REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 359 OF 2018

In the matter of application by Krystalline Salt Limited for leave to

apply for Judicial Review Orders of Certiorari and Prohibition

a the decision of the Kenya Revenue Authority

BETWEEN

Krystalline Salt Limited.....Applicant

versus

Kenya Revenue Authority.....Respondent

RULING

Introduction

1. On 24th October 2018, this court invited the parties to address the court on the doctrine of exhaustion of administrative remedies and the implication (if any) of section 9 (2) of the Fair Administrative Action Act[1] to this case. The doctrine of exhaustion of administrative remedies says that a person challenging an agency decision must first pursue the agency's available remedies before seeking judicial review. [2]

2. The above section provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

3. The parties filed written submissions, which they highlighted. However, in their submissions, counsel for both parties went beyond the issue the court had invited them to address and submitted extensively on the question whether or not the applicant's application meets the threshold for the court to grant the leave sought to commence judicial review proceedings. I will confine this ruling to the question I invited the parties to address and the conclusion arrived at will determine whether I will address the other issue addressed by the parties. I propose first to briefly set out the respective parties' cases below.

The prayers sought

4. Before this court is an application seeking leave to institute judicial review proceedings for grant of orders of *Certiorari* to quash the Respondent's decision declaring the applicant to be a payer of Ksh. 1,358,754,214 being Tax allegedly due from Water Resources Management Ltd (herein after referred to as the authority). It is alleged that said decision was taken in violation of due process as laid out in the Tax Procedures Act[3] and in contravention of the Constitution.

5. In addition, the applicant also seeks leave to apply for an order of Prohibition prohibiting the Respondent from serving agency notices upon its bankers or freezing its bank accounts or suspending its PIN or threatening, intimidating, harassing, prosecuting it or enforcing or implementing the demand notices served upon it.

6. Further, the applicant prays that the leave so granted do operate as stay of any decision, action, implementation and/or enforcement

proceedings against it or howsoever otherwise premised on the said Demand Notices.

7. Lastly, the applicant prays that the court issues any other orders it deems just and fair in the circumstances, and the costs of the application.

The grounds relied upon.

8. The applicant states that it has since 2013 been locked in a court battle with to as the authority, now pending in the Court of Appeal, and, save for the said case, it does not owe the Authority the said tax. It states that the impugned decision made pursuant to the provisions of section 42 of the Tax Procedures Act[4] (herein after referred to as the Act) is premature, malicious, capricious and in bad faith.

9. In addition, the applicant states that the said notice is defective, invalid and *ultra vires* for failure to comply with section 42 of the Act. In addition, it states that it was issued in violation of Article 47, 48 and 50 of the Constitution as read with the provisions of the Fair Administrative Action Act.[5] Lastly, it states that the Notice is irrational, unreasonable, issued in bad faith and in violation of the rules of natural justice.

Respondent's Replying Affidavit

10. Simon Mwilu, a Manager-Policy and Tax Advisory Division at Kenya Revenue Authority swore the Replying Affidavit dated 10thSeptember 2018. He deposed that following investigations, the Respondent issued a demand for Pay as You Earn, Income Tax and Withholding Tax for Ksh. 1,368,545,479 on 24th June 2016 to the above Authority. He also states that the authority wrote back on 29th July 2016 acknowledging the tax liability and requested for time to liaise with the parent Ministry, and, that it made a proposal to pay which it did not honor.

11. He averred that the authority committed to pay a certain amount monthly in order to meet its tax obligation and to reduce further escalation of the debt. He averred that in its letter proposing the said payment plan, it stated that part of its inability to meet its tax obligation was due to debts owed to it by various companies and corporations among them the applicant herein. He averred that in a bid to secure its interest and recover the taxes, the Respondent in exercise of powers conferred to it by section 42 of the Act issued Agency Notices to debtors indicated by the Authority who included the applicant herein.

12. In addition, Mr. Mwilu deposed that section 42 (6) of the Act provides a concise procedure which the applicant should have taken if they were aggrieved by the said decision. He also averred that the applicant has admitted in his pleadings the existence of a legal battle with the Authority and has admitted being indebted to the authority to the tune of Ksh. 1,000,000,000/=. He deposed that the Commissioner is empowered under section 58 and 59 of the Act to require the production of documents and information to enable the Commissioner to ascertain tax liability of a person. Further, he averred that section 42 of the Act empowers the Commissioner to require a payer who owes or may subsequently owe money to the taxpayer to pay the amount specified in the notice to the Commissioner.

***Ex parte* applicant's further Affidavit**

13. Hasmita Patel, the applicant's compliance Manager swore the further affidavit dated 26th September 2018. He denied the allegation that the applicant owes the Authority Kshs. 1,000,000,000/= and added that under section 7 of the Fair Administrative Action Act,[6] an aggrieved person can bring an application for judicial review on the grounds stated therein, and that the impugned decision falls under the said grounds.

14. He also averred that under section 42(6) of the Act, where a perso is served with a Notice maintains that there is no tax due, all that he is required to do is to serve a Notice indicating so within 7 days. He deposed that the applicant did serve the Notice; hence, the applicant complied with the redress mechanism under the act. In addition, he averred that the Tribunal is not properly constituted; hence, it is not possible for the applicant to lodge a complaint at the tribunal. Lastly, he averred that the Respondent's failure to reject, amend or accept a notice erved on him is not a decision that is appealable under the Act.

15. Mr. Patel swore a supplementary Affidavit dated 20th November 2018 in which he deposed *inter alia* that the Court of Appeal granted a stay of execution in the case between the applicant and the Authority, and it is entitled to enjoy the stay, and, that the said stay halts any enforcement measures by the Authority or the Respondent herein.

Determination

16. The applicant's counsel argued that this case fits the exceptions to the doctrine of exhaustion. He cited *Republic v NEMA*[7] for the proposition that where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted. He argued that in the circumstances of this case, the doctrine of exhaustion is in applicable. He argued that an agency Notice issued under section 42 of the Act is not an appealable decision capable of being challenged in the Tax Appeals Tribunal pursuant to section 52 of the Act.

17. Counsel further argued that assuming an appeal lies, the Tax Appeals Tribunal Lacks quorum in that it is not properly constituted, and, that, the Respondent has refused to give its decision to the applicant under section 42 (6) of the act and that there is no efficacious remedy available to the applicant. In addition, counsel argued that the real issue for determination is beyond the jurisdictional competence of the Tax Appeals Tribunal.[8]

18. He also argued that the Tribunals jurisdiction under the act is limited to appealable decisions in terms of section 52 (1) of the Act as read with section 12 of the Tax Appeals Tribunal,[9] and, that, the Tribunal cannot claim a universal jurisdiction over all matters taxation. He submitted that the impugned decision must be one recognized by the relevant tax law as one, which an appeal lies. It was his argument that

the Act does not designate an agency notice issued under section 42 of the Act as one of the appealable decisions capable of being challenged in the Tribunal; hence, it is outside the jurisdictional competence of the Tribunal. Counsel argued that taxation can only be done by clear words and not by intendment.[10]

19. Further, he argued that the doctrine of exhaustion has no applicability where the tribunal lacks jurisdiction. He added that this court is bound by the provisions of Articles 23 (3), 50 (1) and 258 (1) of the Constitution to admit this application and protect the applicant's right under section 7 (1) (a) read with 9 (1) (4) of the Fair Administrative Action Act.[11] He cited *Republic v IEBC ex parte NASA Kenya & 6 Others*[12] for the proposition that 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, a situation which arises where the right to approach the statutory forum created is limited to certain parties who are aggrieved in a particular manner defined by the statutory scheme and where the particular party seeking to bring the suit does not fit into any other of the categories defined by the statute.

20. The applicant's counsel also submitted that where the statutory avenues avail no efficacious remedy to the aggrieved applicant, then the exemption does not apply. He argued that the applicant exhausted the mechanism by writing to the Respondent.

21. Additionally, he maintained that the authority is the principal tax defaulter; and, that, the proceedings question the legality, rationality and procedural propriety of the manner in which the Respondent reached the decision to burden the applicant to pay the authority's tax burden. In his view, a reading of section 42 of the Act is that it must be established that the money is lawfully due from a third party to the taxpayer under the said section. He argued that the Respondent failed to observe due process in violation of Article 47 of the Constitution in that it failed to give a prior notice, it failed to supply information, it failed to reply to the communication, and, failed to justify the said action.

22. In summary, the applicant's counsel submitted that this case raises exceptional circumstances which fit the exception doctrine, which are (a) the court should intervene since the dispute raises violation of due process and the right to natural justice; (b) that the court is being invited to determine emerging questions of law; (c) the court is invited to intervene to redress the Respondents decision made in excess of jurisdiction, (d) that there is a risk of irreparable injury and futility if judicial intervention is delayed or refused, (e) public interest calls for judicial intervention in the instant case.

23. The Respondent's counsel cited section 9 (2) of the Fair Administrative Action Act[13] and submitted that an applicant must first satisfy the court that he has followed all other avenues and statutory provisions to remedy the administrative action complained of and as a result, there now lies an action in judicial review. He cited *Speaker of National Assembly v Karume*[14] and *Geoffrey Muthinja Kabiro & 2 Others v Samuel Munga & 1756 others**[15]*** and argued that the doctrine of exhaustion is now established in our jurisprudence. He however added that, one must look at the rationale and justification for the doctrine as explained in *Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6* Others.[16]

24. Referring to section 42 (6) of the Act,[17] counsel argued that the applicant was given notice of nomination as a payer on 27th August 2018. He submitted that the Respondent replied on 28th August 2018, but on 31st August 2018, the applicant instituted these proceedings without affording the Respondent the statutory opportunity of 30 days to reply, hence, these proceedings are premature and an abuse of the court process. Counsel argued that the mechanism provided under the statute is yet to be exhausted, and, that the facts presented in this case can best be ventilated in an appeal process under the above section.

25. It was his submission that where there is an alternative remedy especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review will be granted.[18] He cited *Republic v Kenyatta University ex parte Ochieng Orwa Dominick & 7 Others*[19] and argued that there are no exceptional circumstances to bypass the exhaustion requirement. Also, he cited *Cortec Mining Kenya Limited v Cabinet Secretary of mining & 9 Others*,[20] *Night Rose Cosmetics (1972) Ltd v Nairobi County & 2 Others*[21] for the holding that an applicant must demonstrate exceptional circumstances and must apply for exemption from the court as provided under section 9 (4) of the Fair Administrative Action Act.[22]

26. The question on the table is whether this court is divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of remedies provided under the enabling statute. This question is a direct invitation for court to lay bare the relevant provisions of the statute and construe them to ascertain their meaning.

27. Interpretation is the process of attributing meaning to the words used in a document, be it a Constitution, legislation, statutory instrument, policy or contract having regard to the context provided, by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence.[23]Statutory provisions must be construed purposively and in a contextual manner. Accordingly, courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[24] but should avoid "excessive peering at the language to be interpreted…"[25]

28. It is now trite that enforcement of Tax Statutes is a necessary tool to enforce the power of the State to impose taxes and charges as stipulated in Article 209 of the Constitution. More significant is Article 210 of the Constitution which provides that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. The enforcement of Tax Statues can have an impact on constitutionally guaranteed rights. The litmus test is whether such limitation will pass constitutional muster. It follows that Tax statutes must be understood purposively because the Tax laws are umbilically linked to the Constitution. The court must seek to promote the spirit, purpose and objects of the Articles 209 and 210 of the Constitution. The court must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional and statutory meanings. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. The provision must be understood within the context of the grid, if any, of related provisions and of the Constitution as a whole.

29. The text is often the starting point of any statutory construction, but, the meaning it bears must pay due regard to context. This is so even

when the ordinary meaning of the provision to be construed is clear and unambiguous.[26] It is an elementary rule of statutory construction that all the provisions bearing upon a particular subject are to be brought into view and be interpreted to effectuate the greater purpose of the instrument.[27] Thus, the relevant provisions of tax laws must be construed together in order to get its full meaning. In interpreting a statute, the courts will fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual, which is certain to subvert the societal goals and endanger the public good.

30. A court of law must therefore try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the **plain meaning rule**. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

31. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The court may not add words into a statute. Courts decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature.

32. All that the court has to see at the very outset is what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the court would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature. As the Supreme Court of India observed in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others:-*[28]

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

33. The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning. To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one. Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean. If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.[29]

34. Section 3 of the Tax Appeals Tribunal[30]establishes the Tax Appeal Tribunal to hear appeals filed against any tax decision made by the Commissioner. Section 12 of the 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 Tribunal. The proviso to this provision Provides that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings. The phrases to note in these two provision are *"any tax decision and subject to the provisions of the relevant law."*

35. On the other hand, section 52 (1) of the Tax Procedures Act[31] provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act. The act defines an appealable decision" as follows:- "…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. The word any other decision under the tax laws is significant.

36. Section 52 (1) cited above is to be construed together with section 12 of the Tax Appeals Tribunal which provides *"...subject to the provisions of the relevant law."* The impugned decision was made pursuant to the provisions of section 42 of the Tax Procedures Act[32] which provides as follows:-

42. Power to collect tax from person owing money to a taxpayer

(1) This section applies when a taxpayer is, or will become liable to pay a tax and —

(a) the tax is unpaid tax; or

(b) the Commissioner has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for the payment of the tax.

(2) The Commissioner may, in respect of the taxpayer and by notice in writing, require a person (referred to as the "an agent")—

(a) who owes or may subsequently owe money to the taxpayer;

(b) who holds or may subsequently hold money, for or on account of, the taxpayer;

(c) who holds or may subsequently hold money on account of some other person for payment to the taxpayer; or

(d) who has authority from some other person to pay money to the taxpayer, to pay the amount specified in the notice to the Commissioner, being an amount that shall not exceed the amount of the unpaid tax or the amount of tax that the

Commissioner believes will not be paid by the taxpayer by the due date.

(3) When a notice served under subsection (2) requires an agent to deduct a specified amount from a payment of a salary, wages or other similar remuneration payable at fixed intervals to the taxpayer, the amount required to be deducted by an agent from each payment shall not exceed twenty per cent of the amount of each payment of salary, wages, or other remuneration (after the payment of income tax).

(4) This section shall apply to a joint account when—

(a) all the holders of the joint account have unpaid tax liabilities; or

(b) the taxpayer can withdraw funds from the account (other than a partnership account) without the signature or authorisation of the other account holders.

(5) An agent shall pay the amount specified in a notice under subsection (2) by the date specified in the notice, being a date that that does not occur before the date that the amount owed by an agent to the taxpayer becomes due to the taxpayer or held on the taxpayer's behalf.

(6) When an agent who has been served with a notice under subsection (2) fails to comply with the notice by reason of a lack of monies held by an agent on behalf of, or due by an agent to an agent, an agent shall notify the Commissioner in writing within seven days of receiving the notice, setting out the reasons for an agent's inability to comply.

(7) When the Commissioner is notified by an agent under subsection (6) that an agent is unable to pay the amount due, the Commissioner shall within a period of thirty days, in writing to an agent—

(a) accept the notification and cancel or amend the notice issued under subsection (2); or

(b) reject the notification.

(8) The Commissioner shall notify an agent in writing of a revocation or amendment of a notice given under subsection (2) where the taxpayer pays the whole or part of the tax due or has made an arrangement satisfactory to the Commissioner for the payment of the tax.

(9) The Commissioner shall serve the taxpayer with a copy of a notice served on an agent under this section.

(10) A payment made by an agent to the Commissioner in accordance with a notice issued under this section is treated as having been made on behalf of the taxpayer and shall discharge an agent of any liability to the taxpayer or any other person.

(11) The Commissioner shall credit any amount paid by an agent under this section against the tax owed by the taxpayer.

(12) The Commissioner may require, in writing, any person, within a period of at least thirty days, to provide a return to the Commissioner showing any monies which may be held by that person for a taxpayer referred to in subsection (1) or monies held by that person which are due to a taxpayer referred to in subsection (1).

(13) A taxpayer who without reasonable cause fails to comply with a notice or a requirement by the Commissioner under this section shall be personally liable for the amount specified in the notice or requirement.

37. From the phrase*"...subject to the provisions of the relevant law,"* three key points emerge. *First*, whether the impugned decision was taken pursuant to the above section. I find no difficulty answering this question in the affirmation nor is there an argument before me to suggest otherwise. The provisions speak for themselves.

38. *Second*, whether the decision is an appealable decision within the above provision. As stated above, the act defines an appealable decision" as 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. The words *"any other decision under the tax laws"* is significant. The impugned notice falls under the above definition. To hold otherwise would amount to intellectual dishonesty given the clarity of the provision.

39. *Third*, whether the impugned decision is an administrative decision within the meaning of section 2 of the Fair Administrative Action Act.[33]Section 2 of the Fair Administrative Action Act[34] provides that "…, unless the context otherwise requires— "administrative action" includes— (i) the powers, functions and duties exercised by authorities or quasi-judicial 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.

40. The applicant does not contest that the impugned action constitutes an administrative action. In fact, the applicant's argument confirm that the Fair Administrative Action Act[35] applies in this case. It argues that under section 7 of the Fair Administrative Action Act,[36] an aggrieved person can bring an application for judicial review on the grounds stated therein, and that the impugned decision falls under the said grounds.

41. Thus, the impugned decision being an administrative action within the meaning assigned to it under the Fair Administrative Action Act, [37] it follows that the provisions of section 9(1)(2)(3) & (4) of the Fair Administrative Action Act[38] do apply. The requirement for

exhaustion of available remedies applies. As argued later in this ruling, the said provisions are couched in mandatory terms. In any event, it is not contested that the said provisions apply. The contest is whether the applicant has demonstrated exceptional circumstances for the applicant to qualify to bypass the exhaustion requirement.

42. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. There are numerous decisions of this court holding that this doctrine is now of esteemed juridical lineage in Kenya.[39] The doctrine was felicitously stated by the Court of Appeal[40] in *Speaker of National Assembly vs Karume*[41] in the following words:-

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

43. True, the above case was decided before the promulgation of 2010 Constitution. However, many Post-2010 court decisions have found the reasoning sound. In fact, post 2010 decisions have provided justification and rationale for the doctrine under the 2010 Constitution.[42] In *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 others*,[43] 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*."

44. In the *Matter of the Mui Coal Basin Local Community*,[44] the High Court stated the rationale for the doctrine in the following terms:-

> *"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..."*

45. As the applicants counsel correctly pointed out, two principles are discernible from case law. One, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricism of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[45]Two, in exceptional circumstances, the court may find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

46. I earlier and with sufficient detail captured the reasons offered by the applicant in support of the argument that there exists exceptional circumstances to warrant bypassing the Tribunal. I need not repeat the same here. I will only highlight a few of the reasons cited, but I must at the earliest opportunity point out that the applicant's argument that there exists exceptional circumstances falls on the following grounds. *First*, the reasons cited do not qualify to be "exceptional circumstances." I will shortly discuss the question what constitutes exceptional circumstances.

47. *Second*, and more fundamental, even if the court was to be persuaded that the reasons cited do qualify and or meet the exceptional circumstances requirement tests, there is a second hurdle for the applicant to jump. Under section 9(4) of the Fair Administrative Action Act, [46] an applicant is required to apply to the court for an exemption. This will be discussed later.

48. The reasons cited are that an agency Notice issued under section 42 of the Act is not an appealable decision capable of being challenged in the Tax Appeals Tribunal pursuant to section 52 of the Act. I have already discussed this issue and held that the impugned decision is an appealable decision and falls within the definition under the act.

49. Counsel further argued that assuming an appeal lies, the Tax Appeals Tribunal lacks quorum in that it is not properly constituted. This argument fails because as the law stands, the applicant was required to apply to court for an exemption fits the exceptional requirement test. No such application was filed. Differently put, this reason does not absolve the applicant form applying for an exemption as provided under the law.

50. The applicant also argued that the Respondent refused to give its decision to the applicant under section 42 (6) of the act. If that is correct, the applicant never sought orders from the court seeking orders to be supplied with alleged reasons. In any event, the requirement for an applicant to apply for exemption still applies, the test being, the applicant must demonstrate exceptional circumstances. I have with sufficient detail discussed below what constitutes exceptional circumstances. The reason cited herein does not qualify.

51. It was argued that that there is no efficacious remedy available to the applicant and that the real issue for determination is beyond the jurisdictional competence of the Tax Appeals Tribunal. This cannot be true. As held above, this decision is an appealable decision under the act and falls within the jurisdiction of the tribunal. The argument that no efficacious remedy can be obtained from the tribunal also collapses. A reading of the relevant provisions reals a well thought dispute resolution mechanism and deliberate vesting of power to the Tribunal to

determine tax disputes.

52. The applicant's counsel also cited alleged violation of Articles 47, 48 and 50 of the Constitution in support of his argument that the Tribunal lacks jurisdiction. This argument fails on two fronts. *First,* the Fair Administrative Action Act[47] flows from Article 47 of the Constitution; hence, it has a constitutional underpinning. One cannon of constitutional construction provides that provisions of the Constitution to be construed in a holistic manner. As we construe the right to a fair Administrative Action and the right to be heard, one must bear in mind Articles 209 and 210 of the Constitution. Differently stated, the statutory provisions governing imposition of taxes have a constitutional underpinning. The Constitution contemplates a situation whereby KRA will have the power to impose and collect taxes.

53. Second, as for the alleged violation of Articles **50** of the Constitution, I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava**[48]** which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** is a distinct right from the right to a fair hearing under Article **50(1)(2)** of the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.**[49]** Fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.*

54. *Third,* as demonstrated by the above facts, this is a tax dispute triggered by a decision taken pursuant to the relevant tax law. It does not raise a constitutional question at all to warrant invoking this court's jurisdiction. A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[50] The issues raised in this case can be resolved by interpreting the facts and the relevant statutes. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. [51]

55. The arguments presented by counsel for *ex parte* applicant and all the reasons discussed above do not qualify under the exception requirement. More important, for a litigant to qualify, he must apply for exemption from the court. Differently put, the applicant ought to have moved the court under section 9(4) of the Fair Administrative Action Act[52] and demonstrate the existence of exceptional circumstances. This will become clear as I discuss the this provision in detail below.

56. Section **9(2)** of the Fair Administrative Action Act[53] provides that the High Court or a subordinate court under subsection **(1) shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted**. Also relevant is sub-section **(3)** which provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

57. The word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[54]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[55] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

58. Perhaps I should add that the duty of the court is to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute. The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

59. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[56] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[57] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

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

61. I have herein above discussed the reasons cited by the applicant and found that they do not constitute exceptional circumstances. I am alive to the fact that what constitutes exceptional circumstances depends on the facts of each case[58] and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. In addition, the Fair Administrative Action Act[59] is heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance. I find that the following points from a leading South African decision relevant:-[60]"

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

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

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

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

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

62. Additionally, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[61] These requirements have not been shown to exist in this case.

63. The Fair Administrative Action Act[62] does not define 'exceptional circumstances.' However, this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.

64. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[63]

65. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

66. There was no argument that the appellate tribunal has developed a rigid policy, which renders the requirement for exhaustion futile. It has not been established that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of this case suggests otherwise. It has not been shown that the mechanism is not effective nor has it been demonstrated that the *ex parte* applicant cannot obtain an effective remedy from the Tribunal.

67. The second requirement is that on application by the applicant, the court may grant an exemption. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the Fair Administrative Action Act.[64] The person seeking exemption must satisfy the court, *first* that there are exceptional circumstances, and, *second*, that it is in the interest of justice that the exemption be given.[65] Section **9(4)** of the Fair Administrative Action Act[66] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.

68. The law is that Section **9(4)** of the Fair Administrative Action Act[67] postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine.

69. It is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the Fair Administrative Action Act.[68] It follows that an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional circumstances to exempt it from this requirement.[69]

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

71. 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.

72. The next question is whether the dispute resolution mechanism established under the Tax laws is competent to resolve the issues raised in this application. I have addressed this issue above. The jurisdiction of the Tribunal is expressly provided under the act. No serious argument was advanced before me to challenge the jurisdiction of the Tribunal to entertain the dispute. As concluded earlier, before me is a tax dispute which reveals an appealable decision under the act.

73. The above discussion leads me to the conclusion that this case offends section **9 (2)** of the Fair Administrative Action Act.[70] The applicant did not apply for an exemption, as the law requires nor has it satisfied the exceptional circumstances requirement under section **9(4)** of the Fair Administrative Action Act.[71] I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. Having so found, and considering that the court had only invited the parties to address the question of exhaustion, I find no reason to address the question whether the application meets the threshold for grant of leave.

74. In view of my findings as herein discussed, the conclusion becomes irresistible that the applicant's application must fail. Accordingly, the applicant's application dated 30th August 2019 is hereby dismissed with no orders as to costs.

Orders accordingly.

Signed, dated and delivered at Nairobi this 10th day of June, 2019

John M. Mativo

Judge

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[1] Act No. 4 of 2015.

[2] Peter A. Devlin, Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims.

[3] Act No. 29 of 2015.

[4] Act No. 29 of 2015.

[5] Act No. 4 of 2015.

[6] Act No. 4 of 2015.

[7] CA No. NAI 84 of 2010, {2011} e KLR.

[8] Act No. 40 of 2013.

[9] Act No. 40 of 2013.

[10] Citing *Keroche Industries Ltd v KRA & 5 Others* {2007} 2 KLR 240.

[11] Act No. 4 of 2015.

[12] {2017} e KLR.

[13] Act No. 4 of 2015.

[14] {1992} KLR.

[15] {2015 } e KLR.

[16] {2017} e KLR.

[17] Supra.

[18] Citing *Republic v National Environment Management Authority* {2011} e KLR.

[19] {2018} e KLR.

[20] {2017} e KLR.

[21] {2018} e KLR.

[22] Act No. 4 of 2015.

[23]See Petition 150 of 2015 consolidated with 234 of 2015, citing Wallis JA dealt with the matter as follows in *Natal Joint Municipal*

Pension Fund vs Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18].

[24]Investigating Directorate: *Serious Economic Offences and Others vs Hyundai Motor Distributors (Pty) Ltd and Others*: In re *Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[25] *Johannesburg Municipality vs Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted *Jaga vs Dönges, N.O. and Another*; *Bhana vs Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 664G-H.

[26] See Commissioner of Income Tax vs. Menon {1985}] KLR 104; {1976-1985]} EA 67,

[27] *Smith Dakota vs. North Carolina*, 192 US 268(1940)

[28] {1987} 1 SCC 424.

[29]This position was appreciated by the Supreme Court of Kenya in Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others.

[30] Act no. 40 of 2013.

[31] Act No. 29 of 2015.

[32] Supra.

[33] Act No. 4 of 2015.

[34] Ibid.

[35] Ibid.

[36] Act No. 4 of 2015.

[37] Ibid.

[38] Ibid.

[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.

[46] Act No. 4 of 2015.

[47] Act No. 4 of 2015.

[48] {2015}eKLR

[49] Ibid.

[50]http://www.yourdictionary.com/constitutional-question.

[51]Justice Langa in *Minister of Safety & Security v Luiters*, {2007} 28 ILJ 133 (CC).

[52] Act No. 4 of 2015.

[53] Act no. 4 of 2015.

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

[55] Ibid.

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

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

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

[59] Act No. 4 of 2015.

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

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

[62] Act No. 4 of 2015.

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

[64] Act No. 4 of 2015.

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

[66] Act No. 4 of 2015.

[67] Act No. 4 of 2015.

[68]Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

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

[70] Act No. 4 of 2015.

[71] Ibid.