



**County Assemblies Forum v Commissioner Kenya Revenue Authority & 2 others;
Salaries and Remuneration Commission (Interested Party) (Constitutional
Petition 4 of 2023) [2023] KEHC 23740 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CONSTITUTIONAL PETITION 4 OF 2023
JK SERGON, J
OCTOBER 12, 2023**

BETWEEN

COUNTY ASSEMBLIES FORUM PETITIONER

AND

THE COMMISSIONER KENYA REVENUE AUTHORITY 1ST RESPONDENT

CONTROLLER OF BUDGET 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

AND

SALARIES AND REMUNERATION COMMISSION INTERESTED PARTY

JUDGMENT

1. The petitioner herein, the County Assembly Forum (CAF) moved to court by way of a Petition seeking;
 - a. A Declaration that members of the County Assembly motor vehicle reimbursement amount does not fall within the ambit of Sections 3 and 5 of the [Income Tax Act](#); therefore should not be subject to tax.
 - b. An Order of Permanent Injunction restraining the 1st Respondent whether by themselves, their agents, servants, representatives and/or persons acting with the authority of the 1st Respondent from imposing a tax on the members of county assembly motor vehicle reimbursement benefit.
 - c. A Declaration that the decision of the 1st Respondent to impose a tax on the members of the County Assembly motor vehicle reimbursement is in



contravention of Articles 10,27,47,50 and 210 of the Constitution of Kenya, 2010.

- d. An Order for Mandamus do issue directing the 2nd Respondent to release funds for reimbursement of the motor vehicle benefit to the respective County individuals as per Gazette Notice No. 8792.
 - e. An Order awarding costs of the Petition to the Petitioner.
 - f. This Honorable Court be pleased to issue such further orders, writs and directions.
2. The factual basis of the instant petition is as follows; Sometime in 2022, the Salaries and Remuneration Commission (SRC) the Interested Party herein pursuant to its mandate as provided for under the provisions of Article 230 (4) of the Constitution of Kenya, 2010 conducted a job evaluation for Members of the County Assemblies, which included the determination of the basic salary, commuter allowance, car loan, mortgage, and other allowances.
 3. Pursuant to the job evaluation, the Interested Party caused to be published in the Kenya Gazette, Gazette Notice No. 8792 dated 27th July 2022 Volume CXXIV No. 145 setting out the benefits that were to accrue to the Members of the County Assembly who were to be elected in August 2022. The Gazette Notice and the benefits therein were to apply to the third Assembly. Paragraph 2(b) (ii) of the said gazette notice provided that "... The Deputy Speaker and Members of the County Assembly shall be provided with a motor vehicle reimbursement of Kshs. 2,212,000/= for the purchase of a car engine capacity not exceeding 1800cc, for official duties as a member of the county Assembly. The motor vehicle reimbursement shall only be payable once in a county assembly term."
 4. On 2nd December 2022, the Interested Party vide a letter referenced SRC/TS/35(77) addressed to all the clerks of the County assemblies, made a clarification on the remuneration and benefits for the Members of the County Assembly with respect to the Gazette Notice No. 8792 of 27th July 2022. The Interested Party clarified that the motor vehicle reimbursement shall be provided to the Deputy Speaker and Member of the County Assembly once in the County Assembly term for the purchase of a motor vehicle for official use and that the reimbursement shall only be provided for up to Kshs. 2,212,000/=. And further that the motor vehicle reimbursement and car loan are distinct benefits to the Members of the County Assembly and that the Members of the County Assembly are eligible for both benefits as set by it and published in Gazette Notice No. 8792 dated 27th July 2022.
 5. The Petitioner having gotten the clarification from the interested party advised its membership of the communication with a view of having the contents of the Gazette Notice No. 8792 of 27th July 2022 as clarified by the interested party in its letter to the clerks of the 47 county assemblies on 2nd December 2022 effected to the benefit of its members.
 6. Before the County Assemblies through the various County assembly service boards could disburse the motor vehicle reimbursement to their members, the 1st Respondent herein illegally assessed and/or deemed the said amount as an income according to section 3 of the Income Tax Act hence taxable and has proceeded to demand the taxed amount from the various county assemblies.
 7. The 2nd respondent without any colour of right and acting in excess of its powers has refused and/or neglected to release funds for members of the county assembly motor vehicle reimbursement benefit to the respective county assemblies alleging that they would only release the funds as per Gazette Notice No. 8792 less tax from motor vehicle reimbursement benefit.



8. The Interested Party also conducted a job evaluation for Members of the National Assembly and Senate and vide Gazette Notice No. 8796 on 27th July 2022. It gazetted various benefits and remuneration with respect to Members of the National Assembly and Senate. In the said Gazette notice the interested party made a provision for reimbursement for a motor vehicle and capped it at a maximum of Kshs. 7,550,000/=. The gazette notice No. 8796 in Paragraph 2(b) ii provides that “Members of Parliament shall be provided with an official car of engine capacity not exceeding 3000cc and they shall be provided with a motor vehicle reimbursement of Kshs. 7,550,000/= for purchase of a motor vehicle not exceeding 3000cc to undertake official duties as a member of parliament.”
9. The Petitioner contends that the 1st respondent has not made any demand of payment of tax by members of the National Assembly and Senate and further that its demand of tax from Members of the County Assembly is not based on the law and is discriminatory since the Members of the County Assembly and Members of the National Assembly and Senate have been conferred a similar benefit by the Gazette Notice no 8792 and Gazette Notice 8796 respectively.
10. Furthermore, the 2nd Respondent has since processed and approved the withdrawal of the motor vehicle reimbursement for members of the National Assembly and Senate without any issue as to tax payable being raised by the 1st Respondent.
11. The Petitioner contends that the 1st Respondent based on an illegal and/or disputed assessment is threatening to issue an agency notice against county assembly accounts based on an erroneous assessment and further that there is an imminent threat that should the 1st Respondent issue the agency notice as threatened the bankers for the county assemblies will be obliged to pay out of the county assemblies accounts to the 1st Respondent yet the amounts which were arrived at as due arise from an erroneous interpretation of the law.
12. The 1st Respondent in cohort with the 2nd Respondent continues to deny the Petitioner’s members access to the motor vehicle reimbursement amount ostensibly until tax is factored in. The 1st Respondent has continued to demand tax from the Petitioner which amount is not taxable and has further charged an interest on the said amount being unpaid.
13. The Petitioner maintains that the 1st Respondent violated provisions of Article 10 of *the Constitution* specifically article 10(1) (b) in the manner in which it interpreted sections 3 and 5 of the Income Tax thereof that the motor vehicle reimbursement granted to Members of a County Assembly fell within the ambit of sections 3 and 5 of the *Income Tax Act*.
14. Furthermore, section 5(2) of the *Income Tax Act* provides that gains or profits include; wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, traveling, entertainment or other allowance received in respect of employment or services rendered and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income. The petitioner contended that the list in the said section is exhaustive and does not include a motor vehicle reimbursement, therefore, the interpretation is illegal and unconstitutional since it offends the provisions of Article 10(1) (b) of *the constitution*.
15. The Petitioner contended that there is no legislation that provides for the imposition of tax on the motor vehicle reimbursement benefit to members of the county assembly.
16. The Petitioner faulted the 1st Respondent for making a determination that the applicability of section 3 and 5 of the *Income Tax Act* were applicable to Members of the County Assembly and not Members of the National Assembly and Senate, this was tantamount to differential treatment and violated the right to equality and principle of non- discrimination and cited articles 27 (1), (4) and (5) of *the Constitution*.



17. The Petitioner contended that action by the 1st Respondent to demand tax payments from members of the County Assembly without engaging the county assemblies is a breach and violation of the express provisions of Article 47(1) on fair administrative action in the constitution and further that the decision of the 1st Respondent to attempt to include county assembly motor vehicle reimbursement within the ambit of sections 3 and 5 of the Income Tax Act is without basis and therefore illegal and unconstitutional since it offends the provisions of Article 47(1) of the Constitution which demands that administrative action(s) ought to be lawful.
18. The Petitioner argued that the 1st Respondent is exceeding its jurisdictional mandate and is acting ultra-vires to its delegated powers in violation of the law and the decision to impose a tax on the motor vehicle reimbursement is clearly unreasonable, unlawful, and excess use of authority and contrary to section 210 (1) of the Constitution.
19. The Petitioner further argued that the 2nd Respondent has exceeded its mandate by demanding payment of tax with respect to the members of the county assembly motor vehicle reimbursement before approving the release of funds to the county assemblies.
20. The Petitioner maintains that the intention and import of Gazette Notice No. 8791 was to ensure that the Members of the County Assembly were reimbursed motor vehicle purchase price to a maximum of Kshs. 2,200,000/= upon presentation of an agreement for the purchase of a motor vehicle and a logbook registered in the name of the Member of the County Assembly. A motor vehicle purchase price is inclusive of all taxes. An attempt to tax reimbursement would be a disadvantage to an MCA who would have already paid the tax of the motor vehicle at the point of purchase.
21. Hon. Philemon Sabulei, the Chairman of the County Assemblies Forum, filed a supporting affidavit in support of the petition.
22. The 1st Respondent filed a replying affidavit dated 29th May, 2023 In response to the petition dated 16th May, 2023 and the supporting affidavit therein which was sworn by Nelly Musyoka serving in KRA Public Sector Division hence conversant with the actions giving rise to the instant suit.
23. The 1st Respondent avers that under Part I of the First Schedule to the Kenya Revenue Authority Act, Cap 469 Laws of Kenya, the 1st Respondent is mandated to enforce the provisions of the Income Tax Act Cap 470, Value Added Tax Act, 2013, East African Community Customs Management Act and the Excise Duty Act, 2015 and should be allowed to continue with the implementation provisions of the Income Tax Act with regard to levy income tax on the Motor Vehicle Reimbursement.
24. That section 3 (2) (a) (ii) of the Income Tax Act provides that any payments or benefits extended to any employee including the Deputy speakers and Members of County Assembly in the course of their employment is subject to tax.
25. That subject to section 5 (2) (a) of the Income Tax Act the motor vehicle reimbursement fell under the category of “... other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or service...” and that based on the above provisions, any payment which is received by any employee of whichever class, in the course of employment or services rendered is income chargeable to tax no matter how it is named as long as it is a benefit unless specifically exempted by written statute and that there is no law exempting the Members of the Counties Assemblies or the Deputy Speakers from taxation of the motor vehicle reimbursement benefit received in the course of their employment.



26. That based on section 5 (2) (a) (ii) as read together with section 3 (2) (a), cash and non-cash benefits however named, are subject to tax together with the other emoluments under the PAYE system in the month it is disbursed to the beneficiaries.
27. That the issues raised in the petition are not Constitutional questions the petitioners were simply challenging a decision made under a tax law, which should be properly challenged under the dispute resolution mechanisms established under the [Tax Procedures Act](#) and therefore not properly before this Court.
28. That the 1st Respondents engaged the relevant stakeholders prior to issuance of the tax advisory on motor vehicle reimbursement and that some of the counties having received the guidance and having been vastly engaged proceeded to remit the taxes when disbursing the benefit while others sought for a payment plan to be able to remit the same in installments. The engagement included discussions as to the treatment of penalty and interest.
29. That the 1st Respondent issued similar demands to the members of the National Assembly and the Senate and that it was therefore misleading for the Petitioners to misguide the Court that players with similar economic circumstance have been accorded different treatment.
30. That the assertion on double taxation was not factual, the 1st Respondent explained the concept of juridical and economic double taxation and stated that for double taxation to exist, taxation must be carried on the same person, same income, same tax head and within the same financial year and further that the absence of any of the aforementioned critical components of double taxation means that the same is not double taxation.
31. The 2nd Respondent filed a replying affidavit dated 7th June, 2023 in response to the petition dated 16th May, 2023 and the supporting affidavit therein which was sworn by Dr. Margaret Nyakang'o the Controller of Budget, she stated that she had read the Petition dated 16th May 2023 and the Supporting Affidavits and perused all the documents attached therein and where necessary sought and obtained legal counsel from my Advocate on record. She stated as follows;
32. That the Office of the Controller of Budget (hereinafter referred to as (COB) is an independent office established pursuant to Article 228 of [the Constitution](#) of Kenya, 2010 and the [Controller of Budget Act](#), 2016.
33. That as the Controller of Budget she is charged with a broad mandate that is set out in statutory and constitution provisions.
34. That in discharging her mandate as Controller of Budget, she is guided by inter-alia, [the Constitution](#), the [Controller of Budget Act](#) 2016, the [Public Finance Management Act](#), 2012 and the attendant Regulations as well as other laws of Kenya.
35. That with regard to overseeing budget implementation, she has two distinct functions namely; (a) To oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds as established under Article 204, 206 and 207 of [the Constitution](#) and (b) Not to approve any withdrawals from public funds unless satisfied that such withdrawals are authorized by law in line with Article 228 (5) of [the Constitution](#).
36. That the Salaries and Remuneration Commission (SRC) vide Gazette Notice No. 8795 dated 27th July, 2022 provided for remuneration and benefits for State Officers in the County Assembly to wit the motor vehicle reimbursement benefit that is the subject of this suit.



37. That following the grant of the above benefit by SRC, she exercised her advisory role and issued an advisory by way of a Circular to all County Assemblies on the implementation of the benefit whereby, she advised on how the motor vehicle reimbursement benefit was to be implemented. To that extent, she advised that the said benefit was to be implemented through the normal budgets whereby the benefit was to feature as a budget item and the individual MCAs would be making a claim for reimbursement on a need basis. Annexed and marked as annexure “MN 1” is a copy of the Circular dated 1st November, 2022 Ref No, COB/CIR/002/VOL.II.
38. That to access the funds from the County Revenue Fund, the Counties were to prepare a requisition for withdrawal of funds which was then to be forwarded to her to ensure that the same is in accordance with the law in line with Article 228(5) of *the Constitution* which requires that she be satisfied that the approval is compliant with the law.
39. That like any other requisition, a request for motor vehicle reimbursement benefit is accompanied by: (a) An Appropriation Act, (b) An extract of the approved Budget estimates showing the amount allocated per expenditure item. Annexed and marked as Annexure “MN 2” is a sample of a requisition from Kitui County for purposes of this suit, (c) The necessary planning documents such as the County Fiscal Strategy Paper, County Integrated Development Plan and the Annual Development Plan.
40. That in addition to the above requirements, where the amount sought to be withdrawn concerns taxable payments such as benefits under the *Income Tax Act*, the *Value Added Tax Act*, payments to suppliers or staff, the documentation provided should include a tabulation of the deductible amount of tax expected to be paid.
41. That once all the necessary documents are received, she has a duty under Article 228(5) of *the Constitution* to ensure that the withdrawal is authorized by the law. To comply with this, she reviews all the documentation provided in order to ensure that they meet the expected legal threshold before approving withdrawal of funds.
42. That regarding the motor vehicle reimbursement benefit, her office has been processing requisitions based on the named documentation including the requirement for including the taxable amount as stipulated above. The processing of the requisition has been ongoing until the petitioner, in a joint meeting held on 23rd May 2023 with her officers, requested that she issue another advisory on the implementation of the motor vehicle reimbursement benefit. It is this request that prompted me to issue a Circular dated 25th May 2023 Ref No. OCOB/Cir/002/Vol.2(21) annexed and marked as Annexure “MN 3”.
43. That so far, through the process explained above, she has processed requisitions for withdrawal of motor vehicle reimbursement benefit for the MCAs who have acquired motor vehicles and sought reimbursement from the following counties; Vihiga, Mandera, Kitui, Baringo, Transnzoia, Wajir, Machakos, Nakuru, Taita Taveta, Kericho and Siaya.
44. That the concerned benefit being a reimbursement benefit, cannot be processed globally as the same crystallizes upon an individual MCA acquiring a motor vehicle, Consequently, a request for motor vehicle reimbursement is with respect to a specific MCA and is reviewed individually.
45. That contrary to what has been proffered by the Petitioner, she has not at any given time acted as an agent of KRA, but rather exercised her mandate independently as provided for under Article 228(5) of *the Constitution* by ensuring that the approval for withdrawal of funds is in accordance with the law such as the *Income Tax Act*.



46. That her mandate under Article 228(4) and (5) of *the Constitution* is to approve the withdrawal of funds in accordance with the law and not payment of specific transactions which is the responsibility of the relevant Accounting Officer. Therefore, where any tax is due, it is the responsibility of the Accounting Officer to ensure that the same is remitted in full, in accordance with the documentation provided during the request for withdrawal of funds which, as explained, contains information regarding the amount to be paid to the individual and the deductible tax. Ultimately, the payment should mirror the approval issued for the withdrawal of funds.
47. That the 2nd respondent has not violated or breached any statutory or Constitutional duties to warrant the grant of the orders sought in the petition.
48. That the Petition against the 2nd respondent lacks merit, is misconceived and should be dismissed with costs.
49. The petitioner filed written submissions in support of the petition and argued that from the gazette notice no. 8792 the benefit that is subject of the instant suit is deduced as being a reimbursement and further that the *Income Tax Act* does not give a definition of the word reimbursement rather the Black's Law Dictionary, 2nd Ed. gives the primary meaning of this word as "to pay back." The petitioner therefore argued that based on the above definition, it was clear that the members of the county assembly relying on the gazette notice are eligible to purchase a motor vehicle whose value is capped at Kshs. 2,200,000/= expecting a reimbursement of a similar amount.
50. The petitioner cited the following legal provisions in support of his case; section 3(1) of the *Income Tax Act* which provides as follows; "that subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya."; section 3(2) of the *Income Tax Act* which provides as follows; that subject to this Act, income upon which tax is chargeable under this Act is income in respect of:- gains or profits from a business, for whatever period of time carried on, employment or services rendered and a right granted to another person for use or occupation of property and dividends or interest; section 5(2) (a) of the *Income Tax Act* provides as follows; " that gains or profits include; wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, traveling, entertainment or other allowance received in respect of employment or services rendered and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income."
51. The petitioner therefore argued that the list in section 5 (2) (a) of the *Income Tax Act*, is exhaustive and does not include a motor vehicle reimbursement. Therefore, from the express wording of section 5 (2) (a), the members of the county assembly motor vehicle reimbursement benefit does not fall within gains or profits with respect to employment consequently, sections 3 and 5 of the *Income Tax Act* do not apply to the motor vehicle reimbursement thus barring the 1st Respondent from making a claim for taxes on the said amount. The Petitioner cited the case of Kenya Revenue Authority v Universal Corporation Ltd (2020) eKLR .
52. The Petitioner argued that that the Respondents were clutching at straws with regards to interpretation of section 5(2) (b) of the *Income Tax Act*, that the motor vehicle reimbursement was part of "other allowances received in respect of employment of services rendered". The petitioner maintained that this assertion cannot be true since the benefit to the members of the county assembly is a reimbursement and not an allowance if indeed it was an allowance the same would have been referred to as a motor vehicle reimbursement allowance.



53. The petitioner argued that the tax demand by the 1st Respondent was based on an erroneous interpretation of section 3 and 5 of the *Income Tax Act* while citing a plethora of cases. The petitioner further argued that the motor vehicle reimbursement benefit is not expressly stated in section 3 and 5 of the *Income Tax Act*, hence, faulted the 1st Respondent for having erred in interpreting the said sections of the law and deeming the benefit taxable while relying on the said sections.
54. The petitioner contended that the 1st Respondent had not ably demonstrated that taxation of the motor vehicle reimbursement had been applied to the members of the Senate and National Assembly, they therefore decried the differential treatment and submitted that it was a violation of the article 27 (1) of *the Constitution*.
55. The petitioner faulted the impugned decision of the 1st Respondent to demand tax payments from members of the county assemblies without engaging them as unreasonable and tantamount to a violation of article 47 of *the Constitution* and section 3 and 4 of the *Fair Administrative Action Act*. The petitioner maintained that the 1st Respondent was obligated to observe fair administrative action and practices as required 47 of *the Constitution* and amplified by the *Fair Administrative Action Act*, 2015 which contains stringent and elaborate procedures to be observed whenever they take administrative actions by observing the principles of fair hearing and natural justice.
56. The petitioner faulted the 2nd Respondent for acting ultra vires in implementing the decision of the 1st Respondent and has proceeded to make the tax-deductible a requirement for the Petitioner's members before disbursing the said reimbursement. The action of the 2nd Respondent was beyond its mandate and the impugned decision has no basis in law and cited the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] 2 KLR 240 where it was held that the power which is abused should be treated as power that has not been lawfully exercised.
57. Finally the petitioner argued that they had ably demonstrated that members of the county assembly motor vehicle reimbursement benefit does not fall within the ambit of sections 3 and 5 of the *Income Tax Act* thus the 1st Respondent had erred in its interpretation that the benefit falls within the said sections and is taxable, it is therefore prudent that the 2nd Respondent whose role is to approve disbursement of funds be ordered to release the reimbursement benefit to the members of county assemblies without the requirement of tax. Therefore, the petitioner argued that it was deserving of the remedies sought in the petition considering the decision of the 1st Respondent is unconstitutional, illegal and not founded on law.
58. The 1st Respondent filed submissions opposing the petition whilst placing reliance on its replying affidavit sworn by Nelly Musyoka filed on 29th May, 2023.
59. The 1st Respondent cited the Section 2 and 52 (1) of the Tax Procedure Act and section 12 of the *Tax Appeals Tribunal Act* and reiterated that the decision to subject motor vehicle reimbursement to tax was made under the *Income Tax Act* is therefore a decision made under a tax law and falls within the jurisdiction of the Tax Appeals Tribunal and hence was not ripe for determination by this court. The 1st Respondent argued that a court's jurisdiction flows from either *the Constitution* or legislation or both and cited the Supreme Court case of *Samuel Kamau Macharia v KCB & 2 Others*, Civil Application No. 2 of 2011 and thence follows that for double taxation to exist, taxation must be carried on the same person, same item, same tax head and within the same financial year. Absence of any of the aforementioned critical components of double taxation means that the same is not double taxation. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1.
60. The 1st Respondent relied on section 2 of the Tax Procedure Act which defines an appealable decision to include any decision made under a tax law. The decision to demand income tax in relation to motor



vehicle reimbursement is a decision made under a tax law, hence it is an appealable decision which should be appealed to the Tax Appeals Tribunal.

61. The 1st Respondent submitted that the court should remit the case to the Tax Appeal Tribunal to be decided on merits and that a constitutional suit such the one herein should only be permitted when all available administrative proceedings fail to produce a satisfactory resolution and cited the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21. The 1st Respondent also submitted on the doctrine of exhaustion in the Court of Appeal case of *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others* [2015] eKLR where it 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 fora 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.
62. The 1st Respondent relied on section 9 (2) of the *Fair Administrative Action Act*, 2015 and section 9 (4) of the *Fair Administrative Action Act*, 2015 and maintained that the requirement for existence of exceptional circumstance in order to circumvent an established dispute resolution mechanism is now enshrined at Section 9 (4) of the *Fair Administrative Action Act*, 2015 and continues to gain favor in Courts. In the instant case the Petitioners have not attempted to provide any reasons for consideration for the Court to depict any exceptional circumstances to warrant coming directly to this Court. They cited a petition similar to the current petition in *Master Freighters Limited v Kenya Bureau of Standards & another* [2019] eKLR in which Korir J. stated that: "Where a party fails to demonstrate that any of the exceptions is available in respect of their case, the court is allowed to deny such a party a remedy for failure to exhaust the alternative process."
63. Consequently, the 1st Respondent urged this Honorable Court to find that the Petitioners have failed to demonstrate the exceptional circumstances in existence necessitating the filing of this Petition before this Honorable Court and the same is a breach of the doctrine of exhaustion.
64. The 1st Respondent challenges the Petition on two limbs, firstly that the issue raised is a simple tax dispute and not a constitutional question. Secondly, the Constitutional Petition must be pleaded with particularity and adequacy which is not the case herein. The 1st Respondent also contended that the petition did not meet the threshold set for a petition and cited the case of *Anarita Karimi Njeru No. 1 of 1979 KLR* as quoted in the Court of Appeal case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others* [2013].
65. The 1st Respondent maintained that the motor vehicle reimbursement being a benefit accrued in the course of the employment of Petitioner to the County Assembly fit with the terms "other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services". It follows that any payment which is received by any employee of whichever class, in the course of employment or services rendered is income chargeable to tax no matter how it is named as long as it is a benefit unless specifically exempted by written statute.
66. The 1st Respondent maintained that the petitioner has not pointed to the Court to any law exempting the Members of the Counties Assemblies or the Deputy Speakers from taxation of the motor vehicle reimbursement benefit received in the course of their employment. They have further not provided why the allowance do not fit the term "other allowance received" They therefore argued that the Motor Vehicle Reimbursement is a benefit received in course of employment therefore chargeable to tax under section 5 (2) ii and 35 of the *Income Tax Act* as read with the PAYE Regulations.



67. The 1st Respondent maintains that they engaged with the petitioners before the tax demand was made and relied on the averments in the Replying Affidavit of Nelly Musyoka at par. 43 to 68 which documented these discussions and was evidence of deliberation between KRA and the petitioners herein which goes to show that all parties were given an opportunity to make their case before the tax demand was issued and further that they the petitioners herein had ignored the fair administrative process under the Tax Procedure Act before filing the case.
68. The 1st Respondent contended that the Petitioners assertion on the preferential treatment of the members of the National Assembly and Senate did not hold water as a similar demand for payment of tax on motor vehicle reimbursement had been issued to members of the National Assembly and Senate, hence the allegation on discrimination was founded on misinformation.
69. Finally the 1st Respondent submitted that the allegation on double taxation was not proven, the petitioners did not demonstrate that two taxes of a similar nature were imposed on the motor vehicle reimbursement to warrant the discussion on the concept of double taxation and that for double taxation to exist, taxation must be carried on the same person, same item, same tax head and within the same financial year and the absence of any of the aforementioned critical components of double taxation means that the same is not double taxation.
70. The 2nd Respondent filed submissions opposing the instant petition.
71. The 2nd Respondent maintained that the mandate of the Controller of Budget is provided for under Article 228 of *the Constitution* which provides that the Controller of Budget shall oversee the implementation of the budgets of the National and County Governments by authorizing withdrawals from public funds under Articles 204, 206, & 207 of *the Constitution*. Further, Article 228 (5) requires the COB not to approve any withdrawal from public funds unless it is satisfied that the withdrawal is authorized by the law.
72. In order to meet the threshold of being satisfied that it is in accordance with the law, the COB is guided by the respective county Appropriation Act, the budgets as well as the necessary planning documents and Circulars issued by the COB to guide the process for requisition of funds.
73. In addition, the COB is at all times guided by *the Constitution*, the *Controller of Budget Act*, the *Public Finance Management Act* and the attendant Regulations as well as any other relevant law.
74. The 2nd Respondent argued that the motor vehicle reimbursement benefit, in addition to the legislations, the budget and planning documents mentioned above, the COB is further guided by Circular REF: COB/CIR/002/VOL.II dated 1st November 2022 and Circular REF: and OCOB/002/VOL.II (21) dated 25th May 2023 (marked as annexure “MN1” and “MN3”) respectively and contained in the 2nd Respondent Replying Affidavit) which contains the format and additional documents that the requisitions ought to comply with.
75. Furthermore, that where the amount sought to be withdrawn concerns
76. Taxable payments such as the motor vehicle reimbursement benefit which they submitted falls under Section 5(2) of the *Income Tax Act*, the documentation provided should include a tabulation of the deductible amount of tax expected to be paid. Further, the entity requisitioning the funds must have processed the request within the prescribed financial system, in this case, the IFMIS System which categorizes the funds either as taxable or non-taxable.
77. Consequently, once an approval for withdrawal of funds is granted, it is the responsibility of the relevant Accounting Officer to ensure that the tax which had been included at the time



- of requisitioning for funds is remitted in full to the relevant institution. It is therefore not the responsibility of the COB to pay the tax.
78. Therefore, the 2nd Respondent contended that the enjoinder of the 2nd Respondent in these proceedings is misconceived as there is no cause of action against the COB. Further, they submitted that the Petitioner has not demonstrated how the COB has failed and/ or refused to release funds for motor vehicle reimbursement.
 79. The 2nd Respondent therefore urged the court to dismiss the case against the 2nd Respondent with costs.
 80. The interested party filed its submissions while relying on its replying affidavit to the petition dated 13th June, 2023 and maintained that it executed its constitutional mandate as provided under article 230 (4) of *the Constitution* of Kenya, 2010 and section 12 of the SRC Act, 2011. That pursuant to the provision of article 230 (4) (a) of *the Constitution*, the interested party reviewed and set the remuneration and benefits for State Officers in the County Assembly and published them in the Gazette Notice No.8792 of 27th July 2022 and further that the motor vehicle reimbursement of Kshs. 2,212,000/= is a benefit within the meaning of the said provision. The interested party reiterated that within the human resource realm a benefit is ordinarily defined as a financial or non-financial compensation that is provided to state or other public officer in addition to their basic salary.
 81. The interested party while citing the Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 Others* [2014] eKLR which held that the principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis, contended that the crux of the petition is whether the transport benefit in the form of motor vehicle reimbursement of Kshs. 2,212,000/= for the Members of County Assembly as set by the interested party is subject to tax and whether the tax demand made by the 1st Respondent is constitutional. The interested party argued that pursuant to section 12 the Tax Appeals Tribunal, that the petitioner being aggrieved by the tax demand issued by the 1st Respondent, to canvass the issues raised in the Petition before the Tax Appeals Tribunal. The interested party therefore was adamant that the instant petition was not ripe for judicial inquiry more so that there exists a more efficacious avenue for resolution of disputes relating to tax, which avenue has not been explored.
 82. The interested party maintained that as per the provisions of Article 230(4)(a) (supra) and Section 11 of the SRC Act, the function of the interested party is limited to setting and reviewing remuneration and benefits for all state officers and such mandate, however, does not extend to issuing tax exemption to any state or public officer.
 83. The interested party argued that article 210 (1) of *the Constitution* of Kenya provides that no tax or licensing fee may be imposed, waived or varied except as provided by the legislation, whereas, article 210 (3) of *the Constitution* of Kenya also provides that no law may exclude or authorize the exclusion of a state officer from payment of tax by reason of; (a) the office held by that state officer; or (b) the nature of work. Therefore, the allegations contained in the petition that the motor vehicle reimbursement benefit as published in Gazette Notice No.8792 of 27th July 2022 is a reimbursement and not taxable is unfounded and contrary to *the Constitution*.
 84. Finally, the interested party submitted that the Petition as filed does not meet the legal threshold required for grant of the orders prayed and ought to be dismissed with costs.
 85. I have considered the grounds stated on the petition, the facts deponed in the supporting affidavit, the responses to the petition and the rival submission made by the parties.



86. The main issue which arose for determination is whether the County Assembly Motor Vehicle reimbursement amount falls within the ambit of Sections 3 and 5 of the [Income Tax Act](#) and whether the same should be subjected to tax.
87. I am persuaded by the arguments put forward by the Petitioner that the list in Section 5(2) (a) of the [Income Tax Act](#) is exhaustive and does not include a Motor Vehicle reimbursement therefore Sections 3 and 5 of the [Income Tax Act](#) do not apply therefore the 1st Respondent is barred from making a claim for Taxes on the said amount. I am further persuaded that the aforesaid benefit to the members of the County Assembly is a reimbursement and not an allowance. The second issue raised by the 2nd Respondent is whether the Controller of Budget (COB) was properly joined to this Petition.
88. I am persuaded by the 2nd Respondent's argument that it was wrongly enjoined to the instant Petition since there is no cause of action brought against the Controller of Budget (COB). It is also apparent that the Petitioner has failed to demonstrate that the 2nd Respondent refused to release funds for Motor Vehicle reimbursement. The Petition as against the 2nd Respondent is hereby dismissed.
89. The Interested Party has urged this Court to find that it lacks Jurisdiction to determine the dispute in the first instance and pointed out that the matter should have been filed in the Tax Appeals Tribunal. With respect, I am not persuaded by the aforesaid argument put forward by the Interested Party. The main issue is whether the Vehicle reimbursement amount falls within Sections 3 and 5 of the [Income Tax Act](#). This is a matter requiring this Court to interpret the Provisions of the aforesaid Statute. The dispute therefore is competently before this Court and the Court has Jurisdiction to determine the Petition.
90. In the end, the Petition partially succeeds giving rise to issuance of the following Orders:-
- i. An Order of declaration is hereby issued that Members of the County Assembly Motor Vehicle reimbursement amount does not fall within the ambit of Sections 3 and 5 of the [Income Tax Act](#) therefore the same is not subject to tax.
 - ii. The 1st Respondent is restrained from imposing tax on the members of County Assembly Motor Vehicle reimbursement benefit.
 - iii. The Petition as against the 2nd Respondent is dismissed.
 - iv. Each party to meet their own costs of the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH OCTOBER, 2023

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Mr. Rutoh

Cherotich for the Petitioners

No Appearance for the Respondents

