



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.422 OF 2013**

**BETWEEN**

**MADISON INSURANCE COMPANY LIMITED.....APPLICANT**

**AND**

**THE COMMISSIONER OF DOMESTIC TAXES.....1<sup>ST</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Madison Insurance Company Kenya Ltd, describes itself as a limited liability company incorporated in Kenya duly licensed and carrying on the business of insurance. It has filed the instant Petition against the 1<sup>st</sup> Respondent, the Commissioner of Domestic Taxes an office established under the **Kenya Revenue Authority Act (Cap 49)** of the **Laws of Kenya**; and the 2<sup>nd</sup> Respondent, Kenya Revenue Authority (hereafter KRA) similarly established under the aforesaid **Kenya Revenue Act**. In its Petition dated 20<sup>th</sup> August, 2013, together with its Supporting Affidavit sworn on its behalf by one, James Ngunjiri, on the same date, the Petitioner challenges the decision of the Respondents in regard to various assessments made under the **Income Tax Act**. In this regard, the Petitioner prays for the following orders;

*“a. A declaration that the assessment made by the Respondents and dated the 22<sup>nd</sup> of March, 2012 is unconstitutional and contrary to Article 210 (1) of the Constitution.*

*b. A declaration that the said assessment violates the provisions of the Income Tax Act and is consequently contrary to the Constitution.*

*c. A declaration that the said assessment denies the Petitioner equal benefit and protection of the law contrary to Article 27 (1) of the Constitution.*

*d. That the said assessment be set aside.*

*e. The costs of this Petition be provided for.*

*f. Such other order as this Honourable Court may deem just.”*

## **The Petitioner's Case**

2. It was the Petitioner's case that prior to 2009, it prepared its returns in accordance with the **Kenya Revenue Authority Act**; and that on 3<sup>rd</sup> February, 2012, the Respondents notified it that it was not entitled to carry forward losses arising from the computation prepared under **Section 19 (8)** of the **Income Tax Act** for the relevant financial year; and additionally in this regard, the Respondents proceeded to adjust its (Petitioner's) 2009 tax computation by excluding the losses carried forward from 2008 amounting to Kshs.1,017,898,538.

3. The Petitioner contended that **Section 15 (4)** of the **Income Tax Act** applies to computations prepared under **Section 19 (8)** of the **Income Tax Act** as its application has not been expressly prohibited and as such, that Section did not apply to computations prepared under **Section 19 (9)** of the **Income Tax Act**. Further and following the repeal of **Section 19 (9)** of the **Income Tax Act**, there was no provision preventing the Petitioner from deducting its losses from its income as provided for by **Section 15 (4)** aforesaid.

4. The Petitioner also stated that it challenged the Respondents position on 21<sup>st</sup> March, 2012 pointing out that, according to the **Income Tax Act**, losses arising from computations under **Section 19 (8)** are available for carrying forward, but, the Respondents rejected this explanation and issued a confirmed assessment (0305200900055/6) on 3<sup>rd</sup> September, 2012. In this regard, again it objected to this confirmed assessment and filed an appeal, being **Appeal No.30/22/12 of 2012** before the Local Committee of Income Tax. The matter was still pending determination at the time the Petition was filed.

5. It was the Petitioner's case therefore that the said assessment has violated its constitutional rights to equal protection of the law in that despite the repeal of a provision of the **Income Tax Act**, the Respondents have continued to apply the same against it and further that it violates **Article 210 (1)** of the **Constitution**.

6. Additionally, that this Court has the jurisdiction to hear and determine the instant Petition while the Local Committee of Income Tax lacks the jurisdiction with respect to the said assessment and therefore the Prayers sought in the Petition should be granted.

## **The Respondents' Case**

7. The Respondents' case is contained in their Replying Affidavit dated 16<sup>th</sup> October, 2013, sworn on their behalf by one, Justus Kiuvu, an Assistant Senior Commissioner at the Kenya Revenue Authority, Domestic Taxes Department.

8. It was their case that prior to the events leading up to this Petition, KRA had carried out an industry wide desk inquiry on the insurance industry to ascertain how the various players in the industry were applying the new requirements of tax assessment under **Section 19 (5)** of the **Income Tax Act**. Further, that on 12<sup>th</sup> January, 2012, it wrote to the Petitioner's Tax Consultants, M/s Deloitte and Touche requesting for copies of the Petitioner's Actuarial reports for the year 2007, 2008, 2009 and 2010 for perusal and for purposes of confirming its tax compliance status. In this regard, the inquiry revealed that for the year of income, 2009, the Petitioner reported life business chargeable income on the basis of transfer of surplus of Kshs.73,200,000.00 In the Respondent's view, this profit ought to have been added to the adjusted general assurance business profit of Kshs.63,758,927.00 to arrive at a combined chargeable income of Kshs.136,958,927.00.

9. They contended that the Petitioner had instead decided to offset the life business surplus transfer with accumulated investment income minus expenditure (I-E) and losses brought down from the year 2008 of Kshs.1,017,898,538.00 to arrive at a combined business loss for the year 2009 of Kshs.880,939,611.00.

10. It was the Respondents' further contention that on 3<sup>rd</sup> February, 2012, KRA wrote to the Petitioner asking it to address the issues aforementioned and by a response dated 6<sup>th</sup> February, 2012, it indicated

that it was reviewing the said issues and would respond. In this regard, the Petitioner, through its letter dated 28<sup>th</sup> February, 2012 attempted to respond to the issues but did not explain the discrepancies in their accounts as raised. This in turn prompted further letters from KRA regarding the same, and later it issued assessment No. 0305200900055/4 which was later confirmed in assessment No. 0305200900055/6.

11. Following the assessment, the Petitioner objected to the same vide its letter dated 21<sup>st</sup> March, 2012 and while the Respondents actually considered the issues raised in the said objection they still maintained their initial position and decided to confirm the assessment. This prompted the Petitioner to file an appeal with the Local Committee aforesaid and the Respondents similarly filed their appeal with the said Committee.

12. The Respondents' case is therefore that the year 2008 net tax loss arrived at under **Section 19 (8)** by the Petitioner is only available for carry forward to be offset against the 2009 tax liability if this loss is emanating from a general insurance business loss since life assurance tax loss is not available for carry forward to 2009. Further, that the said Section provides for the combining of all income of a company in the business in ascertaining the total income of that company while **Section 19 (9)** which became effective on 1<sup>st</sup> January, 1993, provides specifically for what shall constitute the gains or profits from life insurance business for a specific year of income, by introducing a minimum tax concept whereby the chargeable income of life insurance business is the higher of profits determined under I-E (Investment Income minus Expenditure) basis and that is a portion of the life fund surplus that is transferred from the life fund for the benefit of shareholders. That from the foregoing, one cannot choose to ignore the provisions of **Section 19 (9)** and take only the provisions of **Section 19 (8)** if one is determining the gains or profits of a life insurance company for the years of income 1993 to 2008, both years inclusive.

13. The Respondents also stated that under the **Section 19 (9) (b)** calculation, no tax losses could be carried forward, and no relief could be claimed for such losses in subsequent years and further, in a year where no transfer from a life fund was made, chargeable income would be computed under this Section because zero transfer (no transfer) is higher than life business loss computed under **Section 19 (5)** and therefore, no losses would be available for carry forward to the subsequent year.

14. It was also the Respondents' case that the law was later amended thereby repealing **Section 19 (9)** of the **Income Tax Act** to take effect from 1<sup>st</sup> January, 2009 meaning that for the year 2008, the Section was still in force and hence no life business loss was available to be brought forward in 2009 from 2008 and the loss was only available for offset for the year 2008.

15. Further, that the right to benefit from the application of **Section 15 (4)** of the **Income Tax Act** was only restricted to the application of the said Section to losses incurred in the year of income 2008 and if the losses had been incurred in 2009, the Petitioner would have benefited from the same. However, that the Petitioner did not subject the general insurance business trading profits to the allowability and non-allowability tests provided for in **Sections 15** and **16** of the **Income Tax Act**, and had it done so, the general insurance business taxable income would have been Kshs.-26,900,769. That therefore their (Respondents') tax computation for the years 2006, 2007, 2008 and 2009 are correct and in accordance with **Section 19** of the **Income Tax Act** while the Petitioner's computation was not in line with the law. That the Petitioner is in any event seeking to apply the law retrospectively, by seeking to deduct a deficit for a year of income incurred before the donating provisions of the law providing for the same came into effect and by so doing, it sought to unfairly enjoy the benefit of the amendment prematurely, thereby defeating the purpose of the amendment.

16. The Respondents further contended that the basis of the Assessment Notice, the subject matter herein, and factual issues cannot be ventilated in a constitutional Court as they do not raise any constitutional issues and further, the dispute herein is being handled by a competent authority being the Local Income Tax Committee in **Appeal No.30/22/12 of 2012** after the Petitioner had preferred an appeal on it. In this regard, it was their argument that the Committee is a competent authority and is the proper forum to ventilate issues arising herein and hence it is imperative for this Court to allow it to execute its statutory mandate.

17. They argued in addition that their actions were not unconstitutional, illegal and/or null and void as to warrant the invocation of the jurisdiction of the Court herein for the protection of fundamental rights and freedoms under **Articles 22, 27, 210 (1) and 258 (1)** of the **Constitution** and that the Petitioner is not entitled to the orders sought as the Petition is founded on a fundamental misapprehension of this Court's jurisdiction on proceedings brought under **Articles 22 and 23** of the **Constitution**. That the Petitioner has not demonstrated with precision how its constitutional rights have been infringed; has failed to meet the constitutional threshold and the Petition is an abuse of the process of the Court. Further, that the Respondents have demonstrated that they have executed their mandate under **Article 210 (1)** of the **Constitution** by imposing taxes provided for by legislation and that they have not violated the Petitioner's rights to fair administrative action and the taxes, the subject matter herein, were demanded lawfully and procedurally in accordance with the **Income Tax Act**.

18. It was their conclusion therefore that in any event, the Petitioner has not alleged that any of the revenue statutes or provisions thereof which the Respondents and their offices relied on in assessing and collecting the due taxes, are unconstitutional and that the Petition was filed in bad faith purposely to delay, frustrate and defeat the collection of taxes which are due and outstanding to the Government and therefore the Petition ought to be dismissed with costs.

### **Determination**

19. I have read and considered the pleadings as filed in this Court by both Parties. Based on the foregoing and subject to what I shall say below, the key issue that calls for determination is whether there has been a violation of the Petitioner's constitutional rights as alleged. If the answer to this question is in the affirmative, I shall proceed on to determine the remedies available to the Petitioner, if at all.

20. Before I proceed on to determine the main issue, I must however address my mind to the preliminary question of jurisdiction as raised by the Respondents. If I find that there is presently no reason for this Court to delve into the dispute between the Parties, I shall promptly down my judicial tools.

21. In their Written Submissions dated 5<sup>th</sup> March, 2015 and Further Written Submissions dated 2<sup>nd</sup> July, 2015, it was the Respondents' submission that the Petitioner has failed to exhaust the internal mechanism of resolving the dispute as provided under **Sections 82 and 83** of the **Income Tax Act**. In the Respondents' view, if the Petitioner is dissatisfied with the decision of the Local Committee, it can still appeal to the High Court as provided under **Section 86 (2)** of the **Income Tax Act** for the Court to deal with both issues of law and fact. That therefore the Petitioner ought to have allowed the matter to go through the Local Committee and in support of these contentions, they relied on the decisions in **Republic vs The Commissioner of Income Tax and Nakuru Local Income Tax: ex parte Stockman Rozen (K) Ltd; Damian Belfonte vs The Attorney General of Trinidad and Tobago C.A 84 of 2004; Republic vs National Environmental Management Authority, Civil Appeal No 84 of 2010; Kapa Oil Refineries vs Kenya Revenue Authority and 2 Others, H.C Petition No 203 of 2012; Alphonse Mwangemi Munga and 10 Others vs African Safari Club Limited [2008] eKLR; Narok County Council vs Trans Mara County Council [2000] 1 EA 161; and Speaker of National Assembly vs Njenga Karume [2008] 1 KLR 425.**

22. In addition, it was submitted that the issue of collection of taxes is not an issue for constitutional interpretation and while it may be a hardship on any taxpayer, there is also a duty to pay taxes and to do so promptly so that Government business can go on. Accordingly, it was submitted that taxation, generally, and in particular the determining of the actual tax payable is a highly specialized exercise which requires expertise. In this regard, it is urged that while exercising its supervisory jurisdiction, this Court must not assume the role of the relevant tax assessment bodies for it is for such reason that under **Sections 82 and 83** of the **Income Tax Act**, a Local Committee and a Tribunal have been established to address any grievances that the Petitioner may have against the Respondents regarding taxation. They relied on **Masefield Trading (K) Ltd vs Rushmore Company Limited n[2007] 2 EA** where it was stated that in hearing matters brought under **Section 84 (1) and (2)** of the **Repealed Constitution**, the High Court is not concerned with the merits of the decision but rather to conduct an inquiry as to whether the procedure adopted contravened the fundamental rights of the Petitioner.

23. On the other hand, in its Supplementary Submissions dated 19<sup>th</sup> June, 2015, the Petitioner submitted that the submission by the Respondents that the instant Petition has been filed in bad faith with an intention of delaying, frustrating and defeating the collection of taxes due is without factual foundation because by bringing this Petition to the body with the ultimate constitutional authority and responsibility for interpretation of statutes, it has accelerated the process of the definitive resolution of the dispute between it and the Respondents.

24. It was the Petitioner's other position that it would have been a mistake on its part to await the determination of the Appeal by the Local Committee before seeking redress in this Court. Accordingly, that it is not and cannot be an abuse of the process of this Court for a party to move this Court notwithstanding the existence of an alternative remedy when the issue presented is purely one of law as is the case herein (the proper interpretation and application of the effect and interplay of **Sections 15 (4) and 19 of the Income Tax Act**) and that the Local Committee has no jurisdiction to determine questions of violation of fundamental rights as provided under **Article 27 (1) and (2) of the Constitution** and whether there has been breach of the Constitution in any way.

25. While relying on the decisions in **Ramlogan vs The Mayor, Aldermen and Burgesses of San Fernando (1986) LRC (Const); R vs Inland Revenue Commissioner ex parte Mead and Another (1993) All ER; Peter Kariuki vs The Attorney General, Civil Appeal No.29 of 2012; and Kamleshman Sukhlal Damjipattni and Another vs Republic, HC Misc App No.322 of 199 (Unreported)**, it was the Petitioner's submission that the existence of an alternative remedy does not preclude a party from seeking relief from the High Court.

26. As regards the decision in **Rashid Aloggoh and 254 Others vs HACO Industries Limited (supra)** which was relied upon by the Respondents, the Petitioner argued that the said decision is no longer good law as the Ruling therein was reversed by the Court of Appeal where it was held that the availability of other lawful causes of action was not bar to a party who alleged contravention of his or her right under the Constitution.

27. Further, while relying on the dictum of the Court in **Hassan Nyanje Charo vs Khatib Mwashetani and 3 Others [2014] eKLR**, where the Court addressed the question of abuse of court process, the Petitioner submitted that the grounds upon which this Petition is predicated are as stated on the face of it and a cursory look at the same would clearly show that the Petition is within the jurisdiction of this Court and its functions and is aimed at achieving an outcome that is lawful. Additionally, it was its contention that it has genuinely moved this Court to get redress for infringement of its constitutional rights and the same does not amount to an abuse of process. In this regard, additional reliance was placed on the decision in **Mwangi Stephen Mureithi vs Daniel Toroitich Arap Moi, Nairobi Petition No 625 of 2009**.

### **Does this Court then have the Jurisdiction?**

28. The question of jurisdiction goes to the heart of every matter in any litigation. This position has been upheld over the years and this Court has had many opportunities to address the question of jurisdiction and I wish to reiterate the position that jurisdiction is everything and without it a court must down its tools. That was the dictum by Nyarangi J in **The Owners Of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1** where he opined thus:

***"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."***

29. Similar sentiments were echoed by *the Supreme Court in Advisory Opinion Reference No.2 of 2013, Speaker of Senate and Another vs The Attorney General and Others* where it was noted that;

***"Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be***

*resolved at the beginning. It is the fountain from which the flow of the judicial process originates.”*

30. In **Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others Civil Application No. 2 of 2011** the Supreme Court also held that:

*“[68] A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”*

31. In that context, the jurisdiction of this Court stems from **Article 165(3)** of the Constitution which is to the effect that subject to **Clause (5)**, the High Court shall have –

*“(a) unlimited original jurisdiction in criminal and civil matters;*

*(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;*

*(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;*

*(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(i) the question whether any law is inconsistent with or in contravention of this Constitution;*

*(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.*

*(iii) Any matter relating to constitutional powers of State organs in respect of County Governments and any matter relating to the constitutional relationship between the levels of Government;*

*(iv) A question relating to conflict of laws under Article 191; and*

*(v) Any other jurisdiction, original or appellate, conferred on it by legislation. ”*

32. Under **Sub-Clause (6)** of this **Article**, the High Court is vested with supervisory jurisdiction over the Subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a Superior Court.

33. The above provisions therefore clearly articulate the parameters of the jurisdiction of this Court and of equal importance, within the hierarchy of our judicial system, the Legislature has come up with other dispute resolution bodies to supplement and aid Courts. These bodies have been established through legislation and they have been given the powers to exercise judicial and quasi-judicial functions. Our Courts have also over the years upheld the position that where there exist such other dispute resolution forum, parties must strictly utilize them first before approaching the Courts.

34. That is why in *the case of The Speaker of the National Assembly vs The Hon. James Njenga Karume, Civil Application No. NAI 92 of 1992 [NAI 40/92 UR] (unreported)* it was pointed out that;

***“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”***

35. Our law on this position is quite clear therefore that where a statute or any law gives a remedy to any aggrieved party, he or she ought to exhaust such remedy before seeking other alternative remedies. This if followed, does not in any way prevent the parties from further seeking the intervention of this Court. I hold so bearing in mind that this Court still has both original and supervisory jurisdiction under **Article 165 (6) of the Constitution.**

36. This position was well captured by the Court in **Peter Ochara Anam and 3 Others vs Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No.3 of 2010** where the Court expressed the view that;

***“Jurisdiction we all know is everything and once raised it must be confronted from the onset and if successful the court must down its tools. I have no doubt at all that under article 165(3) of the Constitution, I have unlimited and inherent jurisdiction. I am also aware that under article 23(1) of the same constitution this court has jurisdiction, in accordance with article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. I also agree as pointed out by counsel for the petitioner that any interpretation of the Constitution that seeks to curtail such wide and unfettered jurisdiction would be contrary to the spirit and letter of the constitution and would thus render itself invalid. I do not however agree that the bodies created under the provisions of the CDF such as the 1<sup>st</sup> respondent are invalid, null and void as per the constitution.”***

The Court then went on to state that;

***As I have already stated elsewhere in this ruling, it is not uncommon in this country for a statute to provide the procedure through which proceedings founded under the statute are to be handled. Such is section 52 of the CDF. There is nothing unconstitutional about it. The section does not deny the petitioners the right to come to court. It only provides a procedure to be followed when dealing with the disputes under the Act, like the instant dispute. The petitioners have a right to come to this court on whatever matter and howsoever but that must be done in the correct way. It cannot therefore be the case of the petitioners that section 52 of the CDF is in conflict with articles 22, 23, 48 and 50 of the Constitution. Similarly, it cannot be their case that section 52 qualifies the right to access justice in this court...***

In addition, it went on to state that;

***I do not think that it is right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to this court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights...***

***... Coming to Court by way of a constitution petition is not excepted either much as the Constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioner exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1<sup>st</sup> respondent as required by law. It has been stated constantly that where there exists sufficient and adequate legal avenue, a party ought not trivialize the jurisdiction of the court pursuant to the Constitution. Indeed, such a party ought to seek redress under the relevant statutory provision, otherwise such available statutory provisions would be rendered otiose.”***  
***(Emphasis added)***

37. Further, in **Stanley Mungathia Daudi and 4 Others vs Hon. Cyprian Kubai and Others, Meru**

Petition No.5 of 2013, Makau J while addressing the question of dispute resolution under the Constituency Development Fund Act, 2013 expressed the view that;

**“It has been stated constantly that where there exists sufficient and adequate mechanism to deal with a specific issue of dispute by other designated Constitutional organs, the jurisdiction of the Court should not be invoked until such mechanism has been exhausted.” (Emphasis added)**

38. In **Diana Kethi Kilonzo and Another vs IEBC and 10 Others**, Petition No.359 of 2013 it was stated that;

***“[73] 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.*”**

39. I adopt the above reasoning and turning back to the present case, it is not in dispute that prior to instituting these proceedings, the Petitioner filed an **Appeal No.30/22/12 of 2012** against the Respondents’ assessment in accordance with **Section 86** of the **Income Tax Act**. The said Local Committee is established pursuant to **Section 82** of the **Income Tax Act**. **Section 86** of the **Income Tax Act** outlines the mandate of the Local Committee. It provides that;

***“(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 upon him of the notice under that subsection.***

***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.”***

40. My understanding of the foregoing provisions is that the Local Committee is vested with the jurisdiction to hear and determine matters pertaining to the objections to any assessments as outlined under the **Income Tax Act**. It has therefore been established in the present case that there is already in existence a pending dispute before the Local Committee and I take the view that it would be inappropriate for this Court to intervene at this juncture. My reasoning is guided by the fact that this is a statutory body established for that function and I do not see any justification in law to interfere and encroach into the jurisdictional bounds of that Committee. Further, I note from the Petitioner’s pleading that one of the reasons as to why it has instituted these proceedings is that this Court;

***“... has accelerated the process of the definitive resolution of the dispute between it and the Respondent.”*** (See paragraph 3.2, pg. 8 of Petitioner’s Supplementary Submissions)

41. It also contended that;

***“The Local Committee lacks jurisdiction, with respect to the assessment having been made beyond the power granted to the Respondents under the Income Tax Act.”*** (See paragraph 25, pg 14 of the Petition)

42. To my mind, it is the Local Committee that is vested with the powers to initially determine the lawfulness or otherwise of the disputed assessment. In its determination, the Local Committee will examine the mode and the manner in which the Respondents conducted the assessment. It is then that the Committee shall determine whether the assessment was done in accordance with the law. In my considered view, it would be premature for this Court to determine the questions at this point since the same is well within the ambit of the Local Committee. As I have stated elsewhere above, the Petitioner’s recourse to this Court is not yet lost as it can still approach this Court by way of an appeal against the decision of the Local Committee.

43. I must also point out that in the decision of **Ramlogan vs The Mayor (supra)** relied upon by the Petitioner, indeed it was acknowledged that while it is true that the Petitioner may have been able to pursue her claim by way of judicial review and also in private law by an action for trespass to property, there was nothing to prevent her from invoking the fundamental rights provisions in the Constitution. This however cannot be a substitute to ousting the jurisdiction of statutory bodies. I am persuaded by the line of authorities that I have outlined elsewhere above and in any event, in **R vs Inland Revenue Commissioners, ex parte Mead and Another (supra)**, relied on by the Petitioner, the Court therein observed that the approach to the High Court was necessary owing to the fact that not all the remedies sought therein could be granted by the Magistrate’s Court or the Crown.

44. Based on my analysis above, I am inclined to down my tools at this juncture and let the Local Committee determine the legality or otherwise of the assessment as it falls well within its mandate. The Petitioner may still approach this Court thereafter, if it is minded to do so.

### **Disposition**

The Petition herein is therefore struck out. Let each party bear its own costs, as the dispute remains unresolved.<sup>45</sup>

46. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2016**

**ISAAC LENAOLA**

**JUDGE**

### **In the presence of:**

Muriuki – Court clerk

Mr. Chabala holding brief for Miss Odumo for Respondent

Mrs. Ondusi holding brief for Mr. Amoko for Petitioner

### **Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**5/2/2016**