REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 363 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

AND

SONY HOLDINGS LIMITED.....*EX PARTE* APPLICANT

JUDGMENT

The parties

1. The applicant is a limited liability company duly registered under the provisions of the Companies Act. [1] It carries on the business of development, owning and letting real estate. Its principal development is the Westgate Mall situate in Westland's, Nairobi.

2. The Respondent is 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).

Factual Matrix

3. Alex Trachtenberg, a Director of the applicant, swore the verifying Affidavit dated 31st August 2019. He averred that on 21st September, 2013, terrorists attacked the Westgate Mall, and, in response to the attack, security forces launched an operation, which lasted almost two months. In the process, the Mall was destroyed rendering it desolate, thus depriving the Applicant its chief revenue earner and putting it in a tax loss position.

4. Mr. Trachtenberg blamed the applicant's tax tribulations on the destruction of the Mall and its subsequent reconstruction, a period over which he said the Respondent subjected the applicant to numerous and arbitrary assessments, tax audits and private rulings. He stated that despite the Respondent conducting several audits and issuing private rulings confirming the tax treatment of receipts and expenses, thus creating a legitimate expectation on the applicant's part, (which the applicant acted on), the Respondent suddenly changed its position.

5. He stated that the applicant had in force a terrorism and political violence insurance cover for loss of Buildings and Outbuildings and loss of Rent Receivable for the sums of Kshs. 6 billion and Kshs 1.2 billion respectively, with Kenindia Assurance Company Limited. He deposed that despite delay in payment of compensation under the said policy, ultimately, Kshs 3,100,000,000 for loss of Buildings and Outbuildings and Kshs 1,200, 000,000 for loss of Rent Receivable was paid.

6. He stated reconstruction of the Mall began in September 2014 and a portion of the Mall was re-opened in July 2015, but, the reconstruction as at the time of filing this suit was continuing. He stated that the reconstruction cost as at the end of 31stDecember, 2017 stood at Kshs 4,044,425,116/=, translating to a reconstruction deficit of Kshs 944,425,116/=. He averred that the total insurance compensation for loss of Rent Receivable and for Loss/damage to Buildings and Outbuildings paid to the applicant was:-

Compensation for Loss of rent receivable

	Loss of Rent (Kshs)	**Date Received**
Sum insured under the policy	1,200,000,000	
Compensation Received:		
Discharge Voucher dated 18/10/2013	-	13/10/2013
Discharge Voucher dated 07/04/2015	1,000,000,000	11/02/2016
Discharge Voucher dated 18/04/2016	200,000,000	21/04/2016
Total Compensation received	**1,200,000,000**	

Compensation for Loss/Damage of Buildings and Outbuildings

	Property Damage (Kshs)	**Date Received**
Sum insured under the policy	6,000,000,000	
Compensation Received:		
Discharge Voucher dated 18/10/2013	600,000,000	13/10/2013
Discharge Voucher dated 7/04/2015	723,952,600	‘11/02/2016
Discharge Voucher dated 18/04/2016	1,776,047,400	21/04/2016
Total Compensation received	3,100,000,000	
Amounts incurred in restoration (as at 31.12.2017)	4,044,425,116	
(Deficit)/surplus	**944,425,116**	

7. Mr. Trachtenberg stated that the applicant’s tax woes begun in March 2017 when it applied in writing to the Cabinet Secretary for Finance under Section 13 of the Income Tax Act[3] (herein after referred to

as the ITA) for exemption from withholding tax on rental income. He stated that even though it copied the letter to the Respondent out of courtesy, as the body in charge of collection of taxes, the Respondent sought various documents for review, through numerous correspondences, which it provided as per the specific requests.

8. He deposed that instead of recommending its said application, the Respondent purported to conduct a review of its tax matters for a period of over a year, and raised an additional assessment for tax through a letter dated 18th May 2018 and posted it at the Kenya Revenue Authority (KRA) i-Tax platform. In addition, he stated that upon objecting to the assessment, the Respondent amended the assessment as per its Objection Decision dated 10thAugust, 2018, in which it amended and confirmed assessments of tax payable by the applicant in relation to Corporation tax purported to be for the years 2014, 2015 and 2016 as follows:-

	2014	2015	2016	Total
Insurance compensation declared as income in 2013(1.0)	600,000,000	0	0	
Non Allowable IBA under Section 16(2)(b)	0	213,382,038	467,897,963	
Non Allowable deduction	0	49,332,837	112,857,750	
Add Backs (1.0 and 3.0)	600,000,000	262,714,875	580,755,713	
Loss Brought Forward	0	0	-172,608,258	
Profit/(loss) for the year as per tax computation	-227,707,631	-385,990,296	-72,183,470	
Taxable income/(loss)	372,292,369	-123,275,421	335,963,985	
TAXABLE PRINCIPAL TAX DUE @ 30%	111,687,711	0	100,789,196	212,476,906
Penalty @ 20%	22,337,542	0	20,157,839	42,495,381
Interest @ 2%	87,116,414	0	38,299,894	125,416,308
Total Tax	221,141,667	0	159,246,929	380,388,596

9. Mr. Trachtenberg further stated that it is indisputable that the applicant received the insurance compensation of Kshs 600,000,000 on 13thNovember, 2013 being compensation for loss of Buildings & Outbuildings and not for loss of Rent receivable, but, despite this knowledge, the Respondent willfully charged it as taxable income in the year 2014.

10. He also stated that in the Respondent's tax audit conducted for the period January 2012 to December 2014, the Respondent audited and sought details on the compensation for loss of Buildings & Outbuildings of Kshs 600,000,000 vide e-mail communication from one Mr. Jeremiah Makhoha dated 10th March, 2015 and a further letter from Lucy Njoe dated 11th March, 2015. He averred that the audit team was provided with the details on 12th March 2015 and it acknowledged receipt by signing on the schedule of documents received as contained in the applicant's letter dated 23rd March 2015.

11. In addition, Mr. Trachtenberg stated that in its final report on the audit issued on 11th April, 2016, the Respondent having audited and investigated the insurance compensation for loss of buildings & outbuildings was assured that it was properly declared and was not subject to corporate tax and thus made no adjustments to corporation tax. He averred that the Respondent affirmed the foregoing by stating :-

> *"Corporation Tax 2011/01 to 2013/12...A scrutiny of expenses was done and their computation ascertained. These were found to be correctly deducted. No adjustment has been made to this tax head..."*

12. He also stated that another audit was undertaken between May 2016 to January 2017 by KRA for the period January 2013 to December 2014 seeking to verify among other things the profit declared and taxes paid for the said period in order to validate the Income Tax refund claim for overpaid tax of KSh 33,197,669. He deposed that during this further audit, the Respondent sought documents relating to the compensation for loss of Buildings & Outbuildings of Kshs 600,000,000 which were provided, and in its final report, KRA confirmed by its audit report that profits declared and taxes paid were in order and that the applicant was entitled to a refund of Kshs 33,187,669/=.

13. He averred that the Respondent having confirmed by its audits that the Kshs 600,000,000 was insurance compensation for loss of Buildings & Outbuildings as aforesaid, the applicant has a legitimate expectation that the audit cannot be withdrawn to deprive it the right to apply for exemptions of tax under Section 13 of the ITA.

14. Regarding the Non Allowable IBA claim under Section 16(2) (b) of the ITA, he stated that it was the Respondent's employees who, while conducting the audit who informed the Applicant of its entitlement to the same. He stated that prior to reconstructing the Mall, the applicant wrote to the Respondent asking for a period of at least 3 years and 6 months to restore the Mall for the reconstruction not be considered as transfer for purposes of Capital Gain Tax. He stated that vide a letter dated 21st January, 2015, the Respondent confirmed that the reconstruction would not be considered as transfer for purposes of Capital Gains Tax, but in the same letter, it stated that the reconstruction was mere capital repairs that would not be tax deductible.

15. Mr. Trachtenberg stated that by a letter dated 3rd February 2015, the applicant challenged the Respondent's allegation that reconstruction was not tax deductible, and requested for a ruling on the matter. Pursuant thereto, the Respondent issued a private ruling dated 6th May, 2015 confirming that the Applicant could claim Commercial Building Allowance on the reconstruction costs upon construction if it *provided roads, water, sewers and other social infrastructure.*

16. He stated that relying on the Respondent's private ruling that it would only be entitled to commercial building deduction if it provided for the roads water, sewers and other social infrastructure, the applicant incurred millions of Shillings constructing, upgrading and improving the Peponi Road, Mwanzi Road and creating a new road linking Peponi Road and Lower Kabete Road.

17. In addition, he stated that the Mall incurs certain expenses for common areas such as cleaning, security, advertising, land rent, land rates, insurance, management of the property among others whether the property is fully leased or not. He stated that such costs are recovered from the tenants as service charge in proportion to the areas of premises they occupy based on audited service charge accounts and the Landlord meets any unrecoverable amounts. He stated that such costs are necessary expenses for the production and sustenance of the income earned from such property.

18. Lastly, Mr. Trachtenberg stated that the issue of the treatment and classification of un-recoverable service charge was exhaustively covered in a previous KRA audit for the period 1st January, 2012 to 31st December 2014. He added that the said expenses were allowed after explanations sought by the audit team were provided and the issue was dropped in the final report dated 11th April 2016.

Legal foundation of the application

19. The application is grounded on the following grounds:-

a. Section 13 of the ITA vests powers on the Cabinet Secretary, not the Respondent, hence, the Respondent's action of taking over the Applicant's application for exemption from withholding taxes on rental income are ultra vires the said Section.

b. That the law deems as bad faith the exercise of any power outside the purpose of the empowering provision. The purpose of Section 13 of the ITA is to give exemptions to certain taxes by the Cabinet Secretary and not for the Respondent to raise additional tax assessments. The Respondent's use of an application under the said section to raise additional tax assessment is an abuse of statutory power, is in bad faith, and is malicious.

*c. That the Respondent had previously severally audited and/or issued private rulings on the matters on which it subsequently raised the additional assessments. Its sudden change by issuing additional assessments is arbitrary, procedurally unfair, unjust, in bad faith, malicious, and amounts to violation of the Applicant's right to fair administrative action and legitimate expectations as protected under Article 47 of the Constitution and the Fair Administrative Actions Act**[4]** (herein after referred to as the FAA act).*

*d. That section 65 and 68 of the Tax Procedures Act**[5]** (herein after referred to as the TPA) creates a statutory legitimate expectation that the Private Ruling of the Respondent is binding on it, and it cannot renege on it after the Applicant has relied on it to alter its position, as the case herein.*

e. That section 68 of the TPA sets a mandatory procedure that private ruling can only be withdrawn in writing and with reasonable cause, and thus the private ruling dated 6th May 2015 is binding on the Respondent, and, it has never been withdrawn in writing and with reasons for the same.

*f. That Section 67(5) of the TPA expressly excludes private rulings from the provisions of the Tax Appeals Tribunal Act **[6]** (herein after referred to as the TAT act) and thus, this court has jurisdiction to deal with the matter at hand.*

g. The Respondent's decision to resile its own private rulings after the Applicant has relied on the same to alter its position to its disadvantage is illegal, unconstitutional, unfair, unreasonable, capricious, un-procedural, irrational and a violation of the Applicant's right to a fair administrative action and right to legitimate expectation and that the court is entitled to intervene by granting the orders sought.

h. The imposition of tax on purported "non-allowable deduction" is unjust, procedurally unfair, unreasonable, and in violation of the Applicant's right to fair administrative action and legitimate expectations.

i. That previously the Respondent has treated such unrecoverable expenses as deductible under Section 15(i) of the ITA act, creating a legitimate expectation on the part of the Applicant that the same are deductible expenses. The imposition of taxes on expenses that the Respondent has previously treated as tax deductible is unfair, unjust and violation of the Respondent's right to fair administrative action and legitimate expectation.

j. That the additional assessments was in bad faith and is malicious as it is solely intended to hinder the processing and dealing with the Applicant's application to the Cabinet Secretary for exemption of withholding tax as applied.

k. The matters complained of herein concern the right to fair administrative action as protected under Articles 21, 22, 23, 27(1) and 47 of the Constitution and under the FAA Act, and are thus matters over which this Court has proper jurisdiction.

l. Considering that Section 65(7) of the TPA specifically exclude matters of private ruling, which create a legitimate expectation of the Respondent being bound, from the provisions of the TAT Act, this court is the proper venue for determining the issues raised herein.

m. That remedies under Section 29(2) of the TAT act are inadequate to remedy the violation of the Applicant's right to a fair administrative action and legitimate expectation, among other matters raised herein, fall within the four corners of judicial review under Articles 47, 50(1) and 165(6) of the Constitution. Under Section 11 of the FAA act, only this Honorable Court has jurisdiction to hear, determine and grant the remedies sought by the Applicant.

Reliefs sought

20. The applicant prays for the following orders:-

a. An order of certiorari to quash the Respondent's Tax Assessment dated 18th May 2018 posted on i-Tax system on even date, making Additional Tax Assessments based on the assessment letter from the Respondent dated 18th May, 2018 and the Objection Decision letter dated 10th August, 2018.

b. An order prohibiting the Respondent, its servant, agents, staff, employees and persons acting through him from enforcing, implementing, or demanding the payment of corporation, value added and withholding taxes pursuant to the decisions contained in its letter dated 18thMay 2018 posted in i-Tax on even date and Objection Decision letter dated 10th August 2018.

c. An order prohibiting the Respondent, its servant, agents, staff, employees and persons acting through him from issuing numerous arbitrary tax assessments contrary to its own private rulings and prior audits and violating the Applicant's right to legitimate expectation and fair administrative action.

d. An order prohibiting the Respondent, its servant, agents, staff, employees and persons acting through him from using the applicant's application dated 7thMarch, 2017 to the Cabinet Secretary for Finance for exemption from withholding taxes on rental income as basis to issue additional assessments.

e. A Declaration that the Respondent's act of using the applicant's application dated 7th March 2017 to the Cabinet Secretary for Finance for exemption from withholding taxes on rental income for the purposes of claiming arbitrary additional tax is in bad faith, illegal, malicious, an abuse of statutory power to raise additional assessments, unreasonable and is in violation of the applicant's right to fair administrative action and legitimate expectation.

f. A declaration that the applicant has legitimate expectation that the Respondent is bound by its audit findings and reports dated 11th April, 2016 and 25th January, 2017 and the private ruling dated 6th May, 2015 and that the Respondent is liable to be prohibited from oppressing and vexing the Applicant through use of the statutory power to raise additional assessments.

g. That the costs occasioned by this application be borne by the Respondent.

Respondent's Replying Affidavit

21. Joseph William Otieno, the Respondent's acting Chief Manager in charge of Tax matters in Large Tax Payers Office swore the Replying Affidavit dated 26thOctober 2018. He averred that Respondent is the Commissioner of Domestic Taxes appointed under Section 11(4) of the KRA act responsible for the Domestic Taxes. He further deposed that the applicant filed Income tax returns for the years of income 2014, 2015 and 2016, on 23rdJune, 2015; 21st June, 2016 and on 26thApril 2017 respectively, in

accordance with section 24(1) of the TPA act. He stated that the company declared tax losses amounting to Kshs. 227,707,631 in 2014; Kshs. 613,697,927 in 2015 and Kshs. 685,881,397 in 2016.

22. Mr. Otieno averred that the applicant indicated that it commenced restoration and reconstruction exercise on the Westgate Mall on 1st September, 2014 and partly reopened business on 18th July, 2015 and it completed at the end of 2017. He stated that during the said period, the applicant incurred accumulated tax losses of Kshs. 613,697,927 by end of 2015. He stated that the applicant sought an opinion from the Respondent on the allowance of Commercial Building deduction at the rate of 25% per annum, and, that, the Respondent confirmed vide letter dated 6th May, 2015 the legal position subject to the substantive nature of the expenditures to be reviewed upon completion.

23. In addition, he averred that on 7th March, 2017 the applicant applied to the Cabinet Secretary-Finance for exemption from With-holding Income tax rental under section 35(3)(j) and introduced through section 9 (b)(iii) of the Finance Act, 2016. He deposed that the application was referred to the Respondent who reviewed it in order to advise the Cabinet Secretary. He stated that on this premise that the Respondent's officers visited the applicant on the 31st August, 2017 to verify the position in accordance with the procedure.

24. Mr. Otieno averred that section 13 of the ITA provides that:-

> *13. Certain income exempt from tax, etc.*
>
> *(1) Notwithstanding anything in Part II, the income specified in Part I of the First Schedule, which accrued in or was derived from Kenya shall be exempt from tax to the extent so specified.*
>
> *(2) The Minister may, by notice in the Gazette, provide—*
>
> > *(a) that any income or class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in such notice;*
> >
> > *(b) that any exemption under subsection (1) of this section shall cease to have effect either generally or to the extent specified in the notice.*
>
> *(3) A notice under subsection (2) of this section shall be laid before the National Assembly without unreasonable delay, and if a resolution is passed by the Assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.*

25. He deposed that the process prescribed under the above section was not undertaken and, that, the Respondent being the body responsible for collection of tax has the legal obligation to collect taxes.

26. Mr. Otieno deposed that the applicant furnished the Respondent's officers with the list of tenant's which were appointed as With-holding Income Tax Rental agents under section 35(3)((j). He averred that the Respondent's officers also undertook a physical inspection of the Westgate Premises and took note of the access road construction, street lighting installations and Mall extension construction, which were ongoing. In addition, he averred that the officers informed the applicant of their plan to verify it's records in light of its application and the losses, to which the applicant informed the Respondent's officers that there had been a previous Investment deduction audit, which was, then still under dispute.

27. He deposed that the Respondent undertook the review of the tax returns and records of the applicant as per the letter dated 28th August, 2017; and tendered a letter of findings dated 19th December, 2017.

28. Mr. Otieno averred that the Respondent sought to assess corporation income tax in respect of the insurance compensation amounting to Kshs. 600,000,000/= which the applicant classified as capital

income instead of revenue income without supporting documents; the excess of insurance compensation over the cost of restoration amounting to Kshs. 638,397,038; the industrial building claim under the 2nd schedule of the ITA amounting to Kshs. 213,382,038; and, Kshs. 467,897,963 in 2015 and 2016 respectively, which are disallowable under section 16(2)b) of the ITA; and the unsupported expenses described as unrecoverable service charge amounting to Kshs. 49,332,837 in 2015 and Kshs. 112,857, 750in 2016. He stated that the principal corporation tax payable amounted to Kshs. 418,797,213.

29. He also averred that the Respondent sought to assess Value Added Tax (VAT), the insurance compensation amount of Kshs. 2,438,397,490 (VAT hereon being Kshs. 390,143,598) for loss of rent income. In addition, he averred that the additional Withholding income tax assessment on Kshs. 1,437,092,911 amounting to Kshs. 25,507,189 was made on the contractual fees paid by the Applicant in 2015.

30. In addition, Mr. Otieno averred that the Respondent served the Applicant with notices of additional assessments for Corporation tax, VAT and Withholding income tax on 21stMay, 2018 as per letter dated 18thMay 2018. He averred that the applicant filed an objection to the assessments dated 14thJune 2018 under section 51(1) (2) (3) of the TPA disputing the assessment citing various reasons for the same.

31. He averred that the Respondent acknowledged the objection vide a letter dated 23rd July, 2018 and cited the requirement to lodge the same into the Respondent's i-tax system to enable its processing under section 51(4) of the TPA. He averred that notwithstanding the applicant's failure to respond through i-tax, the Respondent delivered an objection decision dated 10thAugust, 2018. He stated that in the said decision, it amended the principal Corporation tax assessments to Kshs. 212,476,906 (down from Kshs. 418,796,004); VAT assessments to Kshs. Nil (down from Kshs. 390, 143, 598); Withholding income tax assessments to Kshs. Nil (down from ksh.25, 507,189,791) and grand total tax assessments to Kshs. 212,476,906 (down from Kshs. 834,446,791). He averred that the Respondent was acting within the law and at no time did they act in an arbitrary manner as alleged by the Applicant.

32. Mr. Otieno also averred that the Finance Act, 2016 introduced withholding Rental Income tax at 10% to be operated by the tenants appointed by the Respondent. Thus, the Respondent appointed the Applicant's tenants as withholding Rental Income tax agents, after which the applicant applied to the Cabinet Secretary in charge of Finance, seeking exemption from withholding income tax on rental incomes citing section 35(3)(j) which grants such right to the Minister, and copied its letter to the Respondent.

33. Mr. Otieno averred that the Respondent in exercise of its mandate sought to undertake due diligence through physical inspection and review of the applicant's records and accounting documents, as the applicant had declared accumulated tax losses amounting to ksh.613,697,927 as at 31st December, 2015. He also stated that the applicant had enlisted the loss situation as the key ground for the requested tax exemption.

34. He deposed that after reviewing the applicant's records and accounting documents, the Respondent served the applicant with a letter of findings dated 19thDecember 2017 requesting for explanations and additional documents. He deposed that the applicant in his reply dated 15thJanuary 2018 did not address the issues raised in the Respondent's letter. He stated that subsequently, the Respondent issued non-agreed additional assessments for Corporation Tax, VAT and withholding income tax on the 18thMay, 2018 and posted it at the i-tax system.

35. Mr. Otieno further averred that the applicant objected to the assessment on 14thJune 2018 and the Respondent acknowledged the objection and amended the same as per its letter dated 10thAugust 2018 in accordance to section 51 of the TPA. He stated that the applicant was unable to lodge the objection through the i-Tax system, and, the Respondent through their letter of 29thAugust, 2018 notified the applicant it was ready to offer it technical assistance.

36. He averred that sections 51, 52 and 53 of the TPA envisage tax disputes which are resolved accordance with the law through the Alternative Dispute Resolution (ADR), the Tax Appeals Tribunal (herein after referred to as the TAT), and the High Court of Kenya, in that order.

37. He averred that the Respondent undertook two prior tax audits on the Applicant for 2004 to 2007 and 2014 in respect of Investment deduction and Refund claims respectively limited to specific inquiries on Investment deduction claims for 2004-2007 and a refund claim for 2014. He deposed that the assessments in respect of the Investment deduction claims are still pending before the TAT, and, that, the current audit did not in any way cover the same items which had been had been covered in the earlier audits.

38. In addition, Mr. Otieno averred that the applicant having treated Insurance compensation received amounting to Kshs. 600,000,000 as capital receipt, the Respondent sought certain specified records and documents in relation to the insurance compensation and the applicant failed to provide the same. He stated that the said request was consistent with section 4 (c) of the ITA which provides that :-*"a sum received under an insurance against loss of profits, received by way of damages or compensation for loss of profits, shall be deemed to be gains or profits of the year of income in which it is received."*

39. Mr. Otieno also averred that the Respondent's own private ruling as per letter dated 6thMay 2015 was granted subject to the transactions' compliance with the relevant legal provisions and it did not in any way negate the mandatory provisions of law specifically Paragraph 6A of the Second schedule of the ITA, 2016.

40. He further averred that the ITA, section 15 (1), states that… *"For the purpose of ascertaining the total income of a person there shall, subject to section 6, be deducted all expenditure incurred in that year of income which is expenditure wholly and exclusively incurred by him in the production of that income, ..."*

41. He referred to section 15(2) (b) of the ITA provides the amounts to be deducted under the second schedule in respect of the year of income. Further, he averred that the ITA in the Second Schedule Paragraph 1(A) provides- *"Where a building is an industrial (Commercial) building within the meaning of subparagraph (1), the following civil works or structures on the premises of the building shall be deemed to be part of the building where they relate or contribute to the use of the building- (i) roads and parking areas; ..."*

42. Mr. Otieno stated that Paragraph 1(A) of the second Schedule of the ITA provides- *"Where a building is an industrial (Commercial) building within the meaning of subparagraph (1), the following civil works or structures on the premises of the building shall be deemed to be part of the building where they relate or contribute to the use of the building- (i) roads and parking areas; ..."*

43. In addition, Mr. Otieno referred to Paragraph 6A of the Second Schedule to the ITA, which provides that… *"Expenditure is incurred in respect of Commercial building-*

> *(1) Where a person incurs capital expenditure on construction of a Commercial building to be used in a business carried on by him or his lessee on or after 1st January, 2013, and the person has provided roads, power, water, sewers and other social infrastructure, there shall be deducted in computing the gains or profits of that person for any year of income in which the building is used, a deduction equal to twenty-five percent per annum.*
>
> *(2) For the purpose of this paragraph a 'commercial building' includes a building for use as an office, shop or show room but shall not include building which qualifies for deduction under any other paragraph or building excluded for industrial building under paragraph 5(3) of this Schedule"*

44. He further averred that what the applicant constructed was a public road falling outside the applicant's premises and not for the exclusive use by the applicant in his business, therefore the applicant cannot

purport to have provided such services for the sole use of their business.

45. He also deposed that the Respondent acted within the law by posting additional assessments into the applicant's i-Tax platform. Further, he averred that the Respondent served the applicant with a notice of inquiry under section 59 (1), (2) of the TPA and with a formal additional assessments under section 31 (1) of the TPA. He also stated that the Respondent issued an objection decision in accordance with section 51(9) of the TPA and received the applicant's copy of Notice of Appeal at the TAT under section 52 of the TPA.

46. In addition, he averred that the Respondent acted within the law by posting additional assessments into the applicant's i-Tax, and, that the Respondent served the applicant with a notice of inquiry under section 59 (1),(2) of the TPA, and additional assessments under section 31 (1) of the TPA. He added that the Respondent issued an objection decision in accordance with section 51(9) of the TPA and received the applicant's copy of Notice of Appeal at the TAT under section 52 of the TPA. Further, he averred that from the foregoing, the Respondent cannot be said to have acted *ultra vires or unfairly.*

47. Mr. Otieno further averred that there has not been any violation of rights of the applicant as the actions were within the law. In addition, he averred that in issuing the additional assessments dated 18thMay, 2018, the Respondent acted within its legitimate mandate. Further, he averred that by undertaking, pursuant to section 59 of the TPA to review and ascertain the validity of the Applicant's request for exemption from withholding Rental Income Tax made under section 13 of the ITA, the Respondent acted within its legal mandate.

48. Similarly, he averred that the Respondent acted within its mandate in undertaking periodic reviews of the applicant's annual tax returns, and by charging the sum of Kshs. 600,000,000/= received by the applicant in respect of insurance compensation in accordance with section 4 (c) of the ITA. In addition, he deposed that the Respondent acted within the law by reviewing the nature of transactions that originated the Commercial Building allowance claims in line with the provisions of paragraph 6A of the Second Schedule of the ITA; and that it did not act against its own private ruling on the same issue.

49. Mr. Otieno also averred that the Respondent acted reasonably and within the law in disallowing the Service Charge expense as the unoccupied areas were in respect of new building extension that was ongoing, hence, it was expected that these expenses would be capitalized in respect of the new building rather than claimed as revenue expenses. Further, he averred that the Respondent acted within the law by serving the applicant with additional assessments, which triggered the Applicant's objection and the Respondent's objection decision, against which the applicant has lodged Notice of Appeals to the TAT.

50. Mr. Otieno averred that the prayers sought offend public policy and interest and that if granted the orders will serve to:-

(a) Usurp the constitutional, statutory and administrative mandate of the Respondent.

(b) Will serve the narrow interests of the Applicant

(c) Create bad precedent, promote impunity, and provoke a trend where a tax payers flaunts the legal requirements.

51. Mr. Otieno averred that the application is pre-mature because section 12 of the TAT act provides for appeals at the Tribunal. He also averred that the applicant has filed a notice of Appeal to the TAT dated 7th September, 2018 intimating that they were aggrieved by the same decision the subject of this application.

52. Further, he averred that the applicant filed Nairobi TAT No. 62 of 2017 before the TAT challenging the decision of the Commissioner declining its application for the Commercial Building Allowance. He stated that the said application was rejected because the Finance Act 2009 applies to buildings that were constructed and put into first use on or after 1stJanuary, 2010, and, that the matter is pending judgment

before the Tribunal. He averred that the existence of the suit therefore offends the provisions of the TPA and the TAT act.

***Ex parte* applicant's supplementary Affidavit**

53. Alex Trachtenberg, the *ex parte* applicant's director swore the further Affidavit dated 17th January 2019 essentially disputing the contents of the Respondent's Replying Affidavit and reiterating the earlier affidavit. He *inter alia* averred that the Respondent has acted unfairly, in abuse of its powers, in violation of the applicant's right to fair administrative action and legitimate expectation. He averred that the foregoing is because the Respondent deliberately and wilfully abandoned its previous official audit findings, tax treatments and private ruling solely with the objective of blocking the applicant's application to the Cabinet Secretary for exemption from withholding tax.

54. He also stated that the Respondent admits that the applicant is entitled to an exemption under section 13 of the ITA. Further, he averred that the Respondent is not under any obligation to collect taxes at all costs, in violation and frustration of the applicant's statutory rights to apply for tax exemption. He further averred that the Respondent's actions are *ultra vires*, based on false apprehension and untrue facts, and, that, the Respondent is purporting to create a false impression that the applicant is seeking to claim Investment deduction, which is not true. Lastly, he averred that it is not true that the applicant failed to provide the details and records of the insurance compensation of Kshs 600,000,000 for loss of buildings and outbuildings.

Issues for determination

55. Upon considering the diametrically opposed positions presented by the parties, I find that the following issues distil themselves for determination:-

a. Whether this suit offends the doctrine of exhaustion of remedies.

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

c. Whether the Respondent usurped the powers of the Cabinet Secretary.

d. Whether the Respondent acted in bad faith.

e. Whether the Respondent violated the applicant's right to legitimate expectation.

f. Whether the decision is tainted by irrationality and/or unreasonableness.

g. Whether the Respondent violated the applicant's right to a fair trial.

h. Whether the applicant has established any grounds for the prayers to be granted.

a. Whether this suit offends the doctrine of exhaustion of remedies.

56. The applicant's counsel argued that this court offers the best and most effective remedy, and invited this court to, so find. He urged that the applicant does not call for a merit review, but only complains of the Respondent's abuse of power, illegality, unfairness, bad faith, unreasonableness and the violation of the right to fair administrative action and legitimate expectation among others. He urged that the said violations impinge on the right to fair administrative action protected under Articles 21, 22, 23, 27(1) and 47 of the Constitution and the FAA act, which fall within this court's jurisdiction. He urged that the proper and most appropriate venue for determining such issues is this court.

57. In addition, the applicant's counsel argued that the scope of remedies provided for under Section 29(2) of the TAT are inadequate, inappropriate and insufficient to remedy the violation of the applicant's right to fair administrative action and legitimate expectation among other matters raised herein. He

submitted that the said issues fall within the four corners of judicial review under Articles 47, 50(1) and 165(6) of the Constitution under this court's jurisdiction. Counsel argued that the remedies provided under section 29(2) of the TAT include:-

> *1) affirming the decision under review;*
>
> *2) varying the decision under review; or*
>
> *3) setting aside the decision under review and either—*
>
> > *a) making a decision in substitution for the decision so set aside; or*
> >
> > *b) Referring the matter to the Commissioner for reconsideration in accordance with any directions or recommendations of the Tribunal.*

58. On the other hand, he argued that the prayers sought in this judicial review application include declarations and orders of prohibitions, which the TAT has no powers or jurisdiction to grant. He submitted that Judicial Review and the other reliefs available under Article 23 and 47 of the Constitution and section 11 of the FAA act are a more effective and convenient remedy than the statutory laid down dispute resolution mechanism because:-

> *a. The applicant's application to the Cabinet Secretary for Withholding Tax Exemption has not been acted upon for over over 1 year 9 months. The only action was the Respondent's impugned conduct of making findings and declarations without authority that the Applicant's application is inapplicable, thus usurping powers not vested in it under section 13 and 35(7) of the ITA. The statute requires that matters of tax exemption be treated without unreasonable delay, hence, the justification for court intervention.*

59. Counsel submitted that section 65(7) of the TPA specifically excludes matters of private rulings from the provisions of the TAT act as follows:-

> *67(5) A private ruling shall set out the Commissioner's opinion on the question raised in the ruling and is not a decision of the Commissioner for the purposes of this Act or the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013)*

60. He also submitted that it is impracticable to refer the matter to the TAT because it would require the applicant to divide or prosecute parallel claims before this court and the TAT at the expense of time, resources and unreasonable delay in the resolution of the matter.

61. He argued that conscious of the foregoing, the applicant made an express averment applying for leave in paragraph 46 of the Chamber Summons application dated 31st August, 2018, requesting the Honourable Court to exempt it from exhausting the alternative remedy in respect of the two other decisions in the interest of justice.

62. The Respondent's counsel submitted that the applicant moved the court pre-maturely. She cited section 12 of the TAT act, provides that any person who disputes the decision of the Commissioner in 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.

63. She submitted that the TAT act establishes a Tribunal for the management and administration of tax appeals. In addition, she submitted that unlike, the judicial review process where the court is restricted from going into the merits of the matter, the TAT delves into the merits of the case and substantively determines the dispute. Therefore, she urged that from the very nature of the dispute, the process cannot be evaluated by the court without going into the merits of the assessments and audits undertaken by the Respondent, hence the TAT is the right forum

64. She argued that by dint of Section 9 (3) of the FAA act, the High Court is required to first satisfy itself that a person seeking judicial review orders has exhausted internal mechanisms for appeal or review available under any written law before instituting judicial review proceedings. She relied on *Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others**[7]* where the court held that:-

> *…that was an alternative remedy which the appellant ought to have disclosed and explained why it was not efficacious, thus resorting to judicial review. The appeal process, unlike judicial review, would afford the parties an opportunity to explore the merits of the decision. We think in the circumstance; the trial court did not misdirect itself in the exercise of its discretion as it accorded with the law. That finding would be sufficient to dispose of this appeal.*

65. The Respondent's counsel also argued that the issues raised in this case ought to be challenged by way of an appeal at the TAT. She reliance on *Diana Kethi Kilonzo vs. IEBC & 2 Others**[8]* which held that "the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them." In addition, counsel relied on *Jimbise Ltd vs KRA: Jimbise & 2 Others vs Kenya Revenue Authority*,[9] in which the court held that:-

> *"…from the reading of Section 2 of the Tax Appeals Tribunal Act, it comes out clearly that the Tribunal is empowered to deal with the decisions of the Commissioner or **any matter** arising under the provisions of any tax law. It is therefore clear that the Tribunal's power is very wide and are not restricted to disputes relating to facts only as applicants contend. The Applicants contention that the Tribunal's power does not empower it to deal with issues relating to the legality of the decision cannot be correct. With respect to the Application of the constitution Article 159(2) (e) the Constitution provides that in exercising judicial authority, the courts and tribunals are guided by inter alia the principles that the purpose and principles of the constitution shall be protected and promoted. It therefore follows that Tribunals are obliged to apply the constitutional principles in determining matters which fall within their jurisdiction. To therefore contend that because the applicants are arising issues that require the application of the constitution, that removes it from the Application of the Tribunal is not correct…"*

66. In his submissions in reply to the Respondent's counsel's submissions, the applicant's counsel argued that the applicant invoked the courts supervisory jurisdiction to enforce fundamental rights. He argued that the case raises the following issues:-

> *a) Whether the Respondent has powers to determine an application for exemption from withholding tax made to the Cabinet Secretary pursuant to Sections 13 and 35(7) of the ITA or whether such acts are ultra vires.*
>
> *b) Whether the Applicant has a right to legitimate expectation that the Respondent is bound by its official and formal private ruling, tax audits and tax treatment, and whether the Respondent can renege on the same after the ex-parte Applicant has relied on the said private ruling, tax audits and tax treatment.*
>
> *c) Whether the Applicant has a right to fair administrative action, including the right to administration action that is expeditious, efficient, lawful, reasonable, and procedurally fair.*

67. The applicant's counsel argued that the above grounds do not require a merit review, but are purely traditional judicial review grounds. He cited the Supreme Court of India in *U.P. State Spinning Co. Ltd vs R.S. Pandey And Another* that which stated that:-

> *'...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...'

68. He submitted that the law empowers the court to intervene in exceptional circumstances even where there are alternative remedies. He placed further reliance on the Court of Appeal in *Fleur Investments Limited v Commissioner of Domestic Taxes & Another*[10] on the proposition that where there are exceptional circumstances, the court will intervene notwithstanding the existence of alternative remedy. He also cited the Court of Appeal in *Republic vs. National Environment Management Authority ex-parte Sound Equipment Limited* [11] thus:-

> "…*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 statutory appeal procedures was suitable to determine it*…"

69. The applicant's counsel sought to distinguish the authorities cited by the Respondent's counsel. Regarding *Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining & 9 others*, he argued that the court was concerned with the fact that the applicant had not disclosed the alternative remedy available and explained why it was not efficacious. He argued that in the instant case, before the grant of leave, the applicant offered adequate and sufficient reasons why the court should exempt it from exhausting the alternative remedies.

70. As for *Diana Kethi Kilonzo VS IEBC & 2 Others*, the applicant's counsel argued that the finding of the court was that if constitutional and other bodies were operating within the law, then the court would not interfere. He urged that like in the case, where it is found that the body or organ was acting outside the law, the court stated that it would be abdicating its supervisory jurisdiction if it did not intervene, just as herein. Lastly, on *Jimbise Ltd vs KRA & 2 others*, counsel argued that the applicant in the said case, unlike the instant case, was raising merit review and had not made out a case why it ought to have been exempted from the statutory remedy.

71. 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,[12]a position upheld by the Court of Appeal[13] in *Speaker of National Assembly vs Karume*[14] thus :-

> *"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.*"

72. The above decision was pronounced prior to the promulgation of Constitution of Kenya, 2010. However, many Post-2010 court decisions in Kenya have embraced the reasoning sound, and have added justification and rationale for the doctrine under the 2010 Constitution.[15] In *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*[16] 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*."

73. The High Court in the *Matter of the Mui Coal Basin Local Community,*[17] 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..."*

74. 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.[18] *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.

75. Talking about the need to extensively analyze the facts, I find it useful to examine the facts and the reliefs sought in this case. The reliefs flow from the pleadings. The pleadings and the prayers sought will help in appreciating the nature of the dispute before this court. It will assist to determine whether this court is the right forum. Prayer 1 seeks an order of *certiorari* to quash the Respondent's Assessment dated 18thMay 2018. It is common ground that the impugned assessment is a tax assessment.

76. Prayer 2 seeks to prohibit the Respondent, its servant, agents, staff, employees and persons acting through him from enforcing, implementing, or demanding the payment of corporation, value added and withholding taxes pursuant to the decisions contained in its letter dated 18th May, 2018 posted in i-Tax on even date and Objection Decision letter dated 10th August, 2018. Again, the impugned decision relates to tax as underlined above.

77. Prayer 3 seeks to prohibit the Respondent, its servant, agents, staff, employees and persons acting through him from issuing numerous arbitrary tax assessments contrary to its own private rulings and prior audits conducted and violating the Applicant's right to legitimate expectation and fair administrative action. I need not explain that the prohibition sought seeks to stop tax assessments.

78. In addition, prayer 4 seeks to prohibit the Respondent from using the applicant's application dated 7thMarch, 2017 to the Cabinet Secretary for Finance for exemption from withholding taxes on rental income as basis to issue additional assessments. It is uncontested that the additional assessments under attack relate to tax.

79. Prayer 5 seeks a declaration that- the Respondent's act of using the applicant's application dated 7th March, 2017 to the Cabinet Secretary for Finance for exemption from withholding taxes on rental income for the purposes of claiming arbitrary additional tax is in bad faith, illegal, malicious, an abuse of statutory power to raise additional assessments, unreasonable and is in violation of the Applicant's right to fair administrative action and legitimate expectation. This prayer targets to invalidate additional tax, which is also a tax decision.

80. The last prayer seeks a declaration that the applicant has a legitimate expectation that the Respondent is bound by its audit findings and reports dated 11th April 2016 and 25th January 2017 and the private ruling dated 6th May 2015, and, that the Respondent is liable to be prohibited from oppressing and vexing the applicant through use of the statutory power to raise additional assessments. It is beyond argument that the audit finding under attack relate to tax matters. In addition, the prayer aims to stop the Respondent from raising "additional tax assessments." It does not require an in depth analysis to

appreciate that this prayer seeks to assail a tax decision.

81. Having established that the prayers sought in this application seek to invalidate tax assessments, the issue under consideration will stand or fall on the question whether the impugned decision is an appealable decision under the tax laws.

82. The preamble to the TPA provides that it is an act of Parliament to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected proposes. Section 52 (1) of the TPA provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the TAT Act. The 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.

83. The preamble to the TAT act provides that it is an Act of Parliament to make provision for the establishment of a Tribunal; for the management and administration of tax appeals, and for connected purposes. The act defines Tax Law to mean— (a) the Income Tax Act;[19] (b) the Customs and Excise Act;[20] or (c) the Value Added Tax;[21] (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner.

84. Section 3 of the TAT act establishes the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner. The words to note in this provision is "any tax decision." There is no contest before me that the decision under challenge in these proceedings is a tax decision within the said definition. Also relevant is section 12 of the TAT act. It provides that a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal; Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings. The foregoing provisions of the law warrant no explanation.

85. The prayers sought in this application target tax assessments. The prayers betray the argument propounded by the applicant that it is aggrieved by the Respondent's alleged hijacking of its application to the Minister under sections 13 and 35 (7) of the ITA. If that was the case, then nothing could have been easier than framing a case on the said allegations and seek appropriate reliefs affecting the alleged conduct. I reiterate that the pleadings and prayers sought in this case evidently reveal an attack on tax assessments. However, the arguments propounded was geared to depict a litigant aggrieved by the Respondent's role under the above sections. Simply put, the said argument is carefully crafted to invalidate a tax decision, which is an appealable decision before the TAT. Differently stated, a lot of energy, ink and paper went into the said argument, but the prayers sought seek to invalidate tax assessments, which are tax decisions.

86. Notwithstanding my above finding, I proceed to examine the grounds cited by the applicant for bypassing the dispute resolution mechanism under the above statutes. The argument as I understand is that under section 65(5) of the TAT, a decision made by the Minister is not an appealable decision. This argument is attractive. However, as stated above, the reliefs sought in this application as summarized above suggest otherwise. It is clear from the reliefs sought that the assault is on tax decisions as opposed to a decision made under the said section. This extinguishes the argument that the challenge is outside the purview of the tribunal. Differently put, the prayers sought target tax assessments. It is evident that under attack is not the Ministers decision; it is the impugned tax assessments. The prayers sought speak for themselves.

87. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court[22] on the principles of good pleading:-

> *"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is*

quite often a single tiny idea that changes everything. … Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

… Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination."[23] *(Emphasis supplied)*

88. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action.

89. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.

90. The Court of Appeal in *Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited*[24] rendered itself as follows:-

"A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

> *"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."*

91. The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat unleaded issues as having been fully investigated. Order 15 Rule 2 of the Civil Procedure Rules, 2010, provides that the court may frame the issues from all or any of the following materials—

a. allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;

b. allegations made in the pleading or in answers to interrogatories delivered in the suit;

c. the contents of documents produced by either party.

92. It is therefore clear that issues in a suit arise, from pleadings or evidence both oral and documentary. However, issues in a suit only arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The need for pleadings to be as precise as possible cannot be doubted. In *M N M vs. D N M K & 13 Others*,[25] it was held that:-

> *"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:*
>
> > *"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."*
>
> *Later in Kenya Commercial Bank Ltd vs. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:*
>
> > *"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."*
>
> *A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See Odd Jobs v. Mubea [1970] EA 476). However, that was clearly not the case in this appeal."*

93. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[26] This being the case, the argument that the applicant be allowed to by-pass the statutory established dispute resolution mechanism on grounds that Section 65(5) of the TAT exempts decisions under the said section from the said mechanism fails because the reliefs sought seek to annul tax decisions, which are appealable under the act.

94. There is no direct prayer in the pleadings seeking to quash the Ministers decision or to compel him to act. If the main grievance was he application for exemption, that such a prayer was necessary. In addition, if the main grievance is alleged violation of fundamental rights, the applicant ought to seek a direct relief addressing the said grievance. On the contrary, all the prayers sought have one common thread, that is, they attack or seek to invalidate tax assessments.

95. The next ground in support of the justification for by passing the said mechanism is that the arguments presented in this case raise constitutional issues. Among the issues cited are alleged breach of the right to legitimate expectation and abuse of power. I will address the said grounds under separate issues. For now, it will suffice to say that much as the applicant attempts to present the issue before the court as constitutional questions, the said argument falls on three grounds. *First*, the prayers sought as explained above present a clear tax dispute, which is an appealable decision as explained earlier.

96. Second, the question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*[27] in

which Justice O'Regan recalling the Constitutional Court's observations in *S vs. Boesak*[28] notes that:-

> *"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of ...the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,.., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."*[29]

97. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation. [30] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the Court.

98. The crux of the applicant's submission is that the Respondent usurped powers conferred upon the Minister, that is, it acted ultra *vires its* powers. The said argument is attractive. However, the resultant decision is a tax decision, which is appealable as, provided under the tax laws. The same argument can be presented before the Tribunal. Differently put, the said issues fall within the province of a tax dispute. It does not warrant the court to determine whether the tax decision is inconsistent with the Constitution. Courts abhor the practice of parties converting every issue in to a constitutional question and filing suits disguised as constitutional Petitions or Judicial Review applications when in fact they do not fall anywhere close to violation to constitutional Rights.

99. The Court of Appeal in *Gabriel Mutava & 2 Ors. vs. Managing Director Kenya Ports Authority & Another*[31] underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows:-

> *"Then there is the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-*
>
> *"…In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.…"*

100. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.[32] I strongly hold the view that, looking at the reliefs sought as highlighted above; TAT can resolve the issues competently. Thus, this is a classic case where the court should invoke the principle of constitutional avoidance. At the tail end of the dispute is ia a prayer to nullify a tax assessment, which is a tax dispute. The powers of TAT appear elsewhere in this judgment. I need not restate them here.

101. *Third,* and more significant and highly dispositive, section **9(2)** of the FAA act 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).**

102. It is instructive to note the use of the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[33]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[34] 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.

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

104. 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.[35] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[36] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

105. 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.

106. More fundamental is the fact that the applicant's advocate in his submissions was alive to the fact that the only way out to by-pass this mechanism is to cite exceptional circumstances and apply for exemption. Counsel referred to paragraphs 46 of the application and argued that they applied for exception. The said argument is not appealing at all. It collapses on three fronts. *First*, there is no prayer in the application or even orally at the hearing seeking exemption. *Second*, as explained below, an applicant citing exceptional circumstances is required to make an application to that effect to the court. *Third*, I do not see how the said paragraphs can amount to the application contemplated under section 9 (4) of the FAA act.

107. It is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the FAA act.[37] Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional circumstances to exempt him from this requirement.[38]

108. Article **47** of the Constitution is heavily borrowed from the South African Constitution. The FAA act is also 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 will usefully refer to the following points from a leading South African decision:-[39]"

> *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.*

109. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. 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.[40]

110. It is useful to mention that there is no definition of 'exceptional circumstances' in the FAA Act, but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[41] The question is whether the applicant distinguished its case from the cases provided for in the tax laws. I am not persuaded it did. I am fortified in view by the applicant's own pleadings and in particular, the prayers sought which are all a direct assault of a tax decision as explained earlier.

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

there are exceptional circumstances in this case. The attempt to invoke constitutional violations does not take away the core complaint, which is, the applicant is aggrieved by tax decisions. Again, for this finding I refer to the prayers sought.

112. I am not persuaded that the internal remedy would not be effective. All that the applicant needed was to prosecute its case before the tribunal. The powers of the Tribunal and the remedies it can grant are clearly defined under the law. It can resolve the dispute. It has not been shown that pursuing the dispute at the tribunal would be futile. There was no argument that the appellate tribunal has developed a rigid policy, which renders the requirement for exhaustion futile. The allegation that the dispute has taken 1 year and 9 months is unconvincing. It is common ground that the tax assessments were made. Aggrieved by the decision, the applicant applied for exemption to the Minister. The Minister sought advice from the Respondent. The Respondent made further inquiries and raised additional tax assessments, thereby compromising the application for exemption. The applicant argues that the Respondent acted *ultra vires* its powers. It accuses the Respondent of usurping the powers of the Minister. The bottom line is that an additional tax assessment was made which is an appealable decision under the Tax laws.

113. It has not been established that applying the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of this case suggests otherwise. The provisions are very clear on the jurisdiction of the Tribunal. It has not been shown that the mechanism is not effective nor has it been demonstrated that the applicant cannot obtain an effective remedy from the Tribunal.

114. Back to the exemption requirement, it is a requirement under the law 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 FAA act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[42]

115. Section **9(4)** of the FAA act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.

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

117. The argument by the applicant's counsel that the applicant in its application sought for exemption is factually incorrect. Counsel referred to paragraphs 41 to 46 on the face of the application and stated that the applicant at the earliest opportunity applied for exemption. Unfortunately, that is not true. No application was made to that effect. As stated above, the law postulates an application to be filed in court as explained above. A party cannot put grounds in the application and during submissions purport to argue that he has complied with the requirement. The record clearly shows that no such application was made.

118. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[43] An internal remedy is adequate if it is capable of redressing the complaint.[44]

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

120. 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.

121. 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. This argument was not advanced before me nor do I find any.

122. The applicant made a passionate plea urging this court to seize jurisdiction and determine this matter. However, it is an elementary position of law that a court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in *the matter of the Interim Independent Electoral Commission*,[45] at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner; "*Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent."* Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[46]

123. In the words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-[47]

> *"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."*

124. It is safe to conclude that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.[48] I cannot do better than to emphasize the need for aggrieved parties to strictly follow procedures that are specifically prescribed for resolution of particular disputes.[49]Perhaps I should add that as was held in *Peter Ochara Anam & 3 Others vs CDFB & 3 Others*,[50] the constitution was not meant to replace statutes that provide remedies to those concerned.

125. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court. This case offends section **9 (2)** of the FAA act. The applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the FAA act nor did it apply for exception. I find and hold that the applicant's application offends the doctrine of exhaustion of statutory remedies. On this ground alone, the applicant's application must fail.

b. Whether this suit is an abuse of court process

126. The Respondent's counsel submitted that since there is a pending Judgement on the issue of Commercial Building Allowance, by seeking the same orders in two different forums, the applicant is obviously seeking to unjustly enrich itself and is appealing a decision, which has not been decided by the TAT. She argued that applicant approached the court with unclean hands by not disclosing at leave stage that the there is a pending dispute on the issue of Capital expenditure being **NRB TAT 62 OF 2017**, whereby the applicant sought to claim commercial building allowance. It was her submission that this suit amounts to abuse of legal process.

127. In addition, the Respondent's counsel submitted that the applicant filed a Notice of Appeal at the TAT dated 7 thSeptember, 2018 intimating that they were aggrieved by the decision of the Commissioner of Domestic Taxes and were intending to appeal against the same. She argued that the same decision against which the appellant filed a notice of Appeal before the TAT forms the basis of this application.

128. The applicant's counsel described the above submission as aimed at deliberately misleading the court because the Respondent did not annex copies of the proceedings or extract of pleadings filed in NRB TAT 62 of 2017 before the court for the court to confirm whether the suits raise identical issues. He argued that the Respondent's decision to deny the applicant's application for withholding tax on rent was made on 18th May 2018 and this defeats the Respondent's argument because it is impossible for a decision rendered on May 2018 to be the subject of a pending appeal before the TAT in the year 2017. In addition, he argued that if indeed it is true that the matter is pending before the TAT, the Respondent acted in bad faith by seizing the application for withholding tax exemption, and, purporting to render the same inapplicable; by raising assessments in 2018 on matters it knows to be pending before NRB TAT 62 of 2017.

129. In addition, counsel argued that the submission that there is a pending judgment on the Commercial Building Allowance or that the Applicant is seeking the same order in two different forums is not supported by any fact or evidence.

130. It is settled law that a person who approaches the court or a tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court or the tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or attempting to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.***[51]***

131. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage. [52] The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those, which it is material for the court or Tribunal to know in dealing with the issues before the court or Tribunal. The duty of disclosure therefore applies not only to material facts known to the applicant, but also to any additional facts, which it would have known if it had made inquiries.

132. I have severally[53]observed that it is trite law that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use.[54] The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

> ***(a)*** *Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.*
>
> ***(b)*** *Instituting different actions between the same parties simultaneously in different court even though on different grounds.*
>
> ***(c)*** *Where two similar processes are used in respect of the exercise of the same right.*

(d) *Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.*

(e) *Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.* ***[55]***

(f) *Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.*

(g) *Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.*

(h) *Where two actions are commenced, the second asking for a relief which may have been obtained in the first.* ***[56]***

133. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.[57]A litigant has no right to purse *paripasua* two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process.[58]

134. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse.[59] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice.[60]

135. Turning to this case, the Respondent in their Replying affidavit failed to annex copies of the alleged previous proceedings, thus depriving the court the basis upon which it can properly address its minds to the annexures, arrive at the right conclusion. On this ground alone, the Respondent's counsel's argument that this suit is an abuse of court process fails.

c. Whether the Respondent usurped the powers of the Cabinet Secretary.

136. The crux of the applicant's argument is that the Respondent's action of "purporting to hijack, act on, review and determine an application for exemption from withholding tax made by the applicant under Section 13 and 35(7) of the ITA are *ultra vires*, illegal and an abuse of powers." In this regard, the applicant's counsel submitted that the power, authority and jurisdiction to exempt a person from withholding tax on rent under the above section lies with the Cabinet Secretary for Finance and the National Assembly.

137. He argued that section 35(7) of the ITA empowers the Cabinet Secretary to exempt a person from any class of taxes and that the Respondent has no power under the said section to decide, review or determine matters relating to exemption of withholding tax on rent. He urged that the Respondent cannot in any way attempt to reject the application or render the same inapplicable. He submitted that the Respondent acted *ultra vires* by usurping and hijacking the powers of the Cabinet Secretary for Finance and the National Assembly under the said section by finding and declaring the applicant's application for exemption for withholding tax dated 7th March 2017 as inapplicable.

138. He argued that the said decision offends section 7(2) (a) (i) of the FAA act and it is abuse of power. He relied on *Republic v Kenya Revenue Authority Ex -parte Tom Odhiambo Ojienda SC t/a Prof. Tom Ojienda & Associates [2018] eKLR***,** where the Court adopted *Hardware & Ironmongery (K) Ltd vs. Attorney-General****[61]*** which stated:-

"What matters is the taking of the decision and not the signature. If the Director had taken the decision that the licence was to be cancelled, he then, properly, have told the Trade Officer to convey the decision to the parties. But it is clear from the officer's evidence that this is not what happened. The fact that the Act makes express provision for delegation of the Director's powers makes it, if not impossible, at least more difficult to infer any power of delegation. There is no absolute rule governing the question of delegation, but in general, where a power is discretionary and may affect substantial rights, a power of delegation will not be inferred, although it might be in matters of a routine nature. The decision whether or not the licence should be revoked required the exercise of discretion in a matter of greatest importance, since it involved weighing the national interest against a grave injustice to an individual. It was clearly a decision to be taken only by a very senior officer and was not one in respect of which a power of delegation could be inferred."

139. In addition, the applicant's counsel submitted that the powers conferred upon the Cabinet Secretary under the said sections are discretionary and cannot be delegated except by a Notice in the Kenya Gazette. In support of this proposition, he relied on the provisions of Section 38 of the Interpretation and General Provisions Act,[62] which provide:-

'...(1) Where by an Act the exercise of a power or the performance of a duty is conferred upon or is vested in the President, the Attorney-General or a Minister, the President, the Attorney-General or the Minister, may, unless by law expressly prohibited from so doing, delegate, by notice in the Gazette, to a person by name, or to the person for the time being holding an office specified in the notice, the exercise of that power or the performance of that duty, subject to such conditions, exceptions or qualifications as the President, the Attorney-General or the Minister may specify in the notice.

(2) Nothing in subsection (1) shall authorize the persons therein mentioned to delegate— (a) a power to make subsidiary legislation;

or (b) a power to issue warrants or to make proclamations or to hear an appeal, under a power in that behalf conferred upon or vested in any such person by an Act.

(3) A delegation made under subsection (1) may be varied or cancelled by the person by whom it was made by notice in the Gazette.

(4) No delegation under subsection (1) of a power or duty shall exclude the exercise of the power or the performance of the duty by the person by whom the delegation was made...'

140. The Respondent's counsel submitted that by invoking section 59 of the TPA to review and ascertain the validity behind the applicant's request for exemption from withholding Rental Income Tax, the Respondent acted within its mandate as the administrative custodian of the ITA and indeed all laws relating to taxation within the Republic. She argued that the Respondent has the responsibility of advising the Cabinet Secretary for Finance on the background information of any taxpayer especially on issues of exemption of taxes. She submitted that the applicant did not demonstrate or prove how the Respondent interfered with their application for exemption. It was her submission that the audits fell purely within the Law and some of them were routine and therefore cannot amount to piggybacking on the applicant's application for exemption.

141. 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. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. 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. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> *"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"**[63]**

142. 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 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 Parliament's enactments. 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 statute purposefully.[64]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.

143. Thus, when the legality of a decision, act or omission is challenged, a court ought first to determine whether, through the application of all legitimate interpretive aids,[65] the impugned decision, act or omission is capable of being read in a manner that complies with the mandate conferred by the enabling statute. The Constitution requires a purposive approach to statutory interpretation.[66] The constitution introduced a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights and the purposes of the statute.

144. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[67] The often quoted dissenting judgment of **Schreiner JA** eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."**[68]*

145. The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others**[69]* observed that:-

> *"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."*

146. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law. In the instant case, what must be avoided is a reading that would necessitate the delegation of powers if the enabling statute would not allow that delegation. The need for proper delegation is based on the doctrine of legality mentioned above. All public power must be sourced in law. I turn squarely now to the question of delegation.

147. My starting point is the maxim *"delegatus delegare non potest"* which:-

> *"is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit*

by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers." ***[70]***

148. In the context of this case, the question is whether the power conferred on the Minister under section 35 (7) of the ITA, either expressly or by necessary implication authorises the sub-delegation of the delegated power to grant tax exemption. The delegation or authorisation, I must stress, must flow from the law. The power to delegate must exist prior to and independently of the manner in which the Minister exercises his powers.

149. A sub-delegation of the Minister's powers could only be justified if it is expressly provided for in the statute or if it is "reasonably necessary" or, to put it differently, "if effect cannot be given to the statute as it stands unless the provision sought to be implied is read into the statute."[71]In order to determine whether the sub-delegation by the Minister to the Respondent is expressly provided under the law or is reasonably necessary, it is appropriate to begin with an examination of the section itself as it appears in the broader context of the Act and the tax laws. For the sake of brevity tax law is defined by the TAT to include- (a) the Income Tax Act;[72] (b) the Customs and Excise Act;[73] or (c) the Value Added Tax;[74] (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner.

150. Although decisions in foreign jurisdictions should never be slavishly adopted, a brief examination reveals that there is much that is similar between our law on delegation and the decisions of foreign courts. I consider that the manner in which they have dealt with similar issues on this aspect provides helpful guidance. In particular, a large number of common-law jurisdictions have adopted the presumption against sub-delegation contained in the maxim *delegatus delegare non potest*, subject generally to the exception that Ministers may freely of necessity delegate within their own departments.[75]

151. In England,[76] Australia[77] and New Zealand,[78] the position is that delegation is less likely to be implied if a power is legislative in nature or if the decision involves the exercise of a wide discretion.[79] In Canada the Supreme Court has regularly held that an authority cannot enact regulations that effectively turn the exercise of a power that was meant to be dealt with by it through regulation into a discretionary administrative power to be exercised by itself or another body.[80] The extent of delegation and the degree of control retained by the delegator have also been examined.[81] In *Allingham and Another v Minister of Agriculture and Fisheries*[82] for example, a committee had the wartime power to order farmers to grow certain crops on specific fields. With respect to one farmer they left the decision of which field should be used to their executive officer. The exercise of power was held to be invalid, but the court noted that there would have been no problem if the committee had acted itself on the recommendation of the officer.[83]

152. Since the touchstone of the applicant's assault stands on the doctrine of *ultra vires*, it is useful to recall the classic judicial pronouncement on the doctrine. In *Council of Civil Service Unions v. Minister for the Civil Service* ***[84]*** Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*.

153. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality.*[85]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it as*"unreasonableness"* in *Wednesbury* Case.[86] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

154. The role of the court in such cases was well stated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[87]where it was held that once a Judicial Review court fails to sniff any *illegality, irrationality* or *procedural impropriety*, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision.

155. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

156. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

157. There is no contest that under section 35 (7) of the ITA, the Minister may, by notice in the Gazette, exempt from the provisions of subsection 35 (3) any payment or class of payments made by any person or class of persons resident or having a permanent establishment in Kenya. What emerges from the material before the court is that the Minister sought advice from the Respondent. The Respondent did a further inquiry, came up with an additional tax assessment, and advised the Minister accordingly. The contestation as I understand is whether

the Respondent could within its powers advice the Minister against granting the exemption sought.

158. The Respondent's position is that the Minister requested the Commissioner for advice before making the decision and the Commissioner in exercising its statutory mandate advised the Minister accordingly thereby making the decision the subject of challenge in these proceedings.

159. I find it fitting to recall the words attributed to Elie Wiesel, a holocaust survivor who said *"...we must always side with the Rule of Law."* [88] This is because law is the bloodline of every nation. The end of Law is justice. It gives justice meaning. It is by yielding Justice that law is able to preserve order, peace and security of lives and property, make the society secure and stable, regulate and shape the behaviour of citizens, safe guard expectations, function as a means of governance, a device for the distribution of resources and burdens, a mechanism for conflict resolution and a shield or refuge from misery, oppression and injustice. Through the discharge of these functions, the law has today assumed a dynamic role in the transformation and development of societies. It has become an instrument of social change.[89]

160. In addition,, I find it fit to cite *Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another*[90] in which I paraphrased the words of Baroness Helena Kennedy QC, a woman activist and chair of the British Council[91] who said that:-

> *"Law is the bedrock of a nation, it tells who we are, what we are, what we value...almost nothing else has more impact on our lives. The law is entangled with everyday existence, regulating our social relation, and business dealings, controlling conduct, which could threaten our safety and security, establishing the rules by which we live. It is the baseline." (Emphasis added).*

161. Section 35 (7) of the ITA uses the word may thereby conferring discretion upon the Minister. I am conscious of the fact that only the public authority to which it has been committed must in general, exercise a discretionary power. It is a well-known principle of law that when a power has been conferred to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another.

162. My research shows that cases on delegation have arisen in diverse contexts, and many of them turn upon unique points of statutory interpretation. The judgments are not always consistent, but one principle emerges. That is, the principle does not amount to a rule that knows no exception. It is a rule of construction which makes the presumption that ''a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this presumption may be rebutted by any contrary indications found in the language, scope or object of the statute."[92]

163. Also relevant in cases of this nature is the Carltona Principle. Special considerations arise where a statutory power vested in a minister or a department of state is exercised by a departmental official. The official is not usually spoken of as a delegate, but rather as the *alter ego* of the minister or the department.[93] In such cases, power is devolved rather than delegated.[94] (A different analysis must, of course, be adopted where powers are explicitly conferred upon or delegated to an official by a law-making instrument.) Under the ''Carltona principle" the courts have recognised that ''the duties imposed on ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case.''[95]

164. In general, therefore, a minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statute but may act through a duly authorised officer[96] of his department.[97] The officer's authority need not be conferred upon him by the minister personally;[98] it may be conveyed generally and informally by the officer's hierarchical superiors in accordance with departmental practice. [99]

165. A classic example is *R. (on the application of National Association of Health Stores) v Department of Health*, in which the Court of Appeal considered whether the knowledge within the department should in law be imputed to the minister (who made the decision to prohibit the use of a herbal remedy in foodstuffs in ignorance of the special expertise of a particular adviser). Sedley L.J. held that to impute the knowledge would be ***''antithetical to good government,''***[100] and result in a situation where ***''the person with knowledge decides nothing and the person without knowledge decides everything.''*** Modern departmental government, he felt, required ministers to be properly briefed about the decisions they must take.

166. However, some matters could be of such importance that the minister is legally required to address himself to them personally,[101] despite the fact that many dicta that appear to support the existence of such an obligation are at best equivocal. It is, however, possible that orders drastically affecting the liberty of the person—e.g. deportation orders, detention orders made under wartime security regulations and perhaps discretionary orders for the rendition of fugitive offenders require the personal attention of the minister. However, it is important to state that the *Carltona* principle may be expressly excluded by legislation.

167. Thus, looking at the scope, purpose and intention of the provisions of section 35 (7) of the ITA, and the legal tax regime in Kenya which are now grouped under the umbrella of tax laws, does the Respondent have a role under the said section. The converse is whether the Minister is required to consult the Respondent while making the decision to exempt tax payment under the said section.

168. The answer to this question lies in the proper construction of the statutory powers of the Respondent. This calls for the interpretation of section 5 of the KRA act. Pursuant to section 5 of the act, KRA under the general supervision of the Minister, is an agency of the Government for the collection and receipt of all revenue. Under sub-section (2) of the said section, in the performance of its functions under subsection (1), the Authority shall—

> *a) administer and enforce—*
>
> > *i. all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;*

ii. the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;

b) to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and

c) to perform such other functions in relation to revenue as the Minister may direct. ***(Emphasis added)***

169. A reading of the above provision leaves me with no doubt that the Commissioner is statutorily mandated to advise the Minister on all matter relating to the administration of, and collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule. It is also clear that the provision confers powers to the Respondent to perform such other functions in relation to revenue as the Minister may direct.

170. With such express statutory mandate as provided in the above provision, the applicant's argument that the power was improperly delegated cannot stand. The opposite is correct. The statute expressly provides the mandate. Further, where the statute confers mandate as in the instant case, it would not be necessary for the Minister to issue a Gazette Notice delegating the function as the applicant's counsel suggested. There would be no need to Gazette that, which is expressly, provided in a statute. It follows that the attempt to invoke the provisions of the Interpretation of General Provisions Act[102] requiring Gazettememt of such delegated powers does not apply in the instant function. This is because the statute expressly confers the powers. Even in absence of the express statutory mandate, this is a classic case where the Charlton principle applies.

171. It is clear that the enabling statute confers mandate upon Respondent to advise the Minister. In any event, how does the applicant expect the Minister to make such a decision without seeking advice from the relevant officers and without making such inquires as would enable him to arrive at a sound decision. Such an argument is tantamount to inviting the Minister to improperly and arbitrarily exercise his powers and discretion. Properly construed, the law permits the Minister to conduct a full and complete evaluation of the application including seeking advice from the Respondent consistent with section 5 cited above and satisfy himself that the requested exemption if allowed complies with the law and the set requirements. It would be unlawful for the Minister or the Respondent to pass a decision exempting tax payment where there has not been a full and complete compliance with the law. The law obligates the Minister to undertake due diligence before granting the exemption, hence, the wisdom behind the requirement for advise under section 5 discussed above. The law vests the mandate of advising the Minister upon the Respondent. To do or suggest otherwise is to engage in an illegality and such a decision will be tainted by an error of the law. I decline the invitation to uphold such an illegality.

d. Whether the Respondent acted in bad faith

172. The applicant's counsel argued that after the Respondent achieving its ulterior motive of denying the applicant the right to apply for tax exemption from the Minister, it, in bad faith, abused its power by purporting to raise additional tax assessments, which tax was not due or owing. Counsel argued that the additional assessments were made contrary to previous tax audits and tax treatments made by the Respondent, and, that, the Respondent wilfully added extraneous and irrelevant conditions not previously disclosed in its authoritative and binding private ruling only to justify its *ultra vires* finding of 19th December 2017 to impede the applicant's application for withholding tax exemption. Consequently, he argued, the applicant's application was delayed for over 1 year 9 months.

173. Counsel invited the court to find that the assessments were issued in bad faith, illegally and in abuse of powers to justify the Respondent's acts of denying the Applicant the statutory right to withholding tax exemption. He relied *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi* ***[103]*** for the holding that held abuse of power includes the use of power for a collateral purpose.

174. In addition, the applicant's counsel argued that the Respondent legitimately knew that paragraph 1 (1A) of the 2nd Schedule to the ITA relating to industrial buildings limited paragraph 6A (1) and deliberately concealed the same to the Applicant while issuing the private ruling dated 6th May, 2015. On this ground, counsel argued that the Respondent acted in bad faith, maliciously and with ulterior motives to induce the applicant to make capital expenditure believing it was an allowable deduction.

175. Further, the applicant's counsel argued that the Respondent failed to set out the opinion and/or assumption of the Respondent that paragraph 1(1A) limited Paragraph 6A of the Second Schedule to the ITA as required by Section 67 of TPA. Instead, he argued the Respondent only raised the said issue for the first time through paragraph 36 of the Reply, making it clear that the reason given is a deliberate afterthought made in bad faith for the sole purpose of prejudicing the Applicant.To buttress his argument, the applicant's he cited *R v Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd* ***[104]***that held that:-

> *"...It is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such a power arbitrarily, capriciously or in bad faith..."*

176. The Respondent's counsels' rejoinder was that the Respondent acted within its mandate, and, that, it served the applicant with a letter of findings dated 19th December 2017 requesting for explanations and additional documents. He submitted that the applicant's reply dated 15th January 2018 did not address the issues raised. She pointed out that non-agreed additional assessments for Corporation Tax, VAT and withholding income tax were confirmed on 18th May 2018 and posted the same to its i-tax system.

177. She submitted that the applicant objected to the assessment on 14th June, 2018 and the Respondent acknowledged the objection and amended the same as per its letter dated 10th August, 2018 in accordance with section 51 of the TPA. She submitted that the applicant was however unable to lodge the objection through the Respondent's i-Tax system. She relied on *KAPA Oil vs KRA & 2 Others* ***[105]*** which held that:-

> *"…if the court were to delve into how the assessments were done on the methods applied, it would be usurping the statutory mandate of the Respondents. In any event there is procedure under the Act on how a decision of the Respondent can be challenged…"*

178. Counsel insisted that the Respondent acted within the law by posting additional assessments into the applicant's i-Tax platform having followed due process prescribed for all tax inquiries. She submitted that the applicant was served with a notice of inquiry as per letter dated 28th August, 2017 under section 59 (1) (2) of the TPA. In addition, she argued that the applicant was served with formal additional assessments under section 31 (1) of the TPA. In addition, she argued that the Respondent issued an objection decision in accordance with section 51(9) of the TPA and it received the Applicant Notice of Appeal at the TAT under section 52 of the TPA.

179. The starting point is that under section 7 of the FAA act, a decision or administrative action may be judicially reviewed if, among other things, if the decision was taken in bad faith or arbitrarily or capriciously, or the decision is not rational or is otherwise unconstitutional or unlawful. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

180. A power is exercised *fraudulently* if its repository intends for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised *maliciously* if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

181. Bad faith has been defined rarely, but an Australian case defined it as ''a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker."[106] Even though "Bad faith" has not been given a precise definition, it has been frequently associated with actions involving malice, fraud, collusion, illegal conduct, dishonesty, abuse of power, discrimination, unreasonable conduct, ill-motivated conduct or procedural unfairness. Justice Southin in *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee**[107]*** articulated the concept of bad faith as follows:-

> *"The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact."(Emphasis added)*

182. A decision maker must not seek to achieve a purpose other than the purpose for which the power to make the decision has been granted by Parliament. Bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied. The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[108]There are many similar judicial pronouncements, which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer. [109] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases, the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making. This approach begs the question of whether the fair minded and informed person is a neutral observer or little more than the court in disguise.

183. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that *"justice should not only be done, but be seen to be done."*[110] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.[111] This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the public.

184. The High Court of Australia explained, *"Bias, whether actual or apparent, connotes the absence of impartiality."* Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[112] A claim of apprehended bias requires a finding that a fair-minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent," "imputed", "suspected" or "presumptive" bias. [113]

185. These differences between actual and apprehended bias have several important consequences. Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the *actual* views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the *possible* views and behavior of the decision-maker.[114] Each form of bias also requires differing standards of evidence.[115] A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. In the absence of an admission of guilt from the decision-maker, or, more likely, a clear and public statement of bias, this requirement is difficult to satisfy. [116] A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer *might* conclude there was a real *possibility* that the decision-maker was not impartial.[117]

186. The Supreme Court of Kenya expressed the same view in *Hon. Lady Justice Kalpana Rawal vs Judicial Service Commission & Anther*[118] citing Professor Groves M. in *"The Rule Against Bias"*[119] where it stated that-*"… claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand."*

187. As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[120]The Lords also made clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair-minded observer would take account of the circumstances of the case at hand.[121]

188. Whether the allegation relates to actual or apprehended bias, it is a serious matter, which strikes to the validity and acceptability of a decision. Actual bias has been applied in the following two fact-situations: (a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.[122]

189. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias,[123] apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.[124]

190. The current double reasonableness test, which commenced its journey in the Supreme Court of Canada[125] and then travelled through the High Court of Australia,[126] is so called because it translates into a two-stage requirement of reasonableness. It is a refinement of sorts of the formulation by the late Professor De Smith in his rationalisation of the real likelihood test as "based on the reasonable apprehensions of a reasonable man."[127] There must be an apprehension of bias that must be reasonably entertained. That is the first stage. In the second stage, the apprehension must be one held by a reasonable person, someone who need not have interest in the outcome of the matter other than the general interest shared by the public in the fair administration of justice. The fulfilment of this general interest is mainly a pre-occupation with a fair administration of justice; a concern that justice is not only done but is manifestly and undoubtedly seen to be done.

191. In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.[128] As formulated, the test is: "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel.

192. The greatest defence to allegations of this nature is that the act must have been performed in good faith. The act complained of must have been done in the performance or intended performance of a duty or authority under the enabling act or by-law passed under it. The words "good faith" must be read in the context of the act. When one speaks of good faith in the performance of a duty or statutory authority, one must look to the nature of the duty or statutory authority to determine what is reasonable and what is not. This contextual approach can lead to very subjective judgments. If there is clear evidence of an intention to act illegally or outside the scope of authority, dishonestly or with malice, in other words, a blatantly dishonest exercise of power, then a party cannot rely on the good faith defence. However, to lose the immunity of "good faith" involves more than negligence or an error in judgment. If there is an honest attempt to give effect to the law, the good faith defence should prevail.

193. The Supreme Court of Canada in *Chaput v. Romain**[129]*** described the "honest belief" distinction as follows:-

"*What is required in order to bring the defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did."*

194. The contrast is with an act of such a nature that it is wholly unauthorized and where there exists no colour for supposing that it could have been an authorized one. In such a case there can be no question of good faith or honest motive. The words "good faith" must be read in the context in which they are found. Acting in good faith presumes exercising a judgment which is either made in good faith or in bad faith. If it is made in good faith, the statutory immunity applies. If it is made in bad faith, the statutory immunity does not apply.

195. I now apply the tests for bad faith discussed above. I am not persuaded that the allegation of bias cited in this case can pass the above tests. The applicant has not demonstrated that the motive of the decision is in doubt. The material before me does not suggest bad faith or a reasonable possibility of ill motive or bad faith in making the impugned decision. Bad faith is a serious allegation which attracts a heavy burden of proof.[130]

196. It is also important to mention that the applicant has not demonstrated that the taxes are not due. On the contrary, the material shows that the taxes were due, hence, the request for exemption. Imputing bad faith just because a litigant is un happy with a decision does meet the tests laid down above. Lastly, as indicated above, the statutory mandate conferred upon the Respondent by section 5 (2) of the KRA act is clear. As stated earlier, modern departmental government, requires ministers to be properly briefed about the decisions they must take.

e. Whether the Respondent violated the applicant's right to legitimate expectation

197. The backbone of the applicant's case is that the Respondent violated its right to legitimate expectation by reneging or resiling from its previous official private tax ruling, tax audits and tax treatments. Counsel for the applicant argued that the applicant has a protected and guaranteed right to legitimate expectation as part of the Right to fair administrative action. It was his argument that this Honourable Court is entitled to intervene under section 7(2) (m) of the FAA act where an administrative action or decision violates the legitimate expectations of

the person to whom it relates. Counsel cited De Smith, Woolf & Jowell, in *"Judicial Review of Administrative Action**[131]*** cited in *Republic v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited**[132]*** thus:-

> *"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."*

198. He also relied on of *Keroche Industries Limited v Kenya Revenue Authority & 5 others**[133]*** which adopted the test outlined by Schieman LJ in the case of *R (BIBI) v Newham London Borough Council* thus:-

> *(1)What has the public authority, whether by practice or by promise committed itself;*
>
> *(2)Whether the authority has acted or proposes to act unlawfully in relation to its commitment;*
>
> *(3)What should the court do?'*

199. To buttress his argument, he cited the applicant's right to legitimate expectation arising out of previous tax audits and tax treatments conducted for the period January 2012 to December 2014 and January 2013 to December 2014. Counsel argued that in the said audit findings, the Respondent found the same to have properly treated; thus creating a legitimate expectation on the applicant that the Respondent was bound by its Audit findings and would not renege or resile therefrom. Counsel argued that in violation of the applicant's right to legitimate expectation, unjustly and unfairly purported to depart from its two previous audit findings by treating the insurance compensation of Kshs 600, 000, 000/= as compensation for loss of profits and not for loss of buildings and outbuildings. Counsel placed reliance on *Republic v Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited*[134] where the court found that a sudden about-face to charge value added tax was arbitrary and in violation of the right to legitimate expectation. In addition, he cited the applicant's legitimate expectation arising out of the Respondent's private ruling. He submitted that, prior to the applicant expending or incurring any capital expenditure on roads, sewers and other social infrastructure, it obtained a private ruling dated 6th May 2015 from the Respondent on the treatment of capital expenditure as follows:-

> *The head office has reviewed the case and given the following ruling:*
>
> *i. The reconstruction expenditure is capital in nature,*
>
> *ii. Sony can claim commercial building deduction in the relevant return of income (IT2C) after completion of construction and after the building is put to use but subject to (iii) below*
>
> *iii. The claim for deduction is allowable if the commissioner is satisfied that it meets the conditions set out under paragraph 6A of the second schedule to the Income Tax Act: that besides the capital expenditure on commercial building, Sony must have provided roads, water, sewers and other social infrastructure.*

200. He argued that relying on the Respondent's private ruling, the applicant incurred heavy expenditure running into hundreds of millions of Shillings to construct, upgrade and improve the roads and provide social infrastructure, which serve and promote the use of the Mall. It was counsel's submission that the reason given in paragraph 36 of the Replying affidavit is in i*nter alia* violation of the same law and is intended to justify the violation of the applicant's rights to legitimate expectation. He submitted that the Respondent is bound by its private ruling and placed reliance *South Bucks District Council vs. Flanagan**[135]*** which was cited with approval, in *Ex Parte M-Kopa Kenya Limited* thus:-

> *"that unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation, in this case it is not contended that the persons who exempted the subject items from taxation had no actual or ostensible authority to do so."*

201. Counsel further submitted that the Respondent's in issuing its private ruling dated 6th May 2015 set out the relevant conditions and the provisions of the law that the applicant had to comply with in order to qualify for commercial building allowance. He argued that the Respondent knew that the applicant would rely on the said ruling, and, that, the applicant relied on the same. To fortify his argument, counsel argued that section 67 imposes an obligation on the Respondent to set out the assumptions the Respondent relies on to issue the opinion as follows:-

> *67(3) (e) A private ruling shall state that it is a private ruling, set out the question ruled on, and identify any assumptions on which the ruling is based.*
>
> *67(5) A private ruling shall set out the Commissioner's opinion on the question raised in the ruling and is not a decision of the Commissioner for the purposes of this Act or the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013)*

202. Counsel further argued that the applicant has a legitimate expectation that the Respondent, will not issue an incomplete, defective and deceptive private ruling deliberately concealing other applicable and mandatory conditions, with the intention of inducing the Applicant to act on the said ruling to its detriment. In addition counsel relied on *ex-parte M-Kopa Kenya Limited Case* for the proposition that a private ruling has a binding effect unless it is formally withdrawn.

203. The Respondent's counsel submitted that the Respondent acted within the law in serving the applicant with additional assessments culminating into the applicant's objection and the Respondent's objection decision. She argued that there cannot be legitimate expectation contrary to the law and relied on *Republic vs. Kenya Revenue Authority Exparte Shake Distributors Limited*,[136] where the court stated:-

> *"…According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of DE SMITH'S JUDICIAL REVIEW, 'Such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)'. It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of law. A public body cannot make a promise which goes against the express letter of the law. In the case before me there is no evidence of a written or verbal promise made to the Applicant that its goods would be allowed in Kenya once he obtained the necessary licenses. One may argue that the legitimate expectation was based on the understanding that goods from Uganda would be admitted into Kenya at a duty rate of 0%. However, that argument cannot hold when one considers the fact that the Respondent has a statutory duty to ensure that all the necessary taxes for goods entering Kenya have been paid. The Applicant's argument that its legitimate expectation was breached therefore fails…"*

204. She also relied on *Republic vs Commissioner of Domestic Taxes and another, ex-parte Kenton College Trust,* ***[137]*** which summarized the ingredients of legitimate expectation thus:-

> "…After reviewing various decisions and books, I have come to the conclusion that for *one to successfully rely on the principle of legitimate expectation it must be demonstrated that:*
>
> *(i) The representation underlying the expectation is clear and unambiguous and devoid of relevant qualifications.*
>
> *(ii) The expectation is reasonable*
>
> *(iii) The representation was made by a decision maker and*
>
> *(iv) The decision maker had the competence and legal backing for making such presentations"*

205. She submitted that the Private ruling was qualified and the applicant cannot purport not to be aware of the sections of the law, which were to be fulfilled as a condition precedent. Counsel cited *Justice Kalpana Rawal vs Judicial Service Commission & 3 others* ***[138]*** which enumerated the vital aspects of the doctrine of legitimate expectation as follows:-

> *"…Legitimate expectation is a doctrine well recognized and established in administrative law. In Commonwealth Commission of Kenya & 5 others, SC Petition Nos. 14,14A,14B & 14C of 2014, the supreme Court stated that legitimate expectation would arise when a body, by representation or by past practice has around an expectation that is within its power to fulfil. For an expectation to be legitimate, therefore, it must therefore be founded upon a promise or practice by a public authority that is expected to fulfil the expectation. Other important aspects of the doctrine:*
>
> > *(a) The Law does not protect every expectation save only for the those which are legitimate (South African Veterinary Council v. Szymanski 2003 ZASCA 11)*
> >
> > *(b) Clear statutory words override any contrary expectations however founded (R.v.DPP ex parte Kebilele Wainanina Kigathi Mungai, HC J.R Misc. 356 of 2013.*
> >
> > *(c) The representations must be one which the decision-maker can competently and lawfully make without which reliance cannot be legitimate (Hauptleisch v. Caledon Divisional Council (1963)(4)SA53)*
> >
> > *(d) Legitimate expectation does not arise when it is made ultra the decision- maker's powers (Rowland v. Environment Agency (2003) EWCA Civ. 1885; and;*
> >
> > *(e) A public authority which has made a representation which it has no power to make is not precluded from asserting the correct position which is within its power to make (Republic v. Kenya Revenue Authority ex-parte Aberdare Freight Services Ltd (2004) KLR 530)"*

206. Lastly, counsel cited *Republic vs. Kenya Revenue Authority Ex-parte Bata Shoe Company (Kenya) limited*[139]which stated that payment of tax is an obligation imposed by the law.

207. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First,* it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second,* if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

208. The first step in the analysis has both an objective and a subjective dimension. *First,* it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or

not.[140] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

209. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[141] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[142] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-

> *"Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."**[143]***

210. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[144] The fear in protecting legitimate expectations substantively is that administrators may be forced to act *ultra vires.* That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act *contra legem.* It is clear that such representations will not be upheld by the court.[145] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law.

211. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[146] These include:- (i) that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," (ii) that the expectation must be reasonable in the sense that a reasonable person would act upon it, (iii) that the expectation must have been induced by the decision-maker and (iv) that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

212. Discussing legitimate expectation, *H. W. R. Wade & C. F. Forsyth**[147]* states thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

213. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. At the risk of repeating myself, I state that the doctrine cannot operate against clear provisions of the law and that it must be devoid of relevant qualification.

214. Talking about the requirement for the legitimate expectation to be devoid of qualifications, the private ruling 6th May 2015 expressly stated:-

> *"The Claim for deduction is allowable if the Commissioner is satisfied that it meets the conditions set out under paragraph 6A of the second schedule to the Income Tax Act: that besides the capital expenditure on commercial building, Sony must have provided roads, water, sewer and other social infrastructure"*

215. From the above excerpt, it is clear that the Respondent's private ruling in respect of Commercial Building Allowance, was subject to the transactions' compliance with the law. It was in conformity with Paragraph 6A of the Second schedule of the Income Tax Act 2016.

216. In addition, the Respondent argued that what was constructed by the applicant was a public road falling outside the applicant's premises and not for the exclusive use by the applicant in his business, which the applicant cannot purport to have provided such services required above for the sole use of their business. This is a contested issue of fact, which warrants oral evidence to prove. Judicial review does not deal with contested issues of fact. It will suffice for me to state that the law excludes public roads. Whether what was constructed is a public or private road is an issue of fact which requires evidence to be established, hence, it falls outside the scope of judicial review jurisdiction.

217. As stated above, the applicant's counsel argued that the applicant has a legitimate expectation that the Respondent, will not issue an incomplete, defective and deceptive private ruling deliberately concealing other applicable and mandatory conditions, with the intention of inducing the applicant to act on the said ruling to its detriment. Unfortunately, this is an attack on the merit of the ruling. The applicant is inviting this court to assume appellate jurisdiction, which is outside the purview of judicial review jurisdiction.

218. I have placed the tests for legitimate expectation explicated in the above authorities side by side with the applicant's arguments. I find that the applicant has not satisfied the tests for the doctrine of legitimate expectation to apply in the circumstances of this case. This ground fails.

f. Whether the decision is tainted by irrationality and/or unreasonableness.

219. The applicant's counsel argued that the Respondent's acts of finding and declaring the applicant's application for withholding tax as inapplicable on the basis additional taxes on the insurance compensation for loss of building is so illogical, unreasonable and irrational that no authority properly and impartially addressing its mind to the circumstances would arrive at the same decision. To fortify his argument, he cited the following facts:-

a. The Respondent conducted a compliance audit for the period 1st January 2012 to December 2014, and a refund audit for the period 1st January 2013 to December, 2014, in which it both specifically requested for and was provided with the details and documents of the Kshs 600, 000, 000 insurance compensation for ***loss of buildings and outbuildings****, and in both occasions it found the same to have been properly treated.*

b. It is unreasonable, illogical, irrational and in bad faith for the Respondent to purport to amend the policy of insurance it was not a party to by claiming that the ex-Parte Applicant, received additional Kshs 600, 000, 000 as compensation for loss of profits contrary to the policy of insurance.

c. The insurance Compensation of Kshs 600, 000, 000 received by the Applicant was for loss of buildings and outbuildings, and not for loss of rent. The Respondent has purported additional assessment of tax on this amount, as loss of rent is illogical, arbitrary and without basis or any foundation.

220. In addition, counsel argued that decision it is illogical, irrational and unreasonable for the Respondent to allow the applicant to deduct unrecoverable service charge in the year 2014 when the Mall was being rebuilt and to confirm the same by compliance audit checks and refund audit, only to turn around and claim the same as non-deductible when the applicant applied for tax exemption.

221. He also argued that it is illegal, illogical, unreasonable and irrational to have two audits from the Respondent confirming proper treatment of both insurance compensation received for loss of buildings and outbuildings and unrecoverable service charge in previous years, and another different tax assessment on the very similar items without any change of law or policy and without the two previous audits having been withdrawn.

222. Further counsel submitted that it is illogical, irrational and unreasonable for the Respondent to issue a private ruling on the applicant's application for commercial building allowance, then upon the applicant relying on the private ruling and thereafter applying for tax exemption, for the Respondent to turn around and treat the applicant's commercial building allowance as investment deduction allowance to impede the applicant's application for tax exemption.

223. Counsel also argued that it is illogical, unreasonable, unfair and unjust for the Respondent, in two previous audits, to find in its official audits that the insurance compensation and the unrecoverable tax charges had been properly treated, only to change the treatment in a purported review of an application for tax exemption, which is in bad faith and unjust as there has been no intervening change in the tax law or policy. **He argued that the Respondent refused to take into account its own audit findings.** To fortify his argument, counsel *Lord Greene M.R* in *Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation****[148]*** that this Honourable Court is:-

"...entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account..."

224. The Respondent's counsel submitted that appellant has failed to prove specifically how the various audits were *ultra vires*, irrational or unreasonable especially when they relate to different periods and tax heads. She argued that there has not been any violation of rights of the applicant as the tax procedures were followed and actions were within the law and in accordance with the TPA.

225. It does not escape the courts attention that the applicant all along spared no energy trying to distinguish its case as raising fundamental constitutional issues, namely alleged violation of Article 47 of the Constitution, the right to legitimate expectation and the right to a fair administrative action. On this ground, counsel argued that the issues raised are of such a nature that only this court has the jurisdiction to try them, hence, the reason why the applicant did not approach the TAT. In a complete departure from the foregoing line of argument, the applicant's counsel is now citing traditional judicial review grounds of illogical, irrationality and unreasonableness. In other words, by citing the said grounds, counsel is now saying, after all, this is a judicial review application. Nevertheless, I will examine the said grounds.

226. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the FAA act. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

227. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[149] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is

placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[150]

228. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it*[151] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[152]This stringent test has been applied in Australia[153] where the court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them."

229. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[154] O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.*[155]

> "*The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock* **[1976] UKHL 6***;* **[1976] 3 All ER 665** *at 697***[1976] UKHL 6***; ,* **[1977] AC 1014** *at 1064 as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. … Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him*."

230. In *Carephone (Pty) Ltd v Marcus NO*[156] per Froneman JA, stated the test as follows:-

> "*In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order*."

231. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and law. Put differently, whether the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law.

232. The following propositions can offer guidance on what constitutes unreasonableness. *First*, *wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. *Second*, this ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom, which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ. *Third*, the test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it.

233. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

234. Legal unreasonableness as I understand it comprises of any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[157]

235. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

236. Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of FAA act which provides that:-

> " *A court or tribunal under subsection (1) may review an administrative action or decision, if-*
>
> *i. the administrative action or decision is not rationally connected to-*
>
> *a) the purpose for which it was taken;*
>
> *b) the purpose of the empowering provision;*
>
> *c) the information before the administrator; or*

d) the reasons given for it by the administrator."

237. The test for rationality was stated as follows by Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others:-* ***[158]***

> "*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

238. In *Trinity Broadcasting (Ciskei) v ICA of*,[159] Howie P stated the rationality test as follows:-

> "*In the application of that test, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at*."

239. A decision which fails to give proper weight to a relevant factors may also be challenged as being unreasonable.[160] It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.[161]

240. The following propositions can offer guidance on what constitutes unreasonableness:-

> *i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;*
>
> *ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;*
>
> *iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;*

241. The Court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. I have carefully examined the impugned tax assessments. I have placed them side by side with the enabling statutory provisions. I do not see any traits of irrationality, procedural impropriety or unreasonableness. There is nothing to show that a reasonable person or Tribunal, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, applying the above tests of unreasonableness and irrationality, I find that the applicant has not demonstrated that the decision was tainted with unreasonableness or irrationality. In any event the reasons cited largely touch on the merits of the decision as opposed to grounds for review. For example, whether the service charge was recoverable or the alleged investment deduction would require oral evidence. Similarly, the terms of the insurance cover would require evidence for the court to establish the nature of the cover.

242. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

g. Whether the Respondent violated the applicant's right to a fair trial.

243. The applicant's counsel cited Article 47 of the Constitution and section 4 (1) of the FAA act and argued that the Respondent violated the applicant's right to fair hearing. He argued that the Respondent acted oppressively, capriciously, illegally and arbitrarily by imposing taxes against the applicant in blatant disregard of its prior determinations and the law.

244. The Respondent's counsel submitted that all the procedures under the TPA were fairly, legally and diligently followed by the Respondent, and that there is no breach of procedure. She submitted that there was lengthy communication between the parties whereby at every stage the Respondent explained to the applicant the purpose of the information required and at no point did the Respondent make a decision without granting the applicant an opportunity to respond and avail the necessary documents as evidenced by the lengthy documents filed by the applicant, specifically Bundle H, filed on 18th January, 2019.

245. She argued that the Respondent having engaged the applicant in all the steps of the Tax processes requited under the TPA until the filing of the Notice of Appeal before the Tribunal, the applicant's allegations that the right to a fair hearing was violated are baseless.

246. In recent years, the common law relating to Judicial Review of administrative action based on procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness," have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[162] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such that the person appealing has not had his case properly considered by the decision maker.

247. In *Local Government Board v. Arlidge*,***[163]*** Viscount Haldane observed, *"...those whose duty it is to decide must act judicially. They*

must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal (or body) whose duty it is to meet out justice."

248. The constitution recognizes a duty to accord a person procedural fairness when a decision is made that affects a person's rights, interests or legitimate expectations.[164] Procedural fairness contemplated by Article **47** and the FAA act demands a right to be heard before a decision affecting ones right is made. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[165]

249. However, what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,[166] observed, *"Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice."* **Wade** in *Administrative Law*[167] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

250. However, the standards of fairness are not immutable. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. [168]Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[169]

251. It is imperative to appreciate the distinction between the right to a fair hearing under Article 50 of the Constitution and the right to a fair hearing under Article 47 of the Constitution. In *J.S.C. vs Mbalu Mutava*[170] the Court of Appeal 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. It stated that fair administrative action broadly refers to administrative justice in public administration. It 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.[171] Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

252. The decision complained of is an administrative function. It is a tax assessment and refusal to grant tax exemption. The governing statutes regulate the process for tax assessment and enforcement. There is evidence that the Respondent's officers visited the applicant. There is evidence that they requested for documents. There is evidence that the Respondent escalated the dispute to the TAT. He also sought exemption from the Minister as the law provides and the exemption was declined. There is evidence that the Respondent is aggrieved by the tax assessments. There is nothing to show that the applicant was not provided with the opportunity to avail its records before the decision was made. It is common ground that the applicant was made aware of the tax assessments. It is also on record that an objection decision was rendered as the law provides and the applicant was made aware of the decision. I find no merit in the argument that the applicant's right to a fair hearing were violated. I find solace in the following passage from the South African Court of Appeal in the judgment of Nugent JA in *Kemp and Others v Wyk and Others*[172] thus:_

> *"A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammeled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this Court in Britten and Others v Pope* **1916 AD 150** *and remain applicable today."*

h. Whether the applicant has established any grounds for the prayers to be granted

253. The applicant's counsel argued that not only did the Respondent act illegally, unreasonably, irrationally and in breach of the applicant's legitimate expectation, but, it contravened its right to fair administrative action in blatant disregard of its powers under the law. He urged that the reliefs sought in this application are the most efficacious and appropriate means of addressing the violations. He submitted that unless the Court intervenes and grants the orders, the applicant's constitutional right to fair administrative action stand to be gravely and irreparably breached and injured. It was his submission that this court has an obligation under Article 21(1) of the Constitution to observe, protect, promote and fulfil the applicant's right to fair administrative action, and is the only court empowered under Articles 23 and 165(6) to grant the prayers and reliefs sought. He urged the court not to hesitate but at once grant the prayers sought to ensure the Respondent acts within the law and fairly.

254. In his view, the question before the court is whether the court can countenance and rubber-stamp these deliberate illegal, unfair, unjust, unconstitutional acts, despite having powers under Article 23 of the Constitution to remedy the same. He singled out the *Pili Management* (infra)case cited by the Respondent's counsel and argued that the same is distinguishable because the said case concerned merit as opposed to the instant case which rests to abuse of powers and violation of rights. He also argued that the Retirement Benefits Case is not applicable.

255. The Respondent's counsel relied on *Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority*[173]for the proposition that judicial review is concerned with decision making process, not the merits of the decision nor is it an avenue to pursue an appeal as was held in *Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others*[174] He submitted that the writ of *Certiorari* cannot issue in absence of bad faith, ulterior motive or possible perverseness on the part of the Respondent, of which there is no evidence of the Respondent acting without statutory authority or jurisdiction. She argued that the writ of *prohibition* also not available to the applicant because the Respondent has not acted unreasonably, without or in excess of its jurisdiction.

256. The applicant prays for two declaratory orders as listed earlier in this judgment. The tests for granting a declaratory relief were settled in *Durban City Council v Association of Building Societies*[175] and confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd.*[176]The court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion. The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the court is satisfied does it proceed to the second leg of the enquiry.

257. The first stage of the enquiry relates to whether the public officer is authorized or obliged by law to render the impugned decision. The first answer to this question lies in the constitutional principle of legality. Organs of State and public officials are creatures of statute. Unlike natural persons who may commit any act, the only requirement being that the act ought to be legal, organs and officials of state are only empowered to act to the extent that their powers are defined and conferred by the constitution and/ or by statute. Any conduct by an organ or official of state beyond their constitutional and/ or statutory powers violates the principle of legality.

258. Applying the above factors to the present application, this court is not persuaded that the circumstances of this case warrant the granting of the declaratory reliefs sought. This is because, as held elsewhere in this judgment, the Respondent's actions are grounded on the enabling tax statutes.

259. The applicant seeks orders of *certiorari*. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

260. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples may include where the applicant's own conduct has been unmeritorious or unreasonable, for example, where the applicant has unreasonably delayed in applying for judicial review. Also, it will not issue where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the applicant ought to have subjected itself dispute resolution mechanism provided under the TAT and the TPA instead of invoking the Judicial Review jurisdiction of this Court.

261. The applicant also seeks orders of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the impugned decision has not been established nor has it been established that the Respondent acted illegally or in excess of its powers nor has the impugned decision been shown to be illegal, irrational or a nullity. The Petitioners cannot seek an order of *Prohibition* to enable them not to pay lawfully due taxes. An order of *Prohibition* cannot issue against clear provisions of the law.

262. 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.

263. 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. Thus, the applicant had a duty to demonstrate these basic requirements.

264. 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. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach.

265. 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.* These being the grounds upon which the impugned decision can be challenged, I find and hold that the applicant has failed to present grounds to demonstrate that the impugned conduct of decision is legally frail.

266. In view of my findings and conclusions as here above discussed, the conclusion becomes irresistible that the applicant's application must fail. Accordingly, the *ex parte* applicant's application dated 14th September 2018 is hereby dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this 15th day of November 2019

John M. Mativo

Judge

---

[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. 4 of 2015.

[5] Act No. 29 of 2015.

[6] Act No. 49 of 2013.

[7] {2017} eKLR.

[8] Constitutional Petition Number. 359 of 2013.

[9] {2017} e KLR.

[10] Civil Appeal 158 of 2017.

[11] {2011} eKLR.

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

[13] Ibid.

[14] {1992} KLR 21.

[15] Ibid.

[16] {2015} eKLR.

[17] {2015} eKLR.

[18] Ibid.

[19] Cap 470, Laws of Kenya.

[20] Cap 472, Laws of Kenya.

[21] Cap 476, Laws of Kenya.

[22] In SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd {2011} VSC 492 at [3]-[6]

[23]See also *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4]; Hoh v Frosthollow Pty Ltd and Ors [2014] VSC 77 at [13] – [20].

[24]{2015} e KLR.

[25] {2017} e KLR.

[26] See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others* Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.

[27] {2002} 23 ILJ 81 (CC).

[28] {2001} (1) SA 912 (CC).

[29] 2001 (1) SA 912 (CC).

[30] Supra note 5 at paragraph 23.

[31] {2016} eKLR.

[32] See Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014.

[33]*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).

[34] Ibid.

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

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

[37]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).

[38] *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).

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

[40] 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

[41] 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.

[42] 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]

[43] Ibid para 44.

[44] Ibid paras 42, 43 and 45.

[45] Constitutional Application No. 2 of 2011 (unreported).

[46] Samuel *Kamau Macharia v. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[47] 19 U.S. 264 (1821).

[48] See *Speaker of the National Assembly vs Karume* {2008} 1KLR 425.

[49] See the Court of Appeal in ***Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another* {2015} eKLR.**

[50] {2011} e KLR.

[51] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[52] *Brinks-Mat Ltd vs Elcombe* {1988} 3 ALL ER 188.

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

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

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

[56](2007) 16 NWLR (319) 335.

[57] Justice Niki Tobi JSC of Nigeria.

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

[59]Ibid.

[60] Ibid.

[61] Civil Appeal No. 5 of 1972 [1972] EA 271.

[62] Cap 2 Laws of Kenya.

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

[64] 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.

[65] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[66] Ngcobo J while interpreting a similar provision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[67] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville above n 18 at 244.

[68] *University of Cape Town vs Cape Bar Council and Another* 1986 (4) SA 903 (AD). See also *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[69] {1987} 1 SCC 424

[70] *Attorney-General, O.F.S. v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C-D.

[71] *Taj Properties (Pty) Ltd v Bobat* 1952 (1) SA 723 (N) at 129G.

[72] Cap 470, Laws of Kenya.

[73] Cap 472, Laws of Kenya.

[74] Cap 476, Laws of Kenya.

[75] This has become known as the '*Carltona* principle'. The English Court of Appeal in *Carltona* above n 22 at 563 held that in order to allow the smooth functioning of government, Ministers are always entitled to have their functions exercised by officials in their departments as it is the Minister that remains responsible to Parliament. This rule is however confined to delegation within government departments. See also *Lewisham Borough Council and Another v Roberts* [1949] 1 All ER 815 at 829 and Wade and Forsyth *Administrative Law* 8 ed (Oxford University Press, New York 2000) at 325.

[76] *King-Emperor v Benoari Lal Sarma* [1945] AC 14; *Jackson, Stansfield and Sons v Butterworth* [1948] 2 All ER 558 at 564-66. See also Craig *Administrative Law* 5 ed (Sweet and Maxwell, London 2003) at 523 and De Smith, Woolf and Jowell *De Smith, Woolf and Jowell's Principles of Judicial Review* (Sweet and Maxwell, London 1999) at 227 and 233.

[77] *R v Lampe and Others; Ex Parte Madalozzo* (1963) 5 FLR 160; *Long v Knowles* [1968] Tas SR 46. See also Pearce and Argument *Delegated Legislation in Australia* 2 ed (Butterworths, Australia 1999) at 269-70 and Skyes, Lanaham, Tracey and Esser *General Principles of Administrative Law* 4 ed (Butterworths, Australia 1997) at 34.

[78] *Geraghty v Porter* [1917] NZLR 554; *Hawke's Bay Raw Milk Producers' Co-operative Co Ltd. v New Zealand Milk Board* [1961] NZLR 218.

[79] The only time the Supreme Court of Canada has considered the sub-delegation of legislative powers was in *Reference as to the Validity of the Regulations in Relation to Chemicals* [1943] SCR 1 where it found that emergency war-time legislation permitted the delegation of regulation-making power. This decision should however be confined to the exceptional circumstances of the case. See Dussault and Borgeat *Administrative Law: A Treatise* 2 ed, Volume I (Carswell, Toronto 1985) at 416. The majority of Canadian authors argue that legislative powers are less likely to be delegated by implication. See id at 416 Jones and De Villars *Principles of Administrative Law* 3 ed (Carswell, Toronto 1999) at 140; Mullan *Administrative Law* 3 ed (Carswell, Toronto 1996) at 194.

[80] See *Vic Restaurant Inc v City of Montreal* [1959] SCR 58; *City of Verdun v Sun Oil Company Ltd* [1952] 1 SCR 222; *Brant Dairy Company Ltd et al v Milk Commission of Ontario et al* 30 DLR (3d) 559 (SCC).

[81] See for example *Credite Suisse and Another v Waltham Forest LBC* [1997] QB 362; *Cohen v West Ham Corporation* [1933] Ch 814 at 826-27; *R v Board of Assessors of Rates and Taxes of the City of Saint John* (1965) 49 DLR (2d) 156; *Labour Relations Board of Saskatchewan v Speers and Regina Undertakers Employees Federal Union* [1948] 1 DLR 340. According to Wade and Forsyth "[t]he vital question in most cases is whether the statutory discretion remains in the hands of the proper authority, or whether some other person purports

to exercise it." Wade and Forsyth above n 28 at 316.

[82] [1948] 1 All ER 780.

[83] Id at 781.

[84] {1985} AC 374.

[85] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[86] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[87] {2015} eKLR.

[88]Mr. Dainius Zalimas, President of the constitutional Court of the Republic of Lithuania, *The Rule of Law and Constitutional Justice in the Modern World*, 11-14 September 2017, Vilnius, Liuthania, delivering a speech at the Farewell Dinner for the 4th Congress of the World Conference on Constitutional Justice, 13th September 2017.

[89] *Masinga vs Director of Public Prosecutions and Others* (21/07) {2011} SZHC 58 (29 April 2011: High Court of Swaziland.

[90] {2018}eKLR.

[91] Published in Just Law {2004}.

[92] J. Willis, ''Delegatus non potest delegare'' (1943) 21 Can. B.R. 257, 259.

[93] See e.g. *Lewisham Borough v Roberts* [1949] 2 K.B. 608, 629, *R. v Skinner* [1968] 2 Q.B. 700; *Re Golden Chemical Products Ltd* [1976] Ch. 300 at 307; cf. *Woollett v Minister of Agriculture and Fisheries* [1955] 1 Q.B. 103. The harmless fiction of the ''alter ego principle'' (D. Lanham, ''Delegation and the Alter Ego Principle'' (1984) 100 L.Q.R. 587) does, however, have its limits. Admissions by a civil servant will not necessarily be treated as admissions by his minister, *Williams v Home Office* [1981] 1 All E.R. 1121. Similarly, evidence of receipt of a letter by a minister's department will not satisfy a requirement that advice be received by a minister of the Crown, although evidence of receipt by an official with responsibility for the matter in question will suffice: Air 2000 Ltd v Secretary of State for Transport (No.2) 1990 S.L.T. 335.

[94] *R. v Secretary of State Ex p. Oladehinde* [1991] 1 A.C. 254 at 283–284, CA.

[95] *Carltona Ltd v Commissioners of Works* [1943] 2 All E.R. 560 at 563 (Lord Greene M.R.); *West Riding CC v Wilson* [1941] 2 All E.R. 827 at 831 (Viscount Caldecote C.J.); *Re Golden Chemical Products Ltd* [1976] Ch. 300. Cf. *R. v Secretary of State for the Home Department Ex p. Phansopkar* [1976] Q.B. 606 where the minister was held to have no power to require applicants for certificates of partiality to obtain them from British Government officials in the applicant's country of origin rather than from the Home Office in London.

[96] *Cf Customs and Excise Commissioners v Cure & Deeley Ltd* [1962] 1 Q.B. 340 (manner of authorization prescribed by statute held, not complied with).

[97] West Riding [1941] 2 All E.R. 827 , *Point of Ayr Collieries Ltd v Lloyd-George* [1943] 2 All E.R. 546; Carltona [1943]2 All E.R. 560 ; Lewisham [1949] 2 K.B. 608 ; Woollett [1955]1 Q.B. 103.

[98] Lewisham [1949] 2 K.B. 608 ; Woollett [1995] 1 Q.B. 103; R. v Skinner [1968] 2 Q.B. 700 Cf. Horton v St Thomas Elgin General Hospital (1982) 40 D.L.R. (3rd) 274. 515 ibid.; see esp. Woollett [1955] 1 Q.B. 103 at 124–126 (Jenkins L.J.); Golden Chemical [1996] Ch. 300, 305.

[99] Ibid.; see esp. Woollett [1955] 1 Q.B. 103 at 124–126 (Jenkins L.J.); Golden Chemical [1996] Ch. 300, 305.

[100] [2005] EWCA Civ 154 at [26].

[101] In Golden Chemical [1976] Ch. 300 the judge denied that such a category existed. But see *Ramawad v Minister of Manpower and Immigration* [1978] 2 S.C.R. 375 and R. (on the application of Tamil Information Centre) v Secretary of State for the Home Department [2002] EWHC 2155; (2002) 99 L.S.G. 32 where it was held that ministerial authorisation was an impermissible delegation as the statute required the minister personally to exercise his judgment

[102] Cap 2 Laws of Kenya.

[103] HCMA No. 743 of 2006 {2007} KLR 240.

[104] {1999} 1 EA 245.

[105] Nairobi High Court J.R Misc. 283 of 2008.

[106] *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19]. Recklessness was held not to involve bad faith (NAFK v Minister of Immigration (2003) 130 F.C. 210, [24]).

[107] {1995} B.C.J. 1763.

[108] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[109]*Minister for Immigration and Multicultural Affairs Ex p Jia* (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); *Bell v CETA* (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[110] *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": *Shrager v Basil Dighton Ltd* [1924] 1 KB 274 at 284.

[111] *See*, eg, *Ebner v Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 363 (Gaudron J) (HCA); Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at [83] (Eng CA); Lawal v Northern Spirit Ltd [2003] UKHL 35; [2004] 1 All ER 187 at [14], [21] (HL); *Forge v Australian Securities Commission* [2006] HCA 44; (2006) 229 ALR 223 at [66] (Gummow, Hayne and Crennan JJ) (HCA). *See* also *Belilos v Switzerland* [1988] ECHR 4; (1998) 10 EHRR 466 at [67] where the European Court of Human Rights explained that the bias rule, as it arose from Art 6 of the European Convention of Human Rights, was based upon the importance of "the confidence which must be inspired by the courts in a democratic society".

[112] *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

[113] *Anderton v Auckland City Council* [1978] 1 NZLR 657 at 680 (SC NZ); *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414 (NSW CA); *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

[114] Groves, M. ***"The Rule Against Bias"*** **[2009] UMonashLRS 10**

[115] Ibid

[116] *See*, eg, *Sun v Minister for Immigration and Ethnic Affairs* [1997] FCA 1488; (1997) 151 ALR 505 at 551-552 (Fed Ct, Aust); *Gamaethige v Minister for Immigration and Multicultural Affairs* [2001] FCA 565; (2001) 109 FCR 424 at 443 (Fed Ct, Aust). *See also* Porter v Magill [2001] UKHL 67; [2002] 2 AC 357 at 489 where Lord Hope accepted that proof of actual bias was "likely to be very difficult".

[117] This expression of the bias test was suggested by the English Court of Appeal in Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at 711 and adopted by the House of Lords in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The Australian test, which is explained below, also adopts an objective assessment and will be satisfied if there is a "possibility" that the decision-maker might not be impartial: *Ebner v Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 345.

[118]Supreme Court No. 11 of 2016.

[119] {2009} U Monash LRS 10.

[120] [1993] UKHL 1; [1993] AC 646 at 670.

[121] Porter v Magil [2001] UKHL 67; [2002] 2 AC 357.

[122] See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v IABSORIW Local No 97* 2008 CanLII 39763 (BCLRB) para 1.

[123] On the contrary, Burns and Beukes Administrative Law 303-304 think it is the other way round. For them, it is generally "a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised." In their view, "a reasonable suspicion of bias or perceived bias is rather more complex"

[124] Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant's medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him

[125] In Committee for Justice and Liberty v National Energy Board 1978 68 DLR (3d) 716 735 de Granpré J laid down what has become the trademark of public adjudication in modern Canada when he stated that: "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. … That test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.' Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?"

[126] In *Livesey v NSW Bar Association* 1983 151 CLR 288 293-294, the previous "high probability" test was supplanted by the reasonable apprehension test.

[127] De Smith Judicial Review 230

[128] *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire*; In *Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (Re Sapire).

[129] {1955} S.C.R. 834.

[130] *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576 (Finn J. at 587).

[131] 6thEdn. Sweet & Maxwell page 609.

[132] {2018} e KLR.

[133] {2007} e KLR.

[134] {2018} e KLR.

[135] {2002} EWCA Civ. 690 [2002] WLR 2601.

[136] {2012} eKLR.

[137]Nairobi H.C Judicial Review No. 294 of 2010.

[138] {2016}e KLR, CA.

[139] {2014} e KLR.

[140] Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.

[141] Søren Schønberg, *Legitimate Expectations in Administrative law* 118 (2003); *C.f.* Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMB. L. J. 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today than is the case in EU law, *see*, Administrative Law of the European Union, its Member States And The United States 285 (Rene

Seerden & Frits Stroink eds., 2002).

[142] Ibid.

[143] Ibid.

[144] Joined Cases 205-215/82, Deutsche Milchkontor GmbH et al. V Germany, 1983 E.C.R. 2633.

[145] Søren Schønberg, Legitimate Expectations in Administrative Law 118 (2003).

[146] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.

[147] *Administrative Law*, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000, at pages 449 to 450.

[148] {1948} 1 KB 223-234.

[149] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[150]Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd,* {1995} 1 All ER 129 (HL) at 157.

[151] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[152] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[153] In *Prasad v Minister for Immigration* {1985} 6 FCR 155.

[154] {2004} ZACC 15*;* 2004 (4) SA 490 *CC* at 512, para 44.

[155] {1995} 1 All ER 129 (HL) at 157.

[156] 1999 (3) SA 304 *(LAC)* at 316, para 36.

[157] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[158] 2000 (4) SA 674 *(CC)* at page 708; paragraph 86.

[159] SA 2004(3) SA 346 (SCA) at 354H- 355A.

[160] *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 per Mason J (at 41).

[161] See *Patel vs Witbank Town Council* 1931 TPD 284 Tindall J said (at 290);

[162] David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[163] {1915} AC 120 (138) HL.

[164] *Kioa v West* (1985), Mason J.

[165] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[166] (1980), at page 161.

[167] (1977) at page 395.

[168] See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[169] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[170] {2015}eKLR.

[171] Ibid.

[172] (335/2004) [2005] ZASCA 77; [2008] 1 All SA 17 (SCA) (19 September 2005).

[173] {2010} e KLR.

[174] {2013} eKLR.

[175] 1942 AD 27 at 32.

[176] 2005 (6) SA 205 (SCA) at para 15 to 17.