2009 returns the deposits of Kshs.2,623,950.00 and 56,675,000.00 respectively yet under law, the *ex-parte* applicant ought to have reflected the deposits of Kshs.2,623,950.00 and 56,675,000.00 in his returns for the years 2007 and 2009 respectively. In the circumstances, the Respondent was entitled to treat this amount as excess funds, profit and or income from a business transaction and consequently to tax it.

28. It was contended that under section 3(1) of the ***Income Tax Act***, Cap 470, there is a tax known as income tax which shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya and that for income to be taxed a person need not have been trading consistently throughout the year; one single isolated transaction that results in profits or which yields income is properly chargeable to tax.The proceeds from the sale of grains is therefore income which accrued in or derived from Kenya and tax should be imposed on the same.

29. It was deposed that the *ex-parte* Applicant having failed to declare in its return of income what the huge deposit was for, the Respondent was lawfully entitled to treat it as undeclared income and to consequently issue an additional assessment. A perusal of the income tax returns for the period 1st January 2007 to 27th July 2011 indicated that monies banked in the *ex-parte* Applicant's accounts from the proceeds of sale of the grain may not have been declared for tax purposes and hence no tax was paid in respect of the same.

30. It was averred that under section 77 of the ***Income Tax Act***, Cap 470, where the Commissioner considers that a person has been assessed at a less amount, either in relation to the income assessed or to the amount of tax payable than that at which he ought to be assessed, the Commissioner may, by an additional assessment, assess that person at such additional amount as, according to the best of his judgment, that person ought to be assessed. In view of section 77 thereof, the *ex-parte* Applicant having failed to declare the income from proceeds of sale of the grains for income tax purposes, the Respondent, according to the best of his judgment, issued an additional assessment for the period 2007 and 2009 for Kshs.90,000,000.00 for each period . To the deponents, under section 2 of the ***Income Tax Act***, Cap 470, "due date" means the date on or before which tax is due and payable or pursuant to a notice issued under the ***Income Tax Act***. In the present case of the *ex-parte* Applicant, the undeclared income ought to have been included in his returns of income of the year 2007 and 2009 and consequently, under Section 92(A) of the ***Income Tax Act*** the due date of the resultant tax where the last day of the 4th Month following the end of the 4th month following the end of the year of income which works out to 30th April 2008 and 30th April 2010.

31. It was contended that the taxes having been due for payment and not having been paid at the due date, the Respondent as it is empowered under Section 96(2) of the ***Income Tax Act***, Cap 470 on 25th

November 2011 declared both the Diamond Trust Bank, Mombasa Branch and Co-operative Bank, Nkrumah Road, Mombasa to be the agent for the *ex-parte* Applicant and required to pay the Respondent the sum of Kshs.180,000.00 being tax due from the *ex-parte* Applicant. The said action was necessitated for fear that if the funds were not secured urgently then the same could have been placed out of reach of the Respondent.

32. According to the deponents, on 29th November 2011, Diamond Trust Bank Limited, responded by saying that they were not in a position to pay Kshs.180,000,000.00 as the *ex-parte* Applicant's account was closed on 11th June 2011. On 30th November 2011, Cooperative Bank Limited, also responded by saying that the *ex-parte* Applicant maintained the account with the bank up to 20th January 2011 and had no other accounts with the bank hence the Agency Notices issued to Diamond Trust Bank and Cooperative Bank therefore did not achieve their objectives.

33. It was the Respondent's case that under the ***Income Tax Act*** once the tax is due and payable the Respondent may straight away commence recovery measures either by agency notice, by suit or by distraint and that where the law allows the Respondent discretion to the best of his judgment the Respondent cannot be required to exercise that discretion in any particular way favourable to a litigant and exercise of such discretion can only be challenged if it is established that it was not exercised judiciously, which is not the contention in this instant case.

34. To the Respondent, the *ex-parte* Applicant's Judicial Review Application is but a further attempt to tax evasion as he has not put any material before this Honourable Court nor afforded any explanation of the source of the colossal amounts deposited in his bank accounts hence the Court ought to decline an invitation to aid the *ex-parte* Applicant in his tax evasion scheme so that he too can pay tax like the other citizens of this Country. To the Respondent, it is immaterial whether one is resident or non-resident in Kenya for the purpose of tax computation if it shown that an individual has been earning an income which accrued n or derived in Kenya.

35. It was contended that the *ex-parte* Applicant is not coming before this Honourable Court with clean hands since in filing his 2007 and 2009 returns, he purported that there was no other income to declare whatsoever while Cooperative Bank Account No.112044030000 indicated transactions during the period 2007 and 2009 with total deposits of Kshs.2,623,950.00 and Kshs.56,675,000.00 respectively.

36. It was disclosed that after being issued with the additional assessments, the *ex-parte* Applicant on 20th December 2011 objected to the assessment as he was entitled to under section 84 of the ***Income Tax Act***, Cap 470 and having objected to the tax demand, the Judicial Review Application is misplaced and the best remedy is for the objection to be dealt with.

37. It was deposed that on 1st March 2012, the Respondent acknowledged the objections for the years of income 2007 and 2009 raised by the *ex-parte* Applicant and having done so, the full amount of Kshs.180,000,000.00 was stood over pending the determination of the objection in accordance with section 85 of the ***Income Tax Act***. Since the objection by the *ex-parte* Applicant has not been finally determined, sections 86 and 88 of the ***Income Tax Act*** are irrelevant and cannot assist in this Application.

38. It was submitted by **Mr. Esmail** for the Respondent while reiterating the contents of the replying affidavits that there are schemes for redress of the dispute herein which the applicant ought to have resorted to first.

Determination

39. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

40. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

41. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

42. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that 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 and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See

Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.

43. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

44. In this application, the parties seem to have placed a lot of weight on the issue whether the applicant was liable to pay the taxes demanded or not. That however, is an issue which goes to the merit rather than the process. As was held in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007:**

> **"it was not the role of the superior court nor of this Court to determine the correctness or otherwise of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004."**

45. However, it must always be remembered that persons charged with statutory powers and duties ought to exercise the same reasonably and fairly. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC MISC. APPL. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**. If the discretion is used arbitrarily and unreasonably, the court may step in to remedy the situation. As was held by the Court of Appeal in **Republic vs. Commissioner of Co- Operatives, Kirinyaga Tea Growers Co- Operative & Savings & Credit Society Ltd. Civil Appeal No. 39 of 1997 [1999] 1 EA 245,** it is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith. It has been appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International Sa (Bureau Veritas) [2005] 2 EA 43**.

46. Therefore whereas this Court is not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court in intervening. In **Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, it was held that in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the *Wednesbury* unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.

47. In this case no attempt has been made to show the nexus between the sums claimed to have been deposited and the assessment made by the Respondent. In other words no rational explanation has been proffered as to how the assessment was arrived at. This Court is well aware of the fact that in appropriate cases speed in the recovery of the unpaid taxes may necessitate that the taxing authority secures the sum before the sum is spirited away from the reach of the authority. In such circumstances the pre-emptive action on the part of the taxing authority may not be objectionable. However, such a decision can only be justified when taken rationally based on material in the possession of the taxing authority. In this case, it is that material that is lacking. Without such material one may well conclude that the Respondent's action was irrational, capricious and arbitrary. Coupled with the failure to afford the applicant n opportunity of being heard before the action was taken contrary to Article 47 of the Constitution, the Respondent's action cannot be justified.

48. It was contended that the applicant ought to have opted for alternative avenues of redress before coming to Court. The Court agrees with the position taken in **Republic vs. National Environment**

Management Authority [2011] eKLR that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

40. That view was shared by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 where it was held:

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

49. However in **Republic vs. National Environment Management Authority** (supra), it was appreciated that it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. One of the grounds upon which the instant application is based is that the action of issuing the Agency Notices was premature as the period stipulated for challenging the decision had not run out. This position has not been controverted by the Respondent. If this was the position then the effect of the Respondent's action was to scuttle the appellate process. It cannot therefore be said that the applicant was precluded from invoking this Court's judicial review jurisdiction as the issue to be decided would then be the propriety of the process taken by the Respondent. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240**:

> **"The respondents' argument that the applicant came to court prematurely without exhausting the internal tax objection process as regards each category of tax, is a serious misdirection because as it has been stated elsewhere in this judgment the issues raised were greater than any of the internal tribunals could handle. The task before the court is not, and has not been that of counting the shillings, it has been one of adjudicating on illegality, the doctrine of *ultra vires*, irrationality, procedural impropriety, Wednesbury unreasonabless, oppression, malice, bias, discrimination and abuse of power. Based on the turning points, outlined above the Court finds that the applicant has demonstrated that the respondents have acted *ultra vires* their powers to assess and levy tax in relation to the applicant. The act of lumping together assessments whereas the statute provides for separate notices of assessment to be issued and giving a 14 days notice, initially, without the separate assessments, was an act aimed at ambushing the applicant and causing panic. In short it was a malicious act which the respondents were not legally entitled to do – what the respondents were authorized to do as stated in *Somerset* is only what is within their statutory powers. And in the face of this, the respondents still have the courage to fault the applicant in seeking judicial review. I say no, when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their**

role in maintaining the balance."

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

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

51. Having considered the issues raised in this application, I am satisfied that the Respondent's action of issuing Agency Notices prematurely was irrational and in bad faith. Its action in plucking a figure of assessment without any rational basis was in my view capricious, arbitrary, irrational and unreasonable and as was held in **Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR**:

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

Order

52. In the premises I find the Notice of Motion dated 20th December, 2011, merited and grant the following orders:

1) An order of *Certiorari* removing into this Court the decision of the Kenya Revenue Authority through the Senior Assistant Commissioner Investigations & Enforcement Department S/Region by letter dated 24th November, 2011 and enclosing additional assessments of income tax for the years 2007 and 2009 dated 25th November 2011, duly stamped by the Senior Assistant Commissioner Southern Region making an additional assessment of income tax in the sum of Kshs.90,000,000 for the year 2007 and similar sum for the year 2009 respectively against the applicant which decisions are hereby quashed.

2) An order of *Certiorari* removing into this Court a decision by the Kenya Revenue Authority through the Senior Assistant Commissioner Investigations & Enforcement Department S/Region contained in a letter dated 25th November 2011 appointing Diamond Trust Bank, Mombasa Branch the agent of the Applicant under Section 96 of the Income Tax and Section 16 of the VAT Act, to collect the amount of additional tax due from the Applicant which decision is hereby quashed.

3) An order of Prohibition directed to the Respondent prohibiting it from collecting monies held on behalf of the Applicant by Diamond Trust Bank, Mombasa Branch, or any other person or agent that the Respondent may appoint as the agent of the applicant for purposes of collecting the tax alleged to be due pursuant to the said additional assessment.

4) Having quashed the said decisions it is nolonger necessary to issue an order of *Mandamus* compelling the Respondent to provide written reasons and grounds upon which the additional tax assessment in the sum of Kshs.180,000,000 as communicated in the letter dated 24th November 2011 aforesaid was been made.

5) **Costs of this application to be borne by the Respondent.**

Dated at Nairobi this 20th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Owiti for the Applicant

Mr Esmail for the Respondent

Cc Simiyu