REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 477 OF 2015

REPUBLIC…….....…..APPLICANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES…....1st RESPONDENT

KENYA REVENUE AUTHORITY……...……..2nd RESPONDENT

EX —PARTE APPLICANT: FLEUR INVESTMENTS LIMITED

RULING

Introduction

1. By a Notice of Motion dated 18th December, 2015, the *ex parte* applicant herein, **Fleur Investments Limited,** seeks the following orders:

> **1. AN ORDER OF CERTIORARI do issue to remove into the High Court of Kenya and quash the decision of the Respondent contained in the Assessment and Letter of Demand dated 29th June 2015 and 14th September 2015 respectively directing the Applicant to remit an amount totaling Kshs. 656,372,183 and Kshs. 644,342,189 respectively.**
>
> **2. AN ORDER OF PROHIBITION do issue to prohibit the Commissioner of Domestic Taxes from implementing and effecting the Assessment and Demand as contained in the Assessment and Letter of Demand dated 29th.lune 2015 and 14thSeptember 2015 respectively.**
>
> **3. AN ORDER that the Respondents do pay the costs of and occasioned by this application.**

Ex Parte Applicant's Case

2. According to the applicant, up to the year 2009, it was engaged in the real estate business as landlord and this was its only income generating activity. Thereafter it carried out no other business and had no income as defined under the ***Income Tax Act***. It had however always filed its income tax and Value Added Tax ("VAT") returns with the Respondent as required by law through its agent Ms Deloitte & Touche, meaning that all information regarding its income, assets and liabilities had been fully disclosed to the Respondent.

3. The applicant however averred that sometime in November 11th, 2013 the 1st Respondent sought to

carry out a compliance check on the books of the Applicant pursuant to section 56 of the ***Income Tax Act*** (Cap 470) and section 30 of the ***Value Added Tax Act*** (Cap 476) (the VAT Act") with effect from Monday 11th December, 2013. However, the said compliance check was postponed and not carried out. By letter dated 9th July, 2014 the 1st Respondent once again asked for examination of all of the Applicant's records, books of accounts and all the documents listed in its letter of that date and by its letter dated 16th August, 2014, the Applicant confirmed the availability of all the information and documents which the 1st Respondent had asked for.

4. It was averred that the 1st Respondent having checked the business transaction for the years 2010 to 2014, confirmed by its letter dated 29th September, 2014 as follows:-

a) Income Tax revealed that audited accounts had been filed and there were no outstanding issues.

b) The Company had no employees.

c) VAT was administered correctly and there were no outstanding issues. The Applicant was therefore commended for being tax compliant. The Applicant was issued with Tax Compliance Certificate up to 29th October, 2015.

5. To the applicant, it was strange that on 29 June 2015, the Respondent raised an assessment notice on the applicant under section 73 of the ***Income Tax Act*** (Cap 470) and section 45 of the ***Value Added Tax Act***, No. 35 of 2013. By the said notice the Respondent demanded payment of Kshs. 656,372,183 being the purported Corporation Tax, VAT, penalties and interest owed by the Applicant for the period 2008 to 2012 which according to the Respondent was based on the computation of the Applicant's estimated "banking income" under the pretext that the Applicant failed to honour a notice of 10 June 2013 scheduling compliance checks and postponing the same due to various reasons and to provide supporting documents to the Respondent to enable it ascertain its income.

6. According to the applicant, in a response dated 14 July 2015, it objected to the assessment and demanded the immediate withdrawal of the assessment notice on the grounds that:-

(a) It was not true that the Applicant had not responded to the letter of 10 June 2013 and that the parties had exchanged several correspondence long after receipt of the said letter of 10 June 2013 hence it was curious that the Respondent would wait for two years before alleging that the Applicant did not respond to its letter of 10 June 2013. The assessment was not based on receipt of any income as defined under the ***Income Tax Act*** or the ***Value Added Tax Act*** for rendering any services or sale of goods as defined under the two Acts.

(b) The Tax allegedly due under section 73 of the ***Income Tax Act*** was erroneous because the Applicant had consistently filed returns with the Respondent through its agent Ms. Deloitte & Touche for all the years in question, which returns had never been questioned. In the circumstances, no amount was due contrary to the Respondent's demand;

(c) The assessment in respect of the VAT allegedly due was similarly erroneous because the Applicant had always filed its monthly returns on time. There had been no delay by the Applicant in filing returns and neither were its returns incorrect or inadequate. It was therefore not clear on what basis the Respondent was bringing the Applicant to tax under the Seventh Schedule to the ***VAT Act***; and

(d) Following the compliance check carried out in August 2014, the Respondent had given the Applicant a clean bill of health. The assessment only showed that the Respondent had not interrogated its records.

(e) The assessment did not reflect the financial position of the Applicant since the figures stated therein as income was not only exaggerated but they were also not supported as income by documentary or other evidence.

7. The applicant however averred that despite its objection, the Respondent declined to withdraw the assessment and instead by letter dated 14th September 2015, adjusted the sum demanded to Kshs.644,342,189.00 and in the said letter:-

(a) notified the Applicant that its objection could not be upheld as it was not accompanied by any supporting documents as required under section 84 of the ***Income Tax Act*** (Cap 470);

(b) Purported that the Applicant had not availed the records sought in the Respondent's letter of 25th March 2014 and that in the circumstances, the Respondent was left with no option but to assess the Applicant based on the "best evidence";

(c) Purported that the Applicant denied its officers entry to its premises on 10th March 2014 when they had come to conduct a compliance check; and

(d) Denied issuing the letter giving the Applicant a clean bill of health.

8. It was averred by the applicant that by letter dated 2nd October 2015, the Applicant reiterated its request for withdrawal of the assessment notice on the following grounds:-

(a) The Respondent has misapplied the provisions of section 84 of the ***Income Tax Act*** as it does not envisage a tax payer (in this case the Applicant) resupplying documents already in the custody of the Respondent. In this case, the Applicant's returns had been filed through its agent M/s Deloitte and Touche for the period in issue and were in the Respondent's custody. The said documents were further attached to the letter aforesaid. It was therefore unreasonable for the Respondent to request that the objection be accompanied by documents already in its possession;

(b) The allegation that the Respondent's were denied entry to the Applicant's premises on 10th March 2014 was not true. No compliance check had been scheduled for 10th March 2014 and indeed no official of the Respondent went to the Applicant's premises on the said date. The correct position is that by letter dated 17th February 2014 in response to the Respondent's email of 5 February 2014, the Applicant had enquired when the Respondent's officers were available and in its reply dated 21st February 2014 the Respondent advised that the compliance check would be carried out on 12th March 2014. The allegation that the Respondent sent its officers on 10th March 2014 was in the circumstances false.

(c) In August 2014, the Respondent had carried out a compliance check and by letter dated 29th September 2014, it notified the Applicant that no issues arose from the audit and subsequently issued the Applicant with confirmation that it was fully tax compliant on 29th October 2014. It follows that the said assessment notice was issued on a patently false premise and that the Respondent had chosen to ignore information in its possession.

9. The applicant averred that subsequently, on 9th October 2015, it issued a notice of intention to appeal against the said assessment and on 12th October 2015, sought confirmation from its auditors M/s Deloitte and Touche on:-

(a) The tax returns filed with the Respondent on behalf of the Applicant;

(b) Confirmation that all transactions in the Applicant's bank accounts were properly captured and reflected in the Applicant's financial statements for the relevant years;

(c) The total accounting and taxable incomes for each year: and

(d) What was the tax due for each of the years, what was paid and if there was any underpayment or overpayment.

10. The applicant disclosed that in a response dated 16th October 2015, Deloitte and Touche confirmed that it filed returns with the Respondent for the years 2008 to 2013 and indicated the dates when the returns were filed. To the applicant, the figures incorporated in the tax returns were in tandem with the Applicant's audited financial statements and the underlying accounting records for each year and that the financial statements had been audited in accordance with the International Standards on Auditing. The applicant revealed that the accounting income and tax adjusted income/(loss) for the period in issue was as follows:-

Year of Income	Accounting Income	Tax adjusted income/(Loss)
2008	32,817,808	10,433,153
2009	7,200,000	(37,137,930)
2010	5,040,000	(42,265,772)
2011	5,520,000	473,135
2012	5,060,000	NIL
2013	NIL	NIL
2014	NIL	NIL

11. The applicant further averred that the details of tax due, paid and any tax overpaid/underpaid was as follows:-

Year of Income	Tax Due	Tax Paid	(Over)/Under payment
2008	3,129,946	4,075,756	(935,810)
2009	NIL	1,368,333	(1,368,333)
2010	NIL	NIL	NIL
2011	NIL	NIL	NIL
2012	NIL	NIL	NIL
2013	NIL	NIL	NIL
2014	NIL	NIL	NIL

12. The applicant further averred that whereas in the said letter, the Auditors confirmed having filed with the 1st Respondent the financial statements confirming all the transactions in the company bank account in each financial year, the 1st Respondent purported to consider the Bank Statements without taking into account the financial statements which were duly filed. In the applicant’s view, it is clear from the foregoing that the Respondent had no right to raise an assessment on the Applicant based on fictitious or assumed "banking income" when all the documentary evidence in its possession and the compliance check of August 2014 clearly showed that the Applicant had no taxable income during the period in issue and that there were no tax issues arising.

13. It was the applicant’s belief that having supplied to the Respondent its annual returns, audited financial statements and all other documents requested showing its actual income and having also received confirmation by letter dated 29th September 2014 that no tax issues arose, there was no

justifiable basis as to why the Respondent would raise an assessment based on the assumed "banking income" or using the 'best evidence rule". In the circumstances, the assessment notice was issued improperly and unreasonably. It was the applicant's case that having confirmed that there were no tax issues arising on 29th September 2014 in connection with the August 2014 compliance audit for the period 2010 to 2014, it is inconceivable that nine (9) months later, the Respondent could raise an assessment of Kshs.656,372,183. It was the applicant's case that in claiming that the Applicant is liable to tax as aforesaid, the Respondent totally has acted unreasonably, irrationally and contrary to the Income Tax and VAT Acts. Similarly, in ignoring the Applicant's actual income as set out in the annual returns and audited financial statements and as ascertained in the Respondent's Audit of August 2014, the Respondent was actuated solely by the need to impose undue taxes upon the Applicant and therefore acted *ultra vires* its powers and authority.

14. It was contended that the Respondent's conduct is in the circumstances in breach of the Applicant's legitimate expectation. It is in addition in flagrant breach of the Respondent's duty to ensure that the Applicant is subjected to fair administrative action that is reasonable and expedient in line with the provisions of Article 47 of the Constitution. By raising an assessment of the Applicant based on the fictitious income, the Respondent has interfered with the Applicant's right to property under Article 40 of the Constitution.

15. The applicant reiterated that the Respondent has declined and/or refused to withdraw the assessment and instead directed the Applicant to appeal to the Tax Appeals Tribunal if it is not satisfied with the Respondent's decision notwithstanding that the assessment is illegal and contrary to the provision of the Tax and VAT Acts.

16. It was the applicant's position that to the extent that the Respondent's basis of bringing the Applicant to tax is erroneous in the first place having been based on fictitious "banking income" as opposed to the income actually earned and in disregard of the letter of 29th September 2014 confirming that there were no tax issues arising, it is unreasonable to direct the Applicant to lodge an appeal to the Tax Appeals Tribunal.

17. The applicant averred that it is clear from the forgoing that the Respondent's conclusion that the Applicant owes Corporation tax and VAT for the period 2008 — 2012 in the total sum of Kshs.644,342,189.00 is without any or any reasonable or logical basis and is not supported by evidence and to the extent that the Respondent raised an assessment based on fictitious income, incorrect figures and conclusions, the Respondent acted irrationally. This is so because the Applicant like any other tax payer expected to be treated fairly and that the Respondent would consider its tax liability based on its actual income. In using predatory tactics to impose tax based on non-existent income, the Respondent not only discriminated against the Applicant but also breached its legitimate expectation.

18. It was the applicant's case that by deliberately ignoring the documents and evidence in its possession and seeking to obtain more tax from the Applicant on the basis of fictitious income, the Respondent abused its office and acted contrary to the ***Public Officers Ethics Act*** as well as Chapter 6 of the Constitution. In addition, the decision to ignore evidence to the contrary and raise the assessment based on assumed income could not have been made by any tribunal properly seized of all the facts set out above hence the impugned assessment notice was in the premises clearly irrational, high handed, null and void.

19. The applicant therefore asserted that the raising of the assessment and refusal to withdraw the same is unreasonable and ***ultra wires*** the Respondent's authority and goes against the evidence on record.

Respondents' Case

20. In response to the application, the Respondents averred that the ex parte applicant is a registered Limited Liability Company under the ***Companies Act*** and a registered taxpayer and has an obligation to pay Value Added Tax, Corporation Tax, Income Tax, Withholding Income Tax and to remit Pay as You Earn for its employees. Further, the ex-parte applicant as a landlord and during the period of the audit,

January 2008 to December 2012, had rent out its premises to Tusker Mattresses Limited for the premises located on LR No. 209/634/1 and 209/634/2. The ex parte applicant had also rent out its premises along Jogoo Road to Uchumi Supermarket Limited for the premises located on LR No. 209/8300.

21. It was averred that by a letter dated 10th June, 2013 the 1st respondent invited the ex parte applicant for an interview which was to take place on 18th June, 2013. In the said letter, the 1st respondent notified the ex parte applicant that it owed the respondents a sum of Kshs 3,909,884/- . By a letter dated 19th June, 2013 the ex parte applicant responded to the 1st respondent's letter urging the respondent to postpone the meeting to another convenient date because they had received the invitation letter a day after the date of the scheduled meeting. Further, the ex parte applicant sought to know how the sum of 3,909,884/- had been arrived at. Thereafter the parties tried to reschedule the meeting to a date that was convenient to all but the same did not materialize.

22. It was averred that by a letter dated 23rd August, 2013 the 1st respondent demonstrated to the ex parte applicant how the sum of Kshs 3,909,884/- had been arrived at. Further, the respondent requested the ex parte applicant to furnish the respondent with its corporate income tax returns and accounts for the year of income 2008 and 2010. By a letter dated 3rd September, 2013 the ex parte applicant acknowledged receipt of the respondents letters dated 23rd August, 2013 but clarified to the respondent that the corporate income tax returns and accounts had been filed by their tax consultants as required by law. By a letter dated 11th November, 2013 the respondent sent to the ex parte applicant the workings on how the amount of Kshs 3,909,884/- had been arrived at and the ex parte applicant was cautioned that the unpaid amount was attracting interest and penalties and had accumulated to a sum of Kshs 4,791,892/- further, the ex parte applicant was informed that the respondent could not confirm owing the ex parte applicant a refund without first carrying a compliance check to ascertain if the amount was due and payable to it and the respondent enumerated the books of accounts that it would be interested in examining when conducting the compliance check.

23. It was averred that by a letter dated 15th November, 2013 the ex parte applicant undertook to avail all the books of accounts that the respondent had requested for in its letter dated 11th November, 2013. Further, the ex parte applicant challenged the demand of Kshs 4,791,892/- contained in the respondents letter dated 11th November, 2013. However, by a letter dated 25th November, 2013 the respondent reiterated its position that it could not confirm that the ex parte applicant had a tax refund due to it until a compliance check had been accrued out. According to the Respondent, on 11th December, 2013 the respondent commenced the compliance check at the ex parte applicant's premises but the information supplied by the ex parte applicant was insufficient which led the respondent to defer the audit to a later. Thereafter, on 16th December, 2013 the respondent through an electronic mail sought for further documents from the ex parte applicant and the ex parte applicant requested the respondent to formalize the request for the documents by making the request for documents on a letter bearing the respondent's letterhead. By a letter dated 20th January 2014 the Ex-parte Applicant undertook to furnish the Respondent with the documents once the said documents had been retrieved and by an electronic mail sent on 5th February 2014 the Respondent reminded the Ex-parte Applicant that the documents the Respondent had requested for had not been supplied to it.

24. According to the Respondent, by a letter dated 17th February 2014 the Ex-parte Applicant invited the respondent to continue with the compliance check from 10th March 2014 as the documents would be available for the Respondent to examine and by a letter dated 21st February 2014 the respondent, in response to the Ex-parte Applicant's letter dated 17th February 2014, rescheduled the continuation of the compliance check to 12th March 2014 but by a letter dated 10th March 2014 the Ex-parte Applicant informed the respondent that the compliance check could not resume on 12th March 2014 because its auditors were on the ground and sought to postpone the compliance check to a later date that it undertook to communicate to the Respondent.

25. It was further averred that by a letter dated 25th March 2014 the respondent pleaded with the Ex-parte

applicant to furnish the respondent with the relevant documents to enable the respondent make an assessment based on the financial books rather than the best judgment of the commissioner. However by a letter dated 28th March 2014 the Ex-parte Applicant informed the respondent that the information sought by the Respondent would only be availed after its auditors were done conducting an audit on the company.

26. It was therefore the Respondent's case that as the Ex-parte Applicant failed to furnish the Respondent with the documents that it had undertaken to provide to the respondent, this necessitated the Respondent to collect the relevant information from the Ex-parte Applicant's tenants and bankers as provided for under section 56 of the ***Income tax Act***, Cap 470, of the Laws of Kenya which information the Respondent was furnished with and which the Respondent employed to arrive at an additional assessment in accordance with the provisions of section 73 and 77 of the ***Income Tax Act***. Based thereon, by a letter dated 29th June 2015 the Respondent demanded from the Ex-parte applicant a sum of Kshs.656,372,183/- being corporation taxes and value Added Tax due payable to the Commissioner which sum also consisted of penalties and interests that had accumulated over time.

27. It was however confirmed that by a letter dated 14th July 2015 the Ex-parte Applicant raised an objection to the Respondent's tax demand and sought to know how the Respondent had arrived at the sum of Kshs.656,372,183/- to which the Respondent by a letter dated 14th September 2015 acknowledged receipt and pointed out the deficiencies in the said objection letter by the Ex-parte Applicant as it lacked supporting documents required under section 83 of the ***Income Tax Act***. However, the Respondent went ahead to tabulate for the Ex-parte Applicant its tax liability and demonstrated how the tax liability had been arrived at and revised the tax liability downwards to Kshs.644,342,189/- having taken into account payments made in the year 2008 and 2012. However by a letter dated 2nd October 2015 the Ex-parte Applicant contested the tax assessment without offering to provide the relevant documents that had been sought by the Commissioner from 16th December 2013 and by a letter dated 9th October 2015 the Ex-parte Applicant served the Respondent with a notice of intention to appeal.

28. The Respondent asserted that contrary to assertions by the Ex-parte Applicant, the Ex-parte Applicant was and is still a landlord renting out its premises to Tusker Mattresses Limited located on L.R. No.209/634/1 and L.R. No.209/634/2 as per the lease executed on 29th October 2008 running for 5 years and three months from 1st January 2008 until 31st March 2013. Further, the Ex-parte Applicant was and is the landlord renting out premises to Uchumi Supermarket Limited along Jogoo Road located on L.R No. 209/8300 which according to information obtained from Uchumi Supermarket Limited, was renewed on 24th October 2013 for a period of six years.

29. The Respondent revealed that according to the provisions of sections 3 and 15(7) there are 6 specified sources of income which are to be declared separately and these are: farming income, business income, rent income, interest income, employment income and dividend income. However, the Ex-parte Applicant has consistently filed its self-assessment returns for the business income but has inconsistently filed its rent income self-assessment returns which has led the Respondent to issue a demand notice for an additional assessment of Kshs.644,324,189/- on the rent income.

30. The applicant was further accused of having refused and failed to subject itself to an audit on its rent income and instead resorted to antics to frustrate the Respondent from conducting an audit on its rent income which forced the Commissioner to exercise her powers under sections 73 and 77 of the ***Income Tax Act*** to raise an additional assessment of Kshs.644,342,189/-.

31. The Respondent however confirmed that it carried out a compliance check on the Ex-parte Applicant's business income and ascertained that there were no outstanding issues and commended the Ex-parte applicant for being compliant on the business income aspect and issued the Ex-parte Applicant with a Tax Compliance Certificate. To that extent, by a letter dated 29th September 2014 the Respondent informed the Ex-parte Applicant that the compliance check on its business income for the period of January 2010 to August 2014 had raised no audit queries and commended the Ex-parte Applicant for being compliant.

32. It was therefore the Respondent's case that it had been fair, rational and reasonable to the Ex-parte Applicant who wants to dictate to the Respondent, who is the taxman, which sources of its income should be or should not be audited by the Respondent by refusing to furnish the Respondent with the relevant documents, thus forcing the respondent to raise additional assessment based on the documents supplied to the respondent by the Ex-parte Applicant's bankers and tenants which was the best evidence available. The Respondent averred that it made more than six requests to the Ex-parte to avail its rent income records but the Ex-parte applicant deliberately refused to furnish the Respondent with the said records which left the Respondent with no option but to use secondary information to arrive at the additional assessment within the provisions of the ***Income Tax Act*** and ***Value Added Tax Act*** thus it is fair, reasonable, objective and a true reflection of the Ex-parte Applicant's income for the period under review.

33. The Respondent asserted that rent on commercial properties is subject to Value Added Tax the properties leased out by the Ex-parte Applicant were commercial properties subject to VAT at the rate of sixteen percent. To the Respondent, it is not bound by the Ex-parte Applicant's auditor's opinion and has a duty to examine independently the accuracy of the documents and the financial statements filed by any taxpayer. This is the reason that the Respondent carries out compliance checks and tax audits as sanctioned by section 56 of the ***Income Tax Act*** and section 48 of the ***VAT Act***, 2013.

34. The Respondent insisted that whereas the onus is on the Ex-parte Applicant to furnish the Commissioner with the documents to disapprove the additional assessment by the government, the applicant failed to pursue an alternative reedy of appeal, despite issuing a notice of appeal, as envisioned under section 86 of the ***Income Tax Act***. In particular the respondents aver that the Ex-parte Applicant should have appealed to the Tax Appeals Tribunal established under ***Tax Appeals Tribunal Act***, 2013.

35. On its art the Respondent insisted that its actions were not unreasonable, unfair or capricious but were grounded on statute and denied breaching the rules of natural justice as evidence by the protracant's correspondence and separation of the Ex-parte Applicant's sources of income as provided for the ***Income Tax Act***.

36. The Respondent took the position that the jurisdiction of this Honorable court under Judicial Review does not extend to the merits or competence with which the decision was executed but to the decision making process hence the ex parte applicant is most undeserving of the orders sought because the ex parte applicant has approached this Court with unclean hands and in particular, the ex parte applicant has failed disclose to this honourable court that:

a. It had rent income for the period under review by the respondent

b. The ex parte applicant failed to declare to the respondent it had rent income by filing nil returns whereas it has rent income.

c. It failed or refused to supply the respondent with the necessary documents to make an assessment on its rent income.

d. It was invited by the Respondent for an interview to resolve the tax issues but never availed itself for the interview.

Determinations

37. I have considered the application, the verifying affidavit, the replying affidavit, the submissions filed both in support of and in opposition to the application as well as the submissions filed and the authorities relied upon.

38. Since an issue was raised as to the viability of the appellate procedure, it is important to deal with the said issue before delving into the merits of the matter. Sections 84, 85 and 86 of the ***Income Tax Act*** provide as follows:

84. (1) A person who disputes an assessment made upon him under this Act may, by notice in writing to the Commissioner, object to the assessment.

(2) A notice given under subsection (1) shall not be a valid notice of Objection unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within thirty days after the date of service of the notice of assessment; but if the Commissioner is satisfied that owing to the absence from Kenya, sickness or other reasonable cause, the person objecting to the assessment was prevented from giving the notice within that period and there has been no unreasonable delay on his part, the Commissioner may, upon application by the person objecting, and after deposit by him with the Commissioner of so much of the tax as is due under the assessment under section 92, or such part thereof as the Commissioner may require, and the payment of any interest due under section 94, admit the notice after the expiry of that period and the admitted notice shall be a valid notice of objection:

Provided that the objection made within the thirty days shall not be valid unless it is accompanied by a return of income together with all the supporting documents, where applicable.

(3) A person aggrieved by the refusal of the Commissioner to admit a notice of objection under subsection (2) may, on depositing with the Commissioner if he so requires, the whole or such part as the Commissioner may require of the amount of tax assessed under the assessment to which objection is made and on paying any interest due under section 94, appeal against the refusal to a local committee, whose decision shall be final.

(4) All the provisions of this Act relating to appeals against assessments shall, so far as they are applicable and subject to the finality of the decision of the local committee, have effect with respect to an appeal under subsection (3), and the local committee hearing the appeal may confirm the decision of the Commissioner or may direct that the notice concerned shall be a valid notice of objection.

85. (1) Where a notice of objection has been received, the Commissioner may -

(a) amend the assessment in accordance with the objection; or

(b) amend the assessment in the light of the objection according to the best of his judgement; or

(c) refuse to amend the assessment

(2) Where the Commissioner either—

(a) agrees to amend the assessment in accordance with the objection; or

(b) proposes to amend the assessment in the light of the objection and the person objecting agrees with the Commissioner as to the proposed amendment, the assessment shall be amended accordingly and the Commissioner shall cause a notice setting out the amendment and the amount of the tax payable to be served on that person.

(3) Where the Commissioner—

(a) proposes to amend the assessment in the light of the objection and the person objecting does not agree with the Commissioner as to the proposed amendment, the assessment shall be amended as proposed by the Commissioner and he shall cause a notice setting out the amendment and the amount of the tax payable to be served on that person; or

(b) refuses to amend the assessment, he shall cause a notice confirming the assessment to be served on that person.

86. (1) A person who has been served with a notice under section 85(3) may—

(a) if his assessment is based upon or consequent upon a direction issued under section 23 or 24, appeal from the decision of the Commissioner to the Tribunal; or

(b) in any other case, appeal from that decision to the local committee appointed for the area in which he resides or, if he is a non-resident person, to a local committee appointed for the Nairobi Area, upon giving notice of appeal in writing to the Commissioner within thirty days after the date of service.

(2) A party to an appeal under subsection (1) of this section or under section 89(1) who is dissatisfied with the decision thereon may appeal to the Court against that decision upon giving notice of appeal to the other party or parties to the original appeal within fifteen days after the date in which a notice of that decision has been served upon him; but an appeal to the Court under this subsection may be made only on a question of law or of mixed law and fact.

(3) Where a person other than the Commissioner has failed to give notice of appeal within a period specified in subsection (1) he may, after depositing with the Commissioner so much of the tax as is payable under section 92(6), or such part thereof as the Commissioner may require, and paying any interest due under section 94, apply to the local committee or the Tribunal, as the case may be, for an extension of the time in which to give the notice of appeal, and the local committee or the Tribunal may grant an extension on being satisfied that, owing to absence from Kenya, sickness or other reasonable cause, he was prevented from giving notice of appeal within the relevant period and that there has been no unreasonable delay on his part.

(4) Where a person other than the Commissioner has failed to give notice of appeal within the period specified in subsection (2) he may apply to the Court for an extension of the time in which to give notice of appeal and the Court may grant an extension on being satisfied—

(a) that he has paid the tax payable or required under section 92(6) (together with any interest charged under section 94); and

(b) that he has paid the tax due under section 93(1)(c); and

(c) that owing to absence from Kenya, sickness or other reasonable cause, he was prevented from giving notice of appeal within the relevant period; and

(d) that there has been no unreasonable delay on his part.

39. According to the applicant, on 29th June 2015, the Respondent raised an assessment notice on the applicant under section 73 of the ***Income Tax Act*** (Cap 470) and section 45 of the ***Value Added Tax Act***, No. 35 of 2013 in which the Respondent demanded payment of Kshs. 656,372,183 being the purported Corporation Tax, VAT, penalties and interest owed by the Applicant for the period 2008 to 2012 which according to the Respondent was based on the computation of the Applicant's estimated "banking income" under the pretext that the Applicant failed to honour a notice of 10th June 2013 scheduling compliance checks and postponing the same due to various reasons and to provide supporting documents to the Respondent to enable it ascertain its income.

40. According to the applicant, in a response dated 14th July 2015, it objected to the assessment and demanded the immediate withdrawal of the assessment notice. Instead of withdrawing the assessment, the

Respondent by letter dated 14th September 2015, adjusted the sum demanded to Kshs.644,342,189.00 and noted that the objection could not be upheld as it was not accompanied by any supporting documents as required under section 84 of the ***Income Tax Act*** (Cap 470). That the said objection was not accompanied by any supporting document was confirmed by the applicant who instead took the position that the Respondent has misapplied the provisions of section 84 of the ***Income Tax Act*** as it does not envisage a tax payer (in this case the Applicant) resupplying documents already in the custody of the Respondent. In this case, the Applicant's returns had been filed through its agent M/s Deloitte and Touche for the period in issue and were in the Respondent's custody. Since the said documents were further attached to the letter dated 16th August, 2014. It was therefore unreasonable for the Respondent to request that the objection be accompanied by documents already in its possession. In passing, and without making a definite determination, this position on its face seems to fly in the face of the provisions of section 84(3) of the ***Income Tax Act*** which provides that "*the objection made within the thirty days shall not be valid unless it is accompanied by a return of income together with all the supporting documents, where applicable."*

41. I associate myself with the decision in **Republic vs. KRA ex parte Metro Pharmaceuticals Limited HC Misc. Application No. 108 of 2011** where the Court expressed itself as follows:

> **"The Appellant has cited this letter as its application for review under Section 229 of EACCMA. I have carefully looked at Section 229 EACCMA and conclude that any application for review of the decision of the Commissioner of Customs should be worded in such a way as to make it very clear that the importer is making an application for review under Section 229. The letter dated 26th September 2008 cannot be said to amount to an application for review as envisaged by section 229 of EACCMA. The conclusion of the letter as already quoted clearly shows the Applicant was reopening the assessment and not asking for review."**

42. In my view, what is contemplated under section 84 of the Act is a valid objection and the Act expressly describes what amounts to a valid objection. It does not say that where the applicant furnished the documents before the objection, it is not necessary to file the same with the objection. To the contrary the Act is clear that where the objection is not accompanied by the supporting documents where applicable, there is no valid objection. It is not contended that the documents were not applicable in this case.

43. Nevertheless the Respondent seemed to have considered the objection since the amount of the assessment was reduced from Kshs. 656,372,183.00 to Kshs.644,342,189.00. The applicant was however aggrieved by this re-assessment and on 9th October 2015, issued a notice of intention to appeal as it was entitled to do.

44. However instead of pursuing the appellate avenue, it commenced these proceedings. Its reason for doing so was that to the extent that the Respondent's basis of bringing the Applicant to tax is erroneous in the first place having been based on fictitious "banking income" as opposed to the income actually earned and in disregard of the letter of 29th September 2014 confirming that there were no tax issues arising, it is unreasonable to direct the Applicant to lodge an appeal to the Tax Appeals Tribunal. According to **Mr. Oraro, SC**, learned counsel for the applicant, the appellate remedy is only applicable where the Respondent complies with the law and does not abuse his power. In this respect reliance was sought from **Republic vs. Kenya Revenue Authority ex parte Jaffe Mujtab Mohamed [2015] eKLR**. However in that case, the Court found that the Respondent's action of issuing the agency notices before the period prescribed for instituting the appellate process had run its course was intended to scuttle the appellate process hence the only available recourse was the judicial process. In this case as the applicant had in fact initiated the appellate process, the circumstances in the instant case are distinguishable from the above cited case. Learned Senior Counsel also relied on **Peter M. Kariuki vs. Attorney General [2014] eKLR**. In that case the Court of Appeal at page 18 was clear in its mind that:

> **"The issues raised by the appellant were not issues reserved only for consideration in an appeal; they could legitimately and legally be raised and addressed in a petition for redress of**

violated constitutional rights, such as was before the learned judge, independent of any other remedy that the appellant had."

45. On behalf of the Respondent it was contended that the Tax Compliance Certificate was issued in respect of business income and not rental income which the applicant did not disclose. The law is however clear that a person who has been served with a notice under section 85(3) (which was the case herein) may appeal from the decision of the Commissioner to the Tribunal which option the applicant had initially and correctly in my view adopted. In my view, since the applicant had invoked the internal dispute resolution mechanism provided under the ***Income Tax Act*** the intended appeal would have enabled the determination of the dispute herein on its merit.

46. I have considered the issues being raised by the applicant in these proceedings. The applicant contends that the 1st Respondent ignored the applicant's statements which were furnished to it. The applicant further contested the allegation that it received rents from its properties and averred that the same had in fact changed hands. Most of the allegations revolved around alleged failure by the Respondent to consider and determine the issues raised by the Applicant in its objection whether legal or factual. However as was held in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327** an allegation that a Tribunal has misconstrued the provision of the law, regulation or a point of law does not entitle the court to question the decision reached. Whereas that may be a ground of appeal, it does not amount to a ground for judicial review. It ought to be appreciated that there is a distinction between taking into account relevant or irrelevant matters which are grounds for judicial review and merely misconstruing a statutory provision or regulation which does not *ipso facto* constitute grounds for judicial review.

47. In my considered view, the issues raised herein could have been properly dealt with by the appellate Tribunal rather than this Court which does not deal with the merits. Even if this Court was to find that the said issues were not dealt with the best option for the Court would be an order remitting the issues to be considered by the Respondent and a decision made thereon one way or the other. However, the Tribunal would be able to consider the same and arrived at a decision on the merits.

48. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

49. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. See **Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike& 4 Others (2008) 3 KLR (EP) 291,** and **Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012.**

50. This position has now acquired statutory underpinning vide section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, 2015 which provides:

> ***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

51. Having considered the issues raised before me in these proceedings, I am not satisfied that this is a matter in which an exemption ought to be considered. As was held in **Republic vs. National Environment Management Authority Civil Appeal No. 84 of 2010** in which the Court of Appeal expressed itself as follows:

> **"...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge."**

52. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 - Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

53. In the premises the order that commends itself to me is that the applicant ought to pursue the appellate process provided for under the ***Income Tax Act*** by invoking the powers conferred upon the appellate Tribunal Committee.

54. In this case, the applicant has not proffered any convincing reason why it abandoned the appellate process it had initiated midstream without seeing it through to its logical conclusion. In tax matters the law is as restated in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007 that:**

> **"As the trial Judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge**

would have to determine first whether the money in Pili's account at the Bank was or was not liable to tax. No material was placed before the Judge on that point... 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."

55. In the premises I will not deal with the merits of the application in order to avoid prejudicing or embarrassing the appellate process that may be undertaken by the applicant herein.

56. I however decline to grant the orders sought herein and in the circumstances of this case the appropriate order in my view would be to strike out this application which I hereby do with costs to the Respondent.

57. It is so ordered.

58. The delay in delivering this ruling, which is regretted, was occasioned by the failure by some of the parties to furnish the Court with soft copies of the documents filed as directed.

Dated at Nairobi this 25th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Oraro with Miss Mutwari for the Applicant

Miss Chinga for Miss Nyagah for the Respondent

CA Mwangi