Republic v County Secretary, Nairobi City County & another; Mungai (Exparte) (Judicial Review Application E046 of 2023) [2025] KEHC 2466 (KLR) (Judicial Review) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E046 OF 2023

JM CHIGITI, J

FEBRUARY 6, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE COUNTY SECRETARY, NAIROBI CITY COUNTY ..... 1ST RESPONDENT

THE COUNTY CHIEF OFFICER, REVENUE AND ADMINISTRATION NAIROBI COUNTY ..... 2ND RESPONDENT

AND

WAINAINA KIGATHI MUNGAI ..... EXPARTE

JUDGMENT

1. The application before this Court is dated 2nd February 2024 and is brought under Order 53 Rules 1(1), (2), (3), and (4) of the Civil Procedure Rules, Section 1A,1B and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution*.

2. The application seeks the following orders;

    a. An Order of Prohibition to prohibit the Respondents from levying penalties and interest on rates which the Applicant has already paid or demanding payment of rates arrears or in any manner howsoever denying the Applicant from paying the annual rates in respect to his properties being L.R. No. 7785/74 situated in Runda Estate, Nairobi and LR. No. 209/7884 situated in Kyuna Estate, Nairobi.

b. An Order of Certiorari to quash the decision by the Respondents to levy penalties and interest on rates which the Applicant has already paid or demanding payment of rates arrears or in any manner howsoever denying the Applicant from paying the annual rates in respect to his properties being L.R. No. 7785/74 situated in Runda Estate, Nairobi and LR. No. 209/7884 situated in Kyuna Estate, Nairobi.

c. An Order of Mandamus to compel the Respondents to issue the Applicant with a current rate demand for the years 2023 and 2024 in respect to his properties being LR. No. 7785/74 situated in old Runda Estate, Nairobi and LR. No. 209/7884 situated in Kyuna Estate, Nairobi without any penalties and/or interest thereon.

d. That the costs of this Application be provided for.

3. The application is verified by the affidavit sworn by Wainaina Kigathi a Statutory Statement dated 31st March 2023.

4. The Ex parte Applicant's case is that he is the registered proprietor of property being L.R. No. 7785/74 situated in Runda Estate, Nairobi and LR. No. 209/7884 situated in Kyuna Estate Nairobi and that he has been diligently paying the Land Rent and Rates of the said properties.

5. According to him sometime in May 2013, the 1st Respondent advertised his property being LR. No. 7785/74 Runda Estate in the local dailies as being a rate defaulter and threatened to sell it. Consequently, he filed an application for Judicial Review seeking orders of Certiorari, Prohibition and Mandamus in HC JR. No. 356 OF 2013.

6. The Court in its judgment delivered on 10th July 2014 by the Hon. Justice Odunga granted an Order of Certiorari quashing the decision of the Respondent to place the Applicant's property being L.R. No. 7785/74 situated in Runda Estate under Nairobi County Management.

7. The Court also issued an order of Mandamus compelling the Respondent to remove a Notice which they had placed on the Applicant's property and on the public entrance on Ruaka Road in Runda Estate and awarded the Applicant costs. It is the Applicant's case that to date the Notice remains uncollected.

8. It is the Applicant's case that on 8th October 2014, the Nairobi City County, the 1st Respondent herein filed a suit at the 1st Class Magistrate's Court City Court being Case No. 50 of 2014 demanding for payment of alleged Rates arrears and penalties of Kshs.12,964,446/- in respect to L.R. No. 7785/74 however having adduced no evidence to support the claim, the 1st Respondent later withdrew the suit on 6th March 2017 and the Court awarded the Applicant the costs the suit.

9. The Applicant states that 1st Respondent simultaneously with the above case filed a suit at the 1st Class Magistrate 's Court, City Court being Case No. 41 of 2014 demanding for payment of alleged Rates arrears and penalties of Kshs. 4,532,338l/- in respect to LR. No. 209/7884 which suit was dismissed on 4th September 2017 and the Applicant awarded costs the suit.

10. The Applicant's case is that the Respondents are well aware of the outcome of the suit having been duly represented by counsel throughout the proceedings and having been served with a copy of the Decree and Certificate of Costs issued therein.

11. Further that the Respondents were required to issue the Applicant with the current rates demand reflecting the correct rates amount payable in respect to L.R. No. 7785/74 situated in Runda Estate. Nairobi and pay the costs thereof but have failed, refused and or ignored to do so in blatant disobedience of the Court Order.

12. According to the Applicant the Respondents have adamantly refused to issue the Applicant with a current rate demand for the year 2023 reflecting the annual rates payable for the current year which is a sum of Kshs. 100,000/- in respect to L.R. No. 7785/74 and Kshs. 41,204.42 in respect to L. R. No. 209/7884 and they have instead purported to issue a demand for payment of land rates arrears, penalties and interest to the tune of Kshs. 2,418,000/- in respect to LR. No. 7785/74 and Kshs. 1,807,590.42 in respect to L. R. No. 209/7884.

13. The Respondents are also said to have also barred the Applicant from paying the rates due for 2023 unless and until the Applicant first pays the sum demanded as land rates arrears and penalty.

14. The Applicant states that on 2nd November 2022, the Respondent had delivered a demand notice dated 3rd October 2022 to his residence demanding a whopping Kshs. 217,493,193/- for alleged rates arrears penalties and interest and year 2022 rates in respect to LR. No. 7785/74.

15. It is the Applicant's case that he is keen to pay the rates due as and when they fall due as failure to do so would justify the Respondent's concerted efforts to levy penalties and interest thereon.

16. In response the Respondents filed a Replying Affidavit sworn on 3rd April 2024 by W.S.Ogola who introduces himself as the County Solicitor of Nairobi County.

17. According to the deponent the Applicant has not produced any evidence to show that he has paid all the outstanding rates, interest charged on all unsettled rates and penalties for the two parcels of properties as alleged.

18. It is also the Respondents' case that the Certiorari, Mandamus and Prohibition orders prayed for in the application and raised in the Notice of Motion are res judicata as some have been adjudicated in Judicial Review Miscellaneous Case No. 356 of 2013 at Nairobi and determined.

19. According to the Respondents the applicant has not demonstrated if any of his rights or any order by court had been infringed. Further that in taking the impugned action the Respondents were exercising their statutory responsibility in demanding, collecting and levying penalties. It is also the Respondents' case that the order of Prohibition sought from levying penalties and interest on the unsettled due rates if granted, will deprive the Respondents the statutory rights as provided under the *Rating Act* Section 26 Act Cap 227 to levy penalties and interest and demand outstanding rates as long as they are due.

20. The Respondents urge that the Applicant has neither stated what is tainted in the Respondents' demands for what is due to it, nor has he demonstrated the illegality, irrationality and procedural impropriety in levying of interest on the uncleared outstanding rates or even provided material evidence that he does not owe the Nairobi City County Government outstanding rates interests and penalties on the aforementioned properties.

21. It is also urged that the issuance of current demand rates without penalties and interest amounts to a waiver of those penalties without following the laid down procedures by the Nairobi City County. Further that the Applicant has not shown any intention or evidence to settle or provide an acceptable proposal to liquidate the outstanding rates and penalties to date.

22. The Court (Justice G.V Odunga as he then was) in Judicial Review Miscellaneous Case No. 356 of 2013 at Nairobi is said to have held that there was no evidence that the Respondent had promised or assured the Applicant he would not pay the rates on his property. Further that the fact that the same has not been demanded for longtime may only entitle the Applicant to reasonable notice to pay the same but does not entitle the Applicant to evade the payment.

23. The Respondents state that an order to compel the Respondent to issue rates without penalties and interests on the outstanding amounts to twisting the finding of Justice G.V Odunga where the Applicant sought Orders of Mandamus to compel the 2nd Respondent to issue him with a Rate Clearance Certificate in respect to the suit property being L.R.No.7785/74, and LR No. 209/7884 the same is said to have been declined.

24. According to the Respondents the Applicant cannot feign knowledge of outstanding rates accounts yet in his Chamber Summons dated 31st March 2023 he avers to have received a demand note of total outstanding rate, interest and penalties amounting to Ksh217,493,193/—.

25. It is also urged that the Nairobi City County since December 2023 to end February 2024 offered 100% waiver of Interest and Penalties for ratable defaulters if they cleared their principal outstanding rates but, the Applicant was never moved to take advantage of this 100% interest and penalties waiver to pay/clear what he owes less all the penalties and interest in dispute.

26. The Ex parte Applicant filed written submissions dated 23rd August 2024. In the submissions the Ex parte Applicant submits that the Respondents legal duty and responsibility to collect property rates and initiate recovery measures against rate payers who are in default is not denied.

27. The Applicant also submits that the onus to produce the rates statement indication that he has not been paying rates is on the Respondent.

28. It is further submitted that contrary to the Respondents' allegations in Judicial Review Miscellaneous Case No. 356 of 2013 the Applicant was seeking Judicial Review orders to restrain the Respondents from clamping the Applicant's property being L.R. No. 7785/74 and placing under the management of Nairobi County for alleged rate arrears.

29. The Applicant further submits that he has not sought orders restraining the Respondents from selling his properties because of rent arrears as was the case in Judicial Review Miscellaneous Case No. 356 of 2013 and as such this court is cannot be functus officio and the matter cannot be res judicata.

30. The Applicant relies on the case of Dennis Paul Manoti vs. Republic [2021] eKLR on the duties of Nairobi City County to issue rates demand notices.

Respondents' case;

31. In response the Respondents filed a Replying Affidavit sworn on 3rd April 2024 by W.S.Ogola who introduces himself as the County Solicitor of Nairobi County.

32. According to him the Applicant has not produced any evidence to show that he has paid all the outstanding rates, interest charged on all unsettled rates and penalties for the two parcels of properties as alleged.

33. It is also the Respondents' case that the Certiorari, Mandamus and Prohibition orders prayed for in the application and raised in the Notice of Motion are res judicata as some have been adjudicated in Judicial Review Miscellaneous Case No. 356 of 2013 at Nairobi and determined.

34. According to the Respondents the applicant has not demonstrated if any of his rights or any order by court had been infringed. It is further their case that in taking the impugned action the Respondents were exercising their statutory responsibility in demanding, collecting and levying penalties.

35. It is also the Respondents' case that the order of Prohibition sought from levying penalties and interest on the unsettled due rates if granted, will deprive the Respondents the statutory rights as provided

under the *Rating Act* Section 26 Act Cap 227 to levy penalties and interest and demand outstanding rates as long as they are due.

36. The Respondents argue that the Applicant has neither stated what is tainted in the Respondents' demands for what is due to it, nor has he demonstrated the illegality, irrationality and procedural impropriety in levying of interest on the uncleared outstanding rates or even provided material evidence that he does not owe the Nairobi City County Government outstanding rates interests and penalties on the aforementioned properties.

37. It is also argued that the issuance of current demand rates without penalties and interest amounts to a waiver of those penalties without following the laid down procedures by the Nairobi City County. Further that the Applicant has not shown any intention or evidence to settle or provide an acceptable proposal to liquidate the outstanding rates and penalties to date.

38. Reliance is placed in Judicial Review Miscellaneous Case No. 356 of 2013 at Nairobi is said to have held that there was no evidence that the Respondent had promised or assured the Applicant he would not pay the rates on his property. Further that the fact that the same has not been demanded for longtime may only entitle the Applicant to reasonable notice to pay the same but does not entitle the Applicant to evade the payment.

39. The Respondents argue that an order to compel the Respondent to issue rates without penalties and interests on the outstanding amounts to twisting the finding of Justice G.V Odunga where the Applicant sought Orders of Mandamus to compel the 2nd Respondent to issue him with a Rate Clearance Certificate in respect to the suit property being L.R.No.7785/74, and LR No. 209/7884 the same is said to have been declined.

40. According to the Respondents the Applicant cannot feign knowledge of outstanding rates accounts yet in his Chamber Summons dated 31st March 2023 he avers to have received a demand note of total outstanding rate, interest and penalties amounting to Ksh217,493,193/—.

41. It is also argued that the Nairobi City County since December 2023 to end February 2024 offered 100% waiver of Interest and Penalties for ratable defaulters if they cleared their principal outstanding rates but, the Applicant was never moved to take advantage of this 100% interest and penalties waiver to pay/clear what he owes less all the penalties and interest in dispute.

Analysis and determination

Issues for determination:

Whether the suit is Res Judicata;

42. The *Civil Procedure Act* Cap 21, at Section 7 provides as follows;

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

43. The expression "former suit" as used in the above sections can be said to mean a suit which has been decided before the suit in question whether or not it was instituted before it.

44. For purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

45. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

46. Further any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of the above section, be deemed to have been refused and where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

47. The doctrine of res judicata is not novel. Its genesis is in Section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya which provides that:

> " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

48. The Supreme Court in a decision rendered on 6th August, 2021 in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR comprehensively dealt with the different facets making up the doctrine of res judicata.

49. The Apex Court went ahead and rendered itself on the threshold for proving the applicability of the doctrine. The Court stated as follows:

> " (86) We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
>
> a. There is a former Judgment or order which was final;
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> b. The Judgment or order was on merit;
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> c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
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> d. There must be between the first and the second action identical parties, subject matter and cause of action

50. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain.

i. What issues were really determined in the previous Application;

ii. Whether they are the same in the subsequent Application and were covered by the Decision.

iii. Whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

51. In our instant case the Respondents challenge the application before this Courts on grounds that the Certiorari, Mandamus and Prohibition orders prayed for have been adjudicated in Judicial Review Miscellaneous Case No. 356 of 2013 the Certiorari, Mandamus and Prohibition orders prayed for in the application and raised in the Notice of Motion are res judicata as some have been adjudicated in Judicial Review Miscellaneous Case No. 356 of 2013.

52. This court has had an opportunity to look at the Judgment in the above matter and it finds that there is no former Judgment or order which was final on the issues raised before this Court. The issues heard and determined in the above case were on Nairobi County's intention to place L.R. No.7785/74 situated in old Runda Estate under Nairobi County management and the removal of a Notice erected on the suit premises. The court also addressed the issue of the issuance of a Rates Clearance Certificate in respect of the suit property.

53. In the instant case the Exparte Applicant seeks orders to prevent the Respondents from levying penalties and interest on rates which he have already been paid or from denying the Applicant to pay the annual rates in respect to L.R. No.7785/74 situated in Runda Estate, Nairobi and L.R. No.209/7884 situated in Kyuna Estate, Nairobi. The Applicants also seeks for the Respondent to issue him with the current rates demand for the years 2023 and 2024in respect of the two properties.

54. It is obvious from the above that the issues raised in the former suit are not similar to the issues raised in the instant suit.

55. This Court also notes that the parties before the Court in Judicial Review Miscellaneous Case No. 356 of 2013 are also clearly not identical to the parties before this Court.

56. For these reasons the ground of res judicata fails.

Whether or not the court is Functus Officio;

57. The Supreme Court in the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) held as follows on the doctrine of functus officio;

> " 18. We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept: "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."
>
> 19. This principle has been aptly summarized further in Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings

are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available" [emphasis supplied]."

58. Having determined that the issues raised before this Court by the Applicant were never determined by the Court in Judicial Review Miscellaneous Case No. 356 of 2013 the issue of this court being functus officio does not arise.

Whether or not the Court ought to grant the prayers sought;

59. The Court in the case of Pastoli vs Kabale District Local Government Council Others [2008] 2 EA 300 at pages 303 to 304 held thus:

> " In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).
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> Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....
>
> Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re an Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".
>
> Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al- Mehdawi v Secretary of State for the Home Department [1990] AC 876)."In the case of Council of Civil Service Unions Vs Minister for the Civil Service (1985) A.C. 374,410 which has now become a reference point in the issuance of judicial review orders, Lord Diplock held as follows:
>
> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the

European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

Whether or not the applicant had a legitimate expectation to receive the demand notice for Rates

60. In *Republic vs. Kenya Revenue Authority Ex parte Shake Distributors Limited HC Misc. Civil Application No. 359 of 2012* it was held that:

> "On the issue of legitimate expectation, the Applicant submitted that it met all the pre-requisite conditions and obtained all the documents necessary for the importation of sugar. The Applicant argued that it had received an assurance that after meeting the necessary conditions its legitimate expectation would be protected and not breached. In reply the Respondent submitted that it did not make any representation to the Applicant that it would clear its imports without imposing conditions permitted in law or release them on terms which contravene customs law or practice. According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of De Smith's Judicial Review, 'Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)'. It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law."

61. The Court in *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021*) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment) Mativo, J held thus:

> " The first step in the analysis has both an objective and a subjective dimension. First, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not. Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.
>
> The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty. Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law. Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows: -
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> Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."

62. Section 15 of The *Rating Act* provides as follows;

    1. Every rate levied by the rating authority under this Act shall become due on the first day of January in the financial year for which it is levied and shall become payable on such day in the same financial year as shall be fixed by the rating authority, of which day, and of the amount of which rate, the rating authority shall publish at least thirty days' notice.

    2. For the purposes of the Act, the valuation roll or any supplementary valuation roll in force on the day on which any rate is payable shall be conclusive evidence of all matters included in such roll.

63. In the instant suit the applicant has demonstrated that the Respondent has refused or declined to issue it with a notice.

64. The Act does not create or contemplate any terms of any conditions pre requisite to the issuance of a notice.

65. The Respondent is constantly under a duty to issue notices for rates whenever they are due and, in any event, annually upon all ratable or last like the applicant herein.

66. Logically, The Act does not set nor provide for situations when the said notice cannot issue. It is clear in my mind that the fact that the applicant is in arrears must not form the basis for their refusal on the part of the Respondent to issue a notice.

67. The Act does not provide for situations where penalties are imposed and as such to demand penalties on the part of the Respondent is punitive in the circumstances given that a rates defaulter has no way of predicting how penalties on unpaid rates is computed. This offends Article 50 of *the Constitution* which provides for fair hearing. The same further against the grain of Article 47 of *the Constitution* on the right to fair hearing and under the *Fair Administrative Action Act*.

68. In any event the failure to issue the statutory notice amounts to an abdication of a statutory duty on the part of the Respondent. This has a negative impact on the revenue collection on the part of the Respondent. Such an omission offends the *Fair Administrative Action Act* and I so hold.

Whether or not an order of prohibition can issue

69. Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [20221 eKLR, the Court rendered itself thus:

> " The Order of "Prohibition" issues where there are assumptions of unlawful jurisdiction or excess of jurisdiction. It's an order from the High Court directed to an inferior tribunal or body as in this case the Kadhi's Court. Its functions is to prohibit and/or forbids encroachment into jurisdiction and further to prevent the implementation of orders issued when there is lack of jurisdiction."

Whether or not an order of mandamus can issue;

70. From the foregoing, this court finds that the Applicant has made out a case for the grant of the order of Mandamus. In so holding, am guided by the case of Apotex Inc. v Canada (Attorney General) [1994] 3 SCR 1100 the tests for granting an order of Mandamus were set out as follows:

i. There must be a public legal duty to act;

   a. The duty must be owed to the Applicants;

ii. There must be a clear right to the performance of that duty, meaning that;

   a. The Applicants have satisfied all conditions precedent; and

   b. There must have been:

      1. A prior demand for performance;

      2. A reasonable time to comply with the demand, unless there was outright refusal and;

      3. An express refusal, or an implied refusal through unreasonable delay

iii. No other adequate remedy is available to the Applicants;

iv. The Order sought must be of some practical value or effect

v. There is no equitable bar to the relief sought

vi. On a balance of convenience, mandamus should lie.

Whether or not an order of certiorari can issue;

71. Section 16 (1) of The *Rating Act* stipulates as follows;

1. That when the rating authority has given notice under section 15 of this Act of the day on which any rate levied under this Act will become payable, it shall be the duty of every person liable for such rate to pay the amount of such rate at the offices of the rating authority or at any place whether within or without the area of the rating authority to any person authorized by the rating authority to collect such rate on or before such day, failing which proceedings may be taken as hereinafter provided.

2. The rating authority may allow a discount of not more than five per centum, or such other discount as the rating authority may, with the approval of the Cabinet Secretary, determine on any rate paid on or before the day on which such rate becomes payable or such later day as the rating authority may appoint and any scheme of discount under this section may include provision for a different discount on rates paid on or before different dates.

3. The rating authority shall charge simple interest at the rate of three per centum per mensem or at such other rate as the Cabinet Secretary shall by notice in the Gazette prescribe on any sum remaining unpaid after the day on which the same was payable and for the purposes of this subsection a part of a month shall be counted as one month.

4. Notwithstanding sub-section (3), the interest charged shall not exceed the principle amount of the rate owing.

72. Section 17(1) and (2) of the *Rating Act* provides as follows;

1. If, after the time fixed for the payment of any rate, any person fails to pay any such rate due from him and any interest on any such unpaid rate as provided in section 16 of this Act, the rating authority may cause a written demand to be made upon such person to pay, within fourteen days after service thereof on him, the rate due by such person and interest thereon calculated in accordance with section 16(3) of this Act which demand shall be in the appropriate form in the Second Schedule.

2. If any person who has had such demand served upon him makes default, the rating authority may take proceedings in a subordinate court of the first class to secure the payment of such rate and interest in the manner hereinafter prescribed.

73. Section 9 (1) of the *Fair Administrative Action Act*, 2015 provides an avenue for a party aggrieved by an administrative action to without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*. This, is subject to exhausting all other available remedies. Thus, Section (9) (2) provides in mandatory terms that;

> "The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."
>
> Under Section 9 (3) "The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1)."

74. In William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR the court held that the exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The doctrine of exhaustion is in keeping with Article 159 of *The Constitution* which seeks to promote alternative dispute resolution.

75. In the Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425 the court had this to state;

> " 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."

76. In Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] eKLR the court held thus: -

> " The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425."

77. To emphasize on the issue of pursuing out of court remedies as a matter of first instance the Court in Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR held that:

> " It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

78. In Anthony Miano & others v Attorney General & others [2021] eKLR the court stated: -

> " The doctrine of constitutional avoidance deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion.
>
> The first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
>
> The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively."

79. In the case of Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 Others [2014] eKLR; A Supreme Court decision:

> The principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition.
>
> The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:
>
> "The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion".

80. In the South African case, S v Mhlungu, [1995] (3) SA 867 (CC) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph *59*), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.

81. In Geoffrey Muthinja Kabiru& 2 others v Samuel Munga Henry & 1756 others [2015] eKLR the Court of Appeal stated that: -

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...These accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

82. The Court in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR stated as follows:

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*."

83. In the instant it is clear that the Respondent did not move the subordinate court to recover their outstanding interests against the Applicant. What the Respondent opted to do was to refuse to issue a rate notice upon the Applicant. In so doing, the Respondent embraced an illegality. The Respondent is bound by the doctrine of exhaustion. It ought to have first moved the subordinate court to recover the rates and interest within section 17 of the *rating act* which it failed to do and I so hold.

Order;

a. An Order of Prohibition is hereby issued prohibiting the Respondents from levying penalties and interest on rates which the Applicant has already paid or demanding payment of rates arrears or in any manner howsoever denying the Applicant from paying the annual rates in respect to his properties

being L.R. No. 7785/74 situated in Runda Estate, Nairobi and LR. No. 209/7884 situated in Kyuna Estate, Nairobi.

b. An Order of Certiorari is hereby issued quashing the decision by the Respondents to levy penalties and interest on rates which the Applicant has already paid or demanding payment of rates arrears or in any manner howsoever denying the Applicant from paying the annual rates in respect to his properties being L.R. No. 7785/74 situated in Runda Estate, Nairobi and LR. No. 209/7884 situated in Kyuna Estate, Nairobi.

c. An Order of Mandamus is hereby issued compelling the Respondents to issue the Applicant with a current rate demand for the years 2023 and 2024 in respect to his properties being LR. No. 7785/74 situated in old Runda Estate, Nairobi and LR. No. 209/7884 situated in Kyuna Estate, Nairobi without any penalties and/or interest thereon.

d. The costs of this go to the Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2025

.....

J. M. CHIGITI (SC)

JUDGE