



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 336 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR**

**ORDERS OF CERTIORARI AND PROHIBITION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**CHIEF MAGISTRATE'S COURT**

**ANTI-CORRUPTION AND ECONOMIC**

**CRIMES DIVISION-NAIROBI.....3<sup>RD</sup> RESPONDENT**

**AND-**

**JACARANDA HOTEL LIMITED.....INTERESTED PARTY**

**EX -PARTE APPLICANTS:**

**1. KUNGU GATABAKI**

**2. JANE GRACE NJOKI NJENGA**

**3. JAMES RAYMOND NJENGA**

**4. MARY WAMBOI M'MUKINDIA KIMOTHO**

**5. JAMES KIMONDO NGATA**

**JUDGMENT**

**The Application**

1. The *ex parte* Applicants herein are adult Kenyan citizens. They have filed an application by way of a Notice of Motion dated 25<sup>th</sup> September, 2018, seeking judicial review orders against the Kenya Revenue Authority (the 1<sup>st</sup> Respondent herein), the Director of Public Prosecutions (the 2<sup>nd</sup> Respondent herein), and the Chief Magistrate's Court, Anti-Corruption and Economic Crimes Division, Nairobi (the 3<sup>rd</sup> Respondent herein).

2. The 1<sup>st</sup> Respondent is a statutory body charged with the primary responsibility of assessment and collection of taxes; the 2<sup>nd</sup> Respondent is

a constitutional office created under Article 157 (1) of the Constitution and which is charged with the responsibility of instituting and undertaking criminal proceedings against any person with respect of alleged offence; while the 3<sup>rd</sup> Respondent is a court created under Article 169(1)(a) of the Constitution and section 5 of the Magistrate's Courts Act with both civil and criminal jurisdiction.

3. The *ex parte* Applicants are seeking the following orders against the Respondents in their application:

a) **An order of Certiorari to bring into the High Court for purposes of being quashed the charge sheet and proceedings in Nairobi MCCR/1338/2018 (Republic vs Kung'u Gatabaki & Others) instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the *ex parte* Applicants.**

b) **An order of Prohibition directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents prohibiting them from prosecuting, continuing with prosecution and/ or instituting criminal prosecution against the *ex parte* Applicants in the Resident Magistrate's Court in case number MCCR/1338/2018 (Republic vs Kung'u Gatabaki & Others) or any other proceedings against the Ex-Parte Applicants in connection with the tax demand either in its present form or any intended variation thereof.**

c) **An order of Prohibition directed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, prohibiting them from arresting and charging the *ex parte* Applicants in respect of VAT and PAYE for the period between April 2016 and December 2017.**

d) **An order of Prohibition directed to the 3<sup>rd</sup> Respondent prohibiting him/her and any other Magistrate's court of similar jurisdiction from trying, hearing or further hearing and determining MCCR/1338/2018 (Republic vs Kung'u Gatabaki & Others).**

e) **An order of Mandamus to compel the 1<sup>st</sup> Respondent to give credit to the 1<sup>st</sup> Ex-Parte Applicant for the sum of Kshs. 45,000,000 paid in Pay As You Earn (PAYE).**

f) **The cost of this application be provided for.**

g) **That Court be pleased to grant any further orders or reliefs it may deem just and expedient to grant.**

4. The application is supported by a Statutory Statement dated 9<sup>th</sup> August, 2018 and Verifying Affidavit sworn on the same date by Kung'u Gatabaki, the 1<sup>st</sup> *ex parte* Applicant, and a further affidavit sworn by the said deponent on 24<sup>th</sup> January, 2019, on behalf of the *ex parte* Applicants.

5. The Respondents response to the application was in a Replying Affidavit sworn on 5<sup>th</sup> November, 2018 by **Chief Inspector Mohamed Jillo**, an investigator working with the Directorate of Criminal Investigations and seconded to the 1<sup>st</sup> Respondent's Revenue Protection Services, and Grounds of Opposition dated 17<sup>th</sup> September 2018 filed by the 2<sup>nd</sup> Respondent.. This Court directed that the application be canvassed by way of written submissions, and a summary of the parties' respective cases as stated in their pleadings now follows.

#### **The *ex parte* Applicants' Case**

6. The *ex parte* Applicants' case is that by a letter dated 12<sup>th</sup> January, 2018, the 1<sup>st</sup> Respondent issued the Interested Party with an enforcement notice to immediately settle tax arrears in the sum of Kshs. 197,581,802/-, together with a Notice of Distress and Proclamation Notice detaining the Interested Party's goods and chattels located at Jacaranda Hotel in Nairobi. Thereafter, that the Interested Party engaged the 1<sup>st</sup> Respondent on a payment plan to offset the arrears, whereby they proposed to settle the undisputed amount in 12 to 18 monthly instalments and also made a payment of Kshs. 15,533,829/-.

7. The *ex parte* Applicants averred that by a letter dated 26<sup>th</sup> January, 2018, the 1<sup>st</sup> Respondent made a counterproposal and demanded that the Interested Party pays Kshs. 50,000,000/- in three equal monthly instalments starting January 2018, together with the auctioneer's fees of Kshs. 7,903,272/-. On the same day, it is averred that the 1<sup>st</sup> Respondent further issued the Interested Party with an enforcement notice requiring the *ex parte* Applicants to immediately settle tax arrears in the sum of Kshs. 95,499, 859/-.

8. That following extensive negotiations, the Interested Party entered into an agreement with the 1<sup>st</sup> Respondent to settle the tax demanded by making three monthly payments of Kshs. 15,000,000/-, and the balance was to be paid out of the proceeds of sale of its Kachoroba farm property once a Court order in HCCC No. 125 of 2015 which had restrained it from charging, disposing or any way dealing with its assets was varied. The *ex parte* Applicants stated that this proposal was accepted by the 1<sup>st</sup> Respondent, and the Interested Party has paid the 1<sup>st</sup> Respondent the total sum of Kshs. 127, 735,232/- pursuant to the said agreement.

9. However, that despite demand, the 1<sup>st</sup> Respondent has failed to give credit to the Interested Party for the sum of Kshs. 45,000,000/- paid in PAYE, and in an unconscionable turn of events, and without any proper basis, the 1<sup>st</sup> Respondent instituted proceedings against the *ex parte* Applicants under the Tax Procedures Act for alleged non-payment of Kshs. 153,359,181.50/-. The *ex parte* Applicants contend that having accepted the Interested Party's proposal, the 1<sup>st</sup> Respondent is estopped from using the criminal justice system to coerce the Interested Party to pay the entire amount demanded once.

10. The *ex parte* Applicants also urged that the tax offences proceedings against them are contrary to the provisions of section 33 of the Tax Procedures Act, which allows for payment of tax in instalments, and the amount allegedly outstanding is uncertain and keeps mutating with the intention of rendering it impossible for the Interested Party to comply. Further, that the tax offences proceedings were instituted contrary

to the objectives of the Tax Procedures Act, particularly section 103(2) of the Act, and infringe the *ex parte* Applicants' rights under Articles 28, 29, 47 and 50 of the Constitution.

11. According to the *ex parte* Applicants, the charges preferred against them are in respect to the period April to December, 2016 and April to December, 2017 which periods the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> *ex parte* Applicants were not directors of the Interested Party, and the proceedings against them are therefore contrary to section 103(2) of the Act and illegal, null and void. As for the 2<sup>nd</sup> *ex parte* Applicant, it was argued that the 1<sup>st</sup> Respondent has not shown that she had knowledge of the alleged tax offence or that she failed to exercise such due diligence to prevent the commission of a tax offence by the Interested Party thereby acting unreasonably.

12. Furthermore, that the *ex parte* Applicants have been charged as shareholders of Jacaranda Holdings Limited, which is a distinct and separate entity from Jacaranda Hotel Limited as such, they cannot be held liable for actions of the Interested Party. That whereas Jacaranda Holdings Limited is shareholder of the Interested Party, under section 103(2) of the Act, a shareholder of a company is not one of the persons who is deemed to bear the responsibility of the tax obligation of a company. In addition, that the 1<sup>st</sup> *ex parte* Applicant is a Trustee of the Njenga Karume Trust, which is separate entity from the Interested Party, and he is not involved in the day to day management of the Interested Party. Therefore, that the lifting of the corporate veils of the Njenga Karume Trust and Jacaranda Holdings Limited is misconceived, as no basis has been laid to hold the directors of a shareholder personally liable for the deeds of the Interested Party. The *ex parte* Applicants further deposed that under section 15 of the Act, neither a shareholder of a company nor the parent company qualify as tax representatives of the Interested Party.

13. In conclusion, the *ex parte* Applicants also argued that failure to prefer charges against all the directors of Jacaranda Holdings Limited amounts to discrimination. Further, since the request to pay tax by installments has partially been enforced, there is no issue for determination before the Tax Appeals Tribunal. Lastly, to the extent that the proceedings herein are limited to violation of the *ex parte* Applicants' rights under the Constitution and a challenge of the 1<sup>st</sup> Respondent's unfair administrative action, this court has jurisdiction for determining the dispute.

### **The Respondents' Cases**

14. In response, the 1<sup>st</sup> Respondent averred that in the year 2017, it rolled out a revenue enhancement initiative on Payment Returns without Checks (P.R.W.C), and as a result, conducted compliance checks through its Domestic Taxes Department on several companies, including the Interested Party herein, to enhance compliance in line with filing returns and making payments. That upon inquiry, it was discovered that the Interested Party is registered as a resident non-individual taxpayer, with Income Tax Company, Income Tax Pay As You Earn (PAYE) and Value Added Tax (VAT) obligations. That on further investigation, it was also discovered that the Interested Party has been consistently filing returns of both PAYE and VAT, but failed to make subsequent payments between the periods of February 2014 and February 2018, and had not remitted to the 1<sup>st</sup> Respondent a total of Kshs. 417,616,149/- inclusive of interest and penalties.

15. The 1<sup>st</sup> Respondent's case is that the failure by the Interested Party to pay taxes due renders them liable for prosecution under section 95 of the Tax Procedures Act, and that since the Interested Party is a company, section 103(2) of the Tax Procedures Act provides that the offence shall be treated as having been committed by an individual who at the time was a director or other similar officer in the company. In view of the above, the 1<sup>st</sup> Respondent averred that they wrote to the Registrar of Companies to confirm the directorship of the Interested Party, and he established that the *ex parte* Applicants are its directors.

16. Furthermore, that the obligations of the 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants to pay taxes on behalf Interested Party arose as a result of being directors of Jacaranda Hotel Limited and of Njenga Karume Trust, which are majority shareholders of the Interested Party, and they were therefore lawfully charged with the offence of failure to pay taxes by the due date in the **Milimani Magistrate Court Criminal Case No. 1338 of 2018.**

17. Regarding the tax payable, the 1<sup>st</sup> Respondent deposed that the *ex parte* Applicants have legal mechanisms before the Tax Appeals Tribunal to determine the quantum of taxes to be paid. Furthermore, that the *ex parte* Applicants have not demonstrated to this court that their prosecution was actuated by malice, neither have they demonstrated that the actions by the prosecution were unlawful or in excess of authority.

18. In the 1<sup>st</sup> Respondent's view, even if the *ex parte* Applicants were to substantiate allegations of violation of the fundamental rights and freedoms, the resolution of the dispute will not be by way of judicial review but through a constitutional petition. Be that as it may, the 1<sup>st</sup> Respondents argued that only a trial court can make a finding whether or not a criminal offence was committed after hearing the evidence. Accordingly, that the issue for determination before this court is whether the *ex parte* Applicants were arraigned and charged in court in accordance with the law, and not whether or not an offence has been committed by the *ex parte* Applicants. Lastly, the 1<sup>st</sup> Respondent averred that the mere fact that there are pending civil proceedings on the same subject matter does not *ipso facto* warrant the halting or quashing of criminal proceedings and that power has to be exercised sparingly.

19. The 2<sup>nd</sup> Respondent on its part relied on the provisions of Article 157 of the Constitution and the Office of the Director of Public Prosecution Act on the powers and functions of the Director of Public Prosecutions to prosecute, which it stated shall not be under the control of any person. Furthermore, that under the Constitution, legislation can confer prosecution powers on authorities other than the 2<sup>nd</sup> Respondent, including the powers conferred on an authorized officer to prosecute offences under tax laws by section 107 (1) of the Tax Procedures Act.

### **The Determination**

20. The *ex parte* Applicant' Advocates on record, Iseme Kamau & Maema Advocates, filed written submissions dated 4<sup>th</sup> February, 2019,

while Andrew & Steve Advocates for the Interested Party filed written submissions dated 11<sup>th</sup> March, 2019 in support of the *ex parte* Applicants' case. Okello Ogello Advocate for the 1<sup>st</sup> Respondent filed written submissions dated 19<sup>th</sup> February, 2019. The parties canvassed four substantive issues in the said submissions, namely, whether this Court is seized with jurisdiction to determine the *ex parte* Applicants' application; secondly, whether the criminal proceedings brought against the *ex parte* Applicants are lawful; thirdly whether the prosecution of the *ex parte* Applicants is in abuse of prosecutorial powers; and lastly, whether the relief sought is merited.

***Whether this Court is seized with jurisdiction.***

21. On the first issue of this Court's jurisdiction, the *ex parte* Applicants submitted that this Court's judicial review jurisdiction, and jurisdiction to deal with issues of violation of Constitutional rights is provided for under Article 165 and 23 of the Constitution. Accordingly, that this Court has jurisdiction to determine issues dealing with the constitutionality and legality of the 1<sup>st</sup> Respondent's decision. Reliance was placed on the decision in **Republic vs Truth, Justice and Reconciliation Commission & Another ex-parte Beth Wambui Mugo [2016] eKLR** where the court held that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

22. The Interested Party on its part cited the case of **Republic vs Kenya Revenue Authority & Another Ex-Parte Tradewise Agencies [2013] eKLR**, where Odunga J. while citing **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300** observed that in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. It was therefore submitted that the 1<sup>st</sup> Respondent decision to charge the *ex parte* Applicants is tainted with illegality as it is based on an error on law. Also cited was the case of **Alice Anyanzwa v Khwisero Land Disputes Tribunal & 2 others [2018] eKLR** where it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

23. The 1<sup>st</sup> Respondent submitted that the *ex parte* Applicants are required by law to first object to the refusal by the 1<sup>st</sup> Respondent or its officers to give credit of Kshs. 45,000,000/-, and if still dissatisfied, has the right to appeal to the Tax Appeals Tribunal. Furthermore, that Part VIII of the Tax Procedures Act, 2015 provides for a procedure to be utilized before the *ex parte* Applicants can resort to judicial review application. Accordingly, the 1<sup>st</sup> Respondent cited the case of **R vs National Environmental Management Authority (2011) eKLR**, where the Court of Appeal affirmed that alternative available remedies must be exhausted first before one can resort to judicial review. Also cited were the cases of **Republic vs The Council of Legal Education, (2007) eKLR**, **Republic vs Kenya School of Law Ex parte Thomas Otieno Oriwa (2015) eKLR** and **Republic vs Council of Legal education Ex Parte Nyabira Oguita (2016) eKLR**.

24. It was further submitted that it would be improper for the *ex parte* Applicants to assert infringement of their freedom from discrimination, right to human dignity and freedom and security of persons, right to fair administrative action and right to fair hearing under Articles 27, 28, 29, 47 and 50 of the Constitution in this forum, contrary to Rule 4(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. Furthermore, that this court cannot make a determination whether the tax offences proceedings infringe or continue to infringe the *ex parte* Applicants' fundamental rights and freedoms without going into the merits of the case, and only the trial court can make a finding whether or not a criminal offence was committed after hearing the evidence. As such, he argued that the reasons given by the *ex parte* Applicants for quashing the charges are not warranted, and the issues raised herein require a substantive trial.

25. Accordingly, the 1<sup>st</sup> Respondent cited the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** as cited with approval in **Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others (2017) eKLR**, for the proposition that this court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision. In its view, the *ex parte* Applicants have not proven the grounds of the judicial review. Reliance was also placed on the case of **Leonard Otieno vs Airtel Kenya Limited (2018) eKLR** for the proposition that he who alleges must prove.

26. Before determination of the issue of whether this Court is properly seized of the *ex parte* Applicants' application, it is necessary to restate the parameters of judicial review jurisdiction, as stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** thus:

**“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

27. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.** Lastly, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights.

28. Specifically, with respect to tax disputes, section 51(1) & (2) of the *Tax Procedures Act* provide as follows as regards the dispute resolution process:

***“(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.***

***(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.”***

29. Section 52 of the *Tax Procedures Act* in addition provides as follows as regards appealable decisions to the Tax Appeals Tribunal:

***“(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).***

***(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”***

30. An appealable decision is defined by section 3 of the *Tax Procedures Act* 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. A “tax decision” is defined to mean: (a) an assessment; (b) a determination of the amount of tax payable or that will become payable by a taxpayer; (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for; (d) a decision on an application by a self-assessment taxpayer; (e) a refund decision; (f) a decision requiring repayment of a refund; or (g) a demand for a penalty. Lastly, section 12 of the *Tax Appeals Act* also 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, and upon giving notice in writing to the Commissioner, appeal to the Tribunal.

31. It is notable in this regard that section 9(2) and (3) of the *Fair Administrative Act* requires the exhaustion of statutory and other internal review or appeal mechanisms before a party can seek judicial review. Under section 9 (4) of the Act, the 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. While the exceptions to the exhaustion requirement are not clearly delineated the Court of Appeal gave guidelines when they would apply in **Republic vs. National Environment Management Authority, Civil Appeal No. 84 of 2010**, as follows:

***“...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge.”***

32. Likewise, it was held by the High Court **In the Matter of the Mui Coal Basin Local Community (2013) e KLR, R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya and Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR** that in reaching a decision as to whether an exception applies, courts will undertake an analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issues and the ability of a statutory forum to determine them.

33. In the present case, it is not controverted that a tax assessment and demand was made by the 1<sup>st</sup> Respondent to the Interested Party, and that the said parties engaged in negotiations on the payment terms. However, the matter has since progressed from merely being a tax liability and payment dispute, to one of criminal prosecution of the *ex parte* Applicants in **Milimani Magistrates Court Criminal Case No. 1338 of 2018**. The decision by the 1<sup>st</sup> Respondent the *ex parte* Applicants is the primary decision that is being challenged in the present proceedings. The tax refunds due to the Interested Party which is argued by the 1<sup>st</sup> Respondent to be beyond the jurisdiction of this Court has been raised by the *ex parte* Applicants to augment their arguments on the legality of their prosecution, and is therefore secondary and incidental to the decision under challenge.

34. The statutory remedies provided by section 51 and 52 the *Tax Procedures Act* are therefore not only inapplicable in the current circumstances of this application, but have also been overtaken by events. This Court therefore finds that the *ex parte* Applicants have therefore demonstrated that judicial review is a more effective and convenient remedy than the statutory laid down dispute resolution

mechanism, as they are not disputing the amount of tax due for the Interested Party but the processes involved and the law applied to charge and prosecute them. It needs to be restated in this respect that this Court has **inherent and wide jurisdiction under Articles 47 and 165(6) to supervise the Respondents in this respect**. In the premises, I find that this matter is properly before this Court.

### ***Whether the criminal proceedings against the ex parte Applicants are lawful***

35. The ex parte Applicants submitted on the issue whether the criminal proceedings brought against them are lawful, and contended that according to the charge sheet filed in the criminal proceedings, they have been charged with the offence of failure to pay taxes due under section 97(e) of the Tax Procedure Act. However, that upon receiving the demand for payment of tax, the Interested Party entered into negotiations with the 1<sup>st</sup> Respondent in which it proposed to settle the amount demanded in installments and as at August 2018, the Interested Party had paid the 1<sup>st</sup> Respondent the total sum of Kshs. 127,735,232. Furthermore, that despite the 1<sup>st</sup> Respondent accepting the Interested Party's proposal to pay tax in instalments and receiving money under the aforesaid agreement, the 1<sup>st</sup> Respondent unilaterally and without notice instituted the criminal proceedings against the ex parte Applicants.

36. It was the ex parte Applicants' submission that the criminal proceedings are unlawful because under section 39 of the Tax Procedure Act, unpaid tax constitutes a civil debt to the Government and empowers the 1<sup>st</sup> Respondent to recover unpaid taxes from a tax payer by way of a civil suit. Accordingly, they cited the Court of Appeal in **Commissioner of Police & Others vs Kenya Commercial Bank and Others [2013] eKLR** where it was observed that it is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes.

37. In addition, the ex parte Applicants submitted that section 80 of the Tax Procedure Act prohibits the imposition of penalty and prosecution of a tax offence arising from the same act or omission. Further, that under section 89(9) of the Tax Procedure Act, the imposition of a penalty and prosecution of a tax offence emanating from the same act or omission is prohibited. Subsequently, he submitted that the 1<sup>st</sup> Respondent is precluded from imposing penalties and interest and concurrently instituting criminal proceedings against a taxpayer in respect of the same act or omission. Therefore, the 1<sup>st</sup> Respondent having accepted substantial payment in penalties from the Interested Party, in the absence of an undertaking to refund the said amounts to the Interested Party, the 1<sup>st</sup> Respondent automatically waived and/or is estopped from instituting criminal proceedings with a view of enforcing the same tax demand.

38. The Interested Party reiterated the ex-parte Applicants' position that the criminal proceedings instituted against them are unlawful for reasons that they are contrary to sections 33, 39, 80, 89, 103 of the Tax Procedure Act, discriminatory and contravene the ex parte Applicants' legitimate expectation. According to the Interested Party, and while citing **Halsbury Laws of England 4th Edition Vol.1(1)** paragraph 81 at page 151, a person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice.

39. The Interested Party additionally referred to the principles guiding tax legislations as held by Majanja J, in **Republic v Commissioner of Domestic Taxes Large Tax Payer's Office Ex- Parte Barclays Bank of Kenya Ltd [2012] eKLR** where the learned Judge held that in a taxing Act, one has to look at what is clearly said, and that there is no room for intendment as to a tax. Also cited was the decision by Odunga J, in **Republic vs Kenya Revenue Authority ex parte Universal Corporation Ltd [2016] eKLR**, that this Court does not have the liberty to read into the tax legislation the effect of what was not expressed therein.

40. The 1<sup>st</sup> Respondent's on its part submitted that a plain reading of section 33 of the Tax Procedure Act is unambiguous and does not create an estoppel or legitimate expectation barring the 1<sup>st</sup> Respondent from instituting any criminal proceedings against the Interested Party and the ex parte Applicants. Furthermore, counsel argued that an agreement that the taxes be paid in instalments *per se* does not abate prosecution where there is evidence to show that a tax offence or fraud has been committed, and relied on section 105 of the Tax Procedure Act to buttress the argument that payment of taxes and prosecution of the offences are separate processes and a person can be prosecuted for specific acts of tax fraud despite payment of taxes.

41. It was further submitted that upon the default to pay the taxes by the Interested Party, the ex parte Applicants are liable under the Value Added Tax, 2013, the Income Tax Act and the Tax Procedures Act to both imposition of penalty and the prosecution of the offence. Counsel further submitted that the ex parte Applicants have not settled even half of the principal tax neither have they paid a single cent of the penalties, and as such are not entitled to a refund of tax and the criminal proceedings therein lawful and in consonance with section 80 and 89 of the Tax Procedures Act, 2015.

42. It is not in dispute in the present application that the Interested Party owes tax and various provisions of the Tax Procedures Act are applicable as regards the payment of the tax liability of the Interested Party. In addition, the Tax Procedures Act provides for various methods of collection and enforcement of tax payment by the 1<sup>st</sup> Respondent, including by civil suit, preservation of funds by issuing of third party agency notices, distress, search and seizure of goods and assets, production of documents and criminal prosecution.

43. The ex parte Applicants have brought evidence of correspondence between the Interested Party and the 1<sup>st</sup> Respondent regarding the payment of tax arrears due in instalments. The first is a letter dated 12<sup>th</sup> January 2018 from the 1<sup>st</sup> Respondent demanding the settlement of tax arrears inclusive of interest and penalties due of Kshs 197,581,802/= and a notice of distress of the same date. On 18<sup>th</sup> January 2018 the Interested Party's agent wrote to the 1<sup>st</sup> Respondent with a payment plan of 12 to 18 months, which proposal was rejected by the 1<sup>st</sup> Respondent in a letter dated 26<sup>th</sup> January 2018. The 1<sup>st</sup> Respondent instead directed that the tax arrears be settled in three monthly instalments of Kshs 50,000,000/=, and its letter of demand of the same date also demanded immediate payment of additional taxes of Kshs 95,499,859/= of the outstanding tax arrears. On 30<sup>th</sup> January 2018 the Interested Party wrote back seeking more time and indulgence to pay and made a counter offer as to payment

44. Section 33 of the said Act in this regard allows for an arrangement to be made as regards extension of time to make such payment on the

following terms:

- (1) A taxpayer may apply in writing to the Commissioner for an extension of time to pay a tax due under a tax law.**
- (2) When a taxpayer applies for an extension the Commissioner may, if the Commissioner is satisfied that there is reasonable cause—**
  - (a) grant the taxpayer an extension of time for payment of the tax; or**
  - (b) require the taxpayer to pay the tax in such instalments as the Commissioner may determine.**
- (3) The Commissioner shall notify the taxpayer in writing of the decision regarding the application for extension of time, within 30 days of receiving the application for extension of time.**
- (4) Where a taxpayer who has been permitted to pay a tax by instalments under subsection (2) defaults in the payment of an instalment, the whole balance of the tax outstanding at the time of default shall become immediately payable.**
- (5) Despite being granted an extension of time to pay a tax or permission to pay a tax due by instalments by the Commissioner, a taxpayer shall be liable for any late payment interest arising from the original date the tax was due for payment.**

45. The *ex parte* Applicants and Interested Party also relied on section 39 of the Act which provides for the recovery of unpaid tax by suit as follows:

- (1) Despite any other written law for the time being in force, the Commissioner may recover an unpaid tax as a civil debt due to the Government and, where the amount of unpaid tax does not exceed one hundred thousand shillings, the debt shall be recoverable summarily.**
- (2) In any suit for the recovery of an unpaid tax, the production of a certificate signed by the Commissioner stating—**
  - (a) the name and address of the person who is the defendant in the suit; and (b) the amount of tax and late payment interest (if any) due by the person, shall be conclusive evidence that the amount stated on the certificate is due from that person.**

46. It is evident from a plain reading of the provisions that the 1st Respondent is not precluded from recovery of tax by other legal means once there is a default in the payment of tax due on instalment terms. In addition, it is evident from the sections that the recovery of tax by a civil suit is additional to, and irrespective of other collection methods provided for by the law. It is thus my view and understanding that this section does not preclude criminal prosecution, where such criminal prosecution is permissible. The question therefore to be answered, is whether criminal prosecution of the *ex parte* Applicants is permissible and legal in the circumstances of the present application.

47. In this respect while Part XII of the Act provides for penalties and prosecution for criminal offences in relation to payment of tax, including the offence of failure to pay tax when due, the said part is subjected to the principles set out in section 80 thereof as follows:

- (1) A person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.**
- (2) If a person has committed an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence, the Commissioner shall decide whether to make a demand for the penalty or to prosecute the offence.**
- (3) If a person has paid a penalty under a tax law and, in respect of the same act or omission for which the penalty was paid, the Commissioner commences a prosecution, the penalty shall be repaid to the person as a refund of tax under section 48, and the person shall not pay a penalty, in the case of a prosecution, unless the prosecution is withdrawn.**

48. Section 80 is an illustration of the constitutional principle in Article 50(2)(o) of the Constitution that a person cannot be convicted or punished for the same offence more than once. The penalty regime under the tax laws is in this regard premised predominantly on the culpability of a taxpayer for non-payment of tax and potential loss of revenue, which forms the basis for calculating the penalty due. It is thus a form of punishment meted out on a taxpayer for non-compliance with his or her tax obligations and responsibilities. The 1<sup>st</sup> Respondent is in this regard specifically required by section 80 of the Tax Procedures Act to elect whether to impose a penalty or undertake criminal prosecution with respect to a tax liability, and is expressly prohibited from undertaking both methods of enforcement as this would amount to double jeopardy.

49. This Court notes in this respect that it is not disputed that there was an position of penalties on the Interested Party with respect to its tax liability that is the subject of this application, and that the *ex parte* Applicants averments that the Interested Party had paid a total sum of Kshs 127,735,232/= pursuant to the negotiations on the payment of the said liability as at the date of commencing the present judicial review proceedings was not disputed by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent did not provide any evidence to show the defaults in the payment of the agreed instalments, or of the breakdown of the payments made by the Interested Party to support its averments on the nature of the said payment in terms of the principal sum and penalties of the sum of tax that was demanded, and that was the subject of the prosecution of the

ex parte Applicants.

50. It is also notable that it is not in dispute that the tax liability in the present application for which the *ex parte* Applicants are being prosecuted is that of the Interested Party, and it is the same tax liability that was the subject of the aforesaid negotiations and part payment. Therefore, the 1<sup>st</sup> Respondent having elected to make a tax demand to and entered into negotiations with the Interested Party for the payment of the said tax liability, including of interest and penalties, which the Interested Party has partly paid, is prohibited by section 80 of undertaking criminal prosecution of the Interested Party's directors for the same tax liability. Arising from these reasons, it is the finding of this Court that the prosecution of the *ex parte* Applicants is thus not only manifestly illegal for being contrary to section 80 of the Tax Procedures Act, but also unconstitutional.

#### ***Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents abused its prosecutorial powers***

51. On the issue of abuse of prosecutorial powers, the *ex parte* Applicants submitted that that the proceedings against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> *ex-parte* Applicants are contrary to section 103 of the Tax Procedure Act, which identifies the persons who can be charged with a tax offence on behalf of a company that is in default of its tax obligations. It was submitted during the default period, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> *ex parte* Applicants were neither directors, chief executive officer, managing director, company secretary, treasurer nor other similar officer(s) of the Interested Party.

52. Furthermore, it was submitted that the Njenga Karume Trust and Jacaranda Holdings Limited are separate and distinct legal entities from the Interested Party and the proceedings against the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> *ex parte* Applicants on account of their positions at the Njenga Karume Trust and Jacaranda Holdings Limited are misconceived, have no legal basis or foundation and contravene the express provisions section 103 (2) of the Tax Procedure Act. Additionally, that it is trite law that the corporate veil of incorporation can only be lifted by a court of law after considering whether the conditions justifying the same have been established, and it was therefore not available for the 1<sup>st</sup> Respondent to unilaterally purport to lift the corporate veil of the said two entities.

53. According to the *ex parte* Applicants' even if they were directors of the Interested Party as alleged, it is noteworthy that of the purported five directors, the 1<sup>st</sup> Respondent did not prefer criminal charges against two of the directors, and no reason has been given for only selecting and charging a few directors, amounting to discrimination and a violation of Article 27 of the Constitution. Furthermore, that the criminal proceedings contravene the Applicants' legitimate expectation under section 33 of the Tax Procedure Act whereby the 1<sup>st</sup> Respondent has power and discretion to allow a tax payer to pay taxes in installments.

54. Therefore, that the 1<sup>st</sup> Respondent's acceptance of the Interested Party's proposal to pay the taxes demanded in installments created a legitimate expectation that the 1<sup>st</sup> Respondent would not resort to other adverse action or harassment tactics to enforce the same demand that is the subject of the agreement, and amounts to unfair administrative action contrary to Article 47 of the Constitution as read together with the Fair Administrative Action Act. Reliance was placed on the decision in **Republic vs Kenya Revenue Authority ex parte M-Kopa Kenya Limited [2018] eKLR** that a legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage.

55. The *ex parte* Applicants cited the Court of Appeal decision in **Njuguna S. Ndung'u vs Ethics & Anti-Corruption Commission (EACC) & 3 Others [2018] eKLR** which set out the standard of review of prosecutorial discretion where it was held that the burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, that if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the Director of Public Prosecutions to justify the prosecutorial decision. Accordingly, that the evidentiary burden shifted to the 1<sup>st</sup> Respondent to justify the prosecutorial decision which they failed to do. To buttress his argument, he cited the case of **Republic v Kikuyu Magistrates Court (Criminal Division) & 9 others Ex Parte Charles Mbugua Njuguna [2016] eKLR** and **Joram Mwenda Guantai vs The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170** on the instances in which a court can declare a prosecution to be improper .

56. The 1<sup>st</sup> Respondent's legal position on the allegation of bad faith or ill will on its part was that the same are baseless and a misrepresentation of facts. It was submitted that the primary duty of the 1<sup>st</sup> Respondent is to enforce all tax statutes as provided by section 5(2)(a) of the Kenya Revenue Authority Act. Consequently, that the 1<sup>st</sup> Respondent exercised its mandate within the tax statutes by preferring criminal charges against the *ex parte* Applicants pursuant to sections 95 and 97 of the Tax Procedure Act. It was also the 1<sup>st</sup> Respondent's argument that although unpaid tax is a civil debt, it is also a criminal matter and thus section 193A of the Criminal Procedure Code applies to allow two proceedings to run concurrently.

57. The 1<sup>st</sup> Respondent submitted that in deciding to charge the *ex parte* Applicants, it adhered to the provisions of section 103(2) of the Tax Procedure Act and invited the court to find that if a director of the company is another corporate body, the offences committed by such a corporate entity will still be considered to have been committed by the officer who at the time of commission of the offence was the chief executive officer, managing director, a director , company secretary, treasurer or other similar officer of the corporate director. Further, that the tax investigations covered the period from February 2014 to February 2018 during which period the *ex parte* Applicants were directors or considered to be directors of the Interested Party thus criminally liable for the offences committed. In the 1<sup>st</sup> Respondent's view, it is not sufficient for the *ex parte* Applicants to allege that the requirements under section 103(3)(a-b) of the Tax Procedure Act have not been met, and delving into this issue will be going into the merits of the criminal proceedings before the Chief Magistrate, therefore usurping the powers of the court to determine the guilt or otherwise of the *ex parte* Applicants.

58. It was however reiterated that the *ex parte* Applicants and Jacaranda Holdings Limited were directors of the Interested Party and thus accountable to the default to pay taxes and reliance was placed on the ruling by Gikonyo J. in the case of **Agricultural Development Corporation of Kenya vs Nathaniel K. Tum & Anor (2014) eKLR** where he held that directors assumed the responsibility of ensuring that the company abides by all legal requirements, and that from the reading of Section 103 of the Tax Procedure Act, the corporate veil has already been lifted.

59. The 1<sup>st</sup> Respondent therefore urged the court to find that it acted reasonably and within the scope of the Constitution and its statutory authority in instituting the tax criminal proceedings and thus should not interfere with its decision. The 1<sup>st</sup> Respondent also invited the court to be guided by the holding in the case of **Samuel Roro Gicheru & Anor v OCS Nanyuki Police Station & Anor Misc. Criminal Application No. 22 of 2014** where it was held that the power of quashing criminal proceedings has to be exercised very sparingly and with circumspection and in the rarest of cases where there is clear injustice. Reliance was also placed on the decisions in **Kuria & 3 Others vs Attorney General (2002) 2 KLR 69** **Thuita Mwangi & 2 Others v The Ethics and Anti-Corruption Commission, HC Pet. No. 153 of 2013** and **Republic v Director of Public Prosecution & Anor Ex Parte Chamanlal Vrajjala Kamani & 2 Others (2015) eKLR**.

60. It is important to first deal with the applicable principles and circumstances under which the Court will grant order prohibiting the commencement or continuation of a criminal trial process. In this respect, the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The merits of the case, and particularly whether the criminal proceedings have a likelihood of success, or that the Applicant has a good defence is not a ground for halting criminal proceedings by way of judicial review.

61. However, if an applicant demonstrates that the criminal proceedings constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings. The concurrent existence of the criminal proceedings and civil proceedings would not, *ipso facto*, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim.

62. These principles have been restated in various judicial decisions. The role of the different players in the criminal process was recognised in **Republic vs Commissioner of Police and Another ex parte Michael Monari & Another, [2012] eKLR** where it was held that:

**“the police have a duty to investigate on any complaint once a complaint is made. Indeed the police would be failing in their constitutional mandate to detect and prevent crime. The police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court. The predominant reason for the institution of the criminal case cannot therefore be said to have been the vindication of the criminal justice. As long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene”.**

63. In **Joram Mwenda Guantai vs The Chief Magistrate, [2007] 2 EA 170**, the Court of Appeal explained the applicable principles as follows:

**“It is trite that an Order of Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”**

64. In **Johnson Kamau Njuguna & Another v Director of Public Prosecutions (2018) eKLR**, the court also restated the said principles thus:

**“It is settled law that the role of the court in a judicial review application of this nature is to ensure that an applicant is not dragged willy-nilly into court on criminal charges when there is no substantial evidence to sustain an indictment. The DPP has the authority and discretion to decide who, when and how to prosecute within the bounds of legal reasonableness. That role cannot be usurped by the court. If the DPP acts outside the bounds of legal reasonableness, however, he acts ultra vires and the court can intervene, because it is the court’s high responsibility and inherent power to secure fair treatment for all persons brought before the court, and to prevent an abuse of the court’s process.”**

65. The Court of Appeal in **Commissioner of Police and Director of Criminal Investigations Department vs. Kenya Commercial Bank and Others, [2013] eKLR** also held as follows on concurrent criminal a civil proceedings on the same issues:

**“While the law (section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that the power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and travesty of justice for the police to be involved in the settlement of what is purely dispute litigated in court. This is case more suitable for determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations”**

66. The circumstances when a Court can intervene in a criminal prosecution was also the subject of the decision in **R vs. Attorney General exp Kipngeno Arap Ngeny, High Court Civil Application No. 406 of 2001** wherein it was held that:

**“A criminal prosecution which is commenced in the absence of proper factual foundation or basis is always suspect for**

**ulterior motive or improper purpose. Before instituting criminal proceedings, there must be in existence material evidence on which the prosecution can say with certainty that they have a prosecutable case. A prudent and cautious prosecutor must be able to demonstrate that he has a reasonable and probable cause for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable”.**

67. The cases of **Peter Ngunjiri Maina v DPP & 2 Others (2017)eKLR**, and **R v DPP & 2 Others Ex parte Nomoni Saisi (2016) eKLR** identified various scenarios that would require interrogation to warrant a review of the unfettered discretion of the Director of Public Prosecutions as follows:

- (a) Where there is an abuse of discretion;
- (b) Where the decision-maker exercises discretion for an improper purpose;
- (c) Whether decision-maker is in breach of the duty to act fairly;
- (d) Whether decision-maker has failed to exercise statutory discretion reasonably;
- (e) Where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;
- (f) Where the decision-maker fetters the discretion given;
- (g) Where the decision-maker fails to exercise discretion;
- (h) Where the decision-maker is irrational and unreasonable.”

68. This Court has in this respect already found that the prosecution of the *ex parte* Applicants was unlawful and unconstitutional. In addition, sections 104 to 110 of the Tax Procedures Act which provides for the procedure and manner of prosecution of the said offences, are found in Part XII of the Act, and can only be read and applied subject to the overriding principle applicable to that part which is in section 80 of the Act. To this extent, the 1<sup>st</sup> Respondent did overstep its legal boundaries, and acted unlawfully and in abuse of the legal process in prosecuting the *ex parte* Applicants.

69. As to whether legitimate expectation arises that the *ex parte* Applicants would not be subject to any prosecution arising from the Interested Party having been previously penalized, this Court is guided by the application of the principle of legitimate expectation as elaborated in various legal authorities.

70. In the case of **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi [2007] eKLR** the Court held as follows in this regard:

**“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.”**

71. Likewise, in **Halsbury's Laws of England 4th Edition, Vol. 1 (1)** the doctrine of legitimate expectation is outlined as follows at paragraph 81: -

**“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice”.**

72. The requirements for a successful reliance on the doctrine were articulated by the Supreme Court in **Communications Commissions of Kenya & 5 others vs Royal Media Services Ltd and 5 others, (2014) e KLR** as follows:-

**“[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.**

**[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation....**

**[269] The emerging principles may be succinctly set out as follows:**

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”

73. The question that therefore requires to be answered in the present application is whether there was a clear statement or promise not to prosecute the *ex parte* Applicants, whether express or implied, that was made by the 1<sup>st</sup> Respondent. The *ex parte* Applicants argues that conduct of the 1<sup>st</sup> Respondent of entering into the negotiations with the Interested Party to pay the due tax due in instalments amounted to such a promise. This Court however has difficulty adopting this argument for two reasons.

74. Firstly, if there was any express statement or promise made by the 1<sup>st</sup> Respondent whether to the *ex parte* Applicants or Interested Party, it was to accept payment of the due tax in instalments, no express representation was made that it would not commence criminal proceedings against the *ex parte* Applicants.

75. Secondly, as to whether such a promise can be implied by the provisions of section 80 of the Tax Procedures Act and conduct of the 1<sup>st</sup> Respondent in relation thereto, it is my view that the statutory framework of the tax compliance laws prevents such an implication, as criminal prosecution for tax evasion is expressly provided for by the said laws. In addition, even if such an implication could arise as a result of the conduct of the 1<sup>st</sup> Respondent in entering negotiations with the Interested Party on the payment of the due tax and penalties, the contested issue of whether the *ex parte* Applicants were directors of the Interested Party at the material time would have to be resolved first, for them to rely on such an implied representation.

76. This brings me to the last set of arguments made by the parties on whether the *ex parte* Applicants were at the material time relevant officers or directors of the Interested Party to justify their prosecution under section 103 of the Tax Procedures Act, which provides as follows:

**1) If a person acting as an employee or an agent commits an offence under a tax law that person's employer or principal shall be treated as having also committed the offence. (2) If the person that commits an offence under a tax law is a company, the offence shall be treated as having been committed by an individual who, at the time the offence was committed, was—**

**(a) the chief executive officer, managing director, a director, company secretary, treasurer or other similar officer of the company; or**

**(b) acting or purporting to act as the chief executive officer, managing director, a director, company secretary, treasurer or other similar officer of the company.**

**(3) Subsection (1) or (2) shall not apply to a person if— (a) the offence was committed without that person's consent or knowledge; and (b) that person, having regard to the nature of that person's functions and all the circumstances, has exercised reasonable diligence to prevent the commission of the offence.**

77. The status of the *ex parte* Applicants at the time of the alleged non-payment of tax by the Interested Party is contested, with the *ex parte* Applicants arguing that they were not, or do not qualify as directors within the meaning of section 103. The Respondent states otherwise and relies on a search done of the Interested Party's directors, and that it was entitled to lift the corporate veil in so doing by section 103. To resolve this dispute would require this Court to handle conflicting evidential matters and to establish the existence of certain facts at the material time, which entail delving into the merits of this case. This in my humble opinion would be overstepping the judicial review mandate vested upon this Court, and is a matter that needs to be decided by a trial court, whether criminal or civil.

#### *Whether the orders sought are merited*

78. On the last issue as regards the relief sought, the Applicant has sought orders of certiorari and prohibition. The Court of Appeal held in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 *inter alia* as follows as regards the nature of the two judicial review orders:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings....Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

79. The prosecution of the *ex parte* Applicants by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in MCCR/1338/2018 - Republic vs Kung'u Gatabaki &

**Others** has been found by this Court to be unlawful and unconstitutional, and the order sought of certiorari to quash the said prosecution is thus merited. Consequently, an order of prohibition stopping any further prosecution of the *ex parte* Applicants in the said criminal case is also merited, to ensure that this Court does not act in vain.

80. The outstanding orders of prohibition and mandamus sought by the *ex parte* Applicants cannot however be granted by this Court for two reasons. Firstly, this Court cannot prohibit the 1<sup>st</sup> Respondent from undertaking its statutory duties without any justifiable basis. Secondly, given the limits of this Court's judicial review jurisdiction alluded to in this judgment in so far as determination of the merits of the dispute between the *ex parte* Applicants, Respondents and Interested Party, the orders sought that touch on the merits of the dispute cannot be granted.

81. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 25<sup>th</sup> September 2018 is merited only to the extent of the following orders:

**I. An order of Certiorari be and is hereby issued to bring into the High Court for purposes of being quashed the charge sheet and proceedings in Nairobi MCCR/1338/2018- Republic vs Kung'u Gatabaki & Others instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the *ex parte* Applicants.**

**II. An order of Prohibition be and is hereby issued directed to the 3<sup>rd</sup> Respondent prohibiting him/her and any other Magistrate's court of similar jurisdiction from trying, hearing or further hearing and determining MCCR/1338/2018 - Republic vs Kung'u Gatabaki & Others.**

**III. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall meet the *ex parte* Applicant's costs of the Notice of Motion dated Notice of Motion dated 25<sup>th</sup> September 2018.**

82. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2020**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the Applicants' and Respondents' Advocates on record.**

**P. NYAMWEYA**

**JUDGE**