REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION 99 OF 2018

REPUBLIC.....APPLICANT VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

PANALPINA AIRFLO LIMITED .....EX-PARTE APPLICANT

JUDGMENT

The Parties

1. The applicant, Pinalpina Airflo Kenya Limited**,** is a limited liability company incorporated in Kenya.

2. The Respondent, the Commissioner of Domestic Taxes is an office established under Section 13 of the Kenya Revenue Authority Act[1] (herein after referred to as the KRA Act).

Grounds in support of the application

3. The applicant states that its business includes providing handling services including, documentation, cold room handling, vacuum cooling and security (x-ray screening) services to its parent company Panalpina Airflo BV which operates as a transport, freight and logistics company transporting cut flowers to worldwide destinations. The applicant further states that even though the said services were rendered to the said company from Kenya, they were actually consumed abroad and therefore, they are export of services, and, by dint of Section 7 of the Value Added Act, 2013, (herein after referred to as the Act) as read together with paragraph 1 of Part A of the Second Schedule of the Act, the said services are subject to VAT at a zero rate.

4. The applicant states that under section 17(5) of the Act, where a tax payer's input VAT exceeds the Output VAT, they are entitled to a refund by the Respondent provided that such excess emanates from zero rated supplies such as an export of services upon application by the tax payer. It also states that during the period July 2011 to November 2017, it submitted VAT refund claims to the Respondent which the Respondent is required to process and refund the VAT within a reasonable time. In addition, the applicant states that its previous applications pursuant to the said section on the basis of the zero rated export of services provided to the said company have been allowed and the relevant VAT duly refunded as follows:-

Claim Period	**Amount approved (Kshs)**
July 2010 to June 2011	836,475.45
July 2012 to December 2012	6,760,918
July 2013 to Sept 2013	2,966,880
July 2013 to Sept 2013	2,966,880
October 2013 To February 2014	8,075,531
October, 2014	1,768,298
Total	**20,408,102**

5. The applicant states that despite the above, it has not received refunds since 4th September 2015, and, that, the Respondent has refused/ ignored to refund the claims. The applicant also states that notwithstanding that similar claims in the past were approved, the Respondent arbitrarily and without any explanation, rejected its VAT Refund claims for the period May, June and July 2014 and April, May, June and October 2015 as set out in the table below.

Claim Period	**Amount as per claim lodged (Kshs)**
May, 2014	1,343,704
June,2014	1,881,491
July,2014	2,253,241
April,2015	1,954,376
May,2015	1,200,409
June,2015	2,030,044
October,2015	1,954,104
Total	**12,617,369**

6. The applicant further states that the Respondent's reason for the refusal was that '…*Nil refund as supplies are not zero rated…'* and, that, it objected to the decision under Section 51(1) and (2) of the Tax Procedures Act, 2015 (herein after referred to as "the TPA), but the Respondent has declined and/ or failed to either allow the objection in whole or part, or disallow it within the stipulated period of Sixty (60) days. As a consequence, the applicant states that by virtue of Section 51(11) of the TPA, its objections have been allowed and it is entitled to the VAT Refunds for the VAT Refund Claims for May, June and July 2014 as well as April, May, June and October 2015.

7. The Applicant further states that by dint of Sections 17(5) of the VAT Act and 47(1) of the TPA, it made VAT Refund claims for its export of services to Panalpina Airflo BV for the periods August, 2014, January and March 2015 and June to October, 2016 as follows:-

Claim Period	**Date of Audit**	**Amount (Kshs)**
August, 2014	17.10.2016	1,945,942
January,2015	17.10.2016	1,645,225
March,2015	17.10.2016	1,024,232
September 2015	17.10.2016	1,722,130
June,2016	03.02.2017	2,924,488
July,2016	03.02.2017	2,288,602
August,2016	03.02.2017	2,153,142
September,2016	03.02.2017	1,985,959
October,2016	03.02.2017	2,105,761
Total		**17,795,481**

8. The applicant also states that upon receiving the above claims, the Respondent as provided by Section 47(2) of the TPA, audited them on 17th October, 2016 and 3rd February 2017 so as to ascertain their validity, but, more than eighteen months since the first audit was conducted, the Respondent is yet to determine the said claims for the periods August, 2014; January and March, 2015; June, July, August, September and October, 2016.

9. Further, the applicant states that in breach of Section 47(2) of the TPA, Section 4 FAA Act and section 7 of the Public Service (Values and Principles) Act,[2] the Respondent has declined or failed to process and/or audit its VAT Refund claims set out in the table below:-

10. In addition, the applicant states that as regards the VAT Refund claims for January 2017 to May, 2017 (both months inclusive), the Respondent has contravened the provisions of Section 47(3) of the TPA, which requires the Respondent to notify the applicant in writing of the decision in relation to the VAT Refund claim within ninety (90) days.

Legal foundation	Claim Period	Amount as per claim lodged(Kshs)
11. The applicant maintains that that the Respondent's actions outlined herein above are illegal and offend the VAT Act and the TPA. Further, the applicant states that the Respondent has irrationally and unreasonably failed to act on its VAT Refund Claims in breach of section 4 of the Fair Administrative Actions Act (herein after referred to as the FAA Act and Article 47 of the Constitution.	July 2011 to December 2011	4,431,486
	January 2012 to June 2012	3,512,490.02
	January 2013 to June 2013	4,354,028
12. In addition, the applicant states that the Respondent being a statutory body, it has an obligation to carry out its statutory duties in a way that not only upholds the KRA Act and other statutes but which is consistent to the terms, principles and values of the Constitution, the FAA Act as well as the Public Service (Values and Principles) Act,[3] and in particular section 7 thereof, and carry out its duties in a way that is *expeditious, efficient, lawful, reasonable and procedurally fair* and prompt as well as effective. As a consequence, the applicant states that the Respondent has denied the Applicant its right to a fair administrative procedure by subjecting it to unreasonable and unwarranted delays in determining its VAT Refund claims, and, that, it is just and equitable and in the interest of justice that this Honorable Court grants the orders and reliefs sought.	September,2014	1,564,909.00
	November & December, 2014	2,683,108.00
	February,2015	1,216,452.00
	January to May 2016	8,226,767.56
	November,2016	4,070,204.60
	December,2016	3,859,627.29
Reliefs sought	January,2017	2,540,258.78
	February,2017	3,839,149.95
13. The applicant prays for the following orders:-	March,2017	3,316,323.53
a. An order of Mandamus directing the Respondent to remit the sum of Kshs.168,630,037 being aggregate of VAT Refund Claims due to the Applicant made in respect of an export of service to Panalpina Airflo BV.	April,2017	2,159,395.18
	May,2017	92,442,990.00
b. A declaration that the Applicant's Notices of Objection dated 25th May, 2016 and received by the Respondent on 27th May, 2016 have been allowed pursuant to the provisions of Section 51 (11) of the Tax Procedures Act, 2015, as the Respondent failed to make a decision on them within sixty (60) days.	**Total**	**<u>138,217,189.91</u>**

In the alternative to (1) & (1a) above:

c. An Order of Mandamus directing the Respondents to remit the sum of Kshs. 12,617,369 being Value Added Tax ('VAT') Refund Claims made by the Applicant for the period May, June and July 2014 and April, May, June and October 2015.

d. A declaration that as a consequence of the Respondent's inordinate and unreasonable delay in processing the Applicant's VAT Refund Claims for the aggregate sum of Kshs. 138,217,189 in respect of the VAT Refund Claims for the period, July 2011 to December 2011, January 2012 to June 2012, January 2013 to June 2013, September, November and December 2014, February 2015, January to May 2016, November and December,2016 as well as January to May, 2017, the said applications should be deemed to be allowed.

e. In the alternative an Order of Mandamus directing the Respondents to consider the Applicant's VAT Refund Claims amounting to Kshs.16, 073,351 for the periods August, 2014, January and March 2015 that the Respondent audited on 17th October, 2016 and the VAT Refund Claims for the period June to October 2016 audited by the Respondent on 3rd February, 2017, but is yet to give the final outcome.

f. An Order of Mandamus directing the Respondents to carry out an audit of the Applicant's VAT Refund Claims in respect of July 2011 to December 2011, January 2012 to June 2012, January 2013 to June 2013, September, November and December 2014, February 2015, January to May 2016, November and December, 2016 as well as January to May, 2017, in the aggregate of Kshs.138, 217,189 in accordance with Section 47 (2) of the Tax Procedures Act, 2015.

g. An Order of Prohibition directed at the Respondent prohibiting him and /or his officers from disallowing or otherwise adjusting the Applicant's VAT refund claims for the period May, June and July 2014 and April, May, June and October, 2015.

h. The costs of and occasioned by this Application be borne by the Respondent.

Respondent's Preliminary Objection

14. On 21st September 2018, the Respondent filed a Preliminary Objection citing two grounds:-

a) That the Applicant has filed a substantive appeal on the same issues in High Court Income Tax Appeal No. 5 of 2018, Panalpina Airflo

Limited vs. The Commissioner of Domestic Taxes, between the same parties on 16th April, 2018. A copy of the said Appeal is attached hereto.

b) The Honourable Tribunal having pronounced itself and/or delivered a Judgement on 9th March, 2018 on the same issues raised herein and in High Court Income Tax Appeal No. 5 of 2018, Panalpina Airflo Limited Vs. The Commissioner of Domestic Taxes, the ex-parte Applicant has opted to seek redress from two different forums thereby contravening the legal principal of sub-judice which ousts the Courts jurisdiction to hear and determine an issue pending determination before another court.

Respondent's Replying Affidavit

15. Geoffrey Korir, an officer appointed under section 13 of the KRA Act swore the Replying Affidavit dated 25th June 2018. He averred that the applicant is a link between growers and markets on behalf of Panalpina Airflo BV, a company incorporated in Netherlands, which conducts its operations from Netherlands. He also averred that the applicant acts as a link between the horticultural producers in Kenya and the Markets outside Kenya. He deposed that among these producers are Winsor Flowers Limited, Nini Ltd, Penta Flowers Ltd, Fontana Flowers, Maua Agrotech Ltd among others.

16. He averred that Panalpina Airflo BV appointed Airflo Limited, now Panalpina Airflo Limited, as its sole and exclusive agent for export services, and, that, the applicant is entrusted by the principal, Airflo BV with the handling of horticultural produce. He deposed that the applicant paid a fee per Kilogram of every consignment they handled, and, that the applicant receives the produce from producers in Kenya, and processes as agreed in the contract and dispatches it to Panalpina Airflo BV.

17. Mr. Korir averred that the applicant made several VAT refund claim applications on the basis of exported services which the Respondent declined vide Rejection Orders noting that the services offered did not qualify as exported services. He averred that the delay in responding to the application to refund was necessitated by the appeal filed by the applicant at the Tax Appeals Tribunal, and, that, the Respondent was waiting for the ruling before making the decision. He averred that the Tax Appeals Tribunal pronounced itself on 9th March 2018 dismissing the appeal. He reiterated that the services offered by the applicant are not export services and therefore should be charged VAT at the standard rate of 16%.

18. He also deposed that the VAT Act, 2013, defines services exported outside Kenya as "a service provided for use or consumption outside Kenya" and insisted that the services offered by the applicant are provided for use and consumption in Kenya. He listed the applicant's services as provision of cold storage service through receiving consignment for exports, storage of boxes in the cold rooms, palletization and handover to airlines. He also stated that the applicant's services include provision of x-ray screening services, provision of vacuum cooling services and documentation services.

19. He averred that the principal company receives the flowers in a particular state but does not receive the services offered by the applicant because the services are offered and consumed in Kenya. He further averred that the use and consumption of the services is what matters as per section 8 of the act, hence, the reason why the refund claims were declined.

Applicant's Advocates submissions

20. The applicant's counsel relied on *Republic v Kenya Revenue Authority ex parte M-Kopa Kenya Limited*[4] and submitted that the Respondent failed to render a decision on its objection within 60 days, hence, the law deems the objection as allowed. He cited sections 2, 5 and 7 of the VAT act and argued that the question is whether the services were exported to the Netherlands is determined by reference to the place of consumption of the service.

21. It was his submission that the VAT Act does not expressly define what amounts to consumption and relied on a decision by the VAT Appeals Tribunal in *F.H. Services Limited v Commissioner of Domestic Taxes*[5] for the holding that the beneficiary of the service is the final consumer. He also placed reliance on *Republic v Kenya Revenue Authority & Another ex parte Fontana Limited*[6] which quashed a decision holding that services of the overseas agent were consumed by the applicant. To buttress his argument, counsel cited *Unilever Kenya Limited v The Commissioner of Income Tax*[7] for the holding that Kenya is not an island and took cognizance of the Economic Co-operation and Development guidelines which clarifies the term consumption.

22. The applicant's counsel also cited Article 47 of the Constitution and faulted the Respondent for failing to timeously address the VAT Refunds. He relied on *Republic v Cabinet Secretary, Ministry of Information & Communication & 10 Others ex parte Adrian Kamotho Njenga*.[8] In addition, the applicant's counsel argued that the Respondent's actions are irrational, unreasonable and capricious and contrary to the applicant's legitimate expectation. He cited *Republic v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd*[9]for the holding that statutory power can only be exercised validly if they are exercised reasonably. In addition, he referred to section 4 of the FAA Act and argued that the Respondent being a statutory body can only exercise powers conferred upon it by the statute. He relied on *R v Barnet London Borough Council ex parte Nilish Shah*.[10] Counsel argued that the Respondent is yet to give its final determination on the VAT claims, hence, the delay is unreasonable and unwarranted. He also placed reliance on *Pastoli v Kabale District Local Government Council and Others*[11] and argued that the Respondent failed to act fairly, and, that it acted unreasonably and in violation of the applicant's legitimate expectation. He placed reliance on *Republic v Commissioner of Domestic Taxes and another, ex parte Kenton College Trust*.[12]

23. In addition, the applicant's counsel referred to the reliefs sought in the application and referring to prayer (a) which seeks the refund of the Ksh. 168,630,037/=, he urged the court to consider and grant an effective relief.

The Respondent's Advocate's submissions

24. The Respondent's counsel argued that the claims were rejected because the services offered did not qualify as exported. He submitted that the applicant objected to the decision, which the Respondent reaffirmed prompting the applicant to file an appeal before the Tax Appeals Tribunal which was determined on 9th March 2018. He submitted that the applicant appealed against the decision in High Court ITA No. 5 of 2018 which was determined on 31st May 2019. He submitted that this suit is *res judicata.* In addition, He stated that the Respondent appealed against the said decision in the Court of Appeal being CA No. 200 of 2019 and there is a pending ruling on an application for stay which was to be delivered on 6th December 2019.

25. The Respondent's counsel also submitted that this suit does not satisfy the test for judicial review orders to issue. To buttress this argument, he relied on *Republic v Attorney General & 4 others ex parte Diamond Hashim Lalji* and *Ahmed Hasham, Municipal Council of Mombasa v Republic & Umoja Consultants Ltd*[13] and argued that the applicant has not demonstrated that the decision is tainted with illegality, irrationality and procedural impropriety.[14]

26. The Respondent's counsel further submitted that the Respondent is legally permitted to make the impugned decision, and, that, the applicant's application is premised on misapprehension of the law. He added that courts can only interfere where there is noncompliance of the law.[15] He referred to section 2 of the VAT Act and submitted that the services in question qualify as services exported outside Kenya which are zero rated for VAT services. In addition, counsel argued that Part 11 of the First Schedule lists horticultural services which are exempted and placed reliance on *Republic v Kenya Revenue Authority & another ex parte Fontana Limited*.[16] Citing sections 7 and 8 of the VAT Act, counsel submitted that the services in issue were not exported hence section 17 (5) of the act does not apply.

27. As for the alleged delay in replying to the objection, counsel submitted that the reason for the delay was because the same issue was pending determination before the Tax Appeals Tribunal. He submitted that what matters is that the services were consumed in Kenya, but not who requisitioned the service. For this proposition he placed reliance on a decision rendered by the VAT Tribunal[17] and *Savannah Commodities Ltd v Uganda Revenue Authority*.[18]

28. Further, counsel submitted that there exists a clear dispute resolution mechanism under the law[19]and argued that the applicant has not demonstrated exceptional circumstances to be exempted from the statutory dispute resolution mechanism.

Applicant's counsels submissions in Reply

29. The applicant's counsel argued that the issue before this court is not whether the applicant is entitled to VAT Refunds, since the decision had been determined in ITA No. 5 of 2018, but, the failure to comply with section 47 and 51 of the TPA and the FAA Act, hence, to that extent, the decision in ITA NO. 5 of 2018 is irrelevant. On the question of an alternative remedy and exceptional circumstances, counsel relied on *Fleur Investments Limited v Commissioner of Domestic Taxes*[20] and *Republic v National Environment Management Authority*[21]among other foreign decisions and argued that where there is abuse of power and violation of natural justice, the applicant is entitled to judicial review.

Issues for determination

30. Upon evaluating the party's opposing facts and their advocates submissions, I find that the justice of this case will be met by addressing the following issues:-

a) Whether this suit is sub judice.

b) Whether this suit is an abuse of court process.

c) Whether this suit is res judicata.

d) Whether this suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism.

a) Whether this suit is sub judice

31. As stated earlier, on 21st September, 2018, the Respondent filed a Preliminary Objection raising two grounds. One, that, the applicant filed a substantive appeal being Tax Appeal Number 5 of 2018, Panalpina Airflo Limited v The Commissioner of Domestic Taxes between the same parties. The second ground cited by the applicant was that the Tax Appeals Tribunal made its decision and the applicant preferred the above appeal, hence, the applicant has opted to seek redress in two forums.

32. On 5th November 2018, the Respondent's counsel informed the court that he had filed a Preliminary Objection. The applicant's counsel stated that they had filed an appeal against the decision rendered by the Tax Appeals Tribunal. The court noted from the record that even though the Respondent had stated in its objection that it had attached copies of the appeal before the High Court, the same had not been annexed for the court to confirm whether the issues in the said appeal were the same as in this case. Nevertheless, the court stayed these proceedings pending the determination of the said appeal.

33. This matter was mentioned twice to confirm the outcome of the said appeal and on the third mention on 4th June 2019, the parties asked for time to study the implications of the High Court judgment which had just been rendered. On 25th June 2019, the Respondent's counsel stated that he had studied the judgment. He said he wished to proceed with this case. Ultimately, highlighting of submissions proceeded on 30th September 2019. On the said date, the court was supplied with a copy of the judgment in ITA No. 5 of 2018.

34. These proceedings were commenced on 6th March 2018 during the pendency of Income Tax Appeal No. 5 of 2018 in the High Court. The Judgment was delivered on 31st May 2019 against which an appeal has been preferred in the Court of Appeal.

35. Section 5 of the Civil Procedure Act[22] provides that any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. The operative words in this provision are "expressly" or "impliedly barred."

36. Section 6 of the Civil Procedure Act[23] expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

37. As stated above, at the time this case was filed, there was a pending appeal involving the same subject and the same parties. The latin term for pending suit is *lis pendens.* The *Black's Law Dictionary*[24] defines *lis pendens,* as a Latin expression which simply refers to a "pending suit or action." *The Oxford Dictionary of Law*[25] defines the expression in similar terms. In the context of Section 6 of the Civil Procedure Act[26] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

38. The basic purpose and the underlying object of Section 6 is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.[27]

39. The words *"directly and substantially in issue"* are used in contradistinction to the words *"incidentally or collaterally in issue."* Therefore, Section 6 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject- matter in both the proceedings is identical.

40. The question which follows is whether the matters in issue in this case are also directly and substantially in issue in previously instituted suits. The key words in Section 6 are *"the matter in issue is directly and substantially in issue in the previously instituted suit."* The test for applicability of Section 6 is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

41. For section 6 to come into play, the matter in issue in the suits has to be directly and substantially in issue in the previous suit. The court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process. This may be done where the tests of *sub judice* apply. As the High Court of Uganda held in *Nyanza Garage vs. Attorney General*:- ***[28]***

> *"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."*

42. For the doctrine of *sub judice* to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

43. The uncompromising manner in which courts have consistently enforced the *sub judice* rule was best captured in *Thiba Min Hydro Co.*

Ltd v Josphat Karu Ndwiga,[29] which held that it is not the form in which the suit is framed that determines whether it is *sub judice*, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other. A simple test in this case would be whether this court can determine the issues raised in this case and allow or decline the prayers sought in these proceedings without delving into the issues pending before in the said appeal and that if the prayers sought are granted, whether they will have an impact on the said appeal.

44. It is common ground that the applicant herein applied for tax refunds and the Respondent declined the request. The applicant challenged the decision before the Tax Appeals Tribunal which ruled against it. The applicant then challenged the decision before the High Court, and during the pendency of the appeal, it instituted these proceedings, this time framed as citing judicial review grounds.

45. The issues before the Tribunal and the High Court are captured in the judgment of the High Court. The key issue was whether the services in question can be considered as exported services within the meaning of section 2 of the VAT Act. This is the same issue raised by the applicant in this case. In fact, the applicants counsel addressed it in detail in his original written submissions. Order number two in the judgment is relevant. The judge ordered that the applicant is entitled to the VAT tax Refunds. In fact, if prayers (a), 1a, 2, 2a, 3, 4 and 5 in the amended application are allowed, they will have the same effect as order 2 granted by the High Court in ITA No. 5 of 2018.

46. A cursory look at the prayers sought shows that they relate to the same subject matter as in ITA No. 5 of 2018. However the principle of *sub judice* does not talk about the "prayers sought" but rather *"the matter in issue."* I find that the matters in issue in the suits are substantially the same. In *Re the Matter of The Interim Independent Electoral Commission*[30]the Supreme Court cited with approval the an Australian decision where it was held:-[31]

> *"…we do not think that the word 'matter'…means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter…unless there is some right, duty or liability to be established by the determination of the Court…"*

47. In determining whether or not *sub judice* applies, it is the substance of the claim that ought to be looked at rather than the prayers sought. As I stated earlier, had the Respondent's counsel annexed documents relating to the previous suits to its Preliminary Objection, the court could have addressed this issue effectively at that point in time. This could have saved this courts valuable time and infinite resources.

48. Granted, there is a pending appeal against the High Court judgment. The same issues which were litigated before the Tax Appeal Tribunal and the High Court are alive in the Court of Appeal. Applying the principles discussed above, I find and hold that this suit is *sub judice.*

b. Whether this suit is an abuse of court process.

49. It common ground that as at the time these proceedings were filed, ITA No. 5 of 2018 was pending in the High Court. It involves the same parties and the same issues. The attempt to frame the same dispute as a judicial review question does not change its color. It raises the question whether this case is an abuse of court process or is it a classic case of forum shopping.

50. I have severally stated that[32] the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[33] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

> ***(a)*** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
>
> ***(b)*** *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
>
> ***(c)*** *Where two similar processes are used in respect of the exercise of the same right.*
>
> ***(d)*** *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*
>
> ***(e)*** *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.*[34]
>
> ***(f)*** *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*
>
> ***(g)*** *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*
>
> ***(h)*** *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.* [35]

51. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party

by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[36]A litigant has no right to purse *paripasua* two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.[37]

52. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[38] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[39]

53. Turning to this case, the applicant has carefully presented the same issues which were being litigated in the High Court which is unacceptable. I have already in the first issue held that this suit is *sub judice*. The suit presents a sad scenario of not only having parallel proceedings on the same issues involving the same parties but also a great risk of coordinate courts granting conflicting orders. Similarly, this court is being invited to determine substantially similar issues now pending before the Court of Appeal. It follows that this suit falls within the ambit of what constitutes abuse of court proceedings enumerated above. This leads me to the next issue, that, is now that the High Court pronounced itself on the same issues, whether the said issues are now *res judicata*.

c. ***Whether this suit is res judicata.***

54. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

55. It is admitted that the High Court has already pronounced itself. As stated above, the two suits are premised on substantially the same issues. In fact, the prayers sought herein if allowed will have the same effect at the prayers in the High Court judgment. It is immaterial that the applicant now pleads judicial review grounds. As **Somervell L.J**. stated [40] *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. All the facts raised in this case, including the alleged breach of the various provisions of the VAT Act were raised and considered in the said appeal. The case is founded on the same cause of action, same issues, same facts, and same circumstances.

56. It is trite law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[41]

57. The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

58. *Res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[42]

59. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. *Res judicata* halts the jurisdiction of the court and that is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case *in limine* i.e. from the beginning.[43] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.[44] It can only be challenged by way of an appeal, and as the parties admit, there is a pending appeal.

60. Also known in the US as claim preclusion, *res judicata* is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

61. The doctrine of *res judicata* is provided for in Section 7 of the Civil Procedure Act[45] **and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 7 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are:- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.**[46]

62. In ***Gurbachan Singh Kalsi vs. Yowani Ekori[47]*** the former East African Court of Appeal stated as follows:-

> ***"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."***

63. However, it is trite that the mere addition of parties in a subsequent suit or omission of a party or reframing a dispute as a judicial review or constitutional question as has happened in this case does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the subject matter remains the same, the doctrine will still be invoked since the addition of the party or pleading judicial review grounds or constitutional questions would in that case be for the sole purpose of decoration and dressing and nothing else.[48]

64. The civil justice system depends on the willingness of both litigants and lawyers to try in good faith to comply with the rules established for the fair and efficient administration of justice. When those rules are manipulated or violated for purposes of delay, harassment, or unfair advantage, the system breaks down and, in contravention of the fundamental goal of the Civil Procedure Rules, the determination of civil actions becomes unjust, delayed, and expensive. This Judicial Review Application presents a worrying trend on increase in cases of abuse of the judicial process.

65. Clearly, this Judicial Review Application, is founded on issues that have been dealt with in the appeal, and which are pending determination by the Court of Appeal. To me this suit constitutes abuse of court process as stated earlier. The issues having been determined by the High Court are *res judicata*, and once the court of Appeal determines, either way, the doctrine of *res judicata* shall still operate. It is not open for the High Court to entertain the same dispute simply because it has undergone cosmetic surgery and it is now a judicial review application.

66. The applicant cannot evade *res judicata* or *sub judice* by presenting the same dispute disguised as a judicial review application or even a constitutional question. Such an argument ignores the established position that a first appellate is mandated to re-evaluate the evidence before the trial court or tribunal as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. Thus the issues presented in this application were matters to be addressed in the appeal.

67. In addition, the attempt to re-package the same dispute citing judicial review grounds and alleged violation of Article 47 of the Constitution is legally frail and collapses on the following fronts. *First,* a first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.[49]

68. *Second*, a first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him.[50] *Third*, the first appeal has to be decided on facts as well as on law. Which is this law that the applicant says the court hearing the appeal could not address. None. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. *Fourth*, while considering the scope of Section **78** of Civil Procedure Act,[51] a court of first appeal can appreciate the entire evidence and come to a different conclusion. *Fifth,* a first appellate court under section 78 cited above is in the same footing as the trial court, hence, all the issues raised here could have conveniently been raised in the appeal.

69. Simply put, a party cannot be permitted to reframe the same issues then pending before the High Court and now already determined by the High Court and currently the subject of a pending in appeal in the Court of Appeal and present them as judicial review grounds and or constitutional violations. Next, I will address the doctrine of exhaustion of statutory remedies.

d. Whether this court is divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism.

70. I highlighted earlier the submissions by the party's advocates particularly the applicant's counsel on the issue under consideration. It will serve no purpose to rehash it here.

71. I have in numerous past decisions addressed with sufficient clarity the doctrine of exhaustion of remedies among them the recent decision in *Republic v The Commissioner of Domestic Taxes ex parte v Sony Holdings Limited.* ***[52]*** I will inevitably borrow from the said decision in detail.

72. The starting point is to appreciate the statutory framework governing the issues before me. This is because the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[53]The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted*

according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context,' as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background." [54]

73. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law. [55] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* [56] Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

> *"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

74. The above excerpt is useful while ascertaining the purpose of a statute. This position becomes clear if we read the preamble to the TPA Act which provides that it is an act of Parliament to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected proposes. Section 52 (1) of the TPA provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the TAT Act. The TPA defines an "appealable decision" to mean an objection decision and any other decision made under a tax law other than— (a) a tax decision; or (b) a decision made in the course of making a tax decision.

75. In addition, section 2 of the TPA provides for the object and purposes of the act. It provides that the object and purpose of the Act is to provide uniform procedures for consistency and efficiency in the administration of tax laws, facilitation of tax compliance by taxpayers, and effective and efficient collection of tax. More significant is subsection (2) which provides that unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under the Act shall apply. Subsection (3) provides that the Act shall be interpreted to promote the object of the Act.

76. The preamble to the TAT Act provides that it is an Act of Parliament to make provision for the establishment of a Tribunal; for the management and administration of tax appeals, and for connected purposes. The act defines Tax Law to mean— (a) the Income Tax Act; [57] (b) the Customs and Excise Act;[58] or (c) the Value Added Tax;[59] (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner.

77. Section 3 of the TAT act establishes a Tribunal known as the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner. The words to note in this provision is "any tax decision." There is no contest before me that the decision under challenge in these proceedings is a tax decision within the said definition.

78. Also relevant is section 12 of the TAT Act. It provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal; Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

79. The foregoing provisions warrant no explanation. The question is whether this suit offends the above provisions. First, I have already found that this suit is res judicata, *sub judice* and abuse of court process. The said findings have already disposed this case. Even if this suit had survived the above grounds, the applicant still has a fourth hurdle to surmount. This is the doctrine of exhaustion of remedies.

80. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. There are numerous decisions of this court holding that this doctrine is now of esteemed juridical lineage in Kenya. [60] The doctrine was felicitously stated by the Court of Appeal[61] in *Speaker of National Assembly vs Karume* [62] in the following words:-

> *"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures*."

81. Even though the above case was decided prior to the promulgation of the 2010 Constitution, many post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution. [63]The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*[64]as follows:-

> *"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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*."

82. The High Court in the *Matter of the Mui Coal Basin Local Community*, [65] stated thus:-

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

83. From the above jurisprudence, at least two principles are clear. *First*, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[66] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

84. It is common ground that the decision under challenge is an appealable decision under the TPA. Section 9(2) of the FAA Act provides that the High Court or a subordinate court under sub-section **(1) shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted**. Also relevant is sub-section **(3)** which provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

85. In *Republic v The Commissioner of Domestic Taxes ex parte v Sony Holdings Limited* ***[67]*** I observed that it is instructive to note the use of the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[68]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[69] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

86. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

87. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[70] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[71] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

88. A proper construction of section 9(2) & (3) of the FAA Act leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by section **9(4),** which provides that: - "Notwithstanding subsection (3), the High Court or a subordinate Court *may*, *in exceptional circumstances* and *on application by the applicant*, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

89. What constitutes exceptional circumstances depends on the facts of each case[72] and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. In addition, the FAA Act is heavily borrowed from the South African equivalent legislation, that is, the *Promotion of Administrative Justice Act*,[73] hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance. Flowing from the foregoing conclusion, I find that the following points from a leading South African decision on the subject relevant:-[74]

i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."

ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

90. Additionally, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[75] I should perhaps add that there is no definition of 'exceptional circumstances' in the FAA Act, but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[76]

91. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule. As stated above, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case.

92. The applicant's counsel anchored their argument on the assertion that the applicant is challenging violation of provisions of the governing statute, section 4 of the FAA Act and Article 47 of the Constitution. As stated earlier, no amount of invoking the above provisions can alter the character, pith and substance of this case. It is simply a tax dispute disguised as a judicial review application.

93. In addition, there was no attempt to demonstrate that the internal remedy would not be effective and/or that its pursuit would be futile for this court to permit the applicant to approach the court directly. In any event, the applicant sustained parallel proceedings starting from challenging the impugned before the Tax Appels Tribunal where it lost and moved to the High Court where decision was recently rendered in its favour. There was no argument that the statutory mechanism has developed a rigid policy, which renders the requirement for exhaustion futile.

94. There was no attempt to persuade the court that applying the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of this case suggests otherwise. The provisions are very clear on the jurisdiction of the Tribunal and the right of appeal all the way to the Court of Appeal.

95. The second requirement is that on application by the applicant, the court may grant an exemption. It follows that even if the court were to agree with the reasons cited by the applicant (which it can't), the applicant has another hurdle to pass, that, it ought to have applied for an exemption. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the FAA Act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[77] Section 9(4) of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.

96. The law is that Section 9(4) of the FAA Act postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine. No competent application was presented before this court to determine the question whether or not the applicant demonstrated exceptional circumstances; nor do I see any exceptional circumstances in the circumstances of this case.

97. Perhaps, I should add that it is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the FAA Act. Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional circumstances to exempt him from this requirement.[78] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[79] An internal remedy is adequate if it is capable of redressing the complaint.[80]

98. There was no suggestion that the remedy under the act does not offer a prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. Lastly, there was no suggestion, even in the slightest manner that the internal remedy is inadequate and incapable of redressing the complaint.

99. The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it.

100. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, 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. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively.

101. It is my conclusion that the applicant this case offends section 9 (2) of the FAA Act. I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail. On this ground alone, this case is dismissed.

Conclusion

102. Having concluded that this suit is *sub judice*, an abuse of court process, *res judicata* and that it offends the doctrine of exhaustion, I find and hold that this suit is a none starter, it is fatally incompetent and unstainable. I therefore find no need to address the merits of the application.

103. Consequently, on the above grounds I find that this application is fit for dismissal. I therefore dismiss the applicant's Amended Notice of Motion dated 30th July 2018 with costs to the Respondent.

Right of appeal

Dated, Signed and Delivered at Nairobi this **17th** day of **January2020**

John M. Mativo

Judge

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[1] Cap 469, Laws of Kenya.

[2] Act No. 1A of 2015.

[3] Act No. 1A of 2015.

[4] {2018} e KLR.

[5] Appeal No. 6 of 2012.

[6] {2014} e KLR.

[7] Income Tax Appeal No. 735 of 2003.

[8] {2015} e KLR.

[9] {1999} 1 EA 245.

[10] {1983} 1 ALL ER 226, 240.

[11] {2008} 2EA 300.

[12] {2013} e KLR

[13] Civil Appeal N. 185 of 2001.

[14] Citing *Republic v Public Private Partnerships & 3 others ex parte APM Terminals* {2015} e KLR.

[15] Citing Prof. Wade, *Treatise on Administrative Law*, 5th Edition at p 262.

[16] {2014} e KLR.

[17] Citing VAT Tribunal Appeal No. 11 of 2013, *Coca Cola Central East and West Africa Limited v Commissioner of Domestic Taxes*, VAT Tribunal and VAT Appeal No. 6 of 2012, *FH Services Kenya Limited v Commissioner of Domestic Taxes*.

[18] Civil Appeal No. 17 of 2010.

[19] Counsel relied on among others *National Assembly v Njenga Karume* NRB CA No. 92 of 1992.

[20] CA Civil Appeal No. 158 of 2017.

[21] {2011} e KLR.

[22] Cap 21, Laws of Kenya.

[23] Ibid.

[24] *8th Ed.*

[25] *5th Ed.*

[26] Cap 21, Laws of Kenya

[27] *National Institute of Mental Health & Neuro Sciences v C. Parameshwara*, (2005) 2 SCC 256.

[28] HCCS No. 450 of 1993.

[29] {2013} e KLR.

[30] Constitutional Application No. 2 of 2011 {2011} eKLR.

[31] In Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 {1921} 29 CLR 257.

[32] See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016.

[33]Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11.

[34] *Jadesimi v Okotie Eboh* (1986) 1NWLR (Pt 16) 264.

[35](2007) 16 NWLR (319) 335.

[36] Justice Niki Tobi JSC of Nigeria.

[37] See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016.

[38]Ibid.

[39] Ibid.

[40] In *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.

[41] *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

[42]http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

[43] Ibid.

[44] Ibid.

[45] Cap 21, Laws of Kenya.

[46] See *Lotta vs. Tanaki* {2003} 2 EA 556.

[47] Civil Appeal No. 62 of 1958.

[48] *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] eKLR.

[49] See *Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs* {2001} 3 SCC 179.

[50] See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316.

[51] Cap 21, Laws of Kenya.

[52] Misc. Civil Application No. 363 OF 2018.

[53] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[54] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[55] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[56] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[57] Cap 470, Laws of Kenya.

[58] Cap 472, Laws of Kenya.

[59] Cap 476, Laws of Kenya.

[60] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[61] Ibid.

[62] {1992} KLR 21.

[63] Ibid.

[64] {2015} eKLR.

[65] {2015} eKLR.

[66] Ibid.

[67] Misc. Civil Application No. 363 OF 2018.

[68]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[69] Ibid.

[70] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[71] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[72] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[73]Act 3 of 2000.

[74] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[75]See *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae),* 2010 (4) SA 327 (CC) para 39, Mokgoro J.

[76] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[77] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[78] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[79] Ibid para 44.

[80] Ibid paras 42, 43 and 45.