



**Haret v Kenya Revenue Authority & 2 others (Judicial Review Application E004 of 2021) [2023] KEHC 1985 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1985 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**JUDICIAL REVIEW APPLICATION E004 OF 2021**  
**FN MUCHEMI, J**  
**MARCH 9, 2023**  
**IN THE MATTER OF: AN APPLICATION FOR AN**  
**ORDER OF CERTIORARI AND PROHIBITION**  
**AND**  
**IN THE MATTER OF: ORDER 53 RULES 1 & 2 OF THE CIVIL PROCEDURE**  
**RULES AND SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26)**  
**AND**  
**IN THE MATTER OF: THE KENYA REVENUE AUTHORITY**  
**ACT AND THE TAX PROCEDURE ACT (NO. 29 OF 2015)**  
**AND**  
**IN THE MATTER OF: THE CONSTITUTION OF KENYA,**  
**ARTICLES 22, 23, 25(A) (C), 28, 47, 50(1)(2), 165(6), (7)**  
**AND**  
**IN THE MATTER OF: MOHAMMED ISMAIL HARET**  
**AND**  
**IN THE MATTER OF: REPUBLIC VS MOHAMMED**  
**ISMAIL HARET MCCR NO. E667 OF 2021**  
**AND**  
**IN THE MATTER OF: TAX APPEALS TRIBUNAL CASE**  
**TAT NO. 224 OF 2021 BARE MOHAMUD MOHAMED ABD MOHAMED ISMAIL**  
**HARET VS COMMISSIONER INVESTIGATIONS AND ENFORCEMENT**  
**BETWEEN**  
**MOHAMED ISMAIL HARET ..... APPLICANT**  
**AND**



KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
COMMISSIONER OF DOMESTIC TAXES ..... 2<sup>ND</sup> RESPONDENT  
DIRECTOR OF PUBLIC PROSECUTION ..... 3<sup>RD</sup> RESPONDENT

## JUDGMENT

### Brief Facts

1. By a Notice of Motion dated 27<sup>th</sup> August 2021, the *ex parte* applicant seeks the following orders:-
  - a. An order of certiorari to remove into the High Court for purposes of being quashed all decisions, orders and proceedings in Criminal Case Nyeri MCCR no 667 of 2021 pending in the Chief Magistrates Court against the applicant being the accused pursuant to the High Court Supervisory Jurisdiction over subordinate courts under Article 165(6) (7) of the Constitution.
  - b. An order of prohibition to prohibit the respondents from proceeding with the prosecution of Criminal Case no MCCR no 667 of 2021 and demanding the tax penalties and interest claimed in the said charges amounting to ksh 1,037,658,299/- which is currently subject to active consideration of the Tax Appeal Tribunal Case no 224 of 2021 Bare Mohamud Mohamed and Mohamed Ismail Haret v Commissioner Investigations and Enforcement, pending the determination of the Tax Appeal Case by the Tax Appeals Tribunal.
2. In opposition to these proceedings, the respondents filed a Replying Affidavit dated 17<sup>th</sup> May 2022.

### Ex parte Applicant's Case

3. The *ex parte* applicant deposes that he is the registered owner and sole proprietor of Baare Barwaqo Shop in Garissa and he states that on 12<sup>th</sup> May 2020 he received a letter from the 1<sup>st</sup> respondent informing of an investigation being undertaken against his business from the period of January 2014 to December 2019 whereby the respondents' assessment concluded that his shop had a tax liability of ksh 1,037,658,299. Consequently, the *ex parte* applicant contested the amount on 31<sup>st</sup> December 2020 through a letter to the respondents and filed an appeal before the Tax Appeal Tribunal on 17<sup>th</sup> May 2021. The *ex parte* applicant stated his grounds in his appeal as:-
  - a. The 1<sup>st</sup> respondent charged the applicant VAT amounting to ksh 288,126,479/- using an estimated apportionment basis that no accounting sense. It is the applicant's contention that VAT is only chargeable on supply of taxable goods or services made in Kenya as provided for under Section 5(1) of the Value Added Tax Act Cap 470.
  - b. The 1<sup>st</sup> respondent erred in its computation of the proportion of sales chargeable to VAT. The respondent did not provide the details of their working justification of the computation. The respondent further did not provide the details the samples, details and documents they relied on in apportioning the sales between vatable and non-vatable supplies.
  - c. Though their business records were incomplete the applicant categorically stated that 80% of the products they sold were food items which did not attract VAT.
  - d. It was the applicant's contention that the outcome of the proportion computed by the respondent is dependent on the sample size used and the correctness of the mix up of the



products in the sample compared to the total population of all the items. It was also not clear from the respondents working whether all products sold were included in the sample and period covered by the sample as the respondent was yet to share the details of the workings on items used to compute the proportion.

- e. It was thus the applicant's assertion that the respondent acted in bad faith when they computed the figures and issued the proportions of vatable sales without having any rational basis and discussing or consulting with the applicant on the same as it was not feasible for a business in Kenya to manage to pay taxes of ksh 1,037,658,299/- out of total sales of ksh 2,510,595,610/- (41.3% of sales).
4. The *ex parte* applicant contends that while the matter was pending before the tribunal, the 3<sup>rd</sup> respondent drew up and brought forth charges against him effectively instituting criminal proceedings and he was arrested on 27<sup>th</sup> May 2021. The *ex parte* applicant further avers that although he resided and worked in Garissa, he was arraigned at Nyeri Law Courts. Furthermore, no due reason was given for his trial at Nyeri Law Courts as opposed to Garissa Law Courts, Embu or Kerugoya Law Courts.
5. The *ex parte* applicant contends that the respondents ought to be aware of Section 80(1) of the [Tax Procedures Act](#), which provides that a person shall not be taken through both civil and criminal proceedings. He further contends that because he has moved to the tax appeal tribunal, then automatically the respondents are estopped from moving the court on the same claim. Further, the *ex parte* applicant avers that if a person has committed an act or omission that may be liable under tax law to both imposition of penalty and the prosecution of an offence, the commissioner shall decide whether to make a public demand for the penalty or to prosecute. As such, the respondents' actions constitutes a gross and utter violation of Section 80 of the [Tax Procedures Act](#) and therefore *ultra vires*.
6. The *ex parte* applicant argues that the respondents are in contravention of Article 50(1) of the [Constitution](#) as he is apprehensive that he will not be accorded a fair trial in the criminal proceedings while the respondents are determining taxes due in the tax appeal tribunal, as there is a possibility whether active or latent that the respondents can use the criminal proceedings to put undue pressure on him in the tax appeal matter. Moreover, the *ex parte* applicant contends that the respondents are acting in bad faith as they have brought the criminal proceedings after the commencement of the appeal before the tribunal and he is apprehensive that they intend to use the criminal proceedings to arm twist, menace and intimidate him into paying the cooked and highly illogical assessment of tax liability before the conclusion and provision of a decision by the tribunal.
7. The *ex parte* applicant states that it is trite law that once proceedings before the tribunal have commenced, the respondents ought to wait their conclusion before instituting criminal proceedings so as to avoid instances of double jeopardy. As such, the *ex parte* applicant contends that the actions by the respondents constitute a gross manifestation of abuse of process. Moreover, the *ex parte* applicant avers that the amount claimed of ksh 1,037,658,299/- is out of the jurisdiction of the magistrates' court.
8. The *ex parte* applicant avers that the respondents' actions and decision was arbitrary as there are no reasons or grounds at all to warrant his arrest despite an appeal pending before the Tax Appeal Tribunal.

### **The Respondents' Case**

9. It is the respondents' case that the application is misconceived, frivolous, vexatious and aimed at defeating the ends of justice by offending the mandatory requirements of the [Civil Procedure Rules](#), 2010. The respondents argue that the application is not supported by a Supporting Affidavit as required by Order 53 Rule 3 & 4 of the [Civil Procedure Rules](#).



10. The 1<sup>st</sup> and 2<sup>nd</sup> respondents state that they are tasked with the duty of administering all revenue laws in the country relating to the assessment, collection and accounting of all revenue within the Republic of Kenya as mandated by the Constitution of Kenya, 2010, Tax Procedures Act, 2015 and Kenya Revenue Authority Act, 1995. The 3<sup>rd</sup> respondent is the sole body vested with prosecutorial powers within the Republic of Kenya as provided by Article 157 of the Constitution of Kenya, 2010 and in discharging its function is not under the direction of any person.
11. The respondents state that in the year 2020, the 1<sup>st</sup> and 2<sup>nd</sup> respondents in discharge of their duties as mandated by law lodged investigations into the tax affairs of the *ex parte* applicant and issued assessments pursuant to the Tax Procedures Act, 2015. Upon being issued with the tax findings, the *ex parte* applicant opted to object to it at the Tax Appeals Tribunal as a civil dispute.
12. The respondents contend that contemporaneously with the civil dispute, the 1<sup>st</sup> and 2<sup>nd</sup> respondents moved the 3<sup>rd</sup> respondent for prosecution of the *ex parte* applicant upon being satisfied that there were criminal culpability disclosed from the investigation process. The respondents further contend that the pendency of civil proceedings is not a barrier to the commencement of criminal proceedings against the *ex parte* applicant as provided for under Section 193A of the Criminal Procedure Code.
13. The respondents argue that the *ex parte* applicant has not demonstrated any viable ground that may warrant the grant of the orders of certiorari and prohibition sought as the same would amount to interference with the powers of the 3<sup>rd</sup> respondent under Article 157 of the Constitution without any justifiable cause.
14. Contrary to the *ex parte* applicant's averments, the 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that they have not employed any known scientific methods, but the banking method employed by them is a known and accepted scientific method of computing income as exemplified in the case of *Digital Box Limited v Commissioner of investigations and Enforcement* (Tax Appeal Tribunal no 115 of 2017). Furthermore, the statement of the Technical Officer, Mr. Paul Keter, an employee of the 1<sup>st</sup> respondent and the key witness before the magistrates court, clearly outlines how the banking method was employed. Moreover, the respondents argue that there is a rebuttable presumption that the assessments by the 1<sup>st</sup> and 2<sup>nd</sup> respondents are correct and thus the burden falls on the *ex parte* applicant to disprove them. The respondents further contend that such a burden can only be discharged if the criminal process runs its full course.
15. The respondents contend that the application does not reveal any violation of procedure in making the decision to charge him. Furthermore, the *ex parte* applicant has not demonstrated any bias, procedural impropriety, or irrationality in arriving at the administrative decision to charge him before the Chief Magistrates Court at Nyeri. In fact, the respondents contend that from the *ex parte* applicant's own averments in his application for seeking leave to institute the judicial review proceedings, he clearly outlines that due process was followed in arriving at the decision to charge him.
16. The respondents state that the *ex parte* applicant's averments that he works and resides in Garissa and yet he was arraigned in Nyeri Law Courts is not tenable since Section 106(1) of the Tax Procedures Act, 2015 provides that a person who has committed an offence under tax law may be prosecuted in any place in Kenya. Furthermore, the respondents aver that criminal and civil proceedings are distinct and independent and thus can run concurrently. Moreover, the determination of the Tax Appeal Tribunal does not in any way extinguish the criminal charges pending against the *ex parte* applicant as they are distinct and governed by distinct bodies of law and operational matrices with different results.
17. The respondents state that the *ex parte* applicant has not demonstrated with sufficient clarity in pleading constitutional violations that his arrest and prosecution violates that provisions of Article 50



- of the Constitution or is in any way aimed at intimidating him. Furthermore, the *ex parte* applicant has not pleaded with clarity or at all the specific legitimate expectation, how it arose and how it has been breached.
18. The respondents aver that the instant application has been overtaken by events since judgment has already been delivered and that the judgment does not quash or in any way affect the decision to charge the *ex parte* applicant with tax evasion in the criminal case before the lower court. Moreover, the respondents state that the instant application is an attempt by the *ex parte* applicant to circumvent due process and the rule of law as granting the said orders would amount to acquitting him without the benefit of a trial which is contrary to the rule of law and the principles of natural justice.
  19. The *ex parte* applicant filed a Further Affidavit dated 9<sup>th</sup> September 2022 and states his application has adhered to Order 53 Rule 4(1) of the Civil Procedure Rules as he has succinctly put his averments both in his Statutory Statement and Verifying Affidavit accompanying his application for leave.
  20. The *ex parte* applicant contends that the mandate accorded to both respondents ought to be exercised judiciously and in a manner not prejudicial to the law and the fact that these powers are written in statutes does not curtail any individual's right to challenge the manner in which the same are exercised.
  21. The *ex parte* applicant reiterates what he deposed in his application and further stated that the Tax Appeals Tribunal issued its judgment on 28<sup>th</sup> January 2022 whereby it declared that the 1<sup>st</sup> & 2<sup>nd</sup> respondent erred in law and fact by issuing the assessment and thereby set aside the respondents' objection. He further argues that the basis of the charges before the magistrate's court in the criminal proceedings are figures which the tribunal has determined were unlawfully imposed by the 1<sup>st</sup> & 2<sup>nd</sup> respondents. As such, in the absence of proper assessment, the *ex parte* applicant contends that the respondents have no leg to stand on in prosecuting the matter.
  22. Particularly, on Count 1, 2 and 4, the *ex parte* applicant argues that the respondents failed to appreciate that his business is not a company registered under the Companies Act but is a partnership and therefore ought not to be subjected to corporation tax. Furthermore, Counts 3 and 6 is erroneous as the partners are not considered employees of the business and therefore ought not to be subjected to pay PAYE returns as a partnership.
  23. The *ex parte* applicant deposes that although the 1<sup>st</sup> & 2<sup>nd</sup> respondents used the bank assessment method does not stop a tax payer from disputing the assessment. Further the *ex parte* applicant avers that the bank assessment method should not be the only method used to assess the tax payable by a tax payer. He further states that it is common knowledge that not every deposit or transaction in an account is necessarily income to the account owner. Moreover, the *ex parte* applicant states that even though the bank assessment method is well recognized, it ought to be done in a reasonable manner and not be excessive.
  24. Parties hereby disposed of the application by way of written submissions.

### **The Ex parte Applicant's Submissions**

25. The *ex parte* applicant reiterates that he is a businessman who operates a food store (Barwaqo Shop) in Garissa county and his primary business is wholesale and retail of food commodities. He further submits that he is a registered taxpayer under the Income and Tax Act under PIN Number AXXXXXXXXIY.
26. The *ex parte* applicant reiterates the contents of his notice of motion and his further affidavit, relies on Article 47 of the Constitution and Section 4 of the Fair Administrative Actions Act and submits that every person has the right to administrative action, which is expeditious, efficient, lawful, reasonable



- and procedurally fair. The *ex parte* applicant further relies on Section 2 of the [Fair Administrative Action Act](#) and submits that each act of parliament provides for the scope of powers and limits of the authority donated to administrative bodies. As such, there are limits to the exercise of tax administration and prosecutorial powers as provided for the respondents herein. The *ex parte* applicant submits that he was aggrieved by the fact that the respondents instituted concurrent civil and criminal proceedings on a tax matter contrary to Section 80 of the [Tax Procedures Act](#) and thus instituted the current proceedings to challenge the decision to prosecute.
27. The *ex parte* applicant further submits that the basis for instituting the current judicial review proceedings as guided by Section 7 of the [Fair Administrative Actions Act](#) are:-
- a. The respondents were not authorized to institute criminal proceedings by the empowering provisions;
  - b. The decision to charge was procedurally unfair, made in bad faith; materially influenced by an error of law; taken with an ulterior motive or purpose calculated to prejudice his legal rights; an abuse of power and it violated his legitimate expectations of acting within the confines of law.
  - c. The respondents failed to take into account relevant considerations being the fact that charges were brought on already impugned figures at the Tax Appeals Tribunal.
  - d. The respondents' decision to charge is illegal and unconscionable and a situation of non-compliance with mandatory and material procedures and conditions precedent, procedural unfairness and errors of law, which is a ground for judicial review.
28. The *ex parte* applicant relies on Order 53 Rule 4 (1) of the [Civil Procedure Rules](#) and submits that the instant application does not have to be accompanied by a supporting affidavit and that he has put forth his averments in his statutory statement and verifying affidavit accompanying his application for leave. As such, he contends that his application is well before the court in terms of format and merit.
29. The *ex parte* applicant submits that he is not opposed to the statutorily donated mandate accorded to the respondents but he avers that the same ought to be exercised judiciously and in a manner not prejudicial to the rule of law. He further submits that the fact that these powers have been written in statute, does not curtail any individual's right to challenge the manner in which the same are exercised. The *ex parte* applicant cites the case of [Maina & 4 Others v The Director of Public Prosecutions & 4 Others](#) (Constitutional Petition E106 & 160 of 2021 (Consolidated) [2022] KEHC 15 (KLR)) to support his contentions.
30. The *ex parte* applicant further submits that he has brought the current proceedings to effectively quash the decision to charge and prohibit further prosecution of the criminal case MCCR no 67 of 2021 pending in the Chief Magistrates Court at Nyeri as the respondents are fully aware that he instituted civil proceedings in the Tax Appeals Tribunal before he was arrested and arraigned in the criminal court in Nyeri. The *ex parte* applicant further cites that case of [Republic v Director of Public Prosecutions & 2 Others ex parte Simesh Kumar Choudhury; Maisha Packaging Company Limited & Another \(Interested Parties\)](#) [2021] eKLR and submits that the institution and continuance of criminal proceedings with the civil proceedings is an outright abuse of the court process since the same is in contravention to the governing laws on tax matters. Additionally, Section 80 of the [Tax Procedures Act](#) has properly laid down the process regarding the method of addressing disputes in relation to tax matters and therefore to circumvent the same contravenes the statutes the respondents wish to rely on as donating their authority.
31. The *ex parte* applicant argues that the charges in the charge sheet are baseless and are based on assumptions and miscalculations not backed up by law.



32. The *ex parte* applicant further argues that charges proffered against him are based on figures that have been a subject of litigation at the Tax Appeal Tribunal, which found that the 1<sup>st</sup> and 2<sup>nd</sup> respondents erred in heaping the amounts assessed to him. As such, the respondents have no backing as to the means in which their assessments were arrived at. He therefore contends that the criminal proceedings lack factual backing and there is no material evidence to support the same beyond assumptions and miscalculations that have disenfranchised him. The *ex parte* applicant refers to the case of *Republic v Director of Public Prosecution & Another ex parte Kamani*, Nairobi Judicial Review Application no 78 of 2015 and urges the court to quash the decision to charge and dismiss the criminal charges forthwith.
33. The *ex parte* applicant relies on the cases of [Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others](#) [2014] eKLR; *Republic v Council of Legal Education & 2 Others ex parte Michelle Njeri Thiongo Nduati* [2019] eKLR and *Keroche Industries Limited v Kenya Revenue Authority & 5 Others* Nairobi HCMA no 743 of 2006 [2007] KLR 240 and submits that he had a legitimate expectation that the respondents would act in accordance to the provisions of the law relating to the imposition of taxes and administration of penalties and offences.
34. The *ex parte* applicant states that the banking analysis test is an acceptable method of arriving at an assessment in the event the taxpayer defaults in providing sufficient documentation and records to facilitate a proper assessment. He relies on the case of Nairobi TAT no 25 of 2016 *Family Signature Ltd v The Respondent of Investigations and Enforcement* and submits that the respondents herein have issued him with assessments without due regard to information, documentation provide, the nature of business and expected average profits. The *ex parte* applicant further submits that not every deposit amounts to income to the account owner. He reiterates that the respondents made assumptions from the impugned bank deposit analysis without any legal backing and at unreasonable scales disregarding his nature of business and industrial or sector profit margins and performance.
35. The *ex parte* applicant contends that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had an overarching duty to be reasonable in the assessments and apply proper judgment in arriving at any tax assessment. To buttress his contentions, the *ex parte* applicant has cited the writings of Edmund Biber in his article Revenue Administration: Taxpayer Audit Use of Indirect Method at page 9 and the case of Appeal no 15 of 2017 *Digital Box Limited v Commissioner of Investigations & Enforcement*.
36. The *ex parte* applicant cites the case of [Hannah Wambui Githire v Director of Public Prosecutions & 3 Others](#) [2018] eKLR and urges the court to remedy the injustice caused against him and effectively dismiss the criminal proceedings against him.

### **The Respondents' Submissions**

37. The respondents submit that the import of Section 80 of the [Tax Procedures Act](#) is that the commissioner must elect to either impose a penalty or prosecute an offence relating to tax liability. The respondents contend that the *ex parte* applicant has not stated that he was made to pay any penalty, which would act as a bar to prosecution. Further, the respondents contend that the issue of payment of penalties as a bar to prosecution is a point of law which is equivalent to plea of *autrovois acquit/convict* or Article 50(2)(o) of the [Constitution](#) of Kenya, 2010 to which the *ex parte* applicant ought to have raised at the first instant during his arraignment before the court. As such, the respondents contend that section 80 of the [Tax Procedures Act](#), 2015 is not applicable in the instant case since no penalty was imposed on the *ex parte* applicant.
38. The respondents argue that the *ex parte* applicant has misapprehended the law on the issue of concurrence of civil and criminal proceedings. The respondents refer to Section 193A of the [Criminal Procedure Code](#) and the cases of *Republic v Inspector General of the National Police Service & Another*



*ex parte Beatrice Hild Omumia; Peter Nganga Chege & 2 Others (Interested Parties)* [2019] eKLR and *Republic v Attorney General & 4 Others ex parte Kenneth Kariuki Gitbii* [2014] eKLR and submit that the proceedings in the Tax Appeals Tribunal and the Nyeri Magistrates Court can run concurrently. Thus, the mere fact that there are pending civil proceedings at the tribunal on the same subject matter does not *ipso facto* warrant the halting of the criminal proceedings. Moreover, although the *ex parte* applicant has alleged that the criminal proceedings are being used to bully and put undue pressure on him, the respondents contend that he has not submitted even a shred of evidence to prove the allegations.

39. The respondents submit that the Tax Appeals Tribunal and the magistrates' court have different jurisdictions. The tribunal does not have jurisdiction to try criminal cases or tax offences pursuant to Section 3 of the *Tax Appeals Tribunal Act*. It only has exclusive jurisdiction to hear and determine appeals against the commissioner's tax decisions. The respondents further submit that although the tribunal delivered a judgment allowing the *ex parte* applicant's appeal, the said judgment has no impact on the proceedings at the magistrates court since the tribunal did not make a determination of guilt or otherwise. Moreover, the respondents argue that the judgment is subject to further appeal to the High Court whose outcome cannot be predicted.
40. Section 5(1) of the *Criminal Procedure Code* and Section 106 of the *Tax Procedures Act* confers subordinate courts with jurisdiction to try tax offences under the Act.
41. The respondents rely on the case of *Republic v Attorney General & 4 Others ex parte Kenneth Kariuki Gitbii* [2014] eKLR and submit that judicial review applications do not deal with the merits of the case but only the process. The respondents further argue that there are factual foundations for instituting the criminal proceedings against the *ex parte* applicant, which is reasonable suspicion and substantial enough to warrant the prosecution against him. To support this contention, the respondents cite the case of *Republic v Commissioner of Police & Another ex parte Michael Monari & Another* [2012] eKLR.
42. As to whether the prosecution has enough evidence to sustain a conviction, is the duty of the court to make the determination based on evidence. As such, the respondents submits that the issue of whether the 1<sup>st</sup> & 2<sup>nd</sup> respondents correctly applied the bank assessment method in taxing the *ex parte* applicant is a preserve of the trial court. The respondents urge the court to be cautious in its findings so as not to prejudice the criminal proceedings as the instant application is one of judicial review.
43. The respondents refer to the cases of *Republic v Director of Public Prosecutions & Another; John Ngugi Kabogo (Interested Party) ex parte Harrison Wangoro Mwangi & Another* [2020] eKLR and *Republic v Attorney General & 4 Others ex parte Kenneth Kariuki Gitbii* [2014] eKLR and submit that the *ex parte* applicant has not demonstrated that the prosecution is actuated by malice, neither has he shown that the actions by the prosecution are unlawful or in excess of authority. Additionally, the *ex parte* applicant has not shown any evidence of harassment or intimidation or manipulation of the court process to depreciate the likelihood that he might not get a fair trial as provided under Article 50 of the *Constitution*. Moreover, the respondents contend that the *ex parte* applicant shall be given an opportunity to defend himself, cross – examine witnesses and adduce evidence in support of his case.
44. The respondents contend that the *ex parte* applicant's allegations are baseless and without any foundation. On the issue of legitimate expectation, the respondents submit that the *ex parte* applicant has not pleaded with clarity or at all the specific legitimate expectation, how it arose and how it has been breached. Instead, he has made a spurious allegation that the respondents grossly disregarded some provisions without giving the particulars. As such, the respondents contend that the *ex parte* applicant has no demonstrated any substantial grounds that warrant the granting of the judicial review orders sought.



## Issues for Determination

45. The main issues for determination are:-
- a. Whether the Notice of Motion as filed is competent to warrant a determination on merit of the prayers sought;
  - b. Whether the remedies of certiorari and prohibition should issue.

### Whether the Notice of Motion as Filed is Competently Before the Court to Warrant a Determination on Merit of the Prayers Sought.

46. The respondents contend that pursuant to Order 53 Rule 3 & 4 of the [Civil Procedure Rules](#), the notice of motion is not supported by a supporting affidavit and therefore it offends the mandatory requirements of the [Civil Procedure Rules](#), 2010. The *ex parte* applicant argues that the notice of motion does not have to be accompanied by a supporting affidavit as he put forth his averments in his Statutory Statement and Verifying Affidavit accompanying his application for leave.
47. Order 53 Rule 4(1) of the [Civil Procedure Rules](#) provides:-

Copies of Statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

48. I have perused the notice of motion dated 27<sup>th</sup> August 2012<sup>1</sup> and noted that it is not accompanied by a supporting affidavit. However, I have noted that the *ex parte* applicant served the statutory statement and verifying affidavit accompanying the application for leave when he served the substantive motion. Therefore, in the interests of justice and upon reliance of Sections 1A and 1B, it is my considered view that the absence of the supporting affidavit does not substantively render the motion defective and the court shall proceed to determine the substantive issues raised.

### Whether the Remedies of Certiorari and Prohibition Should Issue.

49. The crux of the *ex parte* applicant's submission is that civil proceedings cannot run concurrently with criminal proceedings based on the same set of facts. He argued that he filed an appeal at the tax appeals tribunal and before the determination of the appeal, he was arrested and charged by the respondents. Pursuant to Section 193A of the [Criminal Procedure Code](#) the position of both criminal and civil proceedings running parallel was explained:-

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.

50. The Court of Appeal discussed limitations courts ought to impose on Section 193A of the [Criminal Procedure Code](#) in the case of [Commissioner of Police and Director of Criminal Investigations Department v Kenya Commercial Bank & Others](#) [2013] eKLR where the court held that:-

While the law (section 193A of the [Criminal Procedure Code](#)) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the



prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court.

51. The High Court in *Kuria & 3 Others v AG* (2002) 2 KLR in appreciating the validity of the existence of concurrent civil and criminal proceedings held:-

The normal procedure in the co-existence of civil and criminal proceedings is to stay the civil proceedings pending the determination of the criminal case as the determination of civil rights and obligations are not the subject of a criminal prosecution....A prerogative order should only be granted where there is an abuse of the law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution....It is not enough to state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In the absence of concrete grounds, it is not mechanical enough that the existence of a civil suit precluded the institution of criminal proceedings based on the same set of facts. The effect of criminal prosecution on an accused person is adverse but so also are their purpose in the society, which are immense....an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of court process or that there is a danger to the right of the accused person to have a fair trial.

52. In the instant case, the *ex parte* applicant relies on Section 80 of the [Tax Procedures Act](#) and argues that the act has properly laid down the process regarding the method of addressing disputes in relation to tax matters and therefore the respondents have no basis for subjecting him to criminal proceedings in the magistrates court in Nyeri yet there are civil proceedings in the tax appeals tribunal.

53. Section 80 of the [Tax Procedures Act](#) provides:-

1. A person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.
2. If a person has committed an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence, the Commissioner shall decide whether to make a demand for the penalty or to prosecute the offence.

54. A cursory look at Section 80 of the Act provides that a person who has committed an action or omission liable under tax law can either be prosecuted for the said offence or a penalty may be imposed on such a person. Nowhere in the *ex parte* applicant's pleadings does he state that any such penalty was imposed on him. As such, it is my considered view that the *ex parte* applicant has misapprehended the law, as the said provisions of law does not favour him in this case. Moreover, the said provisions do not bar one from instituting criminal proceedings when there are civil proceedings in place. The said provision provides for the imposition of a penalty or the prosecution of an offence in relation to tax law.



55. It is therefore not automatic that where there are concurrent criminal and civil proceedings, one ought to be stayed. The stay would only be granted on a case by case basis, and only then if the stay would meet the ends of justice.
56. The *ex parte* applicant further argued that the charges brought against him are baseless and in contravention of the law because the respondents arrested him on 27<sup>th</sup> May 2021 despite them being fully aware that he had filed an appeal before the tax appeals tribunal. Moreover, he argues that the charges are based on assumptions and miscalculations, not based on law and the respondents shall use the criminal proceedings to intimidate him into paying the colossal amounts.
57. As discussed above, the law allows for parallel running of civil and criminal proceedings and further that the court's powers to stay or prohibit criminal proceedings should be exercised sparingly and should not carry an effect of frustrating the judicial process. It is a power which the court ought to exercise only in exceptional circumstances where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution. I have perused the *ex parte* applicant's pleadings and it is my considered view that although he argues that the criminal proceedings are an abuse of the court process since they were instituted after the civil dispute in the tax appeals tribunal, he has not demonstrated exactly how the criminal proceedings are an abuse of the court process. Pursuant to Section 193A of the [Criminal Procedure Code](#), civil proceedings can run concurrently with criminal proceedings save that the criminal proceedings are not commenced to advance other gains other than promotion of justice.
58. Notably, the tax appeal has been concluded and the tribunal rendered its judgment on 14<sup>th</sup> August 2021. Therefore, the allegations by the *ex parte* applicant that the respondents intend to use the criminal proceedings to intimidate him in the civil proceedings before the conclusion and provision of a decision by the tribunal, are baseless.
59. Moreover, the *ex parte* applicant has not demonstrated that his arrest was unlawful or the charges brought against him were instituted unlawfully. He has confirmed in his affidavit that he was arrested and charged within the confines of the law. Furthermore, he has not demonstrated any harassment or intimidation or manipulation of the court process which stand to curtail his constitutional right to a fair trial. Although he has submitted that he stands not to be accorded a fair trial, he has not brought forth any evidence to show that his constitutional right to a fair trial has been curtailed.
60. Additionally, the offences the *ex parte* applicant has been charged with are provided for under Sections 95, 97(a) and 104 of the [Tax Procedure Act](#) 2015 and are therefore offences known to the law. It is a fundamental principle of law that it is not for this court to determine the veracity or to weigh the strength of the evidence or accused's person's defence. It is the mandate of the trial court to hear and determine criminal cases. This court can only intervene if there is cogent evidence that the *ex parte* applicant shall not be afforded a fair trial. Moreover, the *ex parte* applicant has further argued that the charges are baseless as they are based on the bank assessment method, which the tax appeals tribunal rendered its judgment on 14<sup>th</sup> August 2020 and held in favor of the *ex parte* applicant. The *ex parte* applicant further argued on the merits of the charges against him to which this court cannot respond to as the court here is exercising its jurisdiction sitting as a judicial review court and not a criminal court. It is therefore my considered view that those issues raised can only be determined by the trial court upon parties ventilating their respective cases.
61. A judicial review court, is mandated to determine the process undertaken by an administrative body while performing its administrative functions based on the three traditional grounds for judicial review being illegality, irrationality and procedural impropriety which were explained in the case of *Council*



of *Civil Service Unions v Minister for the Civil Service* (1985) AC 374, 410 where Lord Diplock spoke of these grounds 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 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 recognised 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 KB 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] AC 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.

In cases where a person's rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against where applicable; a statement of reason; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action.



62. Based on the above discussions, it is my considered view that the ex parte applicant has not demonstrated any illegality, procedural impropriety or irrationality. This court will only prohibit or quash prosecutions or investigations in cases where it would be impossible to give the accused a fair trial or where the investigation is blatantly an abuse of the law or where it would amount to a misuse or manipulation of process because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of the case.

63. The ex parte applicant seeks judicial review orders of certiorari and prohibition. A useful guide on the appropriate reliefs is found in the decision of the Court of Appeal in *Kenya National Examinations Council v Republic ex parte Geoffrey Gathbenji Njoroge* (1997) eKLR where the court stated:-

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 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.

64. In conclusion, I am of the considered view that the ex parte applicant has not demonstrated any illegality or neither has he established procedural impropriety on the part of the respondent in regard to the decision to charge him with a criminal case. As such, I find that the ex-parte applicant has not achieved the threshold to justify granting the orders of certiorari and prohibition.

65. Consequently, these proceedings lack merit and are hereby dismissed.

66. Each party to meet their own costs.

67. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 9<sup>TH</sup> DAY OF MARCH, 2023.**

**F. MUCHEMI**

**JUDGE**

Judgement delivered through videolink this 9<sup>th</sup> day of March, 2023

