



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 54 OF 2019**

**IN THE MATTER OF AN APPLICATION BY COMCARRIER SATELLITE SERVICES  
LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION  
AGAINST THE COMMISSIONER OF DOMESTIC TAXES  
AND  
IN THE MATTER OF THE DECISION BY COMMISSIONER OF DOMESTIC  
TAXES IN HIS NOTICE OF DISTRESS AND PROCLAMATION  
NOTICE DATED 21<sup>ST</sup> FEBRUARY, 2019  
AND  
IN THE MATTER OF THE CONSTITUTION OF KENYA,  
INCOME TAX ACT 470 LAWS OF KENYA  
AND  
IN THE MATTER OF CONTRAVENTION OF SECTION 4 OF THE FAIR  
ADMINISTRATIVE ACTIONS ACT  
AND  
IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT  
AND  
IN THE MATTER OF ORDERS 53 OF THE CIVIL PROCEDURE RULES, 2010  
BETWEEN  
REPUBLIC.....APPLICANT  
=VERSUS=  
THE COMMISSIONER OF DOMESTIC TAXES.....1<sup>ST</sup> RESPONDENT  
KEYNESIAN AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By its directions of 25/3/19, the court directed that the Notice of Motion dated 5<sup>th</sup> March 2019 and Preliminary Objection dated 25<sup>th</sup> March 2019 shall be heard together by way of written submissions.
2. The application of 5/3/19 was actually a Chamber Summons for leave to file judicial review proceedings which was already granted on 6/3/2019 in Chambers ex parte.
3. It would appear that the court was referring to a Notice of Motion dated 13/3/2019 which is referred to in the submissions of the ex parte applicant [but not contained in the file] for which the Respondent raised a Preliminary Objection dated 25/3/2019 to the effect that:

*“That these judicial review proceedings are fatally defective and untenable for want of compliance with Order 53 Rule 3 of the Civil Procedure Act 2010, the Notice of Motion having been filed outside the conditional leave period”.*

4. In the order of court of 6/3/19 granting leave certified on 8/3/19, the court directed that:

*“4. The ex parte applicant shall file and serve the substantive Notice of Motion within 7 days and shall also serve the respondents with the Chamber Summons and a hearing notice within 7 days”*

And hearing was set for 14<sup>th</sup> March 2019.

5. The court directions of 25/3/19 must be taken to refer to the Notice of Motion dated 13/3/2019 and not 5/3/19 when only the Chamber Summons for leave was filed, and which was considered and granted and therefore spent on 6/3/19.

**The application**

6. The Judicial review application for which leave was granted seeks orders as set out in the leave application as follows:

a) *“CERTIORARI to remove into this Honourable Court for purposes of quashing the decision of the 1<sup>st</sup> respondent contained in the distress order and proclamation notice both dated 21<sup>st</sup> February, 2019 directing/instructing the 2<sup>nd</sup> respondent to distrain the applicant’s moveable goods and chattels in respect of tax arrears allegedly owed by Pegrume Limited.*

b) **PROHIBITION** against the 1<sup>st</sup> and 2<sup>nd</sup> respondent restraining them, whether by themselves, their servants or agents from acting and or effecting the decision in the notice of distress as well as the proclamation notice all dated 21<sup>st</sup> February, 2019 against the applicant’s properties.

c) **PROHIBITION** against the 1<sup>st</sup> respondent from making any claims against the applicant or issuing any directive of whatever nature to the 2<sup>nd</sup> respondent or directing the 2<sup>nd</sup> respondent to recover any tax arrears emanating from the demand notice and distress order, all dated 21<sup>st</sup> February, 2019 by attaching and or auctioning moveable goods and chattels belonging to and owned by the applicant or in any way interfere with the business operations the applicant.

d) *This Honourable Court be pleased to issue such other or further relief that it may deem fit and expedient to grant.”*

7. The application for the relief is based upon the grounds set out in the statement accompanying the application for leave as follows:

**“B. THE FACTS AND GROUNDS RELIED UPON**

4. *The applicant is a renowned telecommunication service provider and a registered tax payer holding pin certificate P05114149X duly issued by the Kenya Revenue Authority on 5<sup>th</sup> October, 2001.*

5. *The 1<sup>st</sup> respondent collects and recovers taxes due and owing to the Government of Kenya and further directs and controls the general administration of taxes in the manner provided under the Kenya Revenue Authority Act as well as Tax Procedures Act of Kenya.*

6. *In execution of the aforesaid mandate, the 1<sup>st</sup> respondent is empowered under section 41 of the Tax Procedures Act to issue a distress order for recovery of unpaid taxes due from a tax payer by way of distress and sale of the defaulters moveable property, provided that such distress order specifies and pinpoints the tax defaulter, discloses the amount of unpaid tax liability, identifies property against which the distress order is to be executed and lastly, provides the location of the property against which the distress proceedings are to be executed.*

7. Pursuant to the aforesaid provision, the 1<sup>st</sup> respondent issued a distress order specifically addressed to a company known as Pegrume Limited but which purported to distrain goods and chattels located at Longonot place, 8<sup>th</sup> Floor, which premises is currently occupied by the applicant herein by virtue of a lease agreement entered into on 1<sup>st</sup> November, 2013 and executed on 12<sup>th</sup> June, 2014.
8. By so doing, the 1<sup>st</sup> Respondent wrongly identified the property against which its distress order was to be executed and further erroneously claimed that the goods and chattels located at the said Longonot place belong to Pegrume Limited.
9. It is on the foregoing basis that the 1<sup>st</sup> respondent purported to instruct the 2<sup>nd</sup> respondent to issue a proclamation notice in respect of the applicant's properties kept at the above mentioned Longonot Place with the intention of auctioning the same unless the tax arrears specified in the distress is paid by Pegrume Limited within 10 days ending on 2<sup>nd</sup> March, 2019.
10. The applicant has no affiliation, connection or nexus of whatever nature to the said Pegrume Limited and further, the applicant's incorporation, ownership and management differs from that of Pegrume Limited and neither has it had any business dealings with Pegrume Limited.
11. Accordingly, the applicant is a complete stranger to the tax demands and arrears alleged to be owed by Pegrume Limited and purported to be recovered by way of distress and sale of the applicant's properties.
12. Pegrume Limited has no legal or equitable interest in the goods and chattels subject to the distress order issued by the 1<sup>st</sup> respondent and proclaimed by the 2<sup>nd</sup> respondent vide a notice of 21<sup>st</sup> February, 2019.
13. It is evident that the 1<sup>st</sup> and 2<sup>nd</sup> respondent failed and or neglected to conduct due diligence to ascertain and establish the ownership of the properties purported to be proclaimed prior to issuing the distress order and the proclamation notice.
14. In the circumstances, the 1<sup>st</sup> respondent is guilty of violating the applicant's right to **fair administrative action** by:
- a) Failing to provide written reasons why the applicants property ought to be proclaimed and sold by auction to recover tax arrears and or liabilities owed by Pegrume Limited; and
  - b) Failing to give the applicant an opportunity to make any representation or state its case in opposition to the distress, proclamation and intended sale of its property located at Longonot Place, 8<sup>th</sup> floor.
15. Equally, the 1<sup>st</sup> and 2<sup>nd</sup> respondent have acted **unreasonably, irrationally, illegally and in abuse of their discretion** in arriving at a decision to order for distress, proclamation, attachment and sale of the applicant's properties in a bid to recover tax arrears allegedly owed by the said Pegrume Limited despite the fact that the applicant has no tax liability capable of enforcement on account of the impugned distress order.
16. Additionally, the decision in the distress order and proclamation notice dated 21<sup>st</sup> February, 2019 were based **on grave misapprehension of the law** for reasons that:
- a) The respondent misconstrued the provisions of section 41 of the Tax Procedure Act to the extent that a distress order could not be issued, implemented or enforced against the properties of a person other than the tax defaulter identified and addressed therein.
  - b) The 1<sup>st</sup> respondent failed to consider the fact that the applicant has no tax arrears or liabilities in respect of the distress order addressed to Pegrume Limited and therefore, its properties cannot be proclaimed, attached or auction to recover tax arrears owed by the said Pegrume Limited.
  - c) The 1<sup>st</sup> respondent ignored the fact that the distress order was rendered void ab initio the moment it failed to correctly identify and locate the goods and chattels properly belonging to the Pegrume Limited.
17. The 1<sup>st</sup> respondent acted **arbitrarily and in excess of its** powers in purporting to enforce a distress order against the applicant who is not a tax defaulter per the said order and who neither owes nor holds money for or on account of the said Pegrume Limited to warrant the execution of the distress order against the applicant's property.
18. In addition, the said decision was contrary to the procedures and was therefore inundated with **procedural impropriety** as:
- c) The 1<sup>st</sup> respondent has proceeded to direct the proclamation and auction of the applicant's properties without affording the applicant the right to fair administrative action and right to fair hearing as is required by law.
  - d) The 1<sup>st</sup> respondent proceeded to instruct the 2<sup>nd</sup> respondent to proclaim and auction the applicant's properties without first ascertaining whether the proclaimed properties actually belonged to the said Pegrume Limited.
19. The impugned decision to proclaim and auction the applicant's properties was irrational and unjustified as no person having cognizance of the law and facts espoused above would have arrived at a similar decision.

20. The Said decision has had the effect of paralyzing the applicant's and violating its right to use and enjoyment of its properties as guaranteed under article 40 of the Constitution.

21. For the foregoing reason, the decision by the 1<sup>st</sup> and 2<sup>nd</sup> respondent is void ab initio, an illegality and ought to be brought to the court for purposes of being quashed."

8. Despite opportunity granted by several adjustment for that purpose on 25/3/2019 and 29/4/2019 and 24/7/19, the Respondent did not file a Replying Affidavit but merely filed submissions dated 2/8/2019 in which they improperly set out matters of fact as follows:

*"1<sup>ST</sup> RESPONDENT'S WRITTEN SUBMISSIONS*

*May it please the Court,*

*1. We have had the advantage of reading the Ex-parte Applicant's written submissions filed on 17<sup>th</sup> July 2019 and have this to say in response.*

*2. Vide a letter dated 24<sup>th</sup> August 2017, the Respondent made a VAT demand of Kshs.220,323,895.00 for the years 2000 to 2003 against Pergume Limited.*

*3. Having failed to receive a response to the said demand, the Respondent issued Agency Notices on 27/04/2018 and 30/01/2019 through the Commissioner of Investigation and Enforcement and the Manager Debt Enforcement respectively.*

*4. Subsequently, having failed to recover taxes through the said the Agency Notices, the 1<sup>st</sup> Respondent was constrained to invoke enforcement measures through distress action.*

*5. Prior to instructing the 2<sup>nd</sup> Respondent to commence distress action, the 1<sup>st</sup> Respondent were able to establish that Pegrume Limited is a Telecommunication Services Company that has its office on the 8<sup>th</sup> floor, Longonot Place, Kijabe Street and of P.O. Box 41093-00200 Nairobi.*

*6. Upon further interrogation of the system, we established that Pegrume Limited has a single director one Anjum Chaudry of KRA PIN No. A0001368686X.*

*7. After being served with this application, the Respondent sought to establish the details of the Applicant from its system and established that indeed the Applicant herein has its physical address at Longonot Place, (specifically 8<sup>th</sup> Floor as averred in the Statement of Facts) and whose postal address is P.O. Box 41093-00200 Nairobi.*

*8. From the foregoing, it is clear that the two companies operate from the same premises sharing a common floor plus office space reception and Mr. Anjum Kamal Chaudry of KRA PIN No. A0001368686X is the Single Director of both companies.*

*9. From the foregoing circumstances, it is clear that the Applicant herein, has come to the aid of the Pegrume Limited through untruthful and/or unsubstantiated depositions by their shared Directorship who, not only has an obvious interest in frustrating the execution in his own right by virtue of being 1<sup>st</sup> Judgment Debtor/Respondent, but also whose evidence is bordering on contempt perjury.*

*10. Your Ladyship, the deponent of the Applicant's affidavit is being less than candid with the truth by stating that the Applicant has no affiliation, connection or nexus of whatsoever nature to Pegrume Limited, present or previous dealings with the company.*

*11. It is the Respondent's humble submission that the Applicant cannot succeed in lifting execution in respect items where no receipts and/or any other evidence are produced in proof of ownership especially in this case where it has been confirmed that Pegrume Limited occupied the same office space with it.*

*12. Your Ladyship, the burden is on the Applicant to prove that the proclaimed assets do not belong to the Pegrume Limited but to it, which burden it has not discharged. Having established that Pegrume Limited (judgment debtor) and the Applicant share the same offices and there being no evidence to collaborate the allegation that the distrained goods belong to the Applicant herein, the Orders sought herein cannot obtain. Consequently, this Application is for dismissal with costs to the Respondent on the ground alone.*

*13. In support of our submissions hereinabove, we rely on the case of **Charles Muraya Ndegwa vs Nahashon M. Gatere & 2 Others (2006) eKLR**, where Lady Justice Okwengu (as she then was) in dismissing an objection application against attachment for want of proof of ownership, had this to say.*

***The receipts relied upon by the Objector in proof of ownership are cash sale receipt unsupported by any other evidence that it was actually the Objector who bought the goods. I find that the Objector has not satisfied this Court that the goods belong to her and not to the Plaintiff. I do therefore overrule the Objection and order that the Decree Holder shall be at liberty to proceed with the attachment and sale of the goods.***

*14. In further support of our submissions, we seek to rely on the case of **Catherine Kinyany v Mcl Saatchi & Another [2014] eKLR** where Lady Justice Odera had this to say in dismissing an Objectors application.*

*I find that the Respondent and Objector are essentially the same person operating under different registered company names. As stated in the affidavit of Nathaniel Mbugua Kangethe, the Respondent and the Objector have common directorship. It has transpired from the proceedings that they share the same office, the same address and most probably the same office furniture and equipment. Some of the invoices produced as evidence of purchase of the proclaimed goods bear the name MCL & Marketing Communications Ltd meaning that they do not belong to the Objector alone but also to MCL which is part of the name of the Respondent.*

*Although the Objector argues that the two are separate legal entities as they are registered as two separate companies, the persons acting on behalf of both companies are the same. Nathaniel Mbugua Kangethe is the Chairman of both the Respondent and the Objector. He is the one who recruited the Claimant as an employee of the Respondent.*

*I therefore find that although the objector alleges it is the owner of the proclaimed property, it has not proved that the said property are not at the same time owned by the Respondent. The difference between the Objector and the Respondent appears to be on paper only. Again there are several items that are not included in the receipts and invoices produced by the Objector. The claimant raised the issue about the Objector having failed to explain the relationship between it and the Respondent which the Objector has ignored to explain.*

*The foregoing being the case, I find that the Objection proceedings are an abuse of Court process and I dismiss the same with costs to the claimant.*

15. The upshot of foregoing is that this application is untenable for want of proof of ownership of proclaimed properties by the applicant. We urge this Court to be persuaded by the findings of the previous High Court cases outlined hereinabove with similar facts.

16. Under the circumstance, it is therefore the 1<sup>st</sup> Respondent submission that it should be allowed to realize the outstanding taxes through the distress action as the same is long overdue.”

9. For its part, the ex parte applicant submitted through Counsel as follows:

**“EX-PARTE APPLICANT’S SUBMISSIONS**

**2.0 FACTUAL BACKGROUND**

4. The applicant was incorporated and duly registered under the Companies Act, cap 486 (now repealed) as a Limited Liability Company vide a certificate of incorporation issued on 24<sup>th</sup> July, 2001.

5. Subsequent thereto, the applicant registered itself with the Kenya Revenue Authority (hereinafter known as ‘KRA’) for purposes of payment of its tax liabilities and was as a result issued with its own KRA personal identification number P051141497X as cited in the certificate dated 5<sup>th</sup> October, 2001 and has since been honouring all its tax obligations.

6. In the year 2014, the applicant relocated its business premises to office no.23 on 8<sup>th</sup> floor, Longonot place, Nairobi pursuant to a lease agreement dated 12<sup>th</sup> June, 2014. The said premises were previously occupied by a company known as Pegrume Limited of KRA pin number. P051121074K. The applicant has therefore never shared the said premises with Pegrume Limited.

**2.1. The cause of action**

7. On 21<sup>st</sup> February, 2019, the 1<sup>st</sup> respondent served at the applicant’s business premises aforesaid, a demand notice addressed to Pegrume Limited for payment of tax arrears totaling Kshs.220,323,895/-. On the same date, the 1<sup>st</sup> respondent served at the said premises a **notice of distress** addressed to Pegrume Limited in respect of the aforesaid tax arrears.

8. Pursuant to the said notice of distress, the 2<sup>nd</sup> respondent under the instruction of the first respondent proclaimed the goods and chattels of the applicant on the following misguided notion:

a) The applicant company and pegrume limited operate from the same premises sharing a common floor, office space and reception; and

b) Both companies share a single director namely Mr. Anjum Kamal Chaudry of KRA pin no. A000136868X.

9. It is not disputed by both parties that Pegrume Limited has previously occupied the premises in question. In fact the letter produced by the 1<sup>st</sup> respondent and marked as KRA-6 confirms the ex-parte applicant’s argument that Pegrume Limited was at one time an occupant of the applicant’s current business premises.

10. The only contestations between the ex-parte applicant and the 1<sup>st</sup> respondent are as follows:

a) Whether the two companies share a common physical address;

b) Whether the two companies share directors;

c) Whether the common location and ownership legitimizes the impugned decision of the 1<sup>st</sup> respondent to exercise distress over the applicant's properties.

11. Contrary to the allegations advanced by the 1<sup>st</sup> respondent, we do intend to show and demonstrate to this Honourable Court that the two companies do not share directors or business location and that the impugned decision was founded on both factual and legal errors.

12. The ex-parte applicant urges and intends to demonstrate that the 1<sup>st</sup> respondent has arbitrarily, irrationally, illegally enforced the impugned notices against the ex-parte applicant in absolute violation of the applicant's rights to property, fair administrative action and rules of natural justice."

### **...Grounds for judicial review**

16. The mandate of the Kenya Revenue Authority is to recover taxes from defaulting tax payers. In discharging this mandate, the commissioner of domestic taxes can only recover taxes to the extent permitted by law.

17. In particular, the 1<sup>st</sup> respondent is permitted in law to recover tax arrears from defaulting tax payers by way of distress under section 41 of the Tax Procedures Act.

The said section provides as follows:

Section 41 (1) and (2)

"[41] [1] The commissioner or an authorized officer may issue an order referred to as a distress order in writing for the recovery of unpaid tax by distress and sale of moveable property of a tax payer

[41] [2] A distress order shall specify:

- a) the tax payer against whose property the order is issued;
- b) the amount of unpaid tax liability;
- c) the property against which the distress proceedings are to be executed
- d) the location of the property against which the distress proceedings are to be executed

18. It therefore follows that a distress order issued under section 41 of the Tax Procedures Act can only be executed against the properties of the tax payer identified in such order, and none other. An attempt to execute the same against a third party not only violates the provisions of section 41 of the Tax Procedures Act but also contravenes the provisions article 40 on the right to peaceful enjoyment and ownership of ones' property. These provisions therefore behooves the commissioner of domestic taxes to conduct proper due diligence in identifying and locating the properties of a tax defaulter before issuing or enforcing a distress order.

19. In this particular instance, the 1<sup>st</sup> respondent sought to execute the distress order against the properties of the ex-parte applicant despite the fact that the distress order directly mentioned and identified Pegrume Limited as the tax defaulter against which the order would apply. As a result, the 1<sup>st</sup> respondent's decision to enforce the distress order against the applicant, who is not a tax defaulter and who was not named in the distress order, was ultra vires and in excess of the powers provided in law. Under section 41, the 1<sup>st</sup> respondent had no power, authority or mandate to recover taxes from a non-defaulter.

20. The 1<sup>st</sup> respondent defends its decision to enforce the aforesaid impugned notices against the properties of the ex-parte applicant on the allegations that Pegrume Limited shares an office location and a director with the ex-parte applicant. We submit that the foregoing position is founded on errors of fact and law."

### **Issues for Determination**

10. The twin issues before the court is whether the Preliminary Objection is merited and if not whether the judicial review orders of certiorari and Prohibition sought herein will issue.

### **Determination**

*Preliminary Objection*

11. At the outset, the Preliminary Objection taken by the Respondent does not qualify on the test of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) EA 696 to be regarded as a Preliminary Objection as it calls for the exercise of discretion of the court.

The Judicial review court has discretion to extend the period allowed for the filing of the substantive motion beyond the 21 days prescribed. Properly conceived, a Preliminary Objection as held by Sir Charles Newbold, P. at p.700:

“A Preliminary Objection is in the nature of what used to be demurrer. It raises **a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop.**”

12. This Court had occasion in Mombasa HC Miscellaneous Civil App. JR No. 8 of 2014, **Republic v. Kenya Bureau of Standards & 4 Ors. ex parte Car Importers Association**, to consider at length the power of the court to extend time for filing of the substantive motion for judicial review in Order 53 of the Civil Procedure Rules as follows:

24. *“With respect, I have taken the view that while the provision relating to the 6-month period for commencement of proceedings certiorari is statutory being expressly provided for under section 9 of the Law Reform Act, the requirement for filing of the Notice of Motion upon grant of leave is prescribed by the subsidiary legislation of the Civil Procedure Rules, which contain a rule (Order 50 rule 6) providing expressly for enlargement of time for doing any act prescribed under the Rules. I also consider that the 21-day rule for the filing of the Notice of Motion is a matter of procedure rather than substantive rule of jurisdiction of the court in judicial review matters, and is therefore open to extension in accordance with the substantial justice principle of Article 159 of the Constitution.*

25. *In the case of R v. The General Manager Moi International Airport, ex parte Jared Adimo Odhiambo and Anor. Mombasa HC JR 12 of 2014, I dealt with a similar question as follows:*

*There is no consensus of judicial opinion with regard to authority to enlarge time and I have noted decisions of the Court taking the view that judicial review is a special procedure to which the regular Civil Procedure Rules do not apply, and that therefore there is no power to enlarge time since it is not provided for under the applicable Order 53 of the Civil Procedure Rules. See for example Nyamu, J. in Kithome v The District Land Adjudication and Settlement Officer Mwingi District and others [2006] 1 EA 116 (HCK), holding that it is trite law that the Civil Procedure Rules and the Civil Procedure Act do not apply to judicial review. It was further held in that case that the provisions of Order LIII, rule 3(1) are mandatory and that an application for judicial review must be filed within 21 days, and that there is no provision for extension. See also Angote J. in Republic v Kahindi Nyafula & 3 others Ex Parte Kilifi South East Farmers Co-Operative [2014] eKLR; and Emukule, J. in R vs Nyandarua District Oljoro Orok Division Land Disputes Tribunal & Moses Ndirangu Njuguna ex parte Cyrus Kamau Ng'ang'a, Susan Njoki Ndirangu & Godfrey Kinyori Wamwega, (2010) eKLR, Nakuru HC Misc. Appl. 505 of 2006 (JR).*

*With respect, I take the view that the substantial justice principle of Article 159 of the Constitution applies to empower the court to enlarge time prescribed for doing any act or taking any step under the procedure rules of the court. In my view, the time prescribed for filing of the Notice of Motion for judicial review orders is a matter of procedure for litigating the judicial review claims and not a rule of substantive law on sustainability, enforceability or justiciability of the claims, and it is, therefore, properly amenable to Article 159 principle.*

*As shown above Order 50 rule 6 of the Civil Procedure Rules contemplates extension of time for purposes of anything prescribed under the Rules without excepting Order 53 of the Rules. Even if the 6-month period for the commencement of judicial review proceedings were taken to be statutorily insulated, by the provisions of section 9 of the Law Reform Act, from the court's power of extension under Order 50 rule 6, the same cannot be said of the 21-day period prescribed only by the Rules.*

*For the reason that the prescription as to time of filing is a matter of procedure rather than substantive ingredient of the right or claim, and consequently subject to Article 159 of the Constitution and Order 50 rule 6 of the Civil Procedure Rules, I agree with the school of opinion that the court has power to extend the 21-day period prescribed by the rules for the filing of the Notice of Motion upon grant of leave under Order 53 Rule 3 (1) of the Civil Procedure Rules. See R vs City Council of Nairobi & 2 others ex parte Alice Wahito Ndegwa & 5 others (2012) eKLR, Nairobi HC Misc. Appl. 7 of 2012; R vs The Commissioner of Value Added Tax ex parte Iron Art Limited (2012) eKLR, Nairobi HC JR Misc. Appl. 19 of 2012; R vs City Council of Nairobi ex parte Wilfred Obiero, Nairobi HC JR Misc. Appl. of 2012; and R vs The Commissioner of Value Added Tax ex parte Iron Art Limited (2012) eKLR, Nairobi HC JR Misc. Appl. 19 of 2012.*

*Even where courts have found that the Order 53 is unaffected by the rest of the provisions of the Civil Procedure Rules, so that reliance cannot be placed on the power to extend under Order 50 rule 6, court have fallen back to their inherent power to ensure justice is done. I particularly concur with the reasoning of Githua J. in R v. National Environmental management Authority and Anor. ex parte Elizabeth Njeri Hinga and Anor. (2012) eKLR where the learned judge said:*

*“It is therefore my finding that since Order 53 Rule 3 (1) is not part of the substantive law governing the conduct of judicial review proceedings, this court can exercise its discretion to extend time within which to file a substantive motion for judicial review even after expiry of the 21 days prescribed under Order 53 Rule 3 (1) under its inherent powers, if it is satisfied that it is fair and just to do so.”*

*See also W. Korir J. in R vs City Council of Nairobi & 2 others ex parte Alice Wahito Ndegwa & 5 others (2012) eKLR, Nairobi HC Misc. Appl. 7 of 2012.*

*Moreover, even with regard to enlargement of the 6 months period prescribed by statute for commencing judicial review proceedings under section 9(3) of the Law Reform Act and Order 53 of the Civil Procedure Rules - which is not in issue here - I have noted the decision of Emukule, J. in Apex Finance International Ltd & Anor. v Kenya Anti-Corruption Commission (2012)*

***eKLR upholding the court's discretion. I agree with the learned judge that the court has authority to enlarge time for the filing of judicial review proceedings even after expiry of the 6 months period in appropriate cases especially cases of nullity or illegality. A fortiori, the court has discretion to enlarge the 21-day period for the filing of the Notice of Motion upon grant of leave to commence judicial review proceedings which is sought and granted within six months of the impugned decision.***

26. *The ex parte applicant's counsel states that the two-day delay in filing the Notice of Motion was due to oversight by counsel. I have not seen that the respondents will be prejudiced by extending the time for filing of the Notice of Motion as they have already responded to the Notice of Motion by respective replying affidavits. I also considered that the matter in issue is of substantial importance to the public as well as the ex parte applicants for a determination as to the computation of the 8year rule for importation of secondhand motor vehicles. Accordingly, I will allow ex parte applicant's application dated 15<sup>th</sup> May 2014 for extension of time for filing of the Notice of Motion herein by two days so that the Notice of Motion herein dated the 27<sup>th</sup> March 2014 is deemed properly to be on record."*

The Court has discretion to extend time to file the substantive Notice of Motion and the objection cannot be a proper point of law to be taken by Preliminary Objection.

*No evidence in written submissions*

13. In addition, the Counsel for the Respondents has improperly set out facts in the written submissions, a practice decried by the Court of Appeal (*Nambuye, Ouko and Kiage, JJA.*) in ***Douglas Odhiambo Apel & Anor. v. Telkom Kenya Limited*** [2014] eKLR, where the court in upholding the trial court said as follows;

*"The learned Judge cannot therefore be faulted for rejecting the receipts for legal fees placed before him as annexures to the plaintiffs' submissions. **Submissions, as he correctly observed, are not evidence.**"*

The court must hold that there is no valid Replying Affidavit.

14. The ex parte applicant has denied that the company occupies the same premises occupied by the tax defaulter Pegrume Ltd. The matters of fact set out in the submissions by counsel for the 2<sup>nd</sup> Respondent should properly have been detailed in an affidavit in reply while the court understand the 2<sup>nd</sup> Respondent dilemma in filing a Replying Affidavit and a Preliminary Objection because a Preliminary Objection is taken on the assumption that all the facts pleaded by the applicant are true, the court cannot act upon facts set out in written submissions rather than in a Replying Affidavit on oath. By raising the Preliminary Objection, the Respondent must be taken as having accepted the facts as set out by the ex parte applicants in the Verifying Affidavit in support of the Judicial Review proceedings.

15. The procedure for objection to an execution by the owner of the attached property offered as an alternative remedy in opposition to the judicial review application that Order 22 Rule 51 of the Civil Procedure Rules contemplates existing proceedings in a civil court in which application for execution has been commenced. The provision applies to execution of decrees as follows:

***"[Order 22, rule 51.] Objection to attachment.***

*51. (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.*

*(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.*

*(3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties."*

#### ***On the evidence***

16. Uncontested facts deponed to in the Verifying Affidavit at Paragraph 6-12 indicates that the applicant is a separate legal entity from the alleged tax defaulter Pegrume Ltd, with different Income Tax certificate and the applicant has occupied the place where the 1<sup>st</sup> Respondent purported to levy distress by a lease dated 12<sup>th</sup> June 2014, as follows:

6. ***"THAT pursuant to the aforesaid provision, the 1<sup>st</sup> respondent issued a distress order specifically addressed to a company known as Pegrume Limited but which purported to distrain goods and chattels located at Longonot place, 8<sup>th</sup> Floor, which premises belong to and is currently occupied by the applicant herein. (Annexed herewith and marked as 'GB-1' is a copy of the distress order)***

7. ***THAT the applicant has been occupying the foregoing premises since 1<sup>st</sup> November, 2013 pursuant to a lease agreement between itself and Longonot Place Limited executed by both parties on 12<sup>th</sup> June, 2014. (Annexed herewith and marked as 'GB-1' is a copy of the Lease Agreement)***

8. ***THAT it is evident that 1<sup>st</sup> respondent has wrongly identified the property against which its distress order is to be executed and further erroneously claimed that the goods and chattels located at the said Longonot place belong to Pegrume Limited.***

9. **THAT** it is on the foregoing basis that the 1<sup>st</sup> respondent purported to instruct the 2<sup>nd</sup> respondent to issue a proclamation notice in respect of the applicant's properties kept/stored at the above mentioned Longonot Place with the intention of auctioning the same unless the tax arrears specified in the distress order above is paid by Pegrume Limited within 10 days ending on 2<sup>nd</sup> March, 2019. **(Annexed herewith and marked as GB-3 is a copy of the said Proclamation notice).**

10. **THAT** I know of my own knowledge that the applicant has no affiliation, connection or nexus of whatever nature to the said Pegrume Limited and neither does it have any present or previous dealings with the said company.

11. **THAT** in particular, I am aware that the applicant's incorporation, ownership and management differ from that of Pegrume Limited. **(Annexed herewith and marked GB-4 and GB-5 are the applicant's certificate of incorporation dated 24<sup>th</sup> July, 2001 and the memorandum and articles of association dated 4<sup>th</sup> July, 2001).**

12. **THAT** beyond the foregoing, the applicant holds an Income Tax Certificate no. P051141496X which equally differs from that of Pegrume Limited which is P051121074K as can be seen from the distress order above. **(Annexed herewith and marked as GB-6 is a copy of the applicant's KRA pin certificate).**

17. The warrant of distress is dated 21/2/19 Pegrume Ltd as is the Notice of distress dated the same date under section 41 of the Tax Procedures Act 2015. The warrant of distress does not otherwise the levying of distress of goods belonging to any other person other than the alleged defaulter.

18. Section 41 of the Tax Procedures Act 2015 provides as follows:

*"41. (1) The Commissioner or an authorised officer may Distress orders. issue an order (referred to as a "distress order"), in writing, for the recovery of an unpaid tax by distress and sale of the movable property of a taxpayer.*

*(2) A distress order shall specify*

*(a) the taxpayer against whose property the order is issued;*

*(b) the amount of the unpaid tax liability;*

*(c) the property against which the distress proceedings are to be executed; and*

*(d) the location of the property against which the distress proceedings are to be executed.*

*(3) For the purposes of executing a distress order, the Commissioner or authorized officer may*

*(a) at any time, enter any house or premises described in the distress order to secure the property that is subject to the proceedings;*

*(b) at the cost of the taxpayer, engage such persons as the Commissioner considers necessary to assist in the execution of the distress order; and*

*(c) require a police officer to be present while the distress order is being executed.*

*(4) A police officer to whom subsection (3)(c) applies shall comply with the requirement to be present when the distress order is being executed.*

*(5) The property that is the subject of the distress order*

*(a) shall be identified by attaching a notice stating the property has been impounded for failure to comply with a tax obligation; and*

*(b) shall be kept at the premises where the distress is executed or at any other place that the Commissioner or authorized officer may consider appropriate, at the cost of the taxpayer.*

*(6) When the taxpayer does not pay the tax liability described in the distress order, together with the costs of the distress proceedings*

*(a) in the case of perishable goods, within the period that the Commissioner or authorized officer notifies the taxpayer in writing as reasonable having regard to the condition of the goods; or*

*(b) in the case of other personal property, within ten days after the property has been secured by the Commissioner or authorised officer under subsection (5), the property that is the subject of the distress order may be sold by public auction or private treaty as the Commissioner or authorised officer may direct.*

(7) The Commissioner or an authorised officer shall apply the proceeds of sale of the property that is the subject of the distress order towards the cost of taking, keeping, and selling the property with the balance, if any, applied in the following order

(a) in payment of the unpaid tax due by the taxpayer;

(b) the remainder of the proceeds, if any, shall be paid to the taxpayer.

(8) When the proceeds of disposal of the property that is the subject of the distress order is less than the total of the taxpayer's unpaid tax and the cost of taking, keeping and selling the property, the Commissioner may initiate proceedings to recover the shortfall.

(9) For the purpose of subsection (8), the unpaid amount of the cost of taking, keeping and selling the property that is the subject of the distress order shall be treated as a tax payable by the taxpayer.”

19. The demand letter dated 21/2/2019 for the immediate payment of the tax which accompanied the Notice of Distress and warrant of Distress of the same date as well as the inventory of goods and Chattels distrained by the auctioneers are all addressed to Pegrume Ltd at Longonot Place. No form of notification is given to the applicant Commcarrier Satellite Services td.

20. The question must arise whether the Act authorizes the levying of distress on any property thought to belong to the alleged tax defaulter. I think that the Respondent must exercise diligence to confirm that the distrained goods belong to the tax defaulter. Such a basis for thinking that distrained property belongs to the tax defaulter must exist before the tax authority can properly levy distress. Otherwise, it would be lawful for the tax authorities to distrain goods belonging to any person for non-recovery of tax obligation against a named tax defaulter, and that is absurd.

21. The Respondent would only have established a basis for distraining the property subject of this suit by Replying Affidavit on the facts. None was filed. They denied themselves of the opportunity despite several adjournments for that purpose. The facts being as they are before the court, it must be held that Respondent did not have any justification for distraining the goods subject of these proceedings which are the property of the ex parte applicant as asserted by it without any controverting evidence by the Respondent.

#### *Unreasonableness*

22. It is unreasonable in the *Wednesbury* sense (see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223) for the tax authority to levy distress upon the property of a person other than the tax payer, even on the explanation that the person has some relationship including sharing a director with alleged with the alleged defaulter. The *Wednesbury* unreasonableness is captured in the dictum of Lord Greene, Master of Rolls at page 229 as follows:

**“It is true the discretion must be exercised reasonably. Now that does that mean” Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. *Warrington L J in Short v Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”**

It is absurd to levy distress on the property of a stranger for the tax default of a tax payer.

#### **Doctrine of corporate personality**

23. In *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 the House of Lords' unanimously upheld the doctrine of corporate personality, as set out in the [Companies Act 1862](#), so that creditors of an insolvent company could not sue the company's shareholders to pay up outstanding debts owed. Because of this principle of corporate personality of companies, it cannot be valid to levy an attached on account of default by one company on the assets of another company merely because the two companies share a director or directors. The two companies are different legal entities and liabilities are different notwithstanding the shareholding unless there is evidence of joint ownership of the properties.

24. With respect, the holding of Maureen Onyango J. in the Employment and Labour Court decision of *Catherine Kinyany v Mcl Saatchi & Saatchi & another* [2014] eKLR cited by the Respondents is clearly distinguishable in that the director of the one company who was a director in the second company who the person who had employed the claimant whose dues were sought to be recovered and the court held as follows:

**“The Claimant raised an issue about the procedure by which the objection proceedings were commenced. It was the Claimant’s contention that the proceedings do not comply with Order 22 Rules, Rule 51 and 52 and based on the decision of the court in the case of NGENYE KARIUKI he urged the court to strike out the application.**

*I find that the Respondent and Objector are essentially the same person operating under different registered company names. As stated in the affidavit of Nathaniel Mbugua Kangethe, the Respondent and the Objector have common directorship. It has*

transpired from the proceedings that they share the same office, the same address and most probably the same office furniture and equipment. Some of the invoices produced as evidence of purchase of the proclaimed goods bear the name MCL & Marketing Communications Ltd meaning that they do not belong to the Objector alone but also to MCL which is part of the name of the Respondent.

***Although the Objector argues that the two are separate legal entities as they are registered as two separate companies, the persons acting on behalf of both companies are the same. Nathaniel Mbugua Kangethe is the Chairman of both the Respondent and the Objector. He is the one who recruited the Claimant as an employee of the Respondent.***

*I therefore find that although the objector alleges it is the owner of the proclaimed property, it has not proved that the said property are not at the same time owned by the Respondent. The difference between the Objector and the Respondent appears to be on paper only. Again there are several items that are not included in the receipts and invoices produced by the Objector. The Claimant raised the issue about the Objector having failed to explain the relationship between it and the Respondent which the Objector has ignored to explain.”*

It is significant; however, that the court did not consider the effect of the doctrine of corporate personality in the leading case of **Salomon v. Salomon & Son**, supra.

#### **Fair administrative Action**

25. On the constitutional right to fair administrative action, the tax authority when contemplating distraining goods which it considers are owned by the tax payer together with another person, it must give the other person an opportunity to be heard before the decision to distrain. It is the requirement of Article 47 (2) that:

*“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”***

In this matter, no communication ever went to the applicant on the issue of the tax default by the tax payer and or the distrained property.

#### **Alternative remedy**

26. With respect, counsel for the Respondents has misconceived the law in the submission that there is alternative procedure under Order 22 Rule 51 proviso applies only in relations to court proceedings where a decree has been issued by a court and not in tax procedures under the Tax Procedures Act. The decision of Okwengu, J. (as she then was) in **Charles Muraya Ndegwa v. Nahashon M. Gatere & 2 Ors.** (2006) eKLR was a decision in objection proceedings under the predecessor Order XXI of the Civil Procedure Rules.

27. Section 51 of the Tax Procedures Act 2015, gives a tax payer who is aggrieved by a tax decision an avenue for redress, as shown as follows:

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

However, this alternative remedy belongs to the affected tax payer. It does not apply to a third party who states that the distained goods under section 41 belong to him and he has no relationship with the alleged tax payer for whose default the distress is levied.

#### **Conclusion**

28. By having distress of the property of the ex parte applicant for the default of the tax payer who has no relationship with the applicant save sharing a director, as alleged, and without regard to the ex parte applicant’s right to the property and to fair administrative action, even if it was assumed that the property distrained was also owned by the alleged defaulting tax payer, the 1<sup>st</sup> Respondent acted unreasonably within the meaning of the term in judicial review and in violation of the request of fair administrative action that an owner of property, the ex parte applicant herein as distinct for the alleged tax payer is given an opportunity to be heard and reasons therefor in writing under Article 47 (2) of the Constitution .for its unreasonableness and procedural impropriety the decision to levy distress on the ex parte applicant’s property is illegal, null and void, and it will be quashed and any action or further action based thereon prohibited, respectfully by orders of Certiorari and Prohibition issued by this court.

#### **Orders**

29. Accordingly, for the reasons set out above, the ex parte applicant’s Notice of Motion herein is granted as prayed.

30. In view of the public element of the 1<sup>st</sup> respondent’s mandate, there shall be no order as to costs.

*Order accordingly.*

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF NOVEMBER 2019**

**J.M. MATIVO**

**JUDGE**

**Appearances:**

M/S Rachier & Amolo, Advocates for Ex-parte Applicant.

Mr. Andambi Chabala, Advocate for the 1<sup>st</sup> Respondent.