



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JR. MISC. CIVIL APPLICATION NO. 367 OF 2013**

**IN THE MATTER OF: AN APPLICATION BY MOHAMED  
OMAR BAJOH THE APPLICANT, FOR LEAVE TO APPLY AN  
ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

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

**AND**

**IN THE MATTER OF: THE INCOME TAX ACT CAP. 470**

**AND**

**IN THE MATTER OF: A DECISION  
AND ORDER CONTAINED IN LETTER DATED ON 16<sup>TH</sup>  
SEPTEMBER 2013 BY THE COMMISSIONER OF  
INVESTIGATION AND ENFORCEMENT**

**AND**

**IN THE MATTER OF: THE COMMISSIONER OF  
INVESTIGATION AND ENFORCEMENT .....1<sup>ST</sup>  
RESPONDENT**

**AND**

**IN THE MATTER OF: THE RULING OF  
THE LOCAL COMMITTEE FOR NAIROBI AREA DELIVERED  
ON THE 22<sup>ND</sup> OF AUGUST 2013**

**AND**

**IN THE MATTER OF: THE LOCAL COMMITTEE FOR NAIROBI  
AREA.....2<sup>ND</sup> RESPONDENT**

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 25<sup>th</sup> October, 2013, the *ex parte* applicant herein, **Mohamed Omar Bajoh**, seeks the following orders:
  1. **An Order of Certiorari to remove into the High Court for purposes of it being quashed the decisions and orders made on in the letter of 16<sup>th</sup> September 2013 by the 1<sup>st</sup> Respondent. An Order of Certiorari to remove into the High Court for purposes of it being quashed the decisions and orders made in the Ruling of 15<sup>th</sup> August 2013 and communicated to the Applicant through a letter dated 22<sup>nd</sup> August 2013 by the 2<sup>nd</sup> Respondent.**
  2. **An Order of Mandamus compelling the 1<sup>st</sup> Respondent to rescind its decisions and or its demand made on the 16<sup>th</sup> September 2013. An Order of Mandamus compelling the 2<sup>nd</sup> Respondent to rescind its Ruling made on the 15<sup>th</sup> of August 2013 and communicated to the Applicant through a letter 22<sup>nd</sup> August 2013.**
  3. **An Order of Prohibition against the Respondents, its agents or representatives from issuing any notices to the Applicants, its bankers or any other third parties affiliated or associated with Applicant demanding any payment whatsoever.**
  4. **An order that the Respondents do pay the costs of the proceedings.**

### Ex Parte Applicant's Case

2. The application was based on the following grounds:
  - a) **The Applicant is an employee of Eldoret Grains Company Limited.**
  - b) **That it was a requirement at the material time that the Applicant declare his earnings which was to be taxed.**
  - c) **The Applicant at all times remitted all and any taxes due from his earnings to the Kenya Revenue Authority, as per the law.**
  - d) **The Applicant has never defaulted to pay for any tax from his earnings that were required to be paid for by himself.**
  - e) **That the 1<sup>st</sup> Respondent on or about the month of November 2011 allegedly received information from an informant one Mr. Ibrhaim Magonga Ratemo who was previously working as an employee of the Applicant for 10 years until the 2010 when the said informant was discharged of his duties for misappropriation of the Applicants funds.**
  - f) **That Eldoret Grains Company Limited instituted civil and criminal proceedings against the said informant for return of the money he had misappropriated by instituting Eldoret Chief Magistrates Court Civil Suit No.793 of 2010 which suit is still pending final determination.**
  - g) **That the vague information given by the said informant was to the effect that the Applicant and his employer Eldoret Grains Limited made "secret bankings" for the purpose of evading tax and as such accumulated huge sums of money.**
  - h) **That from the foregoing it is clear that information given to the 1<sup>st</sup> Respondent by the said informant was only given out of spite and malice.**
  - i) **That it is clear that the information availed to the 1<sup>st</sup> Respondent was so vague that it**

could NOT have assisted one to come to the conclusion reached at by the 1<sup>st</sup> Respondent who also clearly made no attempt to verify the allegations of the said informant.

j) That without consulting the Applicant the 1<sup>st</sup> Respondent called for statements of the Applicants personal Bank Accounts held in the First Community Bank, Bank and Standard Chartered.

k) That the 1<sup>st</sup> Respondent purportedly carried out investigations and concluded that the money held in the accounts were undeclared earnings of the Applicant.

l) That without any reference to the Applicant in which it asked the Applicant to pay 6,556,545 (Six million, five Forty Five Hundred) through a letter dated 9<sup>th</sup> August 2012 purportedly being undeclared income.

m) That the Applicant instructed his Auditors PSK Associates to object to the additional assessment of taxes raised for the years of 2007 in which proper grounds to support the objection were raised.

n) That the 1<sup>st</sup> Respondent found that the objection was not valid and communicated the same through a letter dated 12<sup>th</sup> September 2012.

o) That the Applicant then preferred an Appeal against the decision of the 1<sup>st</sup> Respondent. The matter was then referred to the Local Committee as provided under the Income Tax Act Cap. 470.

p) That the Auditors of the Applicant filed a Notice of Appeal on the 9<sup>th</sup> of November 2013.

q) That further to the Notice of Appeal the Applicants Auditors filed a Memorandum of Appeal and Statement of Facts which clearly exonerated the Applicant of any wrong doing on the 21<sup>st</sup> of November 2012.

r) That the 1<sup>st</sup> Respondent responded to the Appeal by filing a Statement of Facts on the 15<sup>th</sup> of July 2013.

s) That on the 17<sup>th</sup> of July 2013 the Applicants Auditors wrote to the 1<sup>st</sup> Respondent and gave a proper account of the source of the money the 1<sup>st</sup> Respondent and gave a proper account of the source of the money the 1<sup>st</sup> Respondent claimed to be the Applicants undeclared earnings which account was ignored by the 1<sup>st</sup> Respondent.

t) That the 2<sup>nd</sup> Respondent on the 15<sup>th</sup> of August 2013 without giving the Applicant any Notice purported to proceed to hear his Appeal in his absence or that of his representatives.

u) That the Applicant was therefore denied a fair hearing as he was not present and so were none of his representatives present during the said hearing.

v) That in the circumstances the 2<sup>nd</sup> Respondent could therefore not have come up with an impartial decision of the matter before it as fair administrative procedures were not adhered to.

w) That on 22<sup>nd</sup> August 2013 the 2<sup>nd</sup> Respondent made a Ruling relying on the information supplied by one Mr. Ibrahim Ratemo Magonga who claimed that he was a

**former employee of the Applicant.**

**x) That the 2<sup>nd</sup> Respondent erroneously found the applicant liable to pay taxes for earnings on which he had already declared.**

**y) That the decision reached by the 2<sup>nd</sup> Respondent on 15 August 2013 and communicated to the Applicant on 22<sup>nd</sup> August 2013 smacks of malice and ill will on its part.**

**z) That without consultation or information and disregard of the law the 1<sup>st</sup> Respondent on 16<sup>th</sup> September 2013 sent a demand letter to me demanding that the Applicant does pay a sum of 6,556,545 (Six million, five fifty six and Five Forty five Hundred).**

**aa) That there is real apprehension that the said Commissioner for Investigation and Enforcement is in the process of effecting the orders contained in the said demand letter by attaching funds held in the Applicants bank accounts.**

**bb) That the 1<sup>st</sup> Respondent had neither the power nor the jurisdiction to issue the said demand letter of 16<sup>th</sup> September 2013, without due process.**

**cc) That the 1<sup>st</sup> Respondent erred in holding that the amounts are due from me.**

**dd) That the 1<sup>st</sup> Respondent blatantly misapplied the law.**

**ee) That there is no predictability in the actions of the 1<sup>st</sup> Respondent as required of public bodies and the action of the 1<sup>st</sup> Respondent borders on abuse of powers vested in it.**

**ff) That the Applicant has a legitimate expectation of being treated in a certain way by the 1<sup>st</sup> Respondent arising from the fact that the Respondent has received and continues to receive income tax from the Applicants earnings without fail.**

**gg) That the courts have an inherent jurisdiction to review the exercise by public bodies or officers seized of statutory powers impinging on legally recognized interest to ensure that such powers wielded by tribunals must not be exceeded or abused.**

**hh) That the Applicant urgently requires the Honourable Court to review the said order or decisions made by the 1<sup>st</sup> Respondent as he will be unable to pay off his creditors and banks shall be running to realize its security as the 1<sup>st</sup> Respondent is in the process of attaching his bank accounts.**

**ii) That the Applicant has always paid his tax obligations, is the sole provide to a very large family, the said actions by the Commissioner for investigations and Enforcement have only one goal to take away his right to livelihood and render him and his family members destitute.**

3. The said application was supported by a verifying affidavit sworn by the applicant on 16<sup>th</sup> October, 2013.
4. According to the applicant, he was an employee of Eldoret Grains Company Limited (hereinafter referred to as the Company) where he had worked as the Operations Manager for over 14 years and had at all times remitted all and any taxes due from him to the Kenya Revenue Authority from his earnings in accordance with the Law. However, the 1<sup>st</sup> Respondent on or about the month of November 2011 allegedly received information from an informant one **Mr. Ibrahim Magonga**

- Ratemo** who was previously working as an employee of the Applicant for 10 years until the 2010 when the said informant was discharged of his duties for misappropriation of the Applicants funds.
5. According to the applicant, the Company instituted civil and criminal proceedings against the said informant for return of the money he had misappropriated by instituting Eldoret Chief Magistrates Court civil Suit No 793 of 2010 which suit was still pending final determination. The said information was to the effect that the applicant and his employer made “**secret bankings**” for the purpose of evading tax and as such accumulated huge sums of money which information according to the applicant was only given out of spite and malice. Further it was clear that the information availed to the 1<sup>st</sup> Respondent was so vague that it could not have assisted one to come to the conclusion reached at by the 1<sup>st</sup> Respondent who also clearly made no attempt to verify the allegations of the said informant.
  6. Despite that, it was averred the 1<sup>st</sup> Respondent called for statements of the applicant’s personal Bank Accounts held in First Community Bank, Barclays Bank and Standard Chartered Bank based on purportedly investigations and concluded that the money held in the said accounts were the applicant’s undeclared earnings. Subsequently, without any reference to the applicant the 1<sup>st</sup> Respondent wrote a demand letter in which he demanded that the applicant pay Kshs 6,556,545 (Six million, five Fifty Six and Five Forty Five Hundred) through a letter dated 9<sup>th</sup> August 2012 purportedly being undeclared income.
  7. This action prompted the applicant to instruct his Auditors PSK Associates to object to the additional assessment of taxes raised of the years of 2007 to 2010 which they did through a letter dated 7<sup>th</sup> September 2012 in which proper grounds to support the objection were raised. The said objection, however was found by the 1<sup>st</sup> Respondent not to be valid which finding was communicated through a letter dated 12<sup>th</sup> September 2012.
  8. Aggrieved by the said decision, the applicant preferred an Appeal against the decision of the 1<sup>st</sup> Respondent and the matter was then referred to the Local Committee as provided under the **Income Tax Act** Cap.470 and the applicant filed a Notice of Appeal on the 9<sup>th</sup> of November 2013 followed by a Memorandum of Appeal and Statement of facts exonerating him from any wrongdoing on the 21<sup>st</sup> of November 2012. To the said appeal, the 1<sup>st</sup> Respondent filed its Statement of Fact on the 15<sup>th</sup> of July 2013 and subsequently on 17<sup>th</sup> of July 2013 the applicant’s Auditors wrote to the 1<sup>st</sup> Respondent and gave a proper account of the source of the money the 1<sup>st</sup> Respondent claimed to be the applicant’s undeclared earnings which account was ignored by the 1<sup>st</sup> Respondent.
  9. It was averred that the 2<sup>nd</sup> Respondent on the 15<sup>th</sup> of August 2013 without giving the applicant any Notice purported to proceed to hear the applicant’s Appeal in his absence or that of his representatives. It was therefore the applicant’s case that he was denied a fair hearing as he was not present and so were one of his representatives present during the hearing and in the circumstances the 2<sup>nd</sup> Respondent could therefore not have come up with an impartial decision of the matter before it as fair administrative procedures were not adhered to.
  10. It was averred that on 22<sup>nd</sup> August 2013 the 2<sup>nd</sup> Respondent made a ruling relying on information supplied to it by the 1<sup>st</sup> Respondent who had in turn relied on information supplied by the said **Mr. Ibrahim Ratemo Magonga** who claimed that he was a former employee of the Applicant in which ruling the applicant contended the 2<sup>nd</sup> Respondent erroneously found the Applicant liable to pay taxes for earnings on which he had already declared.
  11. According to the applicant, the decision reached by the 2<sup>nd</sup> Respondent on 22<sup>nd</sup> August 2013 smacks of malice and ill will on its part. However, without any consultation or information and disregard of the law the 1<sup>st</sup> Respondent on 16<sup>th</sup> September 2013 sent a demand letter to the applicant demanding that the applicant pay a sum of 6,556,545 (Six million, Five Fifty Six and Five Forty Five Hundred) which demand the Commissioner for Investigation and Enforcement is in the process of effecting by attaching funds held in the applicant’s bank accounts.
  12. It was deposed that the 1<sup>st</sup> Respondent had neither the power nor the jurisdiction to demand any sums from the Applicant or issue any such notice and that the 1<sup>st</sup> Respondent had neither the power nor the jurisdiction to issue the said demand letter of 16<sup>th</sup> September 2013, without due

- process hence the 1<sup>st</sup> Respondent erred in holding that the amounts are due from the applicant by blatantly misapplying the law.
13. By a supplementary affidavit sworn on 19<sup>th</sup> December, 2013, the ex parte applicant reiterated that he was never afforded a hearing by the 2<sup>nd</sup> Respondent before the impugned decision was arrived at.
  14. In addition there was an affidavit sworn by **Joseph Mwangi of Garane & Associates Advocates**.
  15. According to the deponent, his firm was instructed by the Applicant herein to act for him during the hearing of his Appeal before the 2<sup>nd</sup> Respondent and when the Applicant's Appeal came up for hearing before the 2<sup>nd</sup> Respondent on the 15<sup>th</sup> of August 2013 he was present. According to him, although the applicant's appeal was set to be heard at 11.20 a.m. as per the Notice issued by the 2<sup>nd</sup> Respondent, it was actually called out at around 10.00 a.m. at which time there was no one present from PSK Associates.
  16. According to him, he entered into the room together with three other officials of Kenya Revenue Authority who were representing the Commissioner for Income Tax and before addressing the Committee he handed over the Notice of Appointment to the Clerk of the 2<sup>nd</sup> Respondent a man who then gave the same to the chair of the 2<sup>nd</sup> Respondent. He then introduced himself and informed the Chair of the 2<sup>nd</sup> Respondent that he had been duly appointed by the Applicant herein to represent him. The Chair told the deponent to step out so that the Committee could deliberate on whether he could represent the Applicant herein and after around 10 minutes he was then called back and was informed without any just cause that he could not participate in the proceedings and was thrown out of the room by the Chair of the 2<sup>nd</sup> Respondent.
  17. According to him, he never met or spoke with **Jacqueline Matara** and the 2<sup>nd</sup> Respondent contrary to the rules of natural justice and mere logic proceeded to hear the Applicant's Appeal without affording him the opportunity to present the Applicants case.
  18. He added that **Mr. Paulino Ruthiri** of PSK Associates came at around 11.00a.m. only to find that the 2<sup>nd</sup> Respondent had proceeded to hear the Appeal without affording him the opportunity to present the Applicants case. **Mr. Paulino Ruthiri** then entered the room where the sitting was taking place only to come out after a few minutes to inform him that the 2<sup>nd</sup> Respondent had dismissed the Applicants Appeal before it. It was deposed that though the proceedings before the 2<sup>nd</sup> Respondent were recorded the 2<sup>nd</sup> Respondent has intentionally failed to produce the same before this Honourable Court. To him, it is clear from the foregoing that the decision rendered by the 2<sup>nd</sup> Respondent was delivered out of bias and ill will.

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

19. The 1<sup>st</sup> Respondent opposed the application vide a replying affidavit sworn by **Nicholas Murage**, its Assistant Commissioner in the Investigations and Enforcement Department on 15<sup>th</sup> November, 2013.
20. According to the deponent, in applying for the Judicial Review Orders sought herein, the Applicant is indirectly appealing the decision of the Nairobi Income Tax Local Committee that dismissed the Applicant's Appeal against the same tax demand. According to him, this case was fully and procedurally heard and determined before the Nairobi Area Local Committee, in the presence of the applicant's representative and the case was heard and dismissed on 15<sup>th</sup> August 2013 and the clerk to the Local Committee communicated this decision on 22<sup>nd</sup> August 2013 to both parties.
21. It was deposed that the committee having orally dismissed the appeal on 15<sup>th</sup> August 2013, reduced the Ruling in writing and delivered the same on 12<sup>th</sup> September 2013 and the clerk further served the parties on 13<sup>th</sup> September, 2013,
22. After setting out what in the deponent's view constituted the background of the case, it was deposed that the Applicant had the opportunity of due process and was heard at the Local Income Tax Committee where he was accorded the opportunity to fully ventilate his issues and that the rules of Natural Justice were observed and he was never denied an opportunity to be heard. His representative, PSK Associates was present at all times, the hearings were transparent and there

was no malice or ill will on the part of the respondent.

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

23. On behalf of the 2<sup>nd</sup> Respondent, a replying affidavit was filed sworn by **Jacqueline Matara**, a Clerk to the 2<sup>nd</sup> Respondent on 10<sup>th</sup> March, 2014.
24. According to the deponent, she was directed by the Chairman of the 2<sup>nd</sup> Respondent to give a Notice of Meeting in accordance to Rule 9(2) of **The Income Tax Act (Local Committee) Rules, 1974** (hereinafter the said Rules) to be held on 18<sup>th</sup> July, 2013, which she did. At the meeting of 18<sup>th</sup> July 2013, she deposed that the Applicant was represented by **Mr. P. M. Ruthuri** of P.S.K.-Associates his duly authorized agents and the Applicant's tax agent applied for a Fourteen (14) days adjournment to prepare to respond to issues raised by the 1<sup>st</sup> Respondent which application the 2<sup>nd</sup> Respondent granted and directed the Applicant to file and serve the same on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents within Fourteen (14) days.
25. The deponent deposed that on 5<sup>th</sup> August 2013 in accordance with Rule 9(2) of the said Rules, she gave a Notice of a meeting of the 2<sup>nd</sup> Respondent to be held on 15<sup>th</sup> August 2013 to the Applicant and on 15<sup>th</sup> August 2013, she attended the 2<sup>nd</sup> Respondent meeting where she ensured all the Tax payers Agents signed an attendance register. Among the Agents in attendance were one **Joseph Mwangi of Garane & Associates Advocates** and **Paulino M. Ruthiri** of PSK – Associates as agents of the Applicant. At the said meeting the 2<sup>nd</sup> Respondent observed that the Applicant failed to file the additional information as directed by the 2<sup>nd</sup> Respondent on 18<sup>th</sup> July, 2013, and his case was thereby dismissed and on 12<sup>th</sup> September 2013 the 2<sup>nd</sup> Respondent delivered its Ruling.
26. It was therefore the deponent's view that the Applicant was accorded ample opportunity to prosecute his Appeal before the 2<sup>nd</sup> Respondent and was represented by his duly authorized agent hence the 2<sup>nd</sup> Respondent's decision was neither erroneous nor did it smack of malice and or ill will as the 2<sup>nd</sup> Respondent strictly followed the rules and the provisions of the **Income Tax Act, Cap 470**.
27. In a further affidavit sworn on 3<sup>rd</sup> April 2014 the same deponent deposed that she was on duty attending to the 2<sup>nd</sup> Respondent on 15<sup>th</sup> August 2013 and in accordance to the general directions lawfully given by the chairman, pursuant to Rule 3(2) (of the said Rules) she instructed all the Appellants to sign the attendance register prior to their appeal being called out. According to her, one **Joseph Mwangi** representing Garane & Associates Advocates came forward purporting to be a lawyer for the Applicant and she pointed out to him the provisions of Rule 2 of the said Rules which requires the Agent to be duly authorised by the Appellant which authority he could not produce. Consequently he could not complete the attendance register as he was not the Appellant's Agent, and therefore column 4 of the attendance register was not fully completed in regard to his status. According to the deponent, he was advised that the 2<sup>nd</sup> Respondent would make a decision once the Appeal is called out. However when the Appeal was called out the Appellant duly Authorized Agent PSK Associates entered the Committee room together with **Mr. Joseph Mwangi** and as **Mr. Joseph Mwangi** could not produce a letter of authority was advised he could not be granted audience by the 2<sup>nd</sup> Respondent and could not therefore go on record and the 2<sup>nd</sup> Respondent proceeded to hear the Applicant's Appeal as the Appellant was duly and effectively represented by his duly authorized Agent Messrs PSK Associates.
28. It was therefore averred that the version given to the Applicant is not true and is intended to mislead this Honourable Court and that the decision rendered by the 2<sup>nd</sup> Respondent was not delivered out of bias or ill will whatsoever.

## Determinations

29. I have considered the application, the various affidavits filed, the submissions as well as the authorities cited.
30. It is clear from the Notice of Motion that the Notice of Motion herein was not correctly intitled.

In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.

31. The rationale for this was given in Mohamed Ahmed vs. R [1957] EA 523 where it was held:

**“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.**

32. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J (as he then was) expressed himself as follows:

**“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**

**“REPUBLIC.....APPLICANT**

**V**

**THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.**

**EX PARTE**

**JOTHAM MULATI WELAMONDI”**

33. Having said that the issue for determination before this Court is whether the applicant was given an opportunity of being heard before the decision adverse to him was made. As Article 47 of the Constitution enacts:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

34. The law is that it does not matter whether the same decision would have been arrived at had the rules of natural justice been adhered to. Once the said rules are violated the decision arrived at must be rendered null and void. This was the position in Onyango Oloo vs. Attorney General [1986-1989] EA 456 where the Court of Appeal expressed itself as follows:

**“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive**

authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio.*" [Emphasis mine].

35. This was a restatement of Lord Wright's decision in General Medical Council vs. Spackman [1943] 2 All ER 337 cited with approval in R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 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 as no decision."

36. In Ridge vs. Baldwin [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows:

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

37. However, as was held by the Court of Appeal in Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

38. Therefore the determination of this application must depend on what took place on 15<sup>th</sup> August, 2013 when the appeal came up for hearing. In Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69, the High Court held that just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is a manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial. Similarly, a party seeking judicial review relief must place sufficient material before the Court on the basis of which the Court can find in his favour. In other words the onus is upon the supplicant for judicial review to show that the reliefs sought are deserved.

39. Although the applicant is emphatic that he was never afforded an opportunity of being heard, the

Respondents have exhibited a copy of the register for the day in which it is indicated that one **Paulino Ruthiri** of PSK Associates appeared as agents for the applicant herein and one **Taib S Ahmed** and signed the said register. Although it is contended that the said **Paulino Ruthiri** arrived after the proceedings had taken place, there was no affidavit sworn by the said person confirming the same. Without controverting evidence emanating from the person who is alleged to have signed the register, the averments purporting to show otherwise can be nothing but inadmissible hearsay.

40. Apart from that it was contended that the applicant's advocate was denied appearance before the 2<sup>nd</sup> Respondents notwithstanding that he had a Notice of Appointment. That the said advocate was before the Committee on the said day is not in doubt. However it is the respondent's position that the said advocate had no evidence that he had been authorized to appear for the applicant and under the Rules he could not be given audience. The said advocate though emphatic that he had his notice of appointment has for reasons unknown to the Court not exhibited a copy thereof. Based on the evidence before the Court I am not satisfied that the said advocate had an authority to appear for the applicant and I am not satisfied that the decision to bar him from participating in the proceedings in the absence of such an authority was unreasonable.
41. With respect to the issues whether or not the applicant was up to date in the payment of his taxes, that is not an issue for this Court to determine. As is stated in *Judicial Review* by **Michael Superstone** pages 24-27:

**“Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will, in my view under the guise of preventing abuse of power, be itself guilty of usurping power.”**

42. Having considered the material before me I am not satisfied that the applicant has placed before me sufficient material to enable me find that he was never afforded an opportunity of being heard. In the premises the doctrine of legitimate expectation does not arise in the circumstances of this case.

### **Order**

43. In the result I find no merit in the Notice of Motion dated 25<sup>th</sup> October, 2013 which I hereby dismiss with costs to the respondents.

**Dated at Nairobi this 13<sup>th</sup> day of February, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Miss Lavuna for the Respondent***

***Cc Alex***