REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APP. NO. 294 OF 2014

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE INCOME TAX ACT, CAP 470 LAWS OF KENYA

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC…….APPLICANT

VERSUS

THE COMMISSIONER

FOR INCOME TAX…..…… 1ST RESPONDENT

NAKURU LOCAL INCOME TAX

APPEAL COMMITTEE.....2ND RESPONDENT

***EX-PARTE*: STOCKMAN ROZEN (K) LIMITED**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 13th August, 2014, the *ex parte* applicant herein, **Stockman Rozen (K) Limited,** seeks the following orders:

1. **The honourable court be pleased to grant an:**

(a) Order of certiorari to remove to this honourable court and quash the assessment notices dated 25/6/14 issued to the Ex parte Applicant (hereinafter referred to as the Applicant) by the 1st Respondent

(b) Order of certiorari to remove into this honourable court and quash the 2nd Respondent's decision delivered on the 30/5/14 dismissing he Applicant's Appeal lodged thereat on all but two grounds arising from the 1st Respondent's Income Tax Assessment for the year 2005 to 2007 raised against the Applicant.

(c) Order of prohibition to prohibit the 1st Respondent in any manner whatsoever or otherwise acting upon the said decision of the 2nd Respondent.

(d) Order of Prohibition to prohibit the 1st Respondent from issuing any other or any further income tax assessments for the years 2005 to 2007 against the Applicant and/or attempting to enforce the same against the Applicant.

2. The cost of this application be provided for.

3. Any other order as the court may deem fit.

Ex Parte Applicant's Case

2. The same application was based on the Statement filed on 28th July, 2014 and was supported by a verifying sworn by **Hamish Ker**, the applicant's director on 10th July, 2014.
3. According to the deponent, the Applicant, an expert in the business of production and sale of flowers and other planting material both in Kenya and abroad, is a company incorporated as a private limited company and whose main business activity is the production of roses, rose hips, young plants & stocks on farms in Kenya and abroad and is a tax payer. By virtue of its status as a company, the Applicant is by law required to submit its returns of income for the purpose of taxation annually which taxes are pegged on invoices received and become due and payable as and when the invoices are received.
4. It was deposed that inevitably, not all debtors will satisfy sums due from them for the supply of goods and services and as a result, business entities face the real danger of being required to pay taxes on income that they have not received. To remedy the issue, the Act makes provision for a situation where debts that are bad or doubtful are excluded from the calculation of income tax for that year of income and are not subject to taxation. To the deponent, as per Section 15 of the ***Income Tax Act***, CAP 470 of the Laws of Kenya (hereinafter the Act), a bad debt is defined as any debt which is bad or doubtful. A bad debt is an account receivable that has been clearly defined as not being collectable whereas a doubtful debt is an account receivable that might become a bad debt at some point in the future or an amount of money that a business does not expect to collect from its clients. From the above it is clear, according to the deponent, that a bad debt does not mean that the debt can never be recovered but merely that for the time that it is not collectible, it cannot be subject to taxation for that year of income but it will be subject to taxation as soon as it is received.
5. It was deposed that the Applicant wrote to the 1st Respondent outlining to him the bad debts they had incurred and gave the reasons for their being bad debts including:

    i. African Agro Industries (Uganda) which owed the Applicants the sum of Kshs 8,002,255.00, which sum the Applicants sought to recover from the company through various means including a court suit whereby judgment was entered on their behalf. Despite this, the company failed to pay and the debts were subsequently written off as bad debts.

    ii. Easygrow Pty (RSA), a company a trading partner of the Applicant based in South Africa owed the Applicants a sum Kshs 3,56,659.00. The Applicants supplied plants to

this company and their workings were through the internet and other correspondence. After various attempts to get the company to pay up, the Applicants decided to carry out a search of the company's physical premises in South Africa but efforts to locate them were fruitless. It is for this reason that the Applicant stated this debt to be a bad debt.

iii. Roshof Roses (RSA) which owed the Applicant Kshs 6, 525,833.00. The company was taken over by new management and despite the Applicants best efforts, the new management of the company were unwilling to provide funds to pay off the debts.

iv. Swandala Roses (ZIM) – This company located in Zimbabwe owed the Applicant Kshs 680,142.00. After carrying out their due diligence, the Applicant discovered that the cost of all the recovery mechanism's open to them would far outweigh the amount owed.

v. New Blooms (ZIM) Limited – This company located in Zimbabwe owed the Applicant Kshs 73,453.00. As with the above company, the Applicant discovered that the cost of collecting the debt would far outweigh the amount owed.

vi. Belflowers (UG) Limited – This company owed the Applicant Kshs 6,046,798.00. After several futile attempts to recover the money from the Company, a search of the company's registry in Uganda revealed that the company had ceased trading on the 16th day of November 2006 and had therefore been struck off the register.

vii. Esmeralda – This Company owed the Applicant Kshs 31,019.00. the firm was undergoing serious financial difficulties and after various attempts to recover the money, it became apparent that the firm would not be able to pay off the debts

vii. East African flowers Kshs – This company owed the Applicant Kshs 644,577.00, the firm was undergoing serious financial difficulties and after various attempts to recover the money, it became apparent that the farm would not be able to pay off the debts.

ix. Mosi Limited . This company owed the Applicant Kshs 16,321.00. The farm was undergoing serious financial difficulties and after various attempts to recover the money, it became apparent that the farm would not be able to pay off the debts and for this reason, the debts were written off.

x. Perfect Limited – This company owed the Applicant Kshs 277,959. In this instance, an investigation into the farm revealed that the farm was no longer trading and it had no assets to be attached. Further to this none of the directors of the company could be located.

6. However, on or about the 11th of August 2010, the 1st Respondent sent a letter to the Applicant stating that they had assessed the Applicant's tax remissions and disallowed their bad debts as not having been proven to be uncollectable which assessment the Applicant objected to vide a letter dated 7th September, 2010. This objection was premised on the fact that the Act at section 15 succinctly provides for the exclusion of bad debts from the assessment of taxes hence any debts which are bad and doubtful may be deemed bad debts.
7. To the deponent, the 1st respondent purportedly relied on Legal Notice No 37 of 2011 created by themselves pursuant to section 15(2) of the Act which gives the Commissioner powers to create guidelines for the purposes of determining what constitutes bad debts. The Legal Notice provides that a debt shall be considered to have become bad if it is proven to the satisfaction of the Commissioner to have become uncollectable.
8. It was however contended that the Legal Notice commenced in the year 2011 and the assessment related to the years of income of 2005-2007 hence the law could not operate retrospectively and the guidelines were inapplicable. Further, irrespective of, it is a well-established principle that the legislature is vested with the powers to make laws and therefore any guidelines must adhere to the

law. The 1st Respondent through the enactment of these guidelines was purporting to amend the legislation which action was clearly illegal and *ultra vires.* To the applicant, the Act at Section 15 succinctly provides for the exclusion of bad debts from the assessment of taxes and it is clear any debts which are bad and doubtful may be deemed bad debts.

9. It was therefore the applicant's case that the 1st Respondent deliberately misinterpreted the law by stating that the Applicant's debts were not bad debts as he had not proven that they were uncollectable, which criteria was not provided for by the Act hence the decision by the 1st Respondent to assess the said debts was made in jurisdictional error and thus *ultra vires* by purporting that the same had not been proven uncollectable, which is not in issue by dint of Section 15 of the Act.
10. Further, the decision by the 1st Respondent to assess the said debts was irrational, unreasonable and illogical as the 1st Respondent decided to clearly disregard the law doing so. As a result thereof the 1st Respondent was claiming from the applicant the sum of about Kshs 2,500,000 yet the Applicant asserted that bad debts must be excluded in the assessment of taxes and cannot be subjected to taxation.
11. Apart from the foregoing, section 84 of Act provides that in case of a dispute between a person/body and the commissioner of taxes regarding the assessment of taxes, the person/body is allowed 30 days within which to formally object and the commissioner of taxes must then consider the objection before making a final decision. However, the 1st Respondent's in direct contravention of the law went ahead and assessed taxes and sent a notice on the same to the Applicant simultaneously denying the applicant who was aggrieved the opportunity to formally object as granted to them by law hence the 1st Respondent's notice of assessment is null and void.
12. Nevertheless irrespective of all the above stated, the applicant went ahead and appealed against the 1st Respondent's decision to the 2nd Respondent as provided by law. The 2nd respondent however, held that out of all the bad debts, it was only the bad debts with regard to Africa Agro Industries (Uganda) and Belflowers (UG) Ltd that could stand and rejected the rest as not being bad debts. In the applicant's view, the 2nd Respondent's decision is tainted with illegality, irrationality and procedural impropriety and should therefore be reviewed.
13. It was the applicant's case that the Respondents made a decision based on gross error of law by holding that the Applicant's debts did not amount to bad debts as they had not been proven uncollectable.
14. In its rejoinder, the applicant contended that the 1st Respondent's affidavit failed to address the issues raised in the Applicant's Notice of Motion and Chamber Summons in relation to 1st Respondent's actions resulting to bias, bad faith and unreasonableness in their reaching of the decision that the Applicant is liable to pay the bad debts for the years 2005 and 2007. In its view, the Kenya Revenue Authority wanted to charge and collect income tax for income that had not yet been received by the Applicant.
15. It was contended that according to ***Black's Law Dictionary*** "income" is defined as money or other form of payment that one receives periodically from business, investments royalties and like and that according to the ***Income Tax Act***, section 3 prescribes that, income tax is chargeable under the Act in respect of gains or profits from a business, for whatever period of time carried on hence it is normal accounting practice to invoice for goods sold sand services rendered to customers. However, if income does not come, such invoices are not considered for taxation.
16. The Applicant's position was that according to the provisions of the Act, tax is payable on income received and therefore, Section 15(2) allows the deduction of bad and or doubtful debts in the computation of taxes and that in several of the invoices raised by the Applicant for the years 2005 and 2007, not all payments were collectible and recoverable thereby forcing the Applicant to treat the debts as bad debts. To date, it was reiterated that the debts incurred as table income for the years in contention are yet to be received and the possibility of ever recovering them is almost nil hence it was unreasonable to the extreme to argue that the Applicants should pay taxes today for amounts that they had not received for the last ten (10) years only in the hope that they would be recovered in the future. In any event, it was added, the Applicant had demonstrated that, it was their practice to pay taxes from income that had previously been declared as bad debts and had been recovered, taxes would indeed be paid on such income.

17. In the applicant's opinion, it was only reasonable and logical that the standards of what constitutes bad debts should be from the perspective of the Applicant being in business, as they are able to determine what makes economical sense to recover debts and what does not. Therefore, it was averred, the 1st Respondent erred in law in claiming that, what continues bad debts, is that which will be to its satisfaction.
18. According to the Applicant, it was the duty of the 2nd Respondent to hear the case and follow due procedure in order to determine the case, hence the 2nd Respondent erred in law for failing to follow procedure. In confirming the decision of the 1st Respondent and concluding that the Applicant ought to pay the income tax for the years 2005-2007 for the income that had not been received as prescribed by the Act, the 2nd Respondent also erred in law.
19. It was submitted by the applicant that pursuant to section 84 of the Act, a person who disputes an assessment may object to the Commissioner within 60 days of service of the assessment and it is only upon the determination thereof that the assessment may be served. However, in this case the Commissioner did not afford the applicant an opportunity to object before confirming the assessment and reliance was placed on **Republic vs. Kenya Revenue Authority & Another ex parte Tradewise Agencies [2013] eKLR**.
20. The applicant further cited section 28 of the ***Interpretation and General Provisions Act*** to the effect that no subsidiary legislation ought to operate to an earlier date than the commencement of the written law under which the subsidiary legislation is made and that no person is to be made or become liable to any penalty in respect of an act committed or the failure to do anything before the day on which the subsidiary legislation is published in the Gazette. In this case, it was submitted that Legal Notice No. 37 of 2011 was made as a subsidiary legislation to the Income Act as guidelines on the allowability of bad debts. The same was published in the Gazette in April, 2011 and was the basis of the Commissioner's rejection of the applicant's claim for exemption from taxation for bad debts. Since the bad debts in question arose from the assessment of the year 2005-2006 long before the gazettement of the said Legal Notice, it was submitted that the act of relying on the Legal Notice was retrospective hence based on **Republic vs. Minister for Finance & 2 Others ex parte Law Society of Kenya** was unreasonable and outside the law. Further reliance was placed on the Jamaican case, **Phillips vs. Erye [1870] LR QB 1 Exchequer Chamber** and **Keroche Industries Ltd vs. Kenya Revenue Authority & Others Misc. Appl. 743 of 2006**.
21. By confirming the 1st Respondent's decision, it was submitted that the 2nd respondent abrogated its duties and failed to deal with the applicant's concerns.
22. It was further submitted that a tax payer ought not to be compelled to pay income tax in that which was never received. In determining whether or not a debt is bad, it was submitted that the issue ought to be left to the tax payer since it is only sensible for the tax payer to be the one to determine whether a debt is collectible or not. Based on the Indian case of **T. R. F. Ltd vs. CIT 323 ITR 397**, it was submitted that it is not necessary for the assessee to establish that the debt, in fact has become irrecoverable but to the contrary it is sufficient that the bad debt is written off as irrecoverable in the account of the assessee.
23. According to the applicant, it is the role of the court to be able to set guidelines on the criteria for determination of bad and doubtful debts. It was argued that it is the duty of the court in this case to intervene and give a clarification as to whether it is right and just for a party to be forced to pay income tax on income that has not yet been received by virtue of them having sent out invoices as in the ordinary practice in business trade.
24. The 2nd respondent was on the other hand accused of being biased by failing to make a decision but opting instead to have the parties agree on the issues hence failing to make a determination based on the hearing of the parties. Further the 2nd respondent did not state the basis of its decision as required under the ***Income Tax (Local Committee) Rules***. Based on **MP Industries vs. India AIR [1966] SC 671**, it was submitted that the giving of reasons imposes restrictions on the part of the executive officer and that if an adjudicator is obligated to give reasons for his conclusions, it makes it necessary to consider the matter carefully. It was similarly submitted that the 2nd Respondent's decision was unreasonable as it failed to take into account the relevant evidence produced by the applicant as to why the applicant wrote off the debts as bad debts.

Respondent's Case

25. In response to the application, the 1st respondent filed a replying affidavit sworn by **Willys Odeyo**, a Station Manager within the Domestic Taxes Department of the Kenya Revenue Authority Nakuru Station on 27th January, 2015.
26. According to him, the application herein as filed is misconceived, bad in law and a total abuse of the court process for the following reasons;

    i. The Applicant has sought the wrong forum and procedure to ventilate its issues as there is a proper procedure provided for under the ***Income Tax Act*** Cap 470 Laws of Kenya that the Applicant has chosen to ignore hence an abuse of the court process.

    ii. The Applicant seeks as against the 1st Respondent to quash the decision contained in a letter dated the 31st of October 2011 which is a period of more than 6 months since it was delivered hence such an order cannot issue by dint of Order 53 Rule 4 of the ***Civil Procedure Rules***.

    iii. That even if the application was properly before the Court, judicial review process such as this one concerns itself with the decision making process and not with the merits of the decision and that the was bogging down the court with the merits of the decision rather than question the decision making process hence the application is a total waste of precious judicial time.

27. It was contended that the 1st Respondent herein is established under the ***Kenya Revenue Authority Act*** Cap 490 Laws of Kenya and under Section 5(1), the Kenya Revenue Authority is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) with respect to the performance of its functions under subsection (1), the Authority is required to administer and enforce all provisions of the written laws set out in part 1 & 2 of the 1st Schedule of the KRA Act for the purpose of assessing, collecting and accounting for all revenues in accordance with those laws. One of such laws to be enforced is the ***Income Tax Act*** Cap 497 Laws of Kenya.
28. The 1st Respondent's position was therefore that at all material times it was well within its statutory mandate to assess the Applicant for payment of tax on its income and had the prerogative of excluding from taxation, the Applicant's bad debts upon the satisfaction of the commissioner of the 1st Respondent that the Applicant's debts have become uncollectable hence bad a fact that the Applicants failed to prove. Further, at all times the 1st Respondent was within its statutory mandate to issue the assessment notice dated the 25/6/2014 having assessed the client for additional taxes which additional taxes arose out of the commissioner not allowing bad debt write off in accordance with the said section 15(2)(a) and at the time the applicant was being assessed for additional taxes no evidence had been received by the Commissioner to the effect that the debts had had become uncollectable hence bad.
29. To the 1st Respondent, it is not true as agued by the Applicant that the definition of bad debts includes doubtful debts which have not necessarily become uncollectable hence even though the same have not become bad, they ought not to be considered for taxation. The law is however clear that at the time of such assessment for exclusion from income, a debt must be estimated to the satisfaction of the Commissioner to have become bad. Therefore, having failed to provide evidence to the satisfaction of the Commissioner that at the time of assessment that the bad and doubtful debts have indeed become bad, the Applicant was assessed for tax on the amounts and the resulting additional tax was Kshs. 18,858, 342.00 and Kshs 7,016,674.00 for the years 2005 and 2007 respectively. In so doing, it was contended that the 1st Respondent was guided by law and carried out the assessment procedurally upon which the Applicants were served with assessment notices for the amount assessed in accordance with Section 78 of the ***Income Tax Act***.
30. It was disclosed that upon being served with the said assessment notices, the Applicants through their agent PFK Kenya Limited filed their objection which was received at the Respondents office on the 10th of September 2010 receipt of which the Commissioner acknowledged on the 12th of May 2011 and proceeded to confirm the assessment after disagreeing with the Tax Payer on the

issues which were raised on the objection notice. Being dissatisfied with the Commissioners Decision, the applicant appealed to the 2nd Respondent Committee.

31. The 1st Respondent divulged that the 1st Local Committee's hearing was on 30th November 2011 at Merica Hotel, Nakuru which hearing was adjourned on request by the Appellant to allow them more time to respond to issues raised by the Respondent. The 2nd Local Committee's hearing was held on 13th March 2012 at ARC Hotel, Egerton University, Njoro which hearing was adjourned to allow the Applicant to furnish the Respondent with the necessary documents within 30 days. The Appellant's submission had been served on the Respondent on 5/3/2012, a few days to the hearing date. The 3rd Local Committee's sitting was hold on 14/3/2014 at ARC Hotel, Egerton University, Njoro when the Applicant applied to be allowed to submit an amended version of their submission dated 28/3/2012 which application was not objected to by the Respondent. The committee however noted that most of the issues arose out of inadequate sharing of information on the part of the Applicant with the Respondent and the two parties were advised to sit together and look at the evidence afresh and file a response with the Committee in the next sitting.

32. It was deposed that the Appellant, represented by **John Thindi** and **Patrick Chebos** and the Respondent, represented by **Amos Gayo** and **Walter Odede** met on 21/3/3014 at the Respondent's offices at Generations House, 5th Floor in Nakuru where it was agreed that the Applicant was to furnish the Respondent with specific records identified as evidence to support the claim in recognition of the fact that there needed to be proof before the debts could be declared bad. As agreed, further records mostly in the form of supporting correspondences between Stokman Rozen Kenya Limited and the various debtors were availed to the Respondent on 2/4/2012 and the Respondent forwarded its position on the issues raised in light of the records availed. The Respondent was in agreement with the Appellant on certain issues and agreed to amend additional income to Kshs 13,099,779 and Kshs. 969,876 in years 2005 and 2006 respectively.

33. At its further hearing, the Local Committee noted that the parties were not agreeing on several other issues hence on the 30/5/2014, it proceeded to give its Ruling in which ruling it upheld the Appellant's appeal to the tune of Kshs. 8,095,678 in 2005 and Kshs. 6,046,797 in 2007. Subsequently, the additional income arising from the Committee's ruling in additional principle tax Kshs 3,228,799 and Kshs 290,963 in years 2005 and 2007 respectively. Further, the Local Committee made the following specific findings with regard to the disputed additional income on presumed bad debts;

    i. With regard to African Agro Industries (Uganda); the company owed the Applicant the sum of Kshs. 8,022,255 which were written off in their books in the financial year ended 31/1/2005 as being bad and doubtful debts. The sums of Kshs 3,486,559 were recovered and written back in accounts in years 2011 and 2012 respectively. The balance of Kshs. 2,337,145.17 is still outstanding to date. The Applicant did not provide evidence to prove efforts taken to collect the debt before writing it off in year 2005. The Local Income Tax Appeals Committee however ruled in favour of the Appellant on grounds that the debt written off had been substantially recovered and written back in accounts for tax purposes. The 1st Respondent has not appealed against this ruling.

    ii. With regard to Easygrow Pty (RSA); the company owed the Applicant a sum of Kshs. 3,556,659 which was written off in the books in year 2005. Evidence provided by the Applicant indicate that the Applicant was in communication with the debtor who was aware and acknowledged their obligation to settle the debt just around the time the debt was written off. The debtor was only waiting for currency exchange rates to stabilize in their favour before making the remittances. The debt had therefore not become uncollectible at the time it was written off in year 2005.

    iii. With regard to Rishof Roses (RSA), the Company owed the Applicant a sum of Kshs 6,525,833 which was written off in the financial year ended 31/1/2005. Evidence provided by the Applicant indicates that the Applicant was in communication with the debtor at the time of writing off the debt and the debtor was aware and accepted its

obligations to settle the debt. The Applicant did not provide results of search made at the company registry to prove change of business ownership in South Africa. The Applicant agreed with the debtor on a payment plan on 17/2/2005. The debt had therefore not become uncollectible at the time of write off.

iv. With regard to Swandale Roses (ZIM); the Company owed the Applicant Kshs 80,142. The debt was written off in the books in the financial year ended 31/1/2005. The Applicant did not provide evidence taken to recover the debt before it was written off. There was no evidence of due diligence report showing how the cost of recovery would far outweigh the amount owed.

v. With regard to New Blooms (ZIM) limited; the Company owed the Applicant a sum of Kshs 73,453. The 1st Respondent rescinded its decision to disallow this debt conquered with the Applicant in the submissions made to the Local Committee that the cost of recovering the debt would be prohibitive.

vi. With regard to Belflowers (UG) Limited, the Company owed the Applicant a sum of Kshs. 6,046,798 which was written off in the financial year ended 31/1/2007. The company was deregistered in Uganda. Notice of deregistration was published in the Uganda Gazette on 20/8/2009 and publication of final deregistration in the Uganda Gazette was to be made after expiry of three months. Although copies of Uganda Gazette showing publication to final deregistration was not availed, records were provided to show efforts taken to recover the debt prior to and after the write off. The 1st Respondent was in agreement with the Applicant in the submissions made to the Local Committee that the debt properly written off.

vii. With regard to Esmeralda the Company owed the Applicant a sum of Kshs 31,019 which was written off in the financial year ended 31/1/2007. The Applicant did not provide details of how the debt arose. The Applicant's argument that the debtor was undergoing financial difficulty and could not pay off the debt is an afterthought since the same was never mentioned in the submission to the local committee. The argument was that the debt was a reconciliation issue. This assertion was also not clarified.

viii. With regard to East African Flowers the company owed the Applicant a sum of Kshs. 644,577 which was written off in the financial year ended 31/1/2007. The Applicant did not provide details of how the debt arose. The Applicant's argument that the debtor was undergoing financial difficulty and could not pay off the debt is an afterthought since the same was never mentioned in the submissions to the Local Committee. The argument was that the debt was a reconciliation issue. This assertion was also not clarified.

ix. With regard to Mosi Limited, the Company owed the Applicant a sum of Kshs. 16,321 which was written off in the financial year ended 31/1/2007. The Applicant did not provide details of how the debt arose. The Applicant's argument that the debtor was undergoing financial difficulty and could not pay off the debt is an afterthought committee. The argument was that the debt was a reconciliation issue. This assertion was also not clarified.

x. And with regard to Perfect Limited; the company owed the Applicant Kshs. 277,959 which was written off in the financial year ended 31/1/2007. The Applicant did not provide evidence to support its contention that he debtor was no longer trading and that is had no assets to be attached and that none of the directors of the company could be located.

34. From the foregoing, it was the 1st Respondent case that the Applicant submitted its case before the Local Committee, was given an opportunity to be heard and the Local Committee proceeded to make its findings on the merits of the matter to the extent of even allowing the Applicants Appeal

to the tune of Kshs. 8,095,678.00 for 2005 and Kshs 6,046,797.00 for the year of 2007 hence the instant suit thus reeks of mischief.

35. To the 1st Respondent, it was not true Legal Notice No. 37 of 2011 purported to amend the law but that indeed the same is in line with the provisions of Section 15(2)(a) with regards to doubtful debts. In its view, the Applicants have chosen to interpret the said Section 15(2)(a) in a self-serving manner and is inviting this court to do the same. It was however the 1st respondent's assertion that the 1st and 2nd Respondent properly applied themselves to the law and procedure hence the Respondents actions are neither *ultra vires* nor against the rules of natural justice.

36. On behalf of the 1st Respondent it was submitted that judicial review is a remedy of last resort and that where there is another remedy the same ought to be pursued. In this case it was submitted that based on sections 84 and 86 of the Act, there are statutory procedures to be followed on receipt of an assessment notice and an appellate procedure upon the Local Committee rendering its decision. Upon the Local Committee making its decision, it was submitted that the applicant ought to have filed an appeal to the High Court. Based on **Speaker of the National Assembly vs. Njenga Karume CACA No. 92 of 1992**, it was submitted that the instant application is an abuse of the court process.

37. It was further submitted that judicial review remedy is not concerned with the merits of the decision but with the decision making process. On the authority of **Kenya Revenue Authority ex parte Yaya Towers Misc. Appl. No. 374 of 2006**, it was submitted that the conservative grounds for judicial review are abuse of discretion, irrationality, excess of jurisdiction, improper motives, failure to exercise discretion, abuse of the rules of natural justice, fettering discretion and error of law, none of which arose in this application.

38. According to the 1st respondent, there has to be precision on the decision sought to be quashed. Relying on Order 53 rule 7 of the ***Civil Procedure Rules*** and **R vs. The Provincial Appeals Tribunal Nyeri & 3 Others exp Samuel Gicheru Ndirangu & Another Muranga HCJR Misc. Appl. No. 15 of 2012**, it was submitted that as the decision sought ought to have been exhibited but was not, there was no certainty as to what order and/or decision is south to be quashed.

39. It was further contended that if on the other hand what is sought to be quashed is the assessment notice issued on 11th August, 2010, then the same cannot be quashed in view of Order 53 rule 6 which requires that leave to file the application be brought within 6 months of the date of making the order.

40. According to the respondent from the record, it is clear that the applicant's contention that they were never given an opportunity to object to the assessment notice is not true as the applicants were duly informed of the decision and it was only after such information that the Commissioner confirmed the assessment pursuant to section 84 of the Act and it was upon that confirmation that the applicant was entitled to an appeal to the Local Committee which right the applicant exercised and the appeal was partly allowed.

41. The Court was urged not to look at the merits of the decision of demanding additional taxes from the applicant as that belongs to another forum. While conceding that under section 15(2) of the Act, bad and doubtful debts are allowable deductions, it was contended that for the same to become allowable, they must be proved to the satisfaction of the Commissioner to have become bad and that even doubtful debts must be proved to have become bad. Since the provision gives the Commission the discretion, it was contended that the applicant cannot be heard to say that the determination of bad debts ought to be from the perspective of the tax payer. Where the law gives the Respondent a discretion, it was submitted that a judicial review court can only step in to see whether the discretion was exercised reasonably, in bad faith or in disregard to the law and in support of this submission reliance was placed on **R. vs. The Registrar of Trademarks exp Sony Holdings Ltd & Anor. Misc. Appl. No. 165 of 2012**.

42. While citing ***Black's Law Dictionary*** 8th Ed. P 432, it was submitted that for a debt to be considered bad, it must be uncollectable and hence a doubtful debt not proven to be uncollectible is not a bad debt. The respondent relied on section 3(1) of the Act which provided that income tax is charged on *inter alia* income which accrued in or was derived in Kenya and accrued is defined in ***Black's Law Dictionary*** 8th Edn. p. 778 as "*money earned but not yet received*" and defines "*income tax*" at page 779 as "*gross income minus all allowable deductions and exemptions*". Therefore, it was submitted that taxable income is that income that has accrued minus allowable

deductions and that the said deductions from the accrued income must be those that are allowable under sections 15(1) and (2) of the Act which includes bad debts at section 15(2)(a). However, for these to be deductible (i) they must be bad or have become bad, (ii) must have been incurred in the production of gains or profits and (iii) must be estimated to the satisfaction of the commissioner to have been bad.

43. The Commissioner having given reasons which were reasonable without reference to Legal Notice No. 37 of 2011, it was untrue, according to the respondent, for the applicant to state that reliance was placed on the said Legal Notice when only section 15(2)(a) was considered. Further the Local Committee found that there was no evidence to prove attempts made at the recovery of the debts and where documents were availed consents we recorded. It was therefore submitted that the 1st Respondent was neither malicious nor whimsical but relied on strict interpretation of the said section. According to the respondent it exercises its discretion judicially after grating the applicant several opportunities present its documents but failed to do so.
44. The respondent urged the Court to observe that the Applicant knowingly avoided statutory procedure and forum to ventilate its issues arising from the 1st Respondent's assessment and the 2nd Respondent's ruling hence this is an abuse of the judicial process meant to avoid the payment of taxes.

Determination

45. 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.
46. 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...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."

47. 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."

48. 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.***

49. 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.
50. In this application the only orders sought by the applicant are the orders of certiorari and prohibition. Under the said reliefs the Court is not entitled to direct the Respondent on the manner of proceeding. Once an order of certiorari is issued, the Respondent is at liberty to decide on what course of action to take of course considering the decision quashing its earlier decision. Similarly, where a prohibition is issued, the Respondent's next step is a matter entirely within the discretion of the Respondent taking into account the directions given by the Court. It is only in cases of mandamus that the Court is entitled to compel the Respondent to act in the manner prescribed by the law. The applicant herein invites this Court to set guidelines on the criteria for determination of bad and doubtful debts. It was argued that it is the duty of the court in this case to intervene and give a clarification as to whether it is right and just for a party to be forced to pay income tax on income that has not yet been received by virtue of them having sent out invoices as in the ordinary practice in business trade. Whereas that is a jurisdiction which may be properly invoked in an appellate or ordinary civil jurisdiction, it may not be properly invoked in judicial review jurisdiction.
51. The Respondents contended that these proceedings are time barred as the decision under challenge was made outside the six months bracket stipulated under Order 53 rule 2 of the ***Civil Procedure Rules***. Section 9(2) of the ***Law Reform Act***, Cap 22 Laws of Kenya provides:

Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relate

52. Therefore in making the rules of the Court the body mandated to do so, in this case the Rules Committee, may prescribe the period for applying for judicial review orders and where it does so, it may only prescribe for six months or such shorter period as it deems fit. However, section 9(3) to which the aforesaid provision is subjected provides:

In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

53. Therefore the Act itself has provided the upper ceiling in terms of the timelines for applying for orders of *certiorari* in certain specified cases.
54. Order 53 rule 2 on the other hand provides:

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the

application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

55. What comes out form the said two provisions is that both under the Act and the Rules, the upper ceiling in terms of timelines for applying for an order of certiorari concerning ***judgment, order, decree, conviction or other proceeding,*** has been set out. It important to note that Parliament did not provide the timelines for application for orders of certiorari generally but went ahead to specify the areas in which the six months period would apply. The other areas were left for the Rules Committee. The Committee itself has not purported to provide, as it is empowered to do, that all matters where certiorari is sought, the same must be done within six months. Accordingly the only express limitation in judicial review orders is with respect to orders of certiorari and even the only in cases concerning *"**judgment, order, decree, conviction or other proceeding".***
56. That brings into focus how that phrase ought to be interpreted. In **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004 [2004] eKLR** and **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, it was held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in those provisions and to nothing else and therefore a decision to alienate or to allocate land, is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal hence the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise as there is nothing capable of being exhibited thereunder. It was further held that Order 53 rule 2 and 7 only apply to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.
57. The phrase "or other proceedings" for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase "or other proceedings" has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi-judicial proceedings as distinct from acts and omissions for which *certiorari* may be applied for.
58. I am of the view that a court of law ought not to drive a litigant from the seat of justice unless the law is clear that the cause of action is time barred under the relevant limitation statute. In **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318,** the Court found that despite the irregularities the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role and it has powers to strike out nullities.
59. The decision which was made by the 1st Respondent, in my view, does not fall within the genus of *"**judgment, order, decree, conviction or other proceeding"*** as contemplated under Order 53 rules 2 and 7 of the ***Civil Procedure Rules*** as read with section 9(3) 0f the ***Law Reform Act*** in order to invite the wrath of the six months limitation period. Accordingly, I find no merit in the contention that these proceedings are time barred.
60. Section 84 of the ***Income Tax Act***, CAP 470 of the Laws of Kenya provides:

(1) A person who disputes an assessment made upon him under this Act may, by notice in writing to the Commissioner, object to the assessment.

(2) A notice given under subsection (1) shall not be a valid notice of Objection unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within thirty days after the date of service of the notice of assessment; but if the Commissioner is satisfied that owing to the absence from Kenya, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving the notice within that period and there has been no unreasonable delay on his part, the Commissioner may, upon application by the person objecting, and after deposit by him with the Commissioner of so much of the tax as is

due under the assessment under section 92, or such part thereof as the Commissioner may require, and the payment of any interest due under section 94, admit the notice after the expiry of that period and the admitted notice shall be a valid notice of objection:

Provided that the objection made within the thirty days shall not be valid unless it is accompanied by a return of income together with all the supporting documents, where applicable.

(3) A person aggrieved by the refusal of the Commissioner to admit a notice of objection under subsection (2) may, on depositing with the Commissioner if he so requires, the whole or such part as the Commissioner may require of the amount of tax assessed under the assessment to which objection is made and on paying any interest due under section 94, appeal against the refusal to a local committee, whose decision shall be final.

(4) All the provisions of this Act relating to appeals against assessments shall, so far as they are applicable and subject to the finality of the decision of the local committee, have effect with respect to an appeal under subsection (3), and the local committee hearing the appeal may confirm the decision of the Commissioner or may direct that the notice concerned shall be a valid notice of objection.

61. From the record, it appears that the applicant's taxes were assessed vide a letter dated 11th August, 2010. In the said letter, the applicant was instructed to arrange settlement thereof within 7 days thereof. It was however informed that it was at liberty to dispute the assessment within 30 days thereof by way of an objection. By a letter dated 7th September, 2010, the applicant proceeded to lodge its objection as advised. That objection was dealt with vide a decision dated 12th May, 2011. Going by the documents on record, I am not satisfied that the applicant's contention that the decision of the Commissioner confirming the assessment was premature and that he was not afforded an opportunity to object is merited. Accordingly the decision in ***Tradewise Case*** (supra) is distinguishable.
62. It was further contended that the 1st respondent purportedly relied on Legal Notice No 37 of 2011 created by themselves pursuant to section 15(2) of the Act which gives the Commissioner powers to create guidelines for the purposes of determining what constitutes bad debts. To the extent that Legal Notice provides that a debt shall be considered to have become bad if it is proven to the satisfaction of the Commissioner to have become uncollectable, it was contended that the same was being applied retrospectively. Section 15(2)(a) of the Act provides:

15(2) Without prejudice to the Subsection (c) in computing for a year of income the gains or profits chargeable to tax under Section 3(2)(a) the following amounts shall be deducted.

> ***(a) Bad Debts incurred in the production of those gains or profits which the commissioner considers to have become bad and doubtful debts so incurred to the extent that they are estimated to the satisfaction of the commissioner to have become bad, during that year of income such guidelines as may be appropriate for the purpose of determining bad debts under this subparagraph"***

63. It is clear from the foregoing provision that the decision as to which of the gains or profits that have become bad and doubtful debts so as to be deducted in computing for a year of income the gains or profits chargeable to tax under section 3(2)(a) is purely the discretion of the Commissioner. To contend as the applicant does that this provision was introduced vide Legal Notice No. 37 of 2011 is clearly incorrect. If the said legal instrument introduced a similar or the same provision, that would only amount to reproduction thereof hence nothing would turn thereon. I also agree with the respondents that nowhere in its decision did the 1st Respondent purport to base its decision on the said Legal Notice. Even if it purported to have done so, since it was empowered to exercise its discretion under the existing provisions of the legislation, the Court in the exercise of its discretion would be very reluctant to interfere with a power which the 1st

Respondent had unless it was alleged, which was not the case in the instant application, that the citing of the "wrong" provision was meant to mislead. Accordingly, I decline to accede to the position taken by the applicant that the 1st Respondent's decision was based on a retrospective or retroactive provision of the law.

64. The applicant took the view that the decision whether or not the debts were bad or doubtful ought to be a subjective one based on the applicant's view. That argument though novel is with due respect not the law. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] 2 KLR 240** it was held:

"It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law."

65. In my view, to adopt the applicant's position would amount to divesting the Respondents of the power to determine whether a person ought to pay taxes and reposing the same onto the Applicant. That in my view would amount to this Court usurping the powers of the Legislature.

66. It was further contended that by the said Legal Notice, the Respondents usurped the powers of the Legislature. Suffice to say that in these proceedings, the applicant does not seek any order impugning the said Legal Notice. This Court cannot in its decision nullify a legal instrument by implication unless such an issue is properly brought before it in proceedings seeking to challenge the legal instrument in question.

67. In tax matters just like in any case where statutory powers are being exercised or duties being performed, the same ought to be exercised or performed 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**.

68. 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.

69. However, in this application, the applicant seems to have spent quite a considerable amount of its case on the issue whether it 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."

70. In this case the applicant was afforded an opportunity of presenting its case and based on the said presentation part of the assessment was set aside. That the 2nd Respondent encouraged the parties to amicably sort out their differences in my view cannot be termed as ceding its mandate to the 1st Respondent.
71. I have considered the 2nd Respondent's decision and whereas it may not meet the normal standards of a judicial determination, that alone cannot justify quashing the same. The decision in my view substantially dealt with the issues before the 2nd Respondent.
72. Apart from that it ought to be appreciated that judicial review is a remedy of last resort. As was held 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:

"…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."

73. It was similarly held 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.
74. Therefore there is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

75. The same principle has been underlined in the cases of **Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291, Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012.**
76. Where there exists an alternative remedy through statutory law, it is desirable that such a statutory remedy ought to be pursued first. I am however alive to the fact that whereas the said principle ought to be upheld, the Court must bear in mind the nature of the dispute before it *viz-a-viz* the jurisdiction vested in the alternative Tribunal. Therefore as was held by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004**, where there is a means of redress that is inadequate, the Court should not exercise restraint. The Court however went on to hold that:

"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process <u>where there is an available common law remedy</u>. In their lordship's words:

> **"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights"."**

77. The same position was adopted in **<u>Republic vs. National Environment Management Authority</u>** (supra), in which 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.
78. Therefore confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. In other words the Court ought to consider whether the alternative remedy is less convenient, beneficial and effectual.
79. In the instant case, section 86(2) of the Act provides with respect to the decision of the Local Committee as follows:

A party to an appeal under subsection (1) of this section or under section 89(1) who is dissatisfied with the decision thereon may appeal to the Court against that decision upon giving notice of appeal to the other party or parties to the original appeal within fifteen days after the date in which a notice of that decision has been served upon him; but an appeal to the Court under this subsection may be made only on a question of law or of mixed law and fact.

80. In this respect it was held in **Constitutional Petition Number 359 of 2013 <u>Diana Kethi Kilonzo vs. IEBC and 2 Others</u>** that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

81. The applicant has not shown why resort to the provisions of section 86(2) of the Act was found inappropriate.

<u>Order</u>

82. In the premises I find no merit in Notice of Motion dated 13th August, 2014, which I hereby dismiss with costs to the Respondents.

Dated at Nairobi this 23rd day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Otieno for the Applicant

Mr Kirugi for the 1st Respondent

Cc Patricia