REPUBLIC OF KENYA

IN THE HIGH COURT IN KENYA

AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 65 OF 2015

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

EX-PARTE FUNAN CONSTRUCTION LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th March, 2015, the *ex parte* applicant herein, **Funan Construction Limited,** seeks the following orders:

> 1. **THAT this Honourable Court be pleased to issue An Order of CERTIORARI to bring to this court and thereby be quashed the Agency Notices dated 17th February 2015 directed to the African Banking Corporation Limited with respect to the Applicant's Bank account No. 000200000010129 held at African Banking Corporation Limited Koinange Street Branch Nairobi and Account Number 0010101207426 at Equity Bank Limited.**
>
> 2. **THAT the costs of this application be provided for.**

Ex Parte Applicant's Case

2. The application was based on the following grounds:

> **(1) The Respondent is obliged by law to observe the rules of natural justice to act lawfully, fairly and reasonably in exercise of their statutory mandate under the *Value Added Tax Act No. 35 of 2013* of the Laws of Kenya.**
>
> **(2) Section 50 (1) of the Value Added Tax Act provides that a person who disputes an assessment made by the Commissioner under section 45 or 46 may, by Notice in writing to the Commissioner, object to the assessment. Subsection (2) thereof provides that a Notice given under subsection (1) shall not be a valid Notice of objection unless:**
>
> i. **it states precisely the grounds of objection to the assessment; and**
>
> ii. **it is received by the Commissioner within thirty days after the date of service of the Notice of assessment.**
>
> iii. **The Applicant upon receiving the Notice of Assessment dated 9th February 2015 immediately submitted a Notice of Objection through their duly appointed agents on 26th February 2015 within the stipulated 30 days as provided under section 50 (2) (b) of the *VAT Act* which Notices of Objection stated precisely the grounds that the demand in the Notices was excessive.**

(4) The Respondent failed to observe the 30 days period as provided under section 50 to consider any objection that may be submitted by the applicant and indeed went ahead and initiated prematurely recovery measures of the disputed demand before the statutory 30 day period lapsed.

(5) As mentioned above, the Applicant duly submitted their objections within 30 days from the date of the Notices but is yet to be heard on their objection before the tax assessment could be considered as the final assessment.

(6) The issuance of the Agency Notices to enforce recovery of the disputed taxes effectively denies the applicant's an opportunity to be heard on their position that the tax as assessed by the Respondent was erroneous and excessive.

(7) The Agency Notices issued by the Respondent emasculates and disparages the due process of the law and is an abuse of the Administrative Justice systems. Failure by the Respondent to consider the applicants objection to the tax assessment before issuing the agency Notices to the bank which has the effect of freezing the applicant's bank account without following the provisions of the VAT act not only amounts to procedural lapse in the processing of tax demands by the respondent but also amounts to procedural impropriety which has exposed the applicants to unfair treatment.

(8) The failure by the Respondent as stated above amount to a breach of the rules of natural justice which require that no person should be condemned unheard.

(9) This Court has unfettered jurisdiction to grant the orders sought.

3. According to the Applicant, it is a reputable organization a contractor in the construction business and has been operating for more than 20 years with a strong economic and capital base and a vast clientele throughout the Republic with an average annual turnover of more than Kshs. 100 Million. It averred that it has heavily invested in people as well as technical expertise to build an outstanding technical capacity to address the challenges in the Construction industry and as result it has been providing remarkable solutions to a wide variety of clientele including Public Sectors, Corporates, Education, Health, Transportation, etc. employing over 100 people permanently and at any given time several casual workers at their various sites and always pays government taxes promptly. In that regard, it contended that it had built a reputation as an excellent and reliable organization in the building and construction solutions and services.

4. It was its case that it received a letter from the respondent dated 18th June 2014 demanding a sum of Kshs. 130,864,666.00 as unpaid taxes from the applicant and through its agents Messrs Mutahi Maranga & Associates Certified Public Accountants, the applicant replied to the said letter on 23rd June 2014 acknowledging receipt of the letter and further indicating the applicant's objection to the respondent's demands as set out in the said letter on grounds that the amount of tax as demanded was disputed. To this, the Respondent on 30th June, 2014, replied acknowledging the objection and requiring that the applicant provides documentation to support their objection against the demands by 8th July 2014 which the applicant did. However the Respondent vide a letter dated on 23rd July 2014 informed the applicant of their intent to carry out a compliance audit at the applicant's place of business for the Period January 2011 to May 2014 to examine the applicant's records on 30th July 2014 pertaining to Value Added Tax and Income Tax, a request which the applicant obliged.

5. It was averred that on 23rd September 2014 the Respondent requested for more details and thereafter engaged the applicant including holding a meeting with the applicant's representatives on 23rd October 2014 to ascertain the amount of the tax claimed and the validity of the applicant's objections against the claims. However, on 6th November 2014, the Respondent advised the applicant that indeed the purported demand as indicated in their letter of 18th June 2014 was valid and the applicant's objections were in essence unsubstantiated and informed the applicant that tax assessment would follow under a separate cover.

6. It was stated by the applicant that it appointed the firm of Kigo Njenga & Company Certified Public Accounts to act on its behalf in place of Messrs Mutahi Maranga and on 15th January 2015 the said firm of Kigo Njenga engaged the Respondent to defer recovery action of the disputed demand against the applicant pending further audit. However, on 9th February 2015, the Respondent served the Applicant with a Notice of Assessment indicating a compilation report of the investigation as regards the tax demanded by the Respondent and requiring that the applicant makes the payments as demanded and advising that the applicant was free to object to the assessments therein within a period of 30 days of the date of service of the Notice.

7. Notwithstanding the foregoing, the Respondent on 17th February 2015 nonetheless served upon the applicant's Bankers the **African Banking Corporation Limited** an Agency Notice purportedly under Section 25 of the ***VAT Act*** directing the Bank to remit payments from the applicant's bank accounts No. **000200000010129** held at African Banking Corporation Limited, Koinange Street Branch Nairobi and **Account Number 0010101207426** at Equity Bank Corporate Branch in the sum of Kshs. 130,864,666.00 effectively rendering the applicant incapable of accessing the said bank account. This Agency Notices, it was contended were never served upon the Applicant. According to the applicant, its agents, Messrs Kigo Njenga & Co. immediately addressed two letters in objection to the notice of assessment by the Respondent one dated 19th February 2015 raising concerns on the illegality of the Agency Notice and a further letter dated 26th February 2015 requesting the Respondent to set aside the agency letter while indicating to them that the applicant had obtained further evidence in support of its objections against the Respondent's claims.

8. The applicant therefore asserted that it was unable to access funds and banking facilities in the material account which generally manage the entire trade operations of the company and had been disabled from paying its our staff and on-going

projects had similarly stalled for this reason. Further, it was unable to participate in public tendering for new projects that require bank securities to be presented by bidders as mandatory condition.

9. In its submissions, the Applicant reiterated the foregoing that On 18th June 2014, the Respondent Authority initiated tax assessment on the operations of the applicants with a view to ascertain disputed tax figures that the applicant was to pay as unpaid taxes calculated for a certain period of time. The exercise went through various phases with the applicant and the respondent engaging each other to try and resolve the unpaid taxes. However, on 9th February 2015 the Respondent, acting under the provisions of section 45 (2) of the ***Value Added Tax Act, 2013*** (hereinafter referred to as "the Act" or "the VAT Act")-, issued a fresh Notice of Assessment of Tax containing amended contents demanding that the Applicants pay the said sums as unpaid taxes. The applicant's on 15th and 26th February 2015 upon receiving the said Notice of Assessment served the Respondent with a valid objection against the Notice of Assessment of tax pursuant to Section 50 of the ***VAT Act*** which provides that such a Notice of Objection must state precisely the grounds of objection to the Notice of Assessment and must be lodged within 30 days' upon issuance of the Notice of Assessment.

10. In that respect it was submitted that the Notice of Objection as served upon the Respondent was valid as it stated the grounds of objection: Excessive and unrealistic assessment and that it was served upon the Respondent within 30 days of receipt of the Notice of Assessment (17 days to be precise). The provisions of the ***VAT Act*** therefore obliged the respondent to consider valid objections raised by the applicant preceding any action for recovery of any assessed Tax. However, there is no claim by the Respondent that such objections as filed were invalid.

11. The applicant relied on section 50 (3) of the ***VAT Act*** which provides that where notice of an objection has been received under the section, the Commissioner shall, within thirty days amend the assessment in accordance with the objection; amend the assessment in the light of the objection according to the best of his judgment; or refuse to amend the assessment. It also cited section 50 (4) thereof which provides that where the Commissioner, in respect of an objection under the section either agrees to amend the assessment in accordance with the objection; or proposes to amend the assessment in the light of the objection and the person objecting agrees with the Commissioner on the proposed amendment, the assessment shall be amended accordingly and the Commissioner shall, within fifteen days, cause a notice setting out the amendment and the amount of tax payable to be served on that person. Reliance was similarly placed on section 50 (5) thereof which provides that where the Commissioner, upon consideration of an objection under the section 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 who shall, within fifteen days, cause a notice setting out the amendment and the amount of the tax payable to be served on that person; or refuses to amend the assessment, he shall, within fifteen days, cause a notice confirming the assessment to be served on that person.

12. It was submitted that upon receipt of the objection from the applicant, the Respondent failed to comply with the above mandatory provisions as no Notice was issued by the respondent to indicate whether or not the applicants' objections were considered.

13. Instead, the Respondent without any reference to the applicant and without contemplation to any objection raised by the applicants proceeded to issue Agency Notices upon the applicants' bankers on 17th February 2015 effectively freezing the applicants' accounts on undertaking of the notice of assessment before the lapse of 30 days for objection sanctioned by section 50 (2) of the ***VAT Act***. It was submitted that the Respondent was mandated and was compelled to stay any recovery action pending the lapse of the 30 days statutory period hence any recovery action initiated before the lapse of the 30 days is premature and impulsive to the detriment of the Applicant and accordingly such action should be adjudicated as an illegality.

14. In support of this submission, the applicant relied on **Republic vs. Kenya Revenue Authority Ex-Parte Mary W. Kamau & Another [2012] eKLR** in which **Githua, J** held:

> **"…As noted earlier, it is apparent from the facts of the instant case that the Applicants were not heard on their objection before the tax assessed earlier was considered as a final assessment and Agency notices were issued to enforce its recovery. This in my view denied the applicants the opportunity to be heard on their position that the tax as assessed by the Respondent was erroneous as it was allegedly not in conformity with financial records held by them. The Respondent did not also consider the objection as it had not received the documents it required for that purpose from the applicants before it issued the Agency notices on 29th April 2011 and 30th April 2011. Failure to consider the said objection irrespective of whatever decision the Respondent would have come out with amounted to failure by the Respondent to perform its statutory duty under Section 85 of the Act. Given the substantial amounts involved in the tax assessment, I find that failure to consider the applicants objection to the tax assessment before issuing the Agency notices which had the effect of freezing the applicants bank accounts without notice was not only a procedural lapse in the processing of tax demands by the Respondent but was a procedural impropriety which exposed the applicants to unfair treatment. It also amounted to a breach of the rules of natural justice which require that no person should be condemned unheard"**

15. According to the Applicant, it is settled law 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. The Respondents in the replying affidavit did not address the issues as claimed by the applicant on the procedural impropriety as exercised by the Respondent in issuing the agency notices but goes to the merits of the impugned decision. The Applicants, it was submitted, indeed have not denied that the Respondent had initiated tax assessment on its operations but on the contrary they have lodged this reference to seek redress for breach of the Respondent's statutory obligations. In support of its case, the applicant relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** as well as **Article 47** of the Constitution and submitted that it was rightfully entitled to fair administrative action from the Respondents

herein being a public administrative body yet the Respondents failed to abide by the legislative requirements and as such the decision to serve agency notices upon the Applicants bankers was procedurally unfair, illegal and illegitimate. Further, the Respondent acted prematurely and contrary to the above mentioned provisions of the law and violated the rules of Natural Justice and express statutory provisions and as a consequence of which the orders of *certiorari* sought herein ought to issue.

Respondent's Case

16. In response to the application, the respondent contended that Applicant Company is a limited liability company incorporated in Kenya in 2002 and specializes in civil, mechanical and general contractual works majoring in water and sewerage services. The Applicant Company had carried out various projects including the relocation of water and sewerage facilities along the Nairobi-Thika Super Highway valued at Kshs.538,556,901.00 and the construction of water and sewer lines in Nairobi-Mukuru Informal Settlements valued at Kshs.155, 000,000.00.

17. On the other hand, the Respondent is a Statutory Corporation duly established under the ***Kenya Revenue Authority Act*** (Cap. 469 of the Laws of Kenya) as the sole agent of the Government for the assessment and collection of all government revenue.

18. It was averred that the Applicant Company herein was selected for examination in a random exercise intended to review input VAT refund payments made by the Respondent which examination was intended to verify the correctness or otherwise of input tax claimed on a VAT refund paid to the Applicant Company. According to the Respondent, it noted that the Applicant Company had lodged refund claims for the period March 2011 to February 2013 totalling Kshs 64,069,590.00 and was paid Kshs 55,674,766.00.

19. The Respondent vide a notice to the Applicant Company dated 23rd April 2014 requested the latter to provide documents for Value Added Tax and Corporation Tax but the Applicant Company did not honour the request by forcing the Respondent to visit the Applicant's premises on 13th May 2014 in order to examine the records requested for in the letter. On arrival at the Applicant Company's premises, the Respondents' officers were orally informed that the records were with the Auditor who had prepared the Input VAT refund claim and relying on some information in its custody, the Respondent proceeded to source for the relevant information from various third parties who had made supplies to the Applicant Company during the period under examination as it is these supplies that would have formed the basis for the input VAT tax refund claimed by the Applicant Company. The said suppliers, namely, ASP Company Limited, General Industries Limited, Kinetics Engineering Limited and Warren Concrete Limited responded to the request by the Respondent and availed various documents which included contracts between the Suppliers and the Applicant Company; statement of account showing transactions with the Applicant Company; and bank statements showing payments received from the Applicant Company.

20. It was averred that on receipt of the documents from the Suppliers, the Respondent reconciled the information contained therein against the information in its possession mainly, schedules of purchases and input VAT tax attached to the VAT refund claims by the Applicant Company and following the reconciliation, established that the Applicant Company when making is application for VAT input tax had represented that is value of purchases from ASP Company Limited was **KShs.229,570,771.00**. However, ASP Company Limited confirmed that it supplied the Applicant Company with steel pipes at a contract price of **USD 1,857,179** equivalent to **KShs.144,569,309.00** and therefore, the Applicant Company had overstated the purchases and hence claimed higher input tax. It was further established that the Applicant Company used fake invoice numbers 53540, 62318, 64960 and 65546 to claim input tax on purchases worth KShs.53,400,000.00 from General Industries Ltd in the year 2010.The Respondent also established that the Applicant Company had used invoice numbers 53540, 62313,6 64960 and 65546 to claim input VAT tax refund on building materials allegedly purchased from General Industries Limited worth Kshs. 53,400,000.00 in the year 2010. However, after examination of records from General Industries Limited, none of the invoices originated from them. The Applicant Company also relied on invoice number 003999 from Kinetics Engineering Limited and invoice number 55250 from General Industries Limited to claim input tax refund. However, on examination of the two invoices from the two separate entities, it emerged that the two (2) invoices bore the same electronic signature device (ESD) signature "3A77B69521239FA7013FF3F57D9375085AC5EFF500017193100730093 8FP08300232".

21. It was averred that the findings of the examination were discussed with the Applicant Company and its Tax Agent, M/s Mutahi Maranga & Associates in a meeting held on 17th June 2014. Thereafter on 18th June 2014, the Respondent demanded payment of the amounts refunded in error pursuant to the provisions of the ***VAT Act***, a demand which he applicant acknowledged on 23rd June 2014 and requested for twenty (20) days to revert back to the Respondent. The Applicant Company continued to engage the Respondent but did not file an objection to the Respondent's assessment within the time provided for in law or provide any additional documents that would enable the Respondent amend its demand.

22. On 23rd July 2014, the Respondent informed the Applicant Company of its intention to widen the scope of the examination to include other tax heads notably Income Tax and Value Added Tax and again on 16th September 2014 the Respondent held a further meeting with the Applicant Company and did a follow up letter to the meeting on 23rd September 2014 with a reminder on 10th October 2014. However, the Applicant Company throughout the examination never supplied any information or documents save for an email dated 23rd October 2014 from its Tax Consultant re-computing the VAT refund. On perusal and analysis of the email the Respondent established that the re-computation of purchases from ASP Company Limited tallied with the Respondent's own finding therefore confirming that the Applicant Company had overstated its purchases in the original Input VAT refund claim; that in respect of purchases from General Industries Limited, the particulars in the original claim were KShs.55,753,624.00 though the Applicant's Tax Consultant re-computed the same as KShs.26, 099,520.00 (half the amount claimed in the original refund claim), again confirming the Respondent's position that the Applicant Company had overstated purchases in its original input VAT refund claims; and in respect of purchases from other Suppliers, no re-computation or evidence was availed.

23. It was disclosed that a meeting between the Applicant and the Respondent was held on 23rd October 2014 to discuss the erroneous input VAT refund and other matters of income tax established in the subsequent examination and the Applicant Company having failed to adduce any further explanation or evidence, the Respondent was left with no option but re-state its position on the erroneous input VAT refund in a letter dated 6th November 2014. A further meeting was held between the Applicant Company and the Respondent on 8th December 2014 to discuss issues of income tax and the Applicant Company committed to provide the documents that had not been provided. Though the Respondent followed up the deliberations of the meeting vide a letter dated 12th January 2015, the Applicant Company did not avail the information but instead in a letter dated 15th January 2015 wrote to the Respondent stating that it had appointed M/s Kigo Njenga & Company to handle its tax matters.

24. To the applicant, following all the back and forth by the Applicant Company, the Respondent determined that it was not keen on resolving its tax matters and on 09th February 2015 issued additional assessments for income tax and VAT established from the subsequent and further examinations of the Applicant Company's tax status. To the Respondent, these additional assessments were not in respect of the input VAT refunded in error. On 17th February 2015 the Respondent instituted enforcement measures to recover the VAT input tax erroneously refunded by issuing agency notices to the Applicant Company's Bank account in order to refund tax paid in error. To these agency notices the applicant responded vide letters dated 19th February 2015 and 26th February 2015 to which it annexed a summary of input tax and copies of invoices in support in March 2011 input VAT refund claim of Kshs. 55, 555,121.00. On perusal of the documents and schedules attached to the Applicant Company's letter dated 26th February 2015, the Respondent established that the Applicant Company was fraudulently relying on records outside the claim period to support the input VAT refund claim for March 2011 and in a letter dated 27th February 2015, the Respondent reconfirmed its earlier position as communicated in the letters dated 18th June 2014 and 06th November 2014.

25. It was the Respondent's case that the Applicant Company has to date neither disputed the demand for the erroneous input VAT refunds nor provided evidence to demonstrate that the same was not justified.

26. It was therefore the Respondent's case that it acted within all four corners of the law and accorded the Applicant Company sufficient opportunity to be heard.

27. The Respondent on their part submitted that the agency notices the Applicant Company is seeking to quash herein are in respect of the Input VAT refund claim demanded by the Respondent in the letter dated 18th June 2014 and in its view, a claim for input VAT refund would arise where the output tax is in excess of input tax. The provisions of the ***VAT Act*** require any person making a taxable supply (goods or services) to pay tax and the supply is the output hence this tax is the output tax. Where a person purchases taxable supplies for furtherance of their business the supply is input and the tax paid on the purchase is input tax. In computing tax payable to the Respondent, it was submitted one should subtract the input tax attributable to taxable supplies from the output tax and pay the difference to the Commissioner of Domestic Taxes. If the input tax is greater than the output tax one should carry forward the difference as a credit to your next VAT return or claim a refund as the case maybe.

28. It was submitted that in conducting an examination of the Applicant Company's input VAT refund claims and other business operations, the Respondent was guided by section 43 which requires any person making taxable supplies under the ***VAT Act*** to keep certain records and in particular section 43 (3) which provides that:

> ***Every person required under subsection (1) to keep records shall, at all reasonable times, avail the records to an authorised officer for inspection and shall give the office every facility necessary to inspect the records.***

29. As the Applicant failed to supply the Respondent with documents as requested, Respondent was forced to rely on documents in the possession of the Applicant's suppliers and in so doing the Respondent was guided by section 48 of the ***VAT Act*** which stipulates:

> ***(1) For the purposes of obtaining full information, whether on a data storage devise or otherwise, in respect of the tax liability of any person or class of persons, or for any other purposes, 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 records, books of account, statements of assets and liabilities or other documents that are in the person's custody or under the person's control relating to the tax liability of any person;***
> >
> > ***(b) furnish such information relating to the tax liability of any person in the manner specified in the notice;***
> >
> > ***(c) attend, at such time and place as may be specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to tax liability of any person.***

30. Following reconciliation of the documents and information received from the Applicant Company's Suppliers for the period under review against the documents in the possession of the Respondent, the latter established that the Applicant Company had made irregular Input VAT claims and made a demand for the same pursuant to section 32 of the ***VAT Act 2013.***

31. To the amount, it was submitted the Respondent also levied the penalty provided for in section 33 of the Act which says:

Any person who fraudulently makes a claim for a refund of tax shall be liable to pay a penalty of an amount equal to two times the amount of the claim.

32. To the Respondent it has demonstrated that it at all material times acted within the law and its actions cannot be said to have been "*ultra vires".*

33. It was submitted the rules of natural justice require that no person should be condemned unheard and indeed this right is protected under the Constitution of Kenya, 2010 and the Respondent relied on **H.C.Misc.Civil Appl. No. 449 of 2001; Republic –vs- KRA; Ex-parte: Total Kenya Limited,** in which **Majanja, J** at page 12 of the judgment held:

"I agree with Counsel for the Respondent that the exchange of correspondence in this instance provided the Applicant an opportunity to be heard and to present its case. That opportunity was afforded from the time the first demand was issued on 08th February 2011 and this opportunity was available until at least 04th May 2001."

34. They also cited **Nairobi H.C. Misc. Civil Application No. 248 of 2013; Republic –vs- Kenya Revenue Authority &** Anor in which the Learned Judge made reference to **Michael Fordham** in ***Judicial Review Handbook***, 4th Edition at page 1007, which states:

Procedural fairness is flexible principle. Natural Justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case.

35. To the Respondents, they have demonstrated that they provided the Applicant Company with numerous opportunities to be heard both through exchange of correspondence and meetings which opportunity arose right from the issuance of the audit notice right to the time the Respondent took enforcement measures. Despite that, the Applicant did not and has not to date file a valid objection to the demand for the input VAT paid in error and the subject matter of the demand. Therefore, the Respondent cannot in the circumstances determine an objection that is non-existent as it would have no powers to do so. To the Respondent, the applicant's letter dated 23rd June 2014 which was in response to the demand for the input VAT refund, cannot be said to have been a valid letter of objections contemplated under section 50 of the ***VAT Act*** as no grounds were set out therein.

a. In the alternative, the Respondent submitted that objection proceedings do not apply to a demand made under section 32 as in this case since under section 50 is clear that an objection may only be lodged against an assessment made under sections 45 or 46 of the Act.

36. The Applicant Company again in its letters dated 19th February 2015 and 26th February 2015 attempted to object to the demand for the input VAT claim dated 18th June 2014.

37. It was submitted that even assuming that section 50 of the Act which deals with objections was applicable to the demand for input VAT made under section 32 of the Act, the letters dated 19th February, 2015 and 26th February, 2015 were out of time since section 50(2)(b) requires that a letter of objection must be filed within thirty (30) days from the date of the assessment. The demand herein made on 18th June 2014 which was a delay of almost 8 months. In support of this submission, he Respondent relied on **Nairobi H.C. Misc. Civil Application No.81 of 2011; Republic vs. The Commissioner of Customs Services; Ex-parte: SDV Transami,** where the court had this to say at page 26:

It is therefore my view that the decision envisaged under Section 229(1) was made on 17th August 2010. The demand letter dated 30th December 2010 was a follow up to the previous demand made upon the Applicant and the interested party. Once the Respondent had communicated in August 2010 that tax was due, it was incumbent upon the Applicant to lodge an appeal within the stipulated or specified period under section 229. That was not done. Therefore it was not open or available to the Applicant to lodge an appeal 5 months after the offensive decision was made. It was not within the jurisdiction and powers of the respondent to entertain an appeal outside the time allowed."

38. The Respondent submitted that for there to be a valid letter of objection, it must state precisely the grounds to the objection. Although the Applicant Company has in the purported letters of objections stated that the demand for the input VAT claim is excessive, it has not stated what the excesses are, nor, provided supporting documentation to enable the Respondent re-consider its position. Further in the said letters, the Applicant seeks a withdrawal of the agency notices whilst at the same alluding to the fact that they are still in the process of reviewing the demand and will in due course file an objection. These in the Respondent's submission, were not the grounds anticipated under Section 50 of the ***VAT Act, 2013***. Additionally, there was confusion as to which demand or assessment the Applicant Company was objecting to. In the letter dated 19th February 2015 it made reference to an amount of Kshs. 130, 864,666 which is the Input VAT refund demand. In the same letter, the Applicant made reference to the notice of assessment dated 09th February 2015; which notice had nothing to do with the input VAT refund demand or the agency notices issued and which are the subject matter of these proceedings. The Notice of assessment dated 09th February 2015, it was contended dealt with confirmation of contract income; VAT on advance payment; Salvation army property; Credit reduction and interest on late payment of VAT; Income tax implication of unsupported purchases; Directors current account; Corporation tax implications; and Separate source – Rent income. Reliance was placed on **Nairobi H.C. Misc. Civil Application No. 534 of 2007; Republic –vs- Kenya Revenue Authority & 2 others**.

39. Similarly, in the case of **SDV Transami** (supra), the learned Judge had this to say at page 19:

"It is important to note that Section 229(1) deals with a decision or omission of the commissioner on matters of customs…..The decision or omission must be prejudicial to the interests and rights of a particular individual. It means that a party is affected by a detrimental decision or omission made by the Commissioner or his agents."

40. Similarly in the case of **Metro Pharmaceuticals Limited** (Supra), the Learned Judge held at page 18:

"The Applicant 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 EACCMA. The conclusion of the letter as already quoted clearly shows the Applicant was reopening the assessment and not asking for review."

41. It was the Respondent's view that the above position was also upheld by this Court in the case of **Europa HealthCare Limited** (supra), where it was held:

"I agree that the letter dated 21st December, 2012 was not clear whether it was challenging the decision of 25th February, 2011 or the demand which came months after the decision."

42. According to the Respondent, it is trite law that a Court may intervene where an administrative body has acted outside jurisdiction or in excess of jurisdiction and that judicial review is concerned not with the merits of the decision but the decision making process. This principle, it was submitted is well set out in the Supreme Court Practice 1997 Vol.53/1-14/6 which was quoted with authority in the case of **Coastal Bottlers –vs- The commissioner of Domestic Taxes (H.C.Misc.Civil Application No. 1756 of 2005)** that:

"The Remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application 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 individual judges for that of the authority constituted by law to decide the matters in question."

34. It was the Respondent's case that the applicant's case was merited and ought to be dismissed.

Determination

35. 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.

36. 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."

37. 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."**

38. 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.***

39. 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.

40. Therefore in dealing with tax matters, the Court of Appeal in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007** expressed itself as hereunder:

> **"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."**

41. However, it must always be remembered that persons charged with statutory powers and duties ought to exercise the same reasonably and fairly. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC MISC. APPL. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**. If the discretion is used arbitrarily and unreasonably, the court may step in to remedy the situation. As was held by the Court of Appeal in **Republic vs. Commissioner of Co- Operatives, Kirinyaga Tea Growers Co- Operative & Savings & Credit Society Ltd. Civil Appeal No. 39 of 1997 [1999] 1 EA 245,** it is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith. It has been appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International Sa (Bureau Veritas) [2005] 2 EA 43**.

42. Therefore whereas this Court is not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court in intervening. 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 in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the *Wednesbury* unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.

43. In this case the issue for determination is whether the applicant was afforded an opportunity to object to the assessment and if the same was done, then whether the Respondent followed the due process subsequent to the said objection. If such due process was not followed the next issue is whether in the circumstances of this case, the process alleged by the applicant was applicable.

44. According to the Applicant, upon receipt of the letter dated 18th June, 2014, demanding a sum of Kshs. 130,864,666.00 as unpaid taxes from the applicant and through its agents Messrs Mutahi Maranga & Associates Certified Public Accountants, the applicant replied to the said letter on 23rd June 2014 acknowledging receipt of the letter and further indicating the applicant's objection to the respondent's demands as set out in the said letter on grounds that the amount of tax as demanded was disputed. The letter dated 23rd June, 2014 was however worded in the following terms:

> ***We believe this demand is as a result of your officers finding as indicated to us on Tuesday the 17 June, meeting.***
>
> ***We would like to let you know that at this point we cannot say yes or no, to your demand. We need to check on the accuracy of your finding.***

We therefore require not less than 20 working days to do so.

We shall revert back to you the soonest possible.

The tax therefore demanded remains disputed.

You may revert to the undersigned for any other clarification…..

43. Section 50 of the ***VAT Act*** provides that a Notice of Objection must state precisely the grounds of objection to the Notice of Assessment and must be lodged within 30 days' upon issuance of the Notice of Assessment. This provision has received judicial interpretation in **Nairobi H.C. Misc. Civil Application No. 534 of 2007; Republic –vs- Kenya Revenue Authority & 2 Others**, where the Court expressed itself as follows:

> **"An objection that does not conditionally state a clear and unambiguous position of the taxpayer and which suggests a discussion or a meeting is not an application under S229 (2)…For it to be effective it must unequivocally deal with all aspects of the assessment and specify the taxpayer's position on each with clear answers and figures admitted or not admitted…."**

45. In this case, the said letter of 23rd June, 2014 cannot be said to be unambiguous. Whereas on one hand it indicated that the taxes, were disputed, it is clear from the letter that the Applicant was unable at that stage to determine whether the demand was correct or not since it required time to verify the claim made by the Respondent. In my view such a letter is not the objection contemplated under section 50 of the ***VAT Act*** and does not meet the criteria of a valid objection thereunder. The Respondent receiving the objection must be in a position to know what exactly the taxpayer is objecting to and what is not objected to. If it is the figures the taxpayer must indicate what in its view ought to be the correct figure unless the whole figure is objected to. In other words, the objection cannot be "in the alternative and without prejudice to the foregoing".

46. It would however seem that there followed an exchange of several correspondences between the parties culminating into the letter dated 6th November, 2014 by which the Respondent reaffirmed their position in the letter dated 18th June 2014. On 9th February, 2015, the Respondent served on the Applicant a Notice of Assessment and informed the Applicant that it was at liberty to object to the same within 30 days. According to the Applicant, it objected vide its letters dated 19th February, 2015 and 26th February, 2015. The letter dated 19th February, 2015 was couched in the following terms:

We are the appointed tax agents for the above client and confirm to have received a copy of the agency notice (through the taxpayer's bankers) as a result of your tax demand for kshs.130, 864,666 which we hereby object on the following grounds:

1. ***That the agency notice has not been issued in good faith since it has come only 7 days after the receipt of the notice of assessment dated 9th February 2015 and received by our client on 10th February 2015. (Note the notice of assessment is not signed as per the attached copy).***

2. ***The notice of assessment had confirmed a 30 days period of objection which would expire on or around the 10th of March 2015.***

3. ***After our appointment which came into effect on 15th January 2015 (see copy of letter attached) we requested for time to study the files. We confirm that this exercise has commenced and that preliminary indications indicate that new evidence is coming up to prove that the amount so demanded is not payable.***

4. ***That the tax stipulated therein is excessive, not as per the accounts and returns submitted and received in your office during the investigation period.***

In view of the above we write to inform you that we are studying that the taxpayer's records and we will be filing our findings or objection to the matters raised on the notice of assessment before the expiry of the 30 days.

We therefore kindly request your office to reverse the agency notice to allow the client to continue doing business and paying taxes to support the revenue demand for this country as he has done in the past.

47. It is clear that in this letter the Applicant was challenging the prematurity of the Agency Notices as the period limited for making objection had not run its course. Secondly, the Applicant contended that from its preliminary objection, the amount demanded was not payable as the same was excessive. However, it was clear that the full picture would only be known after its completion of the evaluation of its records by which time it would be able to file its objection. Going by the decision in **Republic vs. Kenya Revenue Authority & 2 others** (supra) this letter similarly did not constitute a valid objection. According to it, the demand was excessive yet the Applicant did not indicate what in its opinion ought to have been the correct figure. That the Applicant could not do this was understandable taking into account its position that it was still studying its records. That this letter was not, even in the Applicant's view, an objection was clear from the letter itself wherein it stated that it would be filing an objection in due course.

48. The letter dated 26th February, 2015, which seems to have been a follow up to the letter dated 19th February,2015, on the other hand was to the effect that:

We indicated that our objection was based on facts of excessive assessment, unrealistic and excessive tax demanded. We enclose herewith the following to support our objection:

1. ***Copy of the letter dated of objection erroneously addressed to Mr. Mugogo.***

2. ***Copies of 12 files for purchase documents supporting the VAT refund claim for kshs.55, 555,121.00***

3. ***Summary of V.A.T 3 showing individual details of input tax.***

Your findings on investigation audit are as well sorted out by the said files.

49. As indicated hereinabove, even from the Applicant's own standpoint, the letter dated 19th February, 2015 did not constitute a valid objection. The above letter dated 26th February, 2015 seems to only reiterate the substance of the letter dated 19th February, 2015 with respect to "***excessive assessment, unrealistic and excessive tax demanded"*** without shedding light on how much, in the Applicant's view ought to have been demanded. Since the letter dated 19th February, 2015 did not constitute a valid objection, the documents exhibited in the letter of 26th February, 2015 could not support a non-existent objection.

50. The Respondent, however contended that the said two letters were out of time with respect to the letter dated 18th June, 2014. I am not prepared to agree with the Respondent on this line since by its own letter dated 9th February, 2015, the Respondent clearly informed the Applicant that it had 30 days within which to lodge its objection. It is however contended which contention is not disputed that on 17th February, 2015, before the lapse of the said 30 days, the Respondent served the Applicant's Bankers with Agency Notices purportedly under section 23 of the Act. If the Agency Notices were issued pursuant to the said assessment dated 9th February, 2015, the same Notices would be clearly premature. That was the position adopted by this Court in **Republic vs. Kenya Revenue Authority Ex Parte Jaffer Mujtab Mohamed Nairobi Miscellaneous Civil Application No. 312 of 2011**where the Court expressed itself *inter alia* as follows:

> **"One of the grounds upon which the instant application is based is that the action of issuing the Agency Notices was premature as the period stipulated for challenging the decision had not run out. This position has not been controverted by the Respondent. If this was the position then the effect of the Respondent's action was to scuttle the appellate process. It cannot therefore be said that the applicant was precluded from invoking this Court's judicial review jurisdiction as the issue to be decided would then be the propriety of the process taken by the Respondent…Having considered the issues raised in this application, I am satisfied that the Respondent's action of issuing Agency Notices prematurely was irrational and in bad faith."**

51. As was held in **Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR**:

> **"If statutory power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations."**

52. It is however contended by the Respondent that the Agency Notices were in respect of an amount of Kshs. 130, 864,666 which is the Input VAT refund demand made pursuant to section 32 of the ***VAT Act*** which provides:

> ***(1) Where any tax has been refunded in error, the person to whom the refund has been erroneously made shall, on demand by the Commissioner, pay the amount erroneously refunded.***
>
> ***(2) Where a demand has been made for any amount of tax under subsection (1), that amount shall be deemed to be due from the person liable to pay the tax on the date upon which the demand is served upon him and if payment is not made within thirty days of the date of service, an interest of two percent per month or part thereof of such unpaid amount shall forthwith be due and payable:***
>
> ***Provided that the interest chargeable under this subsection shall not exceed one hundred percent of the tax originally due.***.

52. The Agency Notices however did not indicate the provisions of the law under which they were issued. On this aspect I wish to cite with approval the decision of **Majanja, J** in ***Geothermal Development Company Limited vs. Attorney General & 3 Others*** *Petition 352 of 2012 in which he expressed himself as hereunder:*

> **"A notice of the nature issued to enforce collection of taxes must clearly state to be such a notice, state the amount claimed, state the legal provision under which it is made and draw the taxpayers attention to the consequences of failure to comply with the law and the opportunity provided by the law to contest the finding. Such a notice would give the opportunity to any Kenyan to know the case against it and utilise the legal provisions to contest the decision. The right to fair administrative action and the right of access of justice now enshrined in our Constitution demand nothing less."**

53. However, by its letter dated 18th June, 2014, the Respondent had demanded from the Applicant the same amount of Kshs130,864,666.00 which was clearly indicated as refund of VAT based on irregular input claims and particulars thereof were given. The Applicant was required to pay the same within thirty days. The Agency Notices are dated 17th February, 2015 clearly way beyond the said 30 days. The applicant cannot therefore be heard to claim that it was unaware that it was required to pay the said amount. As correctly submitted by the Respondent, the said sum was payable under section 32 aforesaid. Under section 50 of the Act, an objection may only be lodged against an assessment made under sections 45 or 46 of the Act since section 50(1) of the ***VAT Act*** which deal with objections stipulates that:

> ***A person who disputes an assessment made by the Commissioner under section 45 or 46 may, by notice in writing to the Commissioner, object to the assessment.***

54. Sections 45 and 46 of the Act provide:

> ***45(1) For the purposes of this Act, a registered person who has submitted a return shall be treated as having made an assessment of the amount of tax payable for the tax period to which the return relates, being the amount set out in the return.***
>
> ***(2) If a registered person fails to—***
>
> > ***(a) submit a return;***
> >
> > ***(b) keep proper books of accounts, records or documents; or***
> >
> > ***(c) apply for registration as a registered person, as required under this Act, the Commissioner may, based on such evidence as may be available, make an assessment of the tax payable (including interest and any penalty where applicable) by the registered person.***
>
> ***(3) An assessment under subsection (2) shall not alter the due date for the payment of the tax as determined under the Act.***
>
> ***(4) The Commissioner shall cause a notice of the assessment under subsection (2) to be served on the person assessed, and the notice shall state the amount of tax payable and shall inform the person assessed of his rights under this Act.***
>
> ***(5) Subject to subsection (6), an assessment made under subsection (2) shall not be made after five years immediately following the last date of the tax period in which the liability to pay tax arose.***
>
> ***(6) The time limit under subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud.***
>
> ***46. (1) Subject to this section, the Commissioner may amend an assessment by making such alterations or additions to the assessment as he considers necessary to ensure that a registered person is liable for the correct amount of tax in respect of the tax period to which the assessment relates and shall serve notice of the amendment on the registered person.***
>
> ***(2) A registered person who has made a self-assessment pursuant to section 45 may apply to the Commissioner, within the period specified in subsection (4)(b), to make an amendment to the assessment.***
>
> ***(3) If an application has been made under subsection (2), the Commissioner may—***
>
> > ***(a) amend the self-assessment; or***
> >
> > ***(b) refuse the application, and the Commissioner shall serve the registered person with a notice of the decision on the application within thirty days of the receipt of application.***
>
> ***(4) The amendment of an assessment under subsection (1) may be made (a) in the case of gross or wilful neglect, evasion or fraud by or on behalf of the registered person, at any time; or (b) in any other case, within five years of—***
>
> > ***(i) a self-assessment, the date that the registered person submitted the return; or***
> >
> > ***(ii) any other assessment, the date the Commissioner served notice of the assessment, and the Commissioner shall serve the registered person with a notice of an amended assessment within thirty days.***
>
> ***(5) Subject to subsection (6), if an assessment has been amended under subsection (1), the Commissioner may further amend the original assessment within the later of—***

(a) five years after the Commissioner served notice of the original assessment on the registered person or, in the case of a self-assessment, five years after the registered person submitted the return treated as the original assessment; or

(b) one year after the Commissioner served notice of the amended assessment on the registered person.

(6) In any case to which subsection (5)(b) applies, the Commissioner shall be limited to amending the alterations or additions made in the amended assessment to the original assessment.

(7) In this Part, "assessment" includes a self assessment under section 45.

55. From the foregoing it is clear that under section 45 of the Act, the assessment is undertaken where a registered person fails to submits a return; fails to keeps proper books of accounts, records or documents; or fails to apply for registration as a registered person. Section 46 on the other hand applies where the assessment is amended. These provisions clearly do not apply to situations where what is demanded is refund of the input VAT as is contended here. Accordingly section 50 does not apply to the circumstances herein.

56. On the issue whether the applicant was afforded an opportunity to object to the assessment, it is clear that the applicant was afforded an opportunity to lodge its objection to the assessment in circumstances where the provisions for the objection were applicable. The applicant's contention that it was no afforded such opportunity was based on the allegation that the Agency Notice were issued before the expiry of the period for the objection. I have however found that the said Notices were issued pursuant to the demand for refund for input VAT and therefore the provisions of section 50 of the Act were inapplicable.

57. It follows that the issue of the failure to follow the due process before the issuance of the said Agency Notice does not arise.

Order

58. In the premises I find no merit in the Notice of Motion dated 11th March, 2015, which I hereby dismiss with costs to the Respondent.

Dated at Nairobi this 1st day of March, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Maloba for the Applicant

Cc Patricia