REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION 374 OF 2006

REPUBLIC .... APPLICANT

VERSUS

KENYA REVENUE AUTHORITY .... RESPONDENT

EX-PARTE YAYA TOWERS LIMITED

JUDGMENT

The Application before court is the Notice of Motion dated 15th August, 2006. The Applicant is a Limited Liability Company while the Respondent is a Statutory Body established under the Provisions of the Kenya Revenue Authority Act, No.2 of 1995. The Applicant seeks the following orders from this Court:

1. An order of certiorari to bring to this court for the purpose of being quashed, the decision of the Respondent made on 31st March, 2006 in exercise of its statutory powers and discharge of its public duty under the Income Tax Act, Cap 472, Laws of Kenya demanding payment from the Applicant of arrears of income tax in the total sum of Kshs 17,775,190.10.

2. An order of prohibition directed to the Respondent prohibiting the Respondent from enforcing the said decision or demanding the said payment from the Applicant.

The grounds upon which the Applicant seeks the above reliefs are as follows:-

(i) That the facts relied upon to demand the said arrears of income tax payments and penalties from the Applicant cannot sustain a reasonable accusation of any wrong doing.

(ii) That no reasonable person considering the said facts can demand the said payments or level any accusation against the Applicant.

(iii) That the Applicant contracted consultancy services from independent contractors who rendered the services and paid them consulting fees.

(iv) That the said independent contractors duly submitted their income tax returns to the Respondent, declared the consulstancy fees paid and received from the Applicant and also paid income tax thereon which was assessed and levied by the Respondent.

(v) That the individual consultant who actually rendered the services was an expatriate holding a class ‘H’ Entry Permit and was never an employee of the Applicant.

(vi) That it is absurd to suggest that the said individual while rendering the said services was an employee of the Applicant and as such the Applicant was liable to make Pay As You Earn deductions on his behalf and remit the same to the Respondent.

(vii) That the Respondent's decision under challenge amounts to abuse and or excess of power and it has been made mala fide with a view to oppress, vex embarrass and harass the Applicant.

The application is also supported by the Verifying Affidavit ***SYDNEY SARGEANT,*** the Finance Director of the Applicant sworn on the 1st August, 2006. The Applicant was represented by Mr Oyatsi instructed by the firm of Sharpley Barret & Company advocates.

The application was opposed by the Respondent. MR J.K. ONUONGA a Senior Assistant Commissioner in charge of West of Nairobi Zone of the Domestic Taxes Department, which is a department of the Respondent, swore a Replying Affidavit on the 22nd August 2006 in opposition to the instant application. The Respondent was represented by ***MR P.M. MATUKU*** Advocate.

The facts of the case are that on the 7th December, 1999 the Applicant entered into a consultancy contract with a firm known as Modave Technologies for the services of one David Saunders who was a partner in the firm. The said David Saunders held a valid class 'H' Entry Permit which authorized him to carry on the said business and rendered services in accordance with the terms of the contract and a consulting fees was paid to the firm as agreed for the rendered services. Modave Technologies changed its status to a limited liability company and it entered into a new contract with the Applicant to render similar services and the agreed Consulting fees were paid.

The said company paid income Tax from the consulting fees that it received from the Applicant. The Respondent has maintained that at all material times, David Saunders was an employee of the Applicant and the Applicant was under an obligation to make Pay As You Earn deductions from his salary and remit the same to the Respondent. The Respondent further maintains that the Applicant has breached the law by failing to make Pay As You Earn deductions in respect of the said David Sunders and has assessed the alleged said Pay As You Earn deductions and penalties at Kshs 17,775,190.10 vide the letter dated 31st March, 2006. The Applicant has filed this application to challenge the said decision.

The Respondents opposed the Application. The Respondent contend that this Court does not have jurisdiction to hear and determine the Application herein for the following reasons:-

(a) The method and manner of ascertaining a person's total income as well as deductions allowed is set out in the Income Tax Act and it is not for a Judicial Review Court to examine the merits or otherwise of what the Respondent assessed the Applicant.

(b) The power to assess any taxpayer for tax is reserved upon the Commissioner of Income Tax and when the Kenya Revenue Authority through the Commissioner of income Tax has assessed tax against any person under the Income Tax Act, it cannot be said that the power to assess tax does not exist or the jurisdiction to assess for tax thereof has been exceeded.

(c) The matter is to whether one David Saunders was a Consultant or an employee of the Applicant is primarily a question of fact which can only be proved by calling for evidence thus judicial review is not the appropriate avenue.

(d) The purported consultancy agreement between the Applicant and Modave Technologies Ltd was a misrepresentation and contrary to Public Policy.

(e) There is no estoppel against statutory provisions.

The Applicant argues that the Respondent is estopped by law from making the assessment and tax demand against the Applicant and or demanding payment for the said tax from Applicant for the

following reasons.

(i).The Immigration permit class ‘H’ No 7957776 duly issued under the Immigration Act, Cap 172 to David Peter Saunders authorizing him to conduct business under the name of Modave Technologies. The Respondent is estopped from denying the validity of the said entry permit or existence of Modave technologies as a firm.

(ii) The Contract dated 7th December, 1999 between Modave Technologies and the Applicant which is a deed containing a solemn and unambiguous statement or engagement between Modave Technologies and the Applicant and is binding between the parties.

(iii) The contract dated 1st October, 2001 between Modave Technologies Ltd and the Applicant which also contain a solemn and unambiguous statement or engagement between Modave Technologies and the Applicant and is binding between the parties.

(iv) The Respondent has made an assessment and demanded payment from Modave Technologies Ltd in respect of the same services. Modave Technologies Ltd has duly paid to the Respondent all taxes assessed.

In the view of the court, the bone of contention lies on whether one David Peter Saunders was an employee of the Applicant or not. The issue is compounded by the fact that he was a foreigner and at a later point, his firm Modave Technologies changed status to a limited liability company a fact that is not in contention. At this juncture, it is important for the Court to clearly define the following:-

(i) Class ‘H’ Entry Permit.

(ii) Chargeable income for the purposes of the Income Tax Act Cap 470 Laws of Kenya.

Class ‘H’ Entry Permit

(i) The entry permit is addressed by the Immigration Act

Cap 172 Laws of Kenya as hereunder;-

“**A person who intends to engage, whether alone or in partnership, in a specific trade, business or profession (other than a prescribed profession) in Kenya, and who**

(a) has obtained, or is assured of obtaining, any licence, registration or other authority or permission that may be necessary for the purpose; and

(b) has in his own right and his free and full disposition sufficient capital and other resources for the purpose;

and whose engagement in that trade, business or profession will be to the benefit of Kenya.”

Part II of the Income Tax Act Cap 470 laws of Kenya deals with imposition of income tax. Section 3 provides as follows:-

(1) “**Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.**

(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of

(a) gains or profits from:-

(i) a business for whatever period of time carried on;

(ii) employment or services rendered;

(iii) a right granted to another person for use or occupation of property

(b) ....

(c) ....

(d) an amount deemed to be the income of a person under this Act or by rules made under this Act;"

Section 4 of the said Income Tax Act deals with income from businesses and states as follows:-

(a) "**Where a business is carried on or exercised partly within and partly outside Kenya by a resident person, the whole of the gains or profits from that business shall be deemed to have accrued in or to have been derived from Kenya;**

(b) the gains or profits of a partner from a Partnership shall be the sum of:-

(i) remuneration payable to him by the partnership together

(ii) with interest on capital so payable, less interest on capital payable by him to the partnership; and

(iii) his share of the total income of the partnership, calculated after deducting the total of any remuneration and interest on capital payable to any partner by the partnership and after adding any interest on capital payable by any partners to the partnership and where the partnership makes a loss, calculated in the manner set out in sub-paragraph (ii), his gains or profits shall be the excess, if any, of the amount set out in subparagraph (i) over his share of that loss; ..."

Section 5 of the said Act addresses the income from employment and it states:-

(1) For the purposes of section 3(2)(a)(ii) an amount paid to -

(a) a person who is, or was at the time of employment or when the services were rendered a resident person in respect of any employment, or services rendered by him in Kenya or outside Kenya; or

(b) a non-resident person in respect of any employment with or services rendered to an employer who is resident in Kenya or the permanent establishment in Kenya of an employer who is not so resident shall be deemed to have accrued in or to have been derived from Kenya.

(2) For the purposes of section 3(2)(a)(ii), "gains or profits" includes -

(a) Wages, salary, leaves pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, traveling, entertainment or other allowance received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income; ..."

Section 37 of the Income Tax Act also addresses the duties of an employer in relation to an employee with regard to income tax and it provides as follows:-

(1) An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such manner as may be prescribed.

(2) If an employer paying emoluments to an employee fails:-

(a) to deduct tax thereon;

(b) to account for tax deducted thereon; or

(c) To supply the commissioner with a certificate provided by rules prescribing the certificate, the Commissioner may impose a penalty equal to twenty five percent of the amount of tax involved or ten thousand shillings whichever is greater and the provisions of this Act relating to the collection and recovery of tax shall also apply to the collection and recovery of the penalty as if it were tax due from the employer.

(5) Where a person who is required under this section to deduct tax fails to remit the amount of any deduction to such person as the commissioner may direct within the time specified in the rules made under section 130, the provisions of this Act relating to the collection and recovery of tax, and the payment of interests thereon, shall apply to the collection and recovery of that amount as if it were tax due and payable by that person, the due date for the payment of which is the date specified in the rules made under section 130 by which that amount should have been remitted to the payee."

The Respondent has firmly submitted that one David Peter Saunders was an employee of the Applicant for the following reasons:-

(a) Under the contract annexed "JK02," he was not to engage in any other business activity or consultancy arrangement in a related field without written consent of the Applicant.

(b) Under his contract of service, he enjoyed all the benefits associated with an employee as follows:-

(i) Membership to a medical scheme financed by the Applicant as per the annexture marked "JK04", dated 27th May, 2003 from the Applicant's office authorizing payment of membership fees to AAR Health Services.

(ii) He received business from the Applicant by virtue of his employment as per the annexture marked "JK05" an internal memo of the Applicant dated 6th January, 2004 advising the payment of Kshs 231,900 to him as bonus.

(iii) Under the Contract of 7th December, 1999 which is annexture "JK01", at clause 4, he was to be provided with a car by the Applicant.

(iv) By a letter dated 18th August, 2003 which extended his consultancy, he enjoyed offshore, medical, car, air fares, annual leave and work permit fees from the Applicant as per the annexture marked JK06.

(v) He applied for leave to the management of the Applicant wherever he wished to go on leave as evidenced by annexture JK07 which is a leave application form.

(vi) Internal correspondences of the Applicant referred to him as the Engineering Services Manager with the Applicant as per the annexture "JK08" which is a letter dated 18th June, 2001.

It is not prudent to proceed any further without first defining who is an employee and what it entails under the relevant law. In the text Salmond & Heuston on the Law of Torts 20th Edition (1992) at p 448 an employee is defined as follows:-

"**Any person employed by another to do work for him on terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done. It must follow that an employee is one who is bound to obey any lawful orders given by the**

employer as to the manner in which his work shall be done. The employer retains the power of controlling him in his work and may direct not only what he shall do, but also how he shall do it. Whether the employment is by the day or by the job, and whether the amount of wages or salary paid is great or small, is of little assistance in determining the contract of service."

From the above it is clear that the test to be generally applied lies in the nature and degree of control over the person alleged to be an employee. In the Case of ***FERGUSON v DAWSON [1976] lWLR 1230***, the court held that the claimant was an employee and not a sub contractor, since he had no power to delegate his work to someone else to do for him.

ANALYSIS

Judicial review proceedings are directed to the decision making process as opposed to the merit of the decision. This court has on various occasions addressed the scope of judicial review. In the ***HIGH COURT MISC CIVIL APPLICATION NO. 1025 OF 2003, R v JUDICIAL SERVICE COMMISSION*** popularly known as ***Pareno*** Case, this court stated as follows:-

"**The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is 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."**

The Court has no doubt that the issues of assessment of Income Tax are squarely within the mandate of the Commissioner of income tax or rather the Respondent as vested by the Income Tax Act cap 470 laws of Kenya. The courts act with circumspection not to encroach on the statutory obligation of public authorities and paralyse their operations. However, Judicial review powers is a special jurisdiction of the High Court duly meant to provide remedy whenever necessary to correct various improprieties that may be committed by those who exercise public authority.

The grounds for judicial review have experienced unprecedented increase and the challenge for the court is to weigh each and every case presented before it on its own merits. However, there are conservative grounds that have remained outstanding in judicial review challenge such as:-

(i) Abuse of discretion.

(ii) Irrationality.

(iii) Excess of jurisdiction.

(iv) Improper motives.

(v) Failure to exercise discretion

(vi) Abuse of the rules of natural justice

(vii) Fettering of discretion.

(viii) Error of law.

As earlier observed, the court cannot consider the grounds for judicial review as a conclusive list but must address each case on its own merits and in particular address the novel grounds that are emerging as our jurisprudence continues to flourish. I have paid keen attention to the pleadings, the submissions by the learned counsels on record and the applicable law. It is the view of the court that the following are the issues that call for determination.

1. Whether or not David Peter Saunders was an employee of the Applicant for the purposes of Income Tax Act Cap 470 Laws of Kenya?

2. Whether the engagement of David Peter Saunders by the Applicant can be a basis for the Respondent to assess the demanded tax.

3. Whether the Respondent is barred from collecting tax by limitation of time in the Income Tax Act Cap 470 Laws of Kenya.

4. Whether the challenged decision in the Respondent's letter dated 31st March, 2006 was made in excess of the Respondent's jurisdiction?

On the first issue, the parties herein have taken diametrically opposed sides. The Applicant vehemently maintains that David Peter Saunders was at no any time its employee while the Respondent has vividly stated the reasons which leads it to infer that he was an employee of the Applicant. The Applicant argues that an immigrant such as David Peter Saunders could not engage in any employment in Kenya without first complying with the provisions of Immigration Act Cap 172 Laws of Kenya and that he actually needed a valid Entry Permit to engage in employment with the Applicant. The Applicant further submits that indeed it is a criminal offence for a third party to employ an immigrant unless he has a valid entry permit that allows him to be employed. On the other side, the Respondent maintains that David Peter Saunders had all the benefits enjoyed by an employee and as such the Applicant cannot escape the fact that he was its employee.

Going by the definition of an employee earlier alluded to vis a vis the relationship between David Peter Saunders and the Applicant, one does not fail to see a close correlation. In other words, the Respondent is correct to allege that he was an employee of the Applicant. Although the Applicant would want to pretend that he was a partner in Modave Technologies Firm which later translated to a limited liability company, the attributes of an employee such as monthly payments, medical scheme, company car, leave application among others are so conspicuous that such an allegation by the Applicant is indefensible. Indeed, the terms we give to relations are not important than the subsequent evidence arising therefrom which one may safely draw other conclusions. In essence, whether the Applicant continues to deny that David Peter Saunders was an employee or to allege existence of another relationship, does not really matter, in reality, the evidence surrounding the relationship will give it the correct name.

Having established that David Peter Saunders was an employee of the Applicant, poses another challenge alluded to by the Applicant but totally ignored by the Respondent. The challenge is whether he was a lawful employee for purposes of paying income tax. I have considered the Entry Permit for David Peter Saunders dated 5th November 1997. According to the permit, he was allowed entry to Kenya for purposes of business. The permit is deleted where the words employment and profession appear. It is therefore correct to state that the Entry Permit was strictly for David Peters Saunders to carry out business as Madave Technologies but not for employment. If the Applicant in ignorance or fraudulently in breach of law engaged him as an employee, the contract of employment or rather the relationship was illegal and against public policy.

Illegality as to the formation of a contract implies that it is intended to be performed in an illegally prohibited manner and the courts cannot enforce it or provide any other remedies arising out of the contract as it is against Public Policy. The principle of public policy was propounded by Lord Mansfield in the case of ***HALMAN v JOHNSON (1775) 1 COWP, 341 at p 343*** where he stated as follows:-

"**No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise** *ex turpi causa*, **or the transgression of a positive law of this country, there the court has says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the**

advantage of it; for where both are equally at fault, *potior est* **condition defendants."**

It is clear that some contracts may be illegal when entered into and cannot be performed by the parties without the commission of an illegal act leading to breach of criminal law, or any other statute. In the case herein, it appears that David Peter Saunders would not have lawfully entered into any contract of employment with the Applicant without breaching of the provision of the Immigration Act Cap 172 Laws of Kenya. Section 13(2) of the said Act provides as follows:-

"**A person not being a citizen of Kenya, engages in employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by an entry permit, or exempted from this provision by regulations made under Act; shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both; ..."**

In the case of ***LEVY v YATES [1838] A & E 129,*** the case concerned with a statutory rule that no play could be lawfully acted within 20 miles of London without a royal licence, which would only be granted only in certain circumstances. The contract between a theatre-owner and an impression was for the performance of a theatrical production prohibited by the statute and it was held that the contract was unforceable because the agreement could not be carried into effect without contravention of the law.

Parties may also act in ignorance of the law. Where a contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. In the case of ***MILLER v KARLINSI [1945] 62 TLR 85,*** an employee whose mode of payment amounted to a fraud on the revenue was held unable to recover arrears of salary, whether or not the parties knew that what they were doing was illegal.

From the above, it turns out clearly that any contract of employment between David Peter Saunders and the Applicant was illegal from the formation let alone at the time of the performance and would have amounted to a crime under the Immigration Act Chapter 172 Laws of Kenya.

The second issue is properly covered by the foregoing reasons. Since the employment of David Peter Saunders amounted to flagrant breach of section 13(2)(f) of the Immigration Act, the Respondent cannot use the relationship to assess any tax as that would be against the public policy and in any event, the Applicant breached the said law by engaging him in employment.

The Respondent has argued that it acted within the law when it assessed the tax to the tune of Kshs 17,775,190.10 and it cannot be said that it acted without jurisdiction. Indeed there is no contention that the Respondent has powers to issue a demand for taxes. In the case of ***TWIGA PROPERTIES LTD HC MISC CIVIL APPLICTION NO. 665 OF 2003,*** the court at page 12 stated as follows:-

"**Section 15 of the Act sets out the method of ascertainment of a person's total income as well as deductions allowed. It is not for a judicial review court to examine the merits or otherwise of what the Respondent allowed to be deducted, or did not allow."**

The Respondent also has provided the court with a good number of authorities with a view to guide the court on understanding how personal emoluments or salaries are determined for taxation. I have keenly gone through the following cases:

1. NAIPER v NATIONAL BUSINESS AGENCY LTD 2 ALLER 264.

2. ***PRITCHARD (INSPECTOR OF TAXES) v ARUNDALE [1971] ALL ER 1011***.

I appreciate the efforts demonstrated by the Counsel for the Respondent in an attempt to make the issue of taxation clear to the court. However, the Respondent seems to be oblivious or rather misguided on the issue of employment of David Peter Saunders by the Applicant. If he had an entry permit allowing him to engage in employment in Kenya, the arguments by the Respondent would be absolutely correct but that is

not the case. David Peter Saunders had been given an entry permit to Kenya for purposes of doing business as Modave Technologies. It appears that the Applicant for reasons I would not speculate engaged him in employment. The employment was illegal and a criminal offence as per section 13(2)(f) of the immigration Act Cap 172 Laws of Kenya. The big question is whether the Respondent can lay basis for assessing tax on an unlawful engagement and in my view, it cannot because that would be against the public policy and would be benefiting from an illegality.

The third issue is whether the Respondent is time barred from collecting tax from the Applicant. Section 79 deals with time limit for making assessment of tax and it provides as follows:-

(1) An assessment may be made under this Act at any time prior to the expiry of seven years after the year of income to which the assessment relates but -

(a) where fraud or gross or wilful neglect has been committed by or on behalf of a person in connection with or in relation to

(b) tax for a year of income, an assessment in relation to that year of income may be made any time;

(c) in the case of income consisting of gains or profits from employment or services rendered, an assessment in relation thereto may be made anytime prior to the expiry of seven years after the year of income in which the gains or profits are received.

(d) ....

David Peter Saunders started working for the Applicant on 11th October, 1999 and the Respondent sent a demand notice for the assessed tax vide a letter dated 31st March 2006. The Respondent moved swiftly to beat the time limitation. Seven years would have lapsed on 11th October, 2006. However, as I have already stated time is not relevant in this matter because the engagement of David Peter Saunders by the Applicant was illegal ***ab initio***.

Having addressed the above issues, I finally come to the final one which is in relation to jurisdiction of the Respondent. In the case of ***CHIEF CONSTANBLE OF NORTH WALES v EVANS [1982] WLR 115 at p 1173, Lord Brightman.***

"**The court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that the lawful authority is not abused by unfair treatment."**

Every public body owes its powers to the Act donating the same and it is also subject to the Constitution. If a public body acts outside or exceeds the powers donated to it, it will be acting without jurisdiction. In the case of ***WESTMINISTER CORPORTION v LONDON AND NORTHWESTERN RAIL CO. [1905] AC 426 at p 430, Lord Macnaughten*** stated as follows:-

"**It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of authority committed to it. It must act in good faith and must act reasonably ..."**

Lack of jurisdiction is a major a ground for judicial review and courts will readily quash decisions arrived at without jurisdiction. In this instant case if the Respondent acted without jurisdiction, its decision is void. The burden of proof that the Respondent acted without jurisdiction squarely lie on the Applicant and can only be discharged by availing tangible evidence. As earlier noted, the Respondent has statutory powers under the Income Tax Act Chapter 470 Laws of Kenya to assess tax payable. Section 73 of the said Act provides:-

(1) "**Save as otherwise, provided, the Commissioner shall assess every person who has income chargeable to tax as expeditiously as possible after the expiry of time allowed to that person under this Act for the delivery of a return of income.**

(2) **.......**

(3) **Where a person has not delivered a return of income for a year of income, whether or not he has been required by the Commissioner so to do, and the Commissioner considers that the person has income chargeable to tax for that year, he may according to the best of his judgment, determine the amount of the income of that person and assess him accordingly; but the assessment shall not affect any liability otherwise incurred by that person under this Act in consequence of his failure to deliver the return."**

In the view of the court, the Respondent apparently has not acted outside its jurisdiction. However, as I have earlier stated, an illegal contract cannot form any basis for assessment of income tax as that would be against public. Collection of taxes arising from unlawful transactions should be discourged particularly by the courts by refusing to aid any party regardless of any apparent bona fides. In reality, the Respondent has no jurisdiction to assess and levy tax from transactions which have been done in breach of any written law or in furtherance of an illegality under common law.

The Applicant has insisted that it had legitimate expectation and it is too late for the Respondent to deprive it the advantage it had enjoyed in the past. According to the Applicant, David Peter Saunders was working for Modave Technologies which had been registered under the Registration of Business Names Act Chapter 499 Laws of Kenya and Modave Technologies Ltd was later incorporated. After incorporation, Modave Technologies Ltd was assessed by the Respondent and paid tax accordingly. The Applicant argues that there was Legitimate expectation after the law had been complied with. In the Case of ***COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS v MINISTER FOR THE CIVIL SERVICE [1924] 3 ALL ER 935 at page 936, the House of Lords*** held as follows:-

"**An aggrieved person was entitled to revoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal. The appellants' legitimate expectation arising from the existence of a regular practice of consultation which the appellants could reasonably expect to continue gave rise to an implied limitation on the minister's exercise of the power contained in act 4 of the 1982 order; namely an obligation to act fairly by consulting GCHQ staff before withdrawing the benefit of trade union membership. The minister's failure to consult prima facie entitled the appellants to judicial review of the minister's instruction".**

Going by the above decision, the Applicant's allegation of legitimate expectation seems misplaced as it has no foundation at all. There is absolutely nothing to show that the Applicant had any prior benefit or advantage guaranteed by the Respondent. In the view of the court legitimate expectation cannot exist or even be a justifiable reason for breach of the law. Save that, David Peter Saunder's employment by the Applicant was unlawful, the Applicant cannot purport that assessment and demand of tax amounts a withdrawal of some benefit or advantage because payment of tax is a requirement under the law and cannot be abdicated on allegations of legitimate expectation. Thus if Saunders was lawfully employed and the Applicant refused to deduct payee the Respondent would have been entitled to recover the amounts not remitted pursuant to the Income Tax Act.

The Applicant has further alluded that the decision taken by the Respondent is unreasonable and irrational. Irrationality and Wednesbury unreasonable are also major grounds of intervention by the court in judicial review. In the case ***NBI HIGH COURT MISC CIVIL APPLICATION NO. 1769 OF 2004 R v MINISTRY OF PLANNING & ANOTHER ex-parte PROFESSOR MWANGI KIMENYI,*** this court stated as follows:-

“**So where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refused to take relevant factors into account in reaching its decision or based its decision on irrelevant factors, the court would intervene on the ground that the body has in each case abused its power. The reason why the court has to intervene is because there is a presumption that where Parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular way.”**

The Respondent’s decision under challenge does not qualify for quashing under the grounds of irrationality, Wednesbury unreasonable or abuse of discretion or power. As already addressed, the key issue in this entire case is illegality of the employment of Davit Peters Saunder by the Applicant which indeed estops the Respondent from assessing and collecting tax arising from an unlawful engagement.

Turning now to the prayers sought in the Notice of motion dated 1st August 2006. Judicial review orders are discretionary in nature and the court may decline to grant them even if deserved particularly if the court is of the view that there are more efficacious remedies in the circumstances of the case. The Applicant has sought an order of certiorari to bring to this court for purposes of quashing, the decision of the Respondent made on 31st March 2006 whereof the Respondent is demanding payment from the Applicant arrears of income tax amounting to Kshs 17,775.190.10. As earlier stated, the basis of the assessed amount of money is the employment or rather engagement of David Peter Saunders by the Applicant whereof, the Applicant never remitted Pay As You Earn deductions to the Respondent for the period David Peters Saunders was purportedly working for Modave Technologies before it was incorporated.

The court has already made a finding that the engagement of David Peters Saunders by the Applicant as an employee was illegal and the Respondent must lead by example by not countenancing any proceeds arising from unlawful transactions. Although the Applicant is equally guilty of employing David Peters Saunders contrary to the Entry Permit Class ‘H’ which he had, it would be against public policy to allow the Respondent derive benefit therefrom. For the above reasons I issue an order of certiorari to remove into this court the Respondent’s decision of 31st March 2006 demanding payment from the Applicant Kshs 17,775,190.10 and I accordingly and forthwith quash the said decision.

With regard to prayer 2, the Applicant seeks for an order of prohibition directed to the Respondent to prohibit the Respondent from demanding payment from the Applicant of the said sum of Kshs 17,775,190.10. There can be no justification for any demand for the said amount whose basis is an illegal transaction as earlier stated. I do not see any other way of dealing with future threats by the Respondent to the Applicant regarding the aforesaid sums of money other than forestalling the issue once and for all. Consequently I hereby issue an order of prohibition directed to the Respondent to prohibit the Respondent from demanding the aforesaid Kshs 17,775,190.10.

Going by the circumstances of this case, I find that the Applicant has no clean hands and is also guilty of entering into an unlawful engagement which tempted the Respondent to demand tax arising therefrom. Moreover, both Counsel never brought out the issue of illegality upon which the case has turned. Consequently, I find that none of the parties merits costs of this suit and I therefore order that each party do bear the own costs.

DATED and delivered at Nairobi this 21st day of November, 2008.

J.G. NYAMU

JUDGE