REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPL. NO. 471 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY

FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,

PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT

TO ARTICLES 21(1), 23(1) 23(3) (F), 25 (C), 27 (1), 47(1),

49(1)(D) & 50(2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN T HE MATTER OF THE INCOME TAX ACT, CAP 470 LAWS OF KENYA

AND

IN THE MATTER OF THE VALUE ADDED TAX ACT, 2013

AND

IN THE MATTER OF THE TAX PROCEDURES ACT, NO. 29 OF 2015

AND

IN THE MATTER OF THE ADVOCATES ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY.....RESPONDENT

EX PARTE: PROFESSOR TOM ODHIAMBO OJIENDA

SC T/A PROF. TOM OJIENDA & ASSOCIATES

JUDGEMENT

Introduction

1. By a Motion on Notice dated 29th November, 2016, the ex parte applicant herein, **Professor Tom Odhiambo Ojienda**, seeks the following orders:

> **1. THAT the Honourable court be pleased and do hereby grant judicial review order of CERTIORARI to remove into this Honourable Court and quash the assessment conducted by the Respondent, its agents, employees and/or servants contained in a letter dated 7th June, 2016 directed at the ex parte applicant demanding the payment of Kshs 443,631,900.00 as total tax due and owing to the Respondent by the ex parte applicant for the period 2009-2016.**
>
> **2. THAT the Honourable court be pleased and do hereby grant judicial review order of CERTIORARI to remove into this Honourable Court and quash the decision of the Respondent, its agents, employees and/or servants contained in a letter dated 5th September, 2016 referred to as amended assessment purporting to be an objection decision directed at the ex parte applicant demanding the payment of the sum of Kshs 378,682,140.00 as total tax due and owing to the Respondent by the ex parte applicant for the period 2011-2016.**
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> **3. THAT the Honourable court be pleased and do hereby grant judicial review order of ROHIBITION to remove into this Honourable Court and prohibit the Respondent demanding the payment of Kshs 443,631,900.00 as total tax due and owing to the Respondent by the ex parte applicant for the period 2009-2016.**
>
> **4. THAT the Honourable court be pleased and do hereby grant judicial review order of ROHIBITION to remove into this Honourable Court and prohibit the Respondent demanding the payment of Kshs 378,682,140.00 as total tax due and owing to the Respondent by the ex parte applicant for the period 2011-2016.**
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> **5. THAT costs of and incidental to the application be provided for.**
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> **6. THAT such further and other reliefs that this Honourable Court may deem just and expedient to grant.**

Applicant's Case

2. According to the applicant, he is the proprietor of the firm of **Prof. Tom Ojienda & Associates** established after the dissolution of **Prof. Otieno-Odek, Prof Ojienda & Wanyama Advocates**. According to the ex parte applicant, before establishing the saifd firm, he was registered as a taxpayer under the firm of Odhiambo & Odhambo Advicates in Nakuru. The applicant disclosed that he maintained 4accounts three of which were with Barclays Bank while one was with Standard Chartered Bank.

3. It was the ex parte applicant's case that he receive and keeps clients' money in the clients' accounts as a statutory obligation under rule 4 of the ***Advocates (Accounts) Rules*** and the he has, without delay, been paying into the said clients' accounts such monies as defined in Rule 2 of the ***Advocates (Accounts) Rules*** all clients' monies held or received by himself, pursuant to Rule 2 of the ***Advocates (Accounts)***

Rules, in Standard Chartered Bank Account 0150154443401 and Barclays Account 2024984489. According to the ex parte applicant these monies should not be subjected to taxation. On the other hand the ex parte applicant disclosed that all his taxed salaries, allowances, per diems that he has earned over the years are paid into his personal account, Barclays Bank Account 0031249023, Eldoret.

4. It was the applicant's case that as a registered tax payer, he has over the years been submitting his tax returns to the Respondent in accordance with section 24(1) of the ***Tax Procedure Act, 2015*** and VAT through his said firm. It was therefore his case that he is fully tax compliant.

5. It was however averred that by a letter dated 7th June, 2016 addressed to the ex parte applicant, after the applicant had filed a suit stopping the Respondent from collecting 1.3 billion on behalf of one of its clients, the Respondent indicated that it had received information which information it purported to use to assess the ex parte applicant's tax liability for the years 2009-2016 in accordance with section 24(2) of the ***Tax Procedure Act, 2015***, a period of 7 years. It was the ex parte applicant's case that this was contrary to section 23(1)(c) of the ***Tax Procedure Act, 2015***.

6. It was the applicant's case that whereas the law allows the tax payer to retain the document for taxation for a period of five years from the end of the reporting period to which it relates or such shorter period except in exceptional cases, the Respondent purported to conduct an assessment over a period of 7 years, from 2009-2016 without justifiable cause, an action which he applicant contended not only depict malice on the part of the Respondent, but was manifestly illegal, immoral, malicious and actuated by bad faith.

7. It was averred that the Respondent summed up all the monies ever receiver in the ex parte applicant's accounts maintained by him, including the unpaid bills, and illegally collected unpaid fee notes and deposit requests from third parties and treated it as the ex parte applicant's net income subject for taxation, an action which the ex parte applicant deemed unprocedural, fundamentally unreasonable and manifestly illegal. Consequently, the Respondent raised illegal additional assessment of Kshs 443,631,900.00 as tax due and payable by the ex parte applicant through the assessment dated 7th June, 2016.

8. The applicant averred that he duly objected to the said assessment through a letter dated 6th July, 2016. It was disclosed that on 18th August, 2016, the Respondent invited the ex parte applicant's tax agent to a meeting to clarify on the documents previously provided by the tax agent on behalf of the ex parte applicant and to clarify on the issues raised by the ex parte applicant's objection and subsequent meeting with the said tax agent. However the Respondent insisted that the remaining documents, most of which the ex parte applicant had to produce in person (because of advocate-client privilege) and explain them were to be availed by 22nd August, 2016.

9. It was averred that in letter dated 2nd September, 2016, the ex parte applicant's tax agent explained to the Respondent that due to the ongoing Judicial Service Commission's interviews, it was impossible for the ex parte applicant to be available to produce all the supporting documents required and offer an explanation and sought for more time till the end of September. However, in a purported amended assessment dated 5th September, 2016, the Respondent purported to make a final assessment in the total sum of Kshs 378,68,140.00 based on all the ex parte applicant's accounts and therefore subjected to taxation all clients' money receive between 2011-2016, all taxed payments received as allowances and other payments made in to his personal accounts in violation of the fundamental right to fair administrative action and fair hearing as guaranteed by Articles 25(c), 47 and 50(1) and (2) of the Constitution. It was averred that in the said assessment, the Respondent not only assessed the firm's clients' accounts but proceeded to asses for taxation the ex parte applicant's personal accounts through which he is paid salaries and allowances from employment to which taxes had already been paid, on the grounds that the applicant did no provide sufficient details. It was ex parte applicant's case that the Respondent thereby breached the principles of natural justice by refusing to accord the ex parte applicant the right to be heard.

10. It was the ex parte applicant's case that the Respondent now wanted to subject the ex parte applicant to an appeal process over an illegal, immoral, wedensbury unreasonable, irrational and procedurally unfair re-assessment and continued to compel the ex parte applicant to pay an illegal amount of Kshs 378,682,140.00 whose calculation was marred with monumental irregularities, as the tax payable between 2011-2016.

11. It was disclosed that upon issuing the impugned final amended assessment on 5th September, 2016, in a letter dated 26th September, 2016, the Respondent again requested for documents to support payment schedules provided by the County Government of Nairobi. The Respondent also requested the County Government's Secretary, **Dr Robert Ayisi**, to provide witness summons regarding payments made to the ex parte applicant and threatened the said Secretary with sanctions under sections 99 and 100 of the ***Tax Procedures Act, 2015*** in default. It was however the ex parte applicant's case that these requests were unreasonable, procedurally unfair and illegal since the Respondent had already purportedly made an assessment of the alleged tax due and payable by the ex parte applicant, before seeking for more documents and evidence to prove its assessment, a clear indication that the Respondent lacked evidence before its purported impugned assessment.

12. It was averred that while this was ongoing, the information held in the ledger by the Respondent indicated that on 2nd June, 2016, an entry of Kshs 159,368,630.00 was entered as tax payable by the ex arte applicant in respect of VAT alone, which was followed by the first assessment done on 7th June, 2016 for Kshs 443,631,900.00. Apart from this another entry for Kshs 327,868,825.00 was entered as tax payable by the ex parte applicant in respect of VAT alone on 5th September, 2016 making a total of Kshs 487,237,455.00 in terms of VAT alone the same date the impugned amended assessment of Kshs 378,682,140 was issued.

13. It was the ex parte applicant's case that this is not only manifestly unreasonable but also depicts malice since the amount he purportedly owes the Respondent in terms of VAT alone is more than the actual amount he has ever received in his accounts. To him, it is further unreasonable to indicate that he incurred a total of Kshs 487,237,455.00 in respect of VAT from 2nd June, 2016 to 5th September, 2016 whereas the total amount he received in all his accounts for the same period is far below that figure.

14. It was the ex parte applicant's contention that since the impugned assessment was based on wrong entries, it was a recipe for quashing.

15. The ex parte applicant was of the view that the purported investigation and subsequent assessment was calculated to embarrass him and that the same was malicious, defamatory, vindictive, immoral, irresponsible and purely political in nature intended solely to intimidate him, with some desired results in the performance of his duties especially at the Judicial Service Commission and in the ex parte applicant's professional undertakings.

Respondent's Case

16. In response the Respondent outlined its statutory role and mandate and averred that the ex parte applicant is an advocate and proprietor of the law firm of Prof Ojienda & Associates registered for tax under PI A0023966065 with his offices based at Suite No. A8, Silverpool Office Suites, Jabavu Lane, off Argwings Kodhek Road, Nairobi and has offices at C. K Patel Building Kenyatta Avenue, Nakuru. Apart from that firm, the ex parte applicant, according to the Respondent, is indicated as a senior partner in the Law Firm of Odhiambo & Odhiambo Advocates, established in 1994 based at Nakumatt Westside Mall within Nakuru and I registered for tax under PIN P051127831W.

17. According to the Respondent, it had been investigating the applicant from 1st March, 2016, after receiving intelligence information that there were allegations by the Senate that the Nairobi City County Government had procured legal services from the applicant's firm on 7th January, 2014 at the cost of Kshs 92.8 million in a case against the Nairobi Metropolitan PSV Sacco. Further, there were allegations that the ex parte applicant sued the Nairobi City County Government in August, 2015 for non-payment of

legal fees amounting to Kshs 724,197,078.00. The Respondent also averred that in the same intelligence there were claims that Kshs 280 million was wired into the ex parte applicant's personal account for legal services to Mumias Sugar Company.

18. The Respondent then proceeded to set out the particulars of the various bank accounts which in its view the ex parte applicant held either personally or jointly and indicated the ones which were part of the assessment. It was its case that it analysed the bank statements of the various Bank Accounts held by the ex parte applicant at Barclays Bank Ltd and Standard Chartered Bank to determine the nature and value of deposits within the period under review with a view to ascertaining the taxable income of the ex parte applicant. However, it was contended that deposits from loans, salaries, interbank transfers and disbursements were excluded as they do not constitute taxable income. The Respondent then tabulated what in its view was taxable income after excluding the salaries, per diems, disbursements and interbank transfers.

19. It was the Respondent's case that it compared he income as analysed above with the self-assessments of the ex parte applicant and found that the income was much higher than was declared by the ex parte applicant in his self-assessment tax returns filed with the Respondent. It was disclosed that the Respondent also sought other sources of information under section 56 of the ***Income Tax Act***, section 59 of the ***Tax Procedures Act, 2015*** and section 48 of the ***VAT Act, 2013***, with a view to collecting evidence of payments made by third parties for legal services offered by the ex parte applicant. It was averred that the independent information from third parties confirmed that the ex parte applicant was paid legal fees by the Nairobi City County amounting to Kshs 269,858,001.00.

20. It was averred that the Respondent wrote to Mumias Sugar Company Limited vide a letter dated 14th March, 2016 requesting the company to provide the Respondent with fee notes, invoices and payment documents made to the ex parte applicant by the company and that copies of the documents were availed by the said company which, after analysis, the Respondent discovered that most payments were for legal fees made through cheques and that those whose amounts exceeded Kshs 1,000,000.00 were wired directly to the ex parte applicant's Bank Account No. 015015443401 (Standard Bank, Nakuru) which the ex parte applicant alleged to be the client's account as well as Barclays Bank. Hurlingham Branch account no. 2024984489. It was averred that the total payments made by Mumias Sugar Company Limited for legal services offered by the applicant was Kshs 89,472,982.95 credited in account No. 015015443401 at Standard Chartered Bank, Nakuru where the applicant is the sole signatory to the account as well as Barclays Bank, Hurlingham Branch account no. 2024984489. However what was assessed was Kshs 87,450,982.95 which was the amount that had been availed to the Respondent before the final assessment was made.

21. It was averred that the ex parte applicant generated ETR receipts to Mumias Sugar Company and charged VAT to the transactions using his personal PIN A002396606S. It was disclosed that though the VAT so charged by the ex parte applicant was held in trust for the Respondent, the same was not remitted to the Respondent in accordance with both the repealed ***VAT Act***, Cap 476 and section 44 of the VAT Act, 2013. Similarly, the documents obtained from the Nairobi City County Government confirm payments to the ex parte applicant for legal services.

22. According to the Respondent, it traced some of the payments made by the said County Government for the legal services to the ex parte applicant's Bank Account No. 2024984489, Barclays Bank, Hurlingham Branch which the ex parte applicant claims to be client's account and that the payments were done via G Pay, cheque or direct transfer from the bank account of the said County Government.

23. It was the Respondent's case that following the analysis of the foregoing, it issued an additional assessment amounting to Kshs 443,631,900.00 to the ex parte applicant vide a letter dated 7th June, 2016. However, the ex parte applicant objected to the said additional assessment vide a letter dated 6th July, 2016 citing various grounds, an objection which the Respondent acknowledged through a letter dated20th July, 2016 and invited the applicant through its tax agent for a meeting to discuss matters arising from the said objection. It was averred that the meeting between the Respondent and the said tax agent was held on 7th July, 2016 and the Respondent requested the ex parte applicant to demonstrate instances where

allowances, client's money and disbursements were being deposited into the accounts identified and the ex parte applicant undertook to do so by 2nd August, 2016. It was averred that the Respondent made a follow up to the same vide a letter on 3rd August, 2016 but the said information was not availed. However on 12th August, 2016 the Respondent received a letter from the ex parte applicant dated 10th August, 2016 forwarding certain documents which documents did not demonstrate instances when allowances, client's monies and disbursements were deposited in the accounts claimed to be clients' accounts in order to enable the Respondent amend the assessment appropriately.

24. It was averred that the Respondent communicated to the ex parte applicant the missing information and subsequently, a further meeting was held between the Respondent and the ex parte applicant on 18th August, 2016 at which matters arising from the objection were discussed and more details sought by the Respondent. However no information was thereafter availed though vide a letter dated 2nd September, 2016, the ex parte applicant sought for more time (one month) so as to avail the supporting document for his objection, a request which the Respondent objected to citing section 51(11) of the ***Tax Procedures Act***, which limited the Respondent to sixty days to make an objection decision, which decision ought to have been made by 5th September, 2016 failing which the objection would be automatically allowed.

25. In the absence of supporting documents, it was averred, the Respondent was left with no alternative but to issue its objection decision under section 51(9) of the ***Tax Procedures Act*** and the ex parte applicant was duly served with the same on 5th September, 2016.

26. According to the Respondent, section 31 of the ***Tax Procedures Act***, 2015 allows the Commissioner to amend an assessment by making alterations or additions from the available information and to the best of his judgement.

27. According to the Respondent the objection decision of 5th September, 2016 was based on three heads: Income Tax, VAT and PAYE. It was explained that Income Tax was assessed based on under declarations in the self-assessments of the ex parte applicant; VAT based on VAT charged by the ex parte applicant but not remitted to the Respondent and PAYE based on the fact that the Respondent has a payroll that he never deducted and remitted his employees' PAYE as required by the law.

28. According to the Respondent, Tax Compliance status of tax payer is subject to a caveat and further subject to section 72(3) of the ***Tax Procedures Act***. In this case it was averred that the ex parte applicant is tax non-compliant and has been under-declaring his income contrary to section 97(a) of the ***Tax Procedures Act*** and that based on these findings, the applicant's application for a tax compliance certificate dated 7th September, 2016 was rejected by the Respondent.

29. It was deposed that pursuant to the provisions of section 31(4)(b) of the ***Tax Procedures Act***, 2015, the Respondent vacated the assessments for the year 2009 and 2010 which decision was communicated via the objection decision dated 5th September, 2016 and the original demand of Kshs 443,631,900.00 substituted with Kshs 378,682,140.00.

30. It was averred that sections 38 and 83 of the ***Tax Procedures Act***, 2015 provide for late payment interest and penalties and that the said sum of Kshs 378,682,140.00 was arrived at after subjecting the tax due from the ex parte applicant to the said late payment interest and penalties.

31. The Respondent contended that after the 5th September, 2016, having issued its objection decision, the Respondent was no longer looking for documents to assess the ex parte applicant but was conducting investigations and seeking evidence of tax offences as provided for in law.

32. It was the Respondent's position that section 52(1) of the ***Tax Procedures Act*** provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tax Appeals Tribunal in accordance with the provisions of the ***Tax Appeals Tribunal Act***, No. 40 of 2013. However the ex parte applicant has not lodged any such appeal.

33. It was the Respondent's case that this application does not meet the threshold for the issuance of prerogative orders sought and should be dismissed with costs to the Respondent.

Determination

34. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

35. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

36. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a**

Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

37. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

38. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

39. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR,** that:

"**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision**…**I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...**"

40. In **JR. Misc. Application No. 477 of 2014: Republic vs. Public Procurement Administrative Review Board & 2 Others** this Court expressed itself as follows:

"…the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substituting their own judgment for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question…In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interested party did not comply with its

directions issued in the respondent's earlier decision is a matter which would go to the merit rather that the process".

41. Republic vs. Public Procurement Administrative Review Board & Another *ex parte* Gibb Africa Ltd & Another [2012] eKLR where the court set out the established reach of judicial review in Kenya thus:

"In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means lest he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in *Grain Bulk Handlers Limited v J. B. Maina & Co. Ltd & 2 others [2006] eKLR* summarized the purpose of judicial review by stating that:-

"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited *Civil Service Unions vs Minister for the Civil Service case*, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable which I submit is not the case here."

42. Similarly in **Hangsraz Mahatma Gandhi Institute & 2 Others [2008] MR 127** it was stated that:

"Judicial Review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However it will intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the Wednesbury sense; had acted in an unfairly manner and the applicant was not given a fair treatment."

43. In **Penina Nadako Kiliswa vs. Independent Electoral & Boundaries Commission (IEBC) & 2 Others (2015) eKLR,** Supreme Court of Kenya held at paragraph 28:

"The well-recognized principle in such cases is that the court's target in judicial review is always no more than the process which conveyed the ultimate decision arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence, an applicant making a case for judicial review has to show that the decision in question was illegal irrational or procedurally defective."

44. The *Code of Civil Procedure,* Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla** states:

> **"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure…The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."**

45. However, the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** expressed itself at paras 55-58 as follows:

> **"55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**
>
> **56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair**

Administrative Action Act.

57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act,* there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

46. It is now recognised that one of the grounds for grant of judicial review relief is unreasonableness of the decision being challenged. This is clearly a deviation from the traditional common law approach that what is to be considered is the process by which the decision is arrived at rather than the decision itself. An examination of whether or not a decision is unreasonable clearly calls for some measure of consideration of the merits of the decision itself though not in the manner contemplated by an appellate process.

47. According to **De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 7th edition** at paragraph 11-036 on page 602, a decision is also irrational if it lacks ostensible logic or comprehensible justification and that though the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness, hence a decision is said to be irrational in the strict sense of that term if it is unreasoned; if it is *"lacking ostensible logic or comprehensible justification"*.

48. Unreasonableness, according to the same work at para 11-029, connotes decisions which have been accorded manifestly inappropriate weight; strictly "irrational" decisions, namely, decisions which are apparently illogical or arbitrary; uncertain decisions; decisions supported by inadequate or incomprehensible reasons; or by inadequate evidence or which are made on the basis of a material mistake or material disregard of fact.

49. According to **De Smith's Judicial Review** (sixth edition) at Page 559 that:

"Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic…Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision."

50. Sedley, J in **R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another [1998] 1 PLR 1**, states at page 11 that:

"What the not very apposite term "irrationality" generally means in this branch of the law is

a decision which does not add up-in which, in other words, there is an error of reasoning which robs the decision of logic."

51. In **Salim Juma Oditi vs. Minister for Local Government & Ors (2008) eKLR, Wendoh, J** referring to the case of **Associated Provincial Pictures Houses Ltd vs. Wednesbury Corporation (1948) 1KB 223** at P. 229 held that:

"It is true discretion must be exercised reasonably. Now what 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 a 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 their 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."

52. Based on **Bato Star Fishing Ltd vs. Minister of Environmental Affairs and Tourism [2004] ZACC 15**at 44,which was dealing with section 6(2)(h) of the South African ***Promotion of Administrative Justice Act***, a legislation which squares with section 4(2)(k) of our ***Fair Administrative Action Act, 2015*** to the extent that it forbids unreasonable administrative actions or decisions, because of the constitutionalisation of fair administrative action, an unreasonable decision is simply a decision that a reasonable decision-maker could not reach and not necessarily an egregious one per ***Wednesbury.*** In the South African Case the Court opined that:

"42. ...It is well known that the pre-constitutional jurisprudence failed to establish reasonableness or rationality as a free-standing ground of review. Simply put, unreasonableness was only considered to be a ground of review to the extent that it could be shown that a decision was so unreasonable as to lead to a conclusion that the official failed to apply his or her mind to the decision.

44. ...The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be "reasonable". Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."

53. It is in this respect that I understand **Onguto, J's** decision in **Kenya Human Rights Commission vs. Non-Governmental Organisations Co-Ordination Board [2016] eKLR** where the Learned Judge held that the Court, effectively has a duty to look both into the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, and also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of the Constitution.

54. In this case it is contended that the Respondent's decision was unreasonable in that it assessed the ex parte applicant's tax liability without any material and only thereafter did it seek such material. Obviously a decision arrived at without evidence cannot be said to be rational or reasonable. In that event as was held by the Constitutional Court of Uganda in **Twinobusingye Severino vs. Attorney General case, Constitutional Petition No. 47 of 2011**:

"If any authority misdirects itself in law or acts arbitrarily on the basis of considerations which lie outside statutory powers, or unreasonably that its decisions cannot be justified by any objective standard of reasonableness, then it is the duty and functions of the courts to pronounce that such decisions are invalid and when these are challenged by any one aggrieved by them and who has the necessary *locus standi* to do so".

55. Unreasonableness as a ground for is also intertwined with proportionality as a ground for review. In Kenya, Courts in handling decisions of administrative bodies or authorities are required to and have utilized the test of proportionality in addition to the traditional grounds of review. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that:

> **"(1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights."**

56. Accordingly I associate myself with the position taken in **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** where it was held that:

> **"Clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards."**

57. The ***Fair Administrative Act*** (Sections 7(i) and 7(ii)) recognises proportionality as a ground to challenge administrative decisions if the decision is not proportionate to the interests or rights affected.

58. The courts have therefore over the years developed a framework within which to conduct a proportionality analysis which is usefully summarised by **De Smith, Woolf and Jowel**, ***Judicial Review of Administrative Action***, Fifth Edition (pp.594-596) that it is "*a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues*". Therefore the principle, encompasses any or all of the following tests:

> **a. The balancing test, *which requires a balancing of the ends which an official decision attempts to achieve against the means applied to achieve them. This requires an identification of the ends or purposes sought by the official decisions. In addition it requires an identification of the means employed to achieve those ends, a task which frequently involves an assessment of the decision upon affected persons.***
>
> **b. The necessity test which requires that where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective…this aspect of proportionality requires public bodies to adopt those regulatory measures which cause minimum injury to an individual or community.**
>
> **c. The suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.**

59. In this case it was the ex parte applicant's case that upon issuing the impugned final amended assessment on 5th September, 2016, in a letter dated 26th September, 2016, the Respondent again requested for documents to support payment schedules provided by the County Government of Nairobi. It is on all fours that the final amended assessment was made vide the objection decision on 5th September, 2016. By the said letter dated 26th September, 2016, the Respondent referred to a letter dated 28th April, 2016 and sought, as regards the ex parte applicant herein, terms of reference/contracts/instructions, invoices/fee notes and payment documents, withholding tax certificates and withholding VAT Certificates, Court awards or any other money paid to third parties through the ex parte applicant's firm on behalf of the County Government and any other document relevant to the tax investigation. One does not need to be a rocket scientist to see that the documents sought for were relevant for the purposes of

determination of the ex parte applicant's tax liability. The Respondent drew the attention of the Secretary to the County Government to sections 99 and 100 of the ***Tax Procedures Act*** which sections provide as follows:

> **99. Offences relating to enforcement powers**
>
> **(1) A person commits an offence when that person—**
>
> **(a) fails to provide information or produce any document for examination as required by the Commissioner under section 59(1)(a) or (b);**
>
> **(b) fails to appear before the Commissioner as required under section 59(1)(c); or**
>
> **(c) fails to answer any question put to the person by the Commissioner or authorised officer in accordance with section 59(1)(c).**
>
> **(2) A person commits an offence when the person, without reasonable excuse, fails to provide reasonable facilities and assistance as required by section 60(3) (d), (e), and (f), and (6).**
>
> **100. Obstruction of authorised officer**
>
> **A person commits an offence if the person hinders or obstructs the Commissioner or an authorised officer in the performance of the Commissioner's or authorised officer's duties under a tax law**.

60. Section 59(1)(a)(b) and (c) of the ***Tax Procedures Act*** referred to above provides as follows:

> **For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to—**
>
> **a. produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person;**
>
> **b. furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or**
>
> **c. attend at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.**

61. It is therefore clear that the provisions of section 59(1) of the ***Tax Procedures Act*** can only be invoked for ***the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law.*** In this case however the Respondent contended that after the 5th September, 2016, having issued its objection decision, it was no longer looking for documents to assess the ex parte applicant but was conducting investigations and seeking evidence of tax offences as provided for in law. With due respect the Respondent seems to have caught the wrong end of the stick. In seeking information it relied on a provision of the law that entitles it to do so for the purposes of determining the ex parte applicant's tax liability which it had already purported to have determined.

62. With due respect the Respondent seems to have relied on information emanating from third parties without and before carrying out its own investigation and only seeking to support the same after making the decision. In so deciding, the Respondent seems to have delegate its powers and exercise of discretion

to the said third parties contrary to section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

63. In **Hardware & Ironmonery (K) Ltd vs. Attorney-General Civil Appeal No. 5 of 1972 [1972] EA 271,** the Court expressed itself as follows:

"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."

64. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** it was held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. *It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission*... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."** [Emphasis mine.].

65. In the same vein in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** it was held that:

> **"It was a violent breach of the rules of natural justice they are so called because in the absence of some statutory provision as to how the persons who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. The decision maker is not a judge in the proper sense of the word but he must give the parties an opportunity of being heard, before him and stating their case and their view. *He must give notice that he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom authority is not given by law."***

66. It was similarly held that by **Lord Somervel** in **Vine vs. National Doc Labour Board [1956] 3 All ER 939**, at page 951 that:

"The question in the present case is not whether the local board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate. In deciding whether a person has power to delegate, one has to consider the nature of the duly and the character of the person. Judicial authority normally cannot, of course, be delegated…There are on the other hand many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under Crown or not, he would normally, have no authority to delegate. He could take advice, of course, but he could not, by a minute authorise someone else to make the appointment without further reference to him. I am however, clear that the disciplinary powers, whether "judicial" or not, cannot be delegated."

67. It is therefore my view and I hold that the decision by the Respondent in so far as it was arrived at prior to the exercise of the powers conferred on the Commissioner by section 59(1) of the ***Tax Procedures Act***, was unreasonable and irrational and cannot stand.

68. As regards the quantum of damages, the law as set out by the Court of Appeal is that unless the impugned decision is unreasonable, the Court should exercise restraint if what is being challenged is whether tax is payable or how much is due. This position was made clear in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007** where the Court of Appeal held that:

"it was not the role of the superior court nor of this Court to determine the correctness or otherwise of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004."

69. This Court cannot therefore step into the shoes of the Respondent and the Tax Appeals Tribunal and determine whether or not the parte applicant is liable to pay tax and the quantum thereof, at least until all the statutory dispute resolution mechanisms have been exhausted.

70. Similarly, considering the fact that the Respondent's power to determine an objection is time bound, I am unable to find that the Respondent's objection decision violated the ex parte applicant's right to be heard as the Respondent was bound to make a determination within the time prescribed by the law. In this case, the ex parte applicant was clearly afforded an opportunity of being heard and whether or not time should have been extended to the ex parte applicant was an exercise of discretion and considering the Respondent's position that the extension of time as requested by the ex parte applicant would have automatically validate the objection, I cannot in the circumstances of this case fault the Respondent on that score.

71. I however agree with the ex parte applicant that in respect of the period when Tax Compliance Certificates had been issued, the Respondent could not arbitrarily reverse its decision to issue the same without reverting to the ex parte applicant as that would clearly amount to a violation of the ex parte applicant's legitimate expectation. It is not in doubt that on 26th May, 2016, the Respondent issued the applicant with a Tax Compliance Certificate in which it was confirmed that the applicant, Odhiambo & Odhiambo Advocates had filed relevant tax returns and paid taxes due as provided by the law. The said certificate was to be valid for twelve (12) months up to 25th May, 2017. The effect of the issuance of a Tax Compliance Certificate has been the subject of determination by this Court. In **Republic vs. Kenya Revenue Authority & Another ex parte Tradewise Agencies [2013] eKLR**:

"Although the respondent contends that a person who complies with the provisions of the Seventh Schedule paragraph 7 is eligible for a Tax Compliance Certificate because the said person has filed tax returns and paid what he has assessed himself as due to the Commissioner and that a Tax Compliance Certificate does not mean that a person's accounts are perfect or beyond reproach and only an audit conducted by the First Respondent can certify accounts to be beyond reproach for tax purposes the same certificates indicate that the authority reserves the right to withdraw the certificate if new evidence materially alters the

tax compliance status of the recipient. Why would the certificate be withdrawn if it is not evidence of compliance? If it is only evidence of submission of remission of taxes in which event it is not binding on the authority there would be reason for it to be withdrawn by the authority. The only conclusion one would draw is that the certificate is prima facie evidence of compliance and until withdrawn the same is proof of fulfilment of the obligation to pay taxes...Whereas this Court cannot hold that the applicant was not obliged to pay any taxes, the 1st respondent was expected to notify the applicant of any discovery of new evidence which was likely to materially alter the applicant's tax compliance status and hear the applicant's side of the story before taking an action which was contrary to its earlier conduct."

72. It is important to mention that there was attempt to appeal against the said decision vide **Kenya Revenue Authority vs. Tradewise Agencies Limited & Consolidated Bank of Kenya 2014] eKLR**. However on 28th day of February, 2014, **Kihara Kariuki, PCA** dismissed an application which was seeking to extend time or the filing of the Notice and the Record of Appeal thus sealing the fate of the appeal in so far as that ruling was concerned.

73. The same position was adopted in **Republic vs. Kenya Revenue Authority Ex Parte Cooper K-Brands Limited [2016] eKLR,** where it was held as follows:

"It bears repeating that Tax Compliance Certificates are not a final proof of payment of taxes. However, where there is evidence that the taxpayer did not actually pay the taxes, the tax authority ought to furnish the taxpayer with the grounds on the basis of which the tax authority believes that the information giving rise to the Certificate was incorrect before seeking to recover what in its view is the correct amount of tax due."

74. In other words Tax Compliance Certificate is a rebuttable evidence that a person is tax compliant and to my mind the burden of rebutting that presumption falls on the Tax Authority. In other words the issuance of a Tax Compliance Certificate creates a legitimate expectation on the part of the tax payer that the same will not be withdrawn without him being afforded an opportunity to address the intended decision to withdraw the same. *In **Republic vs. Kenya Revenue Authority Ex-Parte Yaya Towers Limited [2008] eKLR**, which **Nyamu, J** (as he then was) reproduced the decision of the House of Lords in the case of **Council of Civil Service Unions and Others vs. Minister for the Civil Service [1924] 3 All ER 935** at p. 936, where it was held that:-*

"An aggrieved person was entitled to revoke judicial review if he showed that a decision of a public authority affected him by depriving him of some benefit or advantage which in the past he had been *permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal. The appellants' legitimate expectation arising from the existence of a regular practice of consultation which the appellants could reasonably expect to continue gave rise to an implied limitation on the minister's exercise of the power contained in act 4 of the 1982 order; namely an obligation to act fairly by consulting GCHQ staff before withdrawing the benefit of trade union membership. The minister's failure to consult prima fade entitled the appellants to judicial review of the minister's instruction".*

75. CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935 where **Lord Diplock** states, at page 949 that:

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has

been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (Emphasis supplied).

76. N the issue whether the ex parte applicant ought to have resorted to the appellate process to challenge the decision, the ex parte applicant's position is that the so called decision by the Respondent was not its decision at all as it was arrived at prematurely. In those circumstances, it is my view and I so hold that the appellate process which deals with the merits of the assessment would not have been an efficacious remedy. As was appreciated by in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240**:

> **"The respondents' argument that the applicant came to court prematurely without exhausting the internal tax objection process as regards each category of tax, is a serious misdirection because as it has been stated elsewhere in this judgment the issues raised were greater than any of the internal tribunals could handle. The task before the court is not, and has not been that of counting the shillings, it has been one of adjudicating on illegality, the doctrine of *ultra vires*, irrationality, procedural impropriety, Wednesbury unreasonableness, oppression, malice, bias, discrimination and abuse of power. Based on the turning points, outlined above the Court finds that the applicant has demonstrated that the respondents have acted *ultra vires* their powers to assess and levy tax in relation to the applicant. The act of lumping together assessments whereas the statute provides for separate notices of assessment to be issued and giving a 14 days notice, initially, without the separate assessments, was an act aimed at ambushing the applicant and causing panic. In short it was a malicious act which the respondents were not legally entitled to do – what the respondents were authorized to do as stated in *Somerset* is only what is within their statutory powers. And in the face of this, the respondents still have the courage to fault the applicant in seeking judicial review. I say no, when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."**

77. Similarly in **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Ltd [1981] UKHL 2** it was held that:

> **"A taxpayer would not be excluded from seeking judicial review if he could show that the Revenue had either failed in its statutory duty towards him or had been guilty of some action which was an abuse of their powers or outside their powers altogether...I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly...to ensure that there are no favourites and no sacrificial victims."**

78. It follows that both on the grounds of unreasonableness and legitimate expectation the ex parte applicant's Motion on Notice dated 29th November, 2016, must succeed.

Order

79. In the premises the orders which commend themselves to me and which I hereby grant are as follows:

> **1. An order of certiorari removing into this Court and quashing the assessment conducted by the Respondent, its agents, employees and/or servants contained in a letter dated 7th June, 2016 directed at the ex parte applicant demanding the payment of Kshs 443,631,900.00 as total tax due and owing to the Respondent by the ex parte applicant for the period 2009-2016.**
>
> **2. An order of certiorari removing into this Court and quashing the decision of the Respondent, its agents, employees and/or servants contained in a letter dated 5th September,**

2016 referred to as amended assessment purporting to be an objection decision directed at the ex parte applicant demanding the payment of the sum of Kshs 378,682,140.00 as total tax due and owing to the Respondent by the ex parte applicant for the period 2011-2016.

3. An order of prohibiting the Respondent from demanding the payment of Kshs 443,631,900.00 as total tax due and owing to the Respondent by the ex parte applicant for the period 2009-2016.

4. An order of prohibiting the Respondent demanding the payment of Kshs 378,682,140.00 as total tax due and owing to the Respondent by the ex parte applicant for the period 2011-2016.

5. As the issue of how much, if any tax, is due from the ex parte applicant to the Respondent is still at large, there will be no order as to costs.

80. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 11th day of May, 2018

J M MATIVO

JUDGE

In the presence of: