REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 152 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

AND

FLEUR INVESTMENTS LIMITED.....*EX PARTE* APPLICANT

JUDGMENT

The application

1. By a Notice of Motion dated **21st** May 2019 the applicant, a limited liability company registered under the provisions of the Companies Act[1] seeks the following orders against the Commissioner of Domestic Taxes, an office established under section **13** of the Kenya Revenue Authority Act[2] (herein after referred to as the KRA Act):-

*a) Judicial review order of Certiorari be and is hereby issued removing before this court and quashing the Respondent's letter of demand dated **13th** November,2018 demanding an amount of **Kshs.200,760/=** based on an alleged expected rent revenues for the year 2017 amounting to **Kshs.2,007,600/=.***

*b) A declaration that the Applicant's Notice of Objection dated **21st** November, 2018 against the Respondent's Demand letter dated **13th**November, 2018 demanding tax in the amount of **Kshs.200, 760/=** is deemed to be allowed and successful by operation of Section **51(11)** of the Tax Procedures Act, 2015, the Respondent having failed and /or declined to issue its Objection Decision within the statutory stipulated period of Sixty (60) days.*

*c) A declaration that the Applicant's Notice of Objection dated **25th** May,2018 against the following :-*

*i. Respondent's e-mails dated **15th** May,2018 raising Certificate of Registration-Income Tax Rental Income Number KRAMRI201800059264, e-return Acknowledgment Receipt Number KRA20180686868693, Payment Defaulter Notice Number 50104513; and*

*ii. Respondent's e-mail dated **23rd** May, 2018 demanding a monthly Rental Income Tax totalling **Kshs.378,000/=** for the period January,2016 to March,2018, has been allowed and successful pursuant to Section **51(11)** of the Tax Procedures Act, 2015 as the Respondent has failed and /or declined to issue its Objection Decision within the statutory stipulated period of Sixty (60) days.*

*d) A Judicial Review Order by way of Prohibition be and is hereby issued prohibiting the Respondent, its servant, agents, staff, employees and persons acting through him from, claiming, assessing, and/or demanding from the applicant residential Rental Income Tax, the applicant not being subject to the provisions of Section **6A** of the Income Tax Act as it derives no income for a residential property.*

*e) An Order of Prohibition be and is hereby issued prohibiting the Respondent, its servant, agents, staff, employees and persons acting through him from issuing arbitrary Rental Income Tax claims and Payment Defaulter Notices against the applicant, the same having been set aside by operation of the law pursuant to Section **51(11)** of the Tax Procedures Act.*

*f) A declaration that the Certificate of Registration for Income Tax Rent dated **15th** May, 2018 is illegal and unlawful having been issued contrary to the provisions of Section **6A** of the Income Tax Act and the same be set aside.*

g) The costs of this Application be provided for.

Grounds relied upon

2. The applicant states that it used to engage in real estate business on commercial properties, but since 2012 it ceased to operate and it no longer earns rental income from residential properties within the meaning of section **6A** of the Income Tax Act[3](herein after referred to as the **ITA**) and the Income Tax (Residential /Rental Income Tax) Regulations,2016.

3. It states that on **15th** May 2018, the Respondent registered it for Rental Income Tax obligation and made an e-return Acknowledgment Receipt Number **KRA20180686868693** for Income Tax – Rent Income Return purporting it to have been made by the applicant. Further, the applicant contends that the Respondent by an e-mail dated **15th** May, 2018 alleged that the applicant had not paid tax for rental income for 01/01/2016 to 31/01/2016 and claimed taxes of **Kshs 17, 920/=** and issued Payment Defaulter Notice Number **50104513** dated **15th** of May 2018. It also states that by an e-mail dated **23rd** of May, 2018, the Respondent issued a tax claim for rental income (residential) of **Kshs. 378,000/=** for the period 1st January, 2016 to March 2018.

4. The applicant also states that it objected to the two claims on grounds that it did not file the alleged Income Tax, and that it has been dormant since 2012 nor had it failed to file returns but the Respondent failed to make an objection decision, hence its objection is deemed as allowed under section **51(11)** of the Tax Procedures Act[4] (herein after referred to as the **TPA**)

5. The applicant states that it wrote to the Respondent on **5th** September, 2018 and **24th**October, 2018 seeking confirmation of the revocation of the tax claims, and requesting investigations on the e-return Acknowledgment Receipt Number **KRA20180686868693.** It contends that the Respondent acted in bad faith, maliciously, unfairly and unjustly by re-introducing matters that were deemed to be allowed under the law by Section **51(11)** of the **TPA** by alleging it its letter dated **13th** November, 2018 that the applicant had "expected rent revenues" of **Kshs 2,007, 600/=** for the year 2017. It maintains that the impugned decision is irrational, unreasonable, whimsical, capricious and arbitrary and it defies of law and logic. It also states that the Respondent acted in bad faith fully aware that the applicant had no rental income.

6. The applicant maintains that the tax claims are without any factual basis, that they are unreasonable, oppressive, arbitrary, irrational, *ultra vires,* unlawful, capricious, unfair, and unjust. It also states that the Respondent acted in a procedurally unfair and improper manner by auto registering it for Income Tax Rental Income obligation, yet it was aware that the applicant was a dormant company and had no income. It also states that the Respondent's failure to deregister it is improper and unfair, malicious and in bad faith. It contends that the Respondent acted procedurally unfairly by failing to investigate who filed the returns in respect of which the false e-return acknowledgement number **KRA20180686868693** was made.

7. The applicant contends that the Respondent having failed to give reasons, this court should hold and to find that under Section **6(4)** of the Fair Administrative Actions Act [5](herein after referred to as the **FAA** Act) the impugned decision was made arbitrarily, in bad faith, improperly, and without good reason.

8. It also states that it is procedurally improper, unfair, unjust, and in bad faith for the Respondent to make such allegations to justify the impugned registration. It states that the Respondent acted *ultra vires* and in abuse of its powers by maliciously and arbitrarily raising fictitious residential rent income tax, without any basis or factual foundation. It also states that the residential Rental Income Tax under section **6A** of the **ITA** read with clause **10** of the Third Schedule to the said Act is only imposed where (a) any resident person has accrued in or derived income from Kenya for the use or occupation of residential property; (b) the residential rental income is in excess of one hundred and forty-four thousand shillings but does not exceed ten million shillings during any year of income; (c) A person who would be liable to pay the residential Rental Income Tax has not elected, in writing to the Commissioner, not to pay the tax under Section **6A**.

9. The applicant states even though under section **12** of the Tax Appeals Tribunal[6] (herein after referred to as the **TAT**), an alternative remedy of appealing to the Tax Appeals Tribunal exists, this alternative remedy is inapplicable because:-

a) The Respondent having failed to make an objection decision within 60 days, Section 51(11) of the TPA mandatorily deems the objection to have been allowed.

b) The Objection having been allowed by operation of statute, the applicant has no grievance to appeal against other than quashing of the notices and prohibiting the Respondent from continuing to harass the applicant.

c) There is no objection decision arising out of the applicant's objection, setting out the statement of findings on the material facts and the reasons for the decision as the law requires, hence the applicant has nothing to appeal against, because the law deems the objection to have been allowed.

d) It is trite law that this court has found that the issue of alternative remedy does not arise where an objection has been allowed by operation of the law.

10. The applicant also states that unless this court intervenes, the alternative remedy will offer no relief to a person whose objection the law deems as allowed under the mandatory provisions of section **51(11)** of the **TPA**. It contends that this court should take judicial notice of the fact that an appeal to the tribunal under Section **12** of the **TAT** is only available against the decision of the Commissioner, and in this matter, there is no decision, the objection having been allowed by operation of the law, hence, the only available remedy to it is Judicial Review and other reliefs available under Articles **23** and **47** of the Constitution and section **11** of the Fair Administrative Action Act[7] (herein after

referred to as the **FAA** Act) which are a more effective and convenient remedy in the absence of an appealable objection decision by the Respondent.

Respondent's grounds of opposition

11. In its grounds of opposition dated **23rd** August 2019, the Respondent states that the application is unmerited, an abuse of court process and it is aimed at circumventing the law. It also states that the application presents a purely tax dispute and as such this court is the wrong forum to determine the dispute. It also states that the Respondent is mandated by the KRA Act to investigate, assess and demand taxes, hence, the application aims at asking this court to usurp the Respondent's statutory powers.

Determination

12. The substance of the applicant's argument challenges the lawfulness of the Respondent's failure to render a decision on its objection to its registration for Rental Income Tax and the Rental Income Tax Assessments. At the heart of the contest lies the construction of section **51 (8) & (11)** of the **TPA** and the consequences of the Respondent's alleged failure to render an objection decision under the said provision.

13. Submitting on the issue, the applicant's counsel cited *Council of Civil Servant Unions v Minister for the Civil Service**[8]*** which defined illegality as a ground for judicial review and argued that the Respondent acted *ultra vires* section **3** and **6A** of the **ITA** as read with Clause **10** of the Third Schedule to the Act. He argued that the Respondent acted in bad faith by raising income taxes against a dormant company. He faulted the Respondent failing to issue an objection decision as provided in Section **51(8) & (11)** of the **TPA** with **60** days.

14. He cited *R v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd* [9]which held that statutory power can only be exercised validly if exercised reasonably. He also cited *R v Barnet London Borough Council ex p Nilish Shah*,[10] for the proposition that an administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in the law. He argued that the Respondent's actions are not only irrational, unreasonable, capricious and arbitrary, but also in bad faith.

15. Despite the fact that this is a fairly dispositive question, the Respondent's counsel did not address it at all. Instead, the Respondent's counsel confined his arguments to one issue, that is, the applicant's failure to exhaust the dispute resolution mechanism laid down under the **TPA**. Counsel completely failed to address yet a further pertinent question, that is whether, the dispute mechanism under the act is triggered by the Respondent's objection decision or whether the dispute resolution mechanism can be resorted to in absence of an objection decision. Put differently, he failed to address his mind to the question whether in absence of an objection decision, an aggrieved party is still required to appeal to the Tax Appeals Tribunal (herein after referred to as the **TAT**).

16. The other notable omission on the part of the Respondent is its failure to file a Replying Affidavit to answer the factual issues raised by the applicant. Relevant to the issue under consideration is the applicant's averment that it lodged an objection and the Respondent failed to make an objection decision within the time stipulated by the law. The applicant's case is predicated on the fact that the Respondent having failed to render an objection decision within **60** days provided under the law, its objection is deemed as allowed by operation of the law. This being the basis upon which the applicant's case stands, it is not clear why the applicant carefully evaded it and more so failed to file a Replying affidavit to rebut the applicant's averments. The effect is that the applicant's averments stand unconverted.

17. It is important to have clarity about the effect of the mechanism of the proceedings under Part **VIII** of the **TPA**, namely, tax decisions, objections and appeals. For the sake of brevity, the proceedings referred to herein are defined in section **50 (4)** of the **TPA** to mean— **(a)** an objection made under section **51**; **(b)** an appeal made to the Tribunal under section **52** in relation to an appealable decision; **(c)** an appeal made to the High Court under section **53** in relation to a decision of the Tribunal; or **(d)** an appeal made to the Court of Appeal under section **53** in relation to a decision of the High Court.

18. Section **50 (4)** of the **TPA** must be interpreted in the light of the injunction contained in Article **50 (1)** of the Constitution, that is the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal and the right to a fair administrative action under Article **47** of the Constitution. The first opportunity for a hearing under the above provisions is the objection to the assessment. Thus, an objection to assessment and the obligation to render an objection decision is not a mere formality nor has it been included in the statute for cosmetic purposes. While it is appreciated that the hearing at this stage is limited, it is a form of *audi alteram partem*, the principles of which have frequently been recognised as being flexible and capable of being tailored according to the exigencies of the situation.

19. Section **51 (8)** of the **TPA** obligates the Commissioner where a notice of objection has been validly lodged within time, to consider the objection and decide either to allow the objection in whole or in part, or disallow it. This decision is referred to as an "objection decision." This section mandatorily requires the Commissioner to make an objection decision. The only qualification is prescribed in section **51 (3)** in the following words:-

> *(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—*
>
> > *(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;*
> >
> > *(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and*
> >
> > *(c) all the relevant documents relating to the objection have been submitted.*

20. There is no argument before me challenging the validity of the objection. A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, *inter alia*, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised. My reading of the law is that the Commissioner has no discretion not to make an objection decision.

21. Were it not for the above special appeal procedure, the avenues for substantive redress available to persons aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common law judicial review as now buttressed by the right to a fair administrative action under Article **47** of the Constitution, and as fleshed out in the **FAA** Act. Here, however, the Act provides its own special procedure for review of appealable decisions. But, and this is crucial to an understanding of this part of the case, the Act nowhere excludes judicial review in the ordinary course. Simply put, if the Commissioner fails to render an objection decision within the time prescribed under the act, then there is no appealable decision to be challenged before the Tribunal. The Act creates a tailor-made mechanism for redressing complaints about the Commissioners decisions, but it leaves intact all other avenues of relief including judicial review if the Commissioner fails to comply with the law.

22. Like all other public entities, the Commissioner is duty-bound to discharge all its duties and functions in accordance with the law. His conduct should be beyond reproach and it is expected to measure up to its policy and legislative prescripts and the correct application of the governing law. In the event the Commissioner fails to properly exercising his or her discretion in terms of the above sections, such an omission would be reviewable both at common law and under the Constitution. This will be dealt with in more detail in the third issue on exhaustion of remedies. It suffices to state that contrary to the impression created by the Respondent, the existence of judicial supervision of the manner in which the Commissioner exercises his or her discretion is an important element in the scheme of the Act as a whole.

23. As a matter of principle, therefore, the Commissioner's exercise of his statutory power would be subject to the discipline of administrative law. Broadly, in order to establish review grounds it must be shown that the Respondent failed to apply its mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice.' Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fides* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the decision maker misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner afore stated. Some of these grounds tend to overlap. In exercising a discretion under the Act, the Commissioner is under a duty to act fairly.

24. At the center of the Respondent's failure to render an objection decision as the law requires is a fundamental issue, namely, whether the failure or refusal to render a decision is an administrative action. Answering this question is important. If it amounts to an administrative action, it is subject to a higher level of scrutiny in terms of the **FAA** Act. The **FAA** Act defines an "administrative action" to include— **(i)** the powers, functions and duties exercised by authorities or quasijudicial tribunals; or **(ii)** any act, **omission** or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Clearly, the Respondent's failure to render an Objection Decision is an administrative Action capable of being challenged by way of judicial review under the Act.

25. Public bodies, no matter how well intentioned, may, only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the rule of law. In *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* the court held :-

> "*the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law*"[11]

26. In this regard, the Respondent is constrained by that doctrine to ensure that his decisions conform to the law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the Constitution or statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of instruments conferring the power. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the empowering provision purposefully.[12]One can confidently assume that the Constitution intends its provisions to be interpreted in a meaningful and purposive way giving effect to its basic objectives.

27. It is useful to consider the broad principles that underlie the importance of lawful conduct on the part of public statutory bodies when discharging their public duties. In that regard, a brief survey of the applicable constitutional and legislative principles underscoring the importance of a transparent and lawful conduct is merited. The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means.[13] On the contrary, the rule of law obliges an organ of state to use the correct legal process.

28. The foregoing principles are premised on the supremacy of the Constitution and the rule of law. The principle of legality is an aspect of the rule of law and the exercise of public power is only legitimate where lawful. The principle of legality requires that the exercise of public power must be rationally related to the purpose for which the power was given. This lies at the heart of the rationality test. Our courts have consistently held that rationality is a minimum requirement applicable to the exercise of public power in that decisions must be rationally related to the purpose for which the power is given otherwise they are in effect arbitrary and inconsistent with the requirement of rationality. The rational connection means that objectively viewed, a link is required between the means adopted by the person exercising the power and the end sought to be achieved.

29. The test therefore in relation to rationality requirements is twofold, being, first, that the decision-maker must act within the law and in a manner consistent with the Constitution, entreated not to misconstrue the nature of his or her powers and, second, that the decision must be

rationally related to the purpose for which the power was conferred. This is because if it is not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law.

30. Section **51** of the **TPA** provides as follows:-

51. Objection to tax decision

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.

3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments;

b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute or has applied for an extension of time to pay the tax not in dispute under section 33(1); and

c) all the relevant documents relating to the objection have been submitted.

4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.

5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

a. the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

b. the taxpayer did not unreasonably delay in lodging the notice of objection.

*8) **Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision."***

9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

*11) **The Commissioner shall make the objection decision within sixty days from the date of receipt of—***

*a) **the notice of objection; or***

*b) **any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.***

31. A stated above, the Respondent never filed a Replying Affidavit to rebut the averments that it never rendered a decision following the applicant's objection. There is nothing before me to show that the Respondent made an objection decision as the law requires. By virtue of the clear provisions of section **51(8)** and **(11)** of the **TPA**, the Respondent is deemed to have allowed the applicant's objection. I find backing in *Republic v Commissioner of Customs Services Ex-Parte Unilever Kenya Limited*[14] in which the court stated that if the Commissioner does not render a decision within the stipulated period, the objection is deemed as allowed by operation of the law. The act requires that where the Commissioner has not made an objection decision within **60** days from the date the tax payer lodged the notice of objection, the objection shall be allowed. This means that the issues that the tax payer had raised in the notice of objection will be accepted. In case of a tax assessment, it will be vacated. On this ground alone, the applicant's application succeeds.

32. The other argument propounded by the applicant is that the Respondent auto registered it for rental income yet it had ceased to operate and that it never owned rental houses. He cited the definition of procedural impropriety in *Pastoli v Kabale District Local Government Council and Others**[15]*** and argued that the Respondent being the sole statutory institution vested with the authority to collect taxes should execute its mandate in a procedurally fair and proper manner. He argued that conducting an "auto registration" of the applicant for Income

Tax Rental Income obligation (based on a false and fabricated e-return Acknowledgment Receipt Number KRA20180686868693), notwithstanding the fact that the applicant is a dormant company which never earned any residential income while in operation is procedurally improper and should not suffice.

33. He argued that the Respondent's refusal and/or failure to carry out investigations on the impugned returns and levying tax based on income tax obligation registration arising out of the said e-return number **KRA20180686868693** is a clear demonstration of the Respondent's lack of fairness. He submitted that the Respondent has unreasonably and unfairly failed to respond and justify the contested documents.

34. He submitted that it is procedurally improper, unfair, unjust, and in bad faith for the Respondent to fail to provide details of the applicant's residential property from which it derives rental income or alleging that the applicant had not been filing its income tax returns and failing to issue an Objection Decision or raising the contested Rental Income Tax.

35. He argued that the applicant does not have any income at all nor did it make an application to be registered for residential rental income tax purposes. He argued that the Respondent has been aware that the applicant has not been involved in any income generating activity. He argued that the Respondent has not at any time contested the accuracy of those returns. He submitted that it is malicious, unreasonable, irrational and capricious for the Respondent to raise fictitious residential Rental Income Tax claims dated **15th** May, 2018, **23rd** May, 2018, **28th** October, 2018 and **13th** October, 2018.

36. The Respondent's counsel did not address this issue at all.

37. The bulk of the applicant' case on the issue under consideration stands on its argument that it had ceased to operate and that it never owned rental houses. The said argument raises a pertinent question, namely, whether the applicant is inviting this court to determine contested issues of facts and whether such an argument is a ground for judicial review. It is basic to law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the court to determine whether the applicant owned houses at the time of the assessment or whether it had ceased to operate at the material time, there is need for direct evidence by the applicant to prove the allegations. The allegations will need to be tested through cross-examination of witnesses before the court can make conclusions.[16] This position was appreciated in *Republic v Anti-counterfeit Agency ex parte Caroline Mangala t/a Hair Works Saloon*[17] which held that judicial review does not deal with contested issues of fact.

38. In the same vein, in *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo*[18] it was held:-

> *"55. It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."(Emphasis supplied)*

39. Judicial review looks into the legality of the dispute not contested matters of evidence. Further, determining the above issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. I am fortified by *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another*[19] which held that:-"…Where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. Similarly, in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[20] it was held:-

> *"…It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant..."*

40. In *Republic v Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 others*[21] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.[22] It is my conclusion that the question whether the applicant owned rental houses or had ceased to operate would require oral evidence to be proved on a balance of probabilities. Such consideration falls outside the purview of judicial review jurisdiction. It is an invitation to this court to engage in a merit review. I decline the invitation to travel that route.

41. Next is the issue whether this court is divested of jurisdiction to entertain this matter by the doctrine of exhaustion of remedies. The applicant's counsel cited section **12** of the Tax Appeals Tribunal Act[23] (herein after referred to as the **TAT** Act) and sections **2** & **52** of the **TPA** and argued that the Respondent has not made an Objection Decision in response to the applicant's Notice of Objection and therefore there is no appealable decision capable of being challenged at the Tax Appeals Tribunal (herein after referred to at the **TAT**). He cited the powers of the **TAT** under section **29** of the **TAT** Act and argued that in the absence of a decision, the **TAT** does not have jurisdiction to make any determination. He relied on *Republic v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited*.[24]He also relied on *Fleur Investments Limited v Commissioner of Domestic Taxes & another*[25] which made reference to ***Speaker of National Assembly v Njenga Karume***[26] where the Court expressed itself as follows:-

> ***"…where there was an alternative remedy and especially where parliament has provided a statutory procedure, 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 to the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…" (Emphasis provided)***

42. He argued that in exceptional circumstances a person aggrieved by a decision of an authority, may seek judicial review orders in court. To buttress his argument he relied on *Republic v National Environment management Authority**[27]*** which held that 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 statutory powers was the real issue and whether the statutory appeal procedures was suitable to determine it.

43. He also relied on *Harley Development Inc. v Commissioner of Inland Revenue**[28]*** for the holding that where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed. (Also cited *R v Department of Education and Employment ex p Begbie**[29]*** and ***Speaker of the National Assembly v Njenga Karume**[30]*** **and** ***R vs National Environment Management Authority Ex-parte Sound Equipment Ltd***[31]**). He argued that the issue for determination is not whether** *the applicant is liable to income tax on residential income but the unreasonable, malicious and capricious manner in which the Respondent has handled the applicant's tax status. He placed reliance on* the Supreme Court of India decision in *U.P. State Spinning Co. Ltd v R.S. Pandey And Another* thus:-

> *'... there are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice...'*

44. He argued that stemming from the above decisions, and in view of the Respondent's abuse of power, lack of an appealable decision and contravention of the Rules of Natural Justice, the applicant is rightfully seeking judicial review orders from this court. He argued that the issue of alternative remedy is therefore a red herring. Lastly, the applicant's counsel in his supplementary submissions cited section **51** of the **TPA** and invited the court to take judicial notice of the wording of section **51 (8)** & **(11)** of the Act which he argued provide a statutory right which cannot be taken away. He cited the grounds for granting judicial review orders in *Republic v Minister in the Office of the President Provincial Administration & Internal Security & 2 Others ex parte Francis Kamau**[32]***and ***Council of Civil Service Unions v Minister For The Civil Service**[33]*** **and urged the court to grant the orders sought.**

45. **The Respondent's counsel cited** section **2** of the **TPA** which sets out the object and purpose of the act. He also cited the definition of an appealable decision in section **3** of the said act and argued that the only reason why an *"appealable decision"* is distinguished from a "tax decision" is not that one of them is brought under the ambit of the **TPA** while the other is not but that both have distinct processes of challenging within the **TPA**.

46. He submitted that the first line of challenging a "tax decision" is by lodging an objection and that a "tax decision" must graduate to an "appealable decision" before being lodged at the **TAT**, otherwise it will be premature. He argued that this case relates a decision made under a tax law. To him, the debate should be whether it is a ***tax decision*** or an ***appealable decision***; what the debate cannot be is what the appropriate forum for litigating the dispute is. He argued that only a "tax decision" is challenged by way of lodging an "objection" and submitted that an "appealable decision" begins its life in the **TAT** pursuant to section **52** of the **TPA**.

47. He also argued that even an appeal to the **TAT** is not valid unless the taxpayer pays the tax not in dispute and added that it is not just the **TPA** that sets down the procedure for challenging such a decision made under a tax law, but the **FAA** Act calls such a decision an "administrative action" and goes ahead to set down the procedure for challenging an administrative action. He argued that before a party applies for judicial review remedies in the High Court he must demonstrate that they have exhausted all internal mechanisms for challenging such a decision pursuant to Section **9(2)** of the **FAA** Act. *(citing The Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Chairman, Rent Restriction Tribunal & 99 others [2018] e KLR; Republic v Kenya Revenue Authority ex-parte new Frarims Wholesalers Limited & 3 others* {2017} e KLR**).**

48. Counsel cited *Rich Productions Ltd v Kenya Pipeline Company & Another**[34]*** which held that the reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. The court went further to state that while the court retains the inherent and wide jurisdiction under Article **165** to supervise, such supervision is limited in various respects and that the court cannot exercise such jurisdiction in circumstances where parties seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.

49. He also cited *Diana Kethi Kilonzo v IEBC & 2 Others**[35]*** for the proposition that the various bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. He placed reliance on *David Ramogi & 4 Others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others**[36]*** for the holding that where particular institutions are tasked under the Constitution or statute to deal with specific grievances, then these channels need to be first explored and exhausted before the intervention of the court is sought unless these are shown to be ineffective or unwilling to discharge their mandate in which case the court may flex its supervisory muscle under Article **165(6)** and possibly issue the necessary prerogative writs against the impugned quasi-judicial body or other appropriate relief under Article **23(3).** (Also cited *George Owino Mulanya & 4 Others v Achieng Odonga & anoth*er [2017] e KLR).

50. He urged the court to rethink the jurisprudence espoused in *Republic v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited* ***[37]*** which he submitted limits the powers of the **TAT**. He submitted that before this court is a tax grievance which can be resolved by the **TAT.** He argued that the alleged failure to make a decision is itself a decision citing the prayers sought in the application. He submitted that the applicant adopted a narrow interpretation of jurisdiction of the **TAT** which renders section **7(1) (b)** of the **FAA** Act a dead-letter. He cited *Grounds for Judicial Review in Kenya—an Introductory Comment to the Fair Administrative Actions Act, 2015* ***[38]*** which opines that the Act ends the monopolistic reign of the High Court as the only body capable of granting judicial review. He **urged the court to dismiss the application.**

51. 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. This doctrine has assumed esteemed juridical lineage in Kenya,[39]a position upheld by the Court of Appeal[40] in *Speaker of National Assembly vs Karume*[41] which held that- *"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."*

52. Many Post-2010 court decisions have added justification and rationale for the doctrine under the 2010 Constitution[42]among them *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*[43] in which the Court of Appeal provided the constitutional rationale and basis for the doctrine 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."*

53. The High Court in the *Matter of the Mui Coal Basin Local Community,* ***[44]*** explained the rationale in the following words:-

> *"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..."*

54. An analysis of the jurisprudence on the doctrine shows that at least two principles emerge. *First,* 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.[45] *Two,* 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.

55. Talking about the need to extensively analyze the facts, a pertinent issue has been raised in this case. The applicant argues that the Respondent failed to render an objection decision within the meaning of section **51 (11)** of the **TPA**. From this sub-section, two consequence flow from the Respondent's failure to make a decision. *First,* the objection by operation of the law stands allowed. As held in the first issue, on this ground alone the applicant's case succeeds. That is the clear language of section **51 (11)** of the **TPA**. That being the correct legal position, there was no need for the applicant to lodge an appeal before the **TAT**.

56. *Second,* the Respondent having failed to render an Objection Decision, there was no basis upon which the applicant could escalate the dispute to the **TAT**. As stated earlier, the proceedings contemplated under section **50 (4)** of the **TPA** and the succeeding sections are— (a) an objection made under section 51; (b) an appeal made to the Tribunal under section **52** in relation to an appealable decision; (c) an appeal made to the High Court under section **53** in relation to a decision of the Tribunal; or (d) an appeal made to the Court of Appeal under section 53 in relation to a decision of the High Court. The absence of an objection decision means that there would be no decision to be challenged before the **TAT.**

57. *Third,* ssection **52 (1)** of the **TPA** provides that a person who is dissatisfied with an appealable decision may appeal the decision to the **TAT** in accordance with the provisions of the **TAT** Act. The act 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. No decision was rendered within the meaning of this definition making it impracticable for the applicant to approach the **TAT** Act.

58. *Fourth,* section **3** of the **TAT** act establishes the **TAT** 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 Commissioner did not render the objection decision.

59. *Fifth,* closely tied to the above point is the legal position that the objection stands allowed if no decision is made within **60** days. The argument that the applicant ought to move to the **TAT** to challenge a non-existent decision is not only legally frail but it is at odds with the law. It beats logic to require a person to go to the **TAT** to challenge a decision which is been deemed as allowed by operation of the law. Why would such a person appeal against a non-existent decision when the law has in peremptory terms allowed his objection?

60. *Sixth,* section **12** of the **TAT** Act 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 **TAT**; Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings. The foregoing provisions of the law warrant no explanation. There is no decision as contemplated under section **51 (8)** of the Act the basis upon which the applicant could have moved to the **TAT.** It follows that the argument by the Respondent based on section **9(2)** of the **FAA** act is in applicable in the circumstances of this case.

61. *Seventh*, 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.

62. The law often is a pragmatic blend of logic and experience. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.

63. That the exercise of a power such as that vested in the Commissioner is reviewable under the Constitution is clear. Exercise of public power is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that public bodies observe fundamental rights and act both ethically and accountably should not be understated. The principal function of Article **47** of the Constitution underpinned by the **FAA** Act is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by a public body affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice.

64. The courts may exercise their powers of judicial review to ensure that the Commissioner does not abuse his or her discretion under the law. A person aggrieved by the manner in which the Commissioner exercised his statutory powers or discretion or fails to exercise his power as has happened in this case is perfectly entitled to seek remedy from the court. The failure to render a decision as the law requires is an issue that warrants the immediate intervention of the court rather than resort to the internal remedy under the **TPA.** The internal remedy is ineffective and inadequate in the circumstances of this case. It does not offer a prospect of success and cannot redress the appellant's complaint. The internal remedy is moreover ineffective and inadequate, because it cannot be implemented in accordance with the relevant principles and values of administrative justice of the Constitution. As repeatedly stated above, section **50** of the **TPA** defines the proceedings contemplated under the Act. For the dispute to graduate to an appeal before the **TAT,** an objection decision is necessary.

65. A court should not lightly entertain the presumption that a statute means to embody a rule of exhaustion which excludes the application of traditional equitable considerations. It is my contention here, as it is with doctrines of judicial review, that the governing statutes have been enacted in the context of a body of general concepts developed and developing which define the appropriate relation of agencies and courts.

66. The exhaustion rule comes into effect only if the remedy-whether administrative or judicial is adequate to protect the asserted claim. It is often the situation, for example, when the validity of a regulation is in question that there is no administrative procedure immediately available for testing its validity. In the instant case the **TPA** and indeed the Tax laws do not have an administrative procedure for testing the validity of the failure by the Commissioner to render an objection decision. In such cases the exhaustion doctrine is inapplicable: the person has no remedy. The question is rather the so-called question of ripeness or, if you will, of standing: does the administrative action materially "affect" a "legally protected interest." Equity comes in when the legal remedy (i.e., the regularly prescribed course of procedure) is inadequate. Clearly, the doctrine of exhaustion is in applicable in the circumstance of this case.

Conclusion

67. When a court is asked to invalidate a decision on grounds of error of law, its task is simply to satisfy itself whether the decision was arrived at based upon relevant evidence, and, whether, the decision maker acted in an arbitrary manner and reached a finding of fact not supported by any evidence. It also entails examining whether the decision maker misdirected himself and directed its attention to the wrong issue by misconstruing a statute. Additionally, it involves examining whether the decision maker stepped beyond the legal limits or acted in an arbitrary manner by reaching an unreasonable conclusion based on the material before it.

68. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by Tribunals or public bodies can be judicially challenged on grounds that the administrative decision does not comply with these basic requirements of legality.

69. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. An administrative or quasi-judicial decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.* I find and hold that the applicant has presented sufficient grounds to demonstrate that the impugned conduct is legally frail.

70. In view of my findings and conclusions as here above discussed, the conclusion becomes irresistible that the applicant's substantive application dated **21st** May 2019 is merited. Accordingly, the said application is allowed. I grant the following orders:-

*a) An order of Certiorari be and is hereby issued quashing the Respondent's letter dated **13th** November 2018 demanding **Kshs.200,760/=** being alleged rent revenue for the year 2017.*

*b) A declaration be and is hereby issued declaring that the applicant's Notice of Objection dated **21st** November 2018 against the Respondent's Demand letter dated **13th**November 2018 is hereby allowed under Section **51(11)** of the Tax Procedures Act..*

*h) A declaration be and is hereby issued declaring that the applicant's Notice of Objection dated **25th** May,2018 against the Respondent's e-mails dated **15th** May,2018 raising Certificate of Registration-Income Tax Rental Income Number KRAMRI201800059264, e-return Acknowledgment Receipt Number KRA20180686868693, Payment Defaulter Notice Number 50104513; and* the *Respondent's e-mail dated **23rd** May, 2018 demanding a monthly Rental Income Tax totalling **Kshs.378,000/=** for the period January,2016 to March,2018, be and is hereby allowed pursuant to Section **51(11)** of the Tax Procedures Act..*

i) An Order of Prohibition be and is hereby issued prohibiting the Respondent, its servant, agents, from, claiming, assessing, and/or demanding from the applicant residential Rental Income Tax for the period(s) stated in the applicant's Notice of Objection.

*j) An Order of Prohibition be and is hereby issued prohibiting the Respondent, its servant, agents, from claiming the impugned Rental Income Tax because the same has been set aside by operation of the law as provided under section **51(11)** of the Tax Procedures Act.*

k) No orders as to costs.

Dated, Signed and Delivered via e-mail at Nairobi this 4th day of September 2020

John M. Mativo

Judge

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[1] Cap 486, Laws of Kenya, This act was repealed by Act No. 17 of 2015.

[2] Cap 469, Laws of Kenya.

[3]Cap 470, Laws of Kenya.

[4] Act No. 29 of 2015.

[5] Act No. 4 of 2015.

[6] Act No. 40 of 2013.

[7] Act No. 4 of 2015.

[8] {1984} 3 All ER 935, 950-951.

[9] {1999} 1 EA 245.

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

[11] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* {2006} ZACC 9; 2007 (1) SA 343 (CC).

[12] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[13] As was held in *Head of Department, Department of Education, Free State Province v Welkom High School*, 2014 (2) SA 228 (CC).

[14] {2012} e KLR.

[15] {2008} 2 EA 300

[16] Counsel cited *Republic vs Land Registrar Taita Taveta District & Another* {2015} eKLR

[17] {2019} e KLR.

[18] {2015} e KLR.

[19]{2014} e KLR.

[20] {2014} e KLR.

[21] {2016} e KLR.

[22] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.

[23] Act No. 40 of 2013.

[24] {2018} e KLR.

[25] Court of Appeal in Civil Appeal 158 of 2017

[26] {1990-1994} EA 546.

[27] {2011} e KLR.

[28] {1996} 1WLR 727,736C.

[29] {2000} 1WLR 1115, 1129F-G.

[30] **{1990-1994} EA 546.**

[31] **CA 84/2010 [2011] eKLR**

[32] {2013} e KLR.

[33] **{1984} 3 ALL ER 935.**

[34]Petition No. 173 of 201.

[35] Constitutional Petition Number 359 of 2013.

[36] {2017} e KLR.

[37] {2018} eKLR

[38] By Ochiel J. Dudley

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

[40] Ibid.

[41] {1992} KLR 21.

[42] Ibid.

[43] {2015} eKLR.

[44] {2015} eKLR.

[45] Ibid.