REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW AND CONSTITUTIONAL DIVISION

MISC APPL NO. 270 OF 2014

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

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

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

AND

IN THE MATTER OF JUDICIAL REVIEW APPLICATION FOR THE ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

THE COMMISSIONER FOR INCOME TAX .....1ST RESPONDENT

THIKA LOCAL INCOME TAX COMMITTEE ..... 2ND RESPONDENT

EX PARTE QPLAST INDUSTRIES LIMITED

JUDGMENT

Introduction

1. By a Notice of Motion dated the 18th July, 2014 the Applicant herein, **Qplast Industries Limited**, seeks the following orders:

a. **Certiorari to remove to this honourable court and quash the agency Notices dated 25th June**

2014 issued by the 1st Respondent seeking to recover and/or realize a sum of Kshs 6,162,159 towards unpaid Corporation Tax arrears against it through its bank account held with I&M Bank Limited, Kenyatta Avenue Branch.

b. **Certiorari to remove into this honourable court and quash the 2nd Respondent's decision delivered on 2nd April 2014 and communicated on 3rd April 2014 (the said decision) dismissing the Applicant's appeal lodged thereat arising from the 1st Respondent's Income Tax Assessments for the year 2006 to 2011 raised against the Applicant.**

c. **Certiorari to remove into this honourable court and quash the 1st Respondent's decision contained in its letter dated 31st October 2011 demanding additional taxes for the years 2006 to 2011, in particular the erroneous taxes levied on the loan advanced to the Applicant in or around the year 2003.**

d. **Prohibition to prohibit the 1st Respondent in any manner whatsoever or otherwise acting upon the said decision of the 2nd Respondent.**

e. **Prohibition to prohibit the 1st Respondent from issuing any other further income assessments for the years 2006 to 2011 against the Applicant and/or attempting to enforce the same against the Applicant.**

f. **The cost of this application be provide for.**

Applicant's Case

2. The Application was supported by a verifying and supplementary affidavit sworn by **Kaushik Jesa**, a director of the applicant in which he deposed that the Applicant is a limited liability company incorporated in the year 2003 (the year of incorporation) as a private limited company and whose main business activity is manufacture of industrial packaging (polythene) and extraction and bottling of mineral water from their own borehole.
3. It was deposed that during the year of incorporation of the applicant the applicant obtained a loan of Kshs. 60, 391,451.00 (the loan) to purchase equipments for the running of its business which loan was secured by guarantees and letters of credit.
4. On or about the year 2011 the 1st Respondent decided to conduct an audit of the Applicant's account for the years 2006 t0 2011 and upon the conclusion of the audit the 1st Respondent erroneously proceeded to determine that taxes ought to be levied on guarantees, letters of credit and a loan advanced to the applicant during the year of incorporation of the applicant and proceeded to demand the same from the applicant.
5. Aggrieved by the said decision, the applicant filed an objection with the 1st Respondent on the 23rd November 2011 stating reasons why the guarantees, letters of credit and the loan were not legally subjectable to income tax. According to the deponent, the 1st Respondent erroneously and without regard to the sound reasoning advanced and documents availed to it by the Applicant confirmed its decision and proceeded to demand the assessed tax from the Applicant.
6. According to the deponent, the ***Income Tax Act***, cap 470 of the Laws of Kenya (hereinafter the Act) at section 3 succinctly provides for the definition of what constitutes an income and therefore provides for what can be subjected to taxation. It was deposed that from the foregoing provisions guarantees, letters of credit and loans are not and cannot statutorily be subjected to taxation hence the decision by the 1st Respondent to levy tax on guarantees, letters of credit and loan was made in jurisdictional error and thus *ultra vires* by purporting to levy taxes on guarantees, letters of credit and loans which are not subject to taxation by dint of section 3 of the Act. Further the decision by the 1st Respondent to levy the said taxes was irrational, unreasonable and illogical as the 1st Respondent decided to levy taxes on accounts which are clearly not taxable under the Act or any tax regime. It was reiterated that the decision by the 1st Respondent to levy the taxes was grounded on fundamental error of fact and law as the 1st Respondent held that loans, guarantees and letters of credit are incomes and therefore taxable and proceeded to erroneously levy taxes on the same.
7. It was averred that the applicant being aggrieved with the decision of the 1st Respondent subsequently lodged an appeal with the 2nd Respondent on the 12th July 2012 appealing the decision of the 1st Respondent and that pursuant to the appeal a meeting was held in the 2nd

Respondent's offices on the 16th April 2013 which meeting resolved that the letters of guarantee were not taxable and went on to uphold this ground of appeal which decision was communicated to the applicant vide a letter dated 3rd May 2013. The said letter proceeded to request the applicant to avail Bank Statements for further analysis on the issue of the loan. The applicant then wrote to its banker vide a letter dated 29th April 2013 and asked for the statements and that the Applicant's banker wrote back to the Applicant vide a letter dated 28th May 2013 stating that it could not avail the documents as it had changed its systems severally since 2003 which information was communicated to the 3rd Respondent.

8. It was deposed that there were ongoing meetings directed by the 2nd Respondent to try and solve the outstanding issues and a report made to the 3rd Respondent and that the Applicant severally sought a meeting with the 1st Respondent which meeting did not materialize as at 16th January 2014 and the Applicant proceeded to make its submissions before the 2nd Respondent. However, in total disregard of the submissions by the Applicant and the documents adduced the 2nd Respondent delivered its decision on the 2nd day of April 2014 and issued a notice of the same on the 3rd April 2014 stating that the guarantees and letters of credit were illegally subjected to tax contrary to law and proceeded to quash the assessment on the guarantees and letters of credit. The 2nd Respondent however confirmed the decision by the 1st Respondent subjecting to tax the loan advanced to the applicant during the year of incorporation.
9. According to the applicant, loans do not fall within the definition of income as defined by the Act and therefore cannot be subjected to taxation. Even if the loan was to be subjected to tax, it was the applicant's case that the 1st Respondent did not follow the correct procedure in levying the taxes as the 1st Respondent failed to issue assessment notice from which a confirmation could issue as required by section 78 of the Act. It was further deposed that even if *arguendo* the taxes were applicable on the loan, then the 1st Respondent was statutorily barred by dint of section 79 of the Act from levying the taxes on the loan as the loan was obtained in the year 2003.
10. It was therefore the applicant's position that the 2nd Respondent's decision is tainted with illegality, irrationality and procedural impropriety and acted undemocratically and with bias as against the Applicant by failing, refusing or neglecting to consider the submissions and documentations adduced by the Applicant and going on to hold that the tax was rightfully and procedurally assessed.
11. To the applicant, the 1st respondent had no jurisdiction to levy the alleged tax or cause the same to be levied with respect to the loan and consequently the 2nd Respondent could not uphold an illegal assessment and in doing so the 3rd Respondent made a decision tainted with illegality. Further, the 2nd Respondent acted *ultra vires* the Act by upholding the decision by the 1st Respondent that the loan was rightfully assessed and tax should be paid thereon whereas the loan is not an income subjectable to taxation as defined by the Act.
12. Based on the subjection of the loan to taxation and the limitation period, the applicant contended that the said decision by the 2nd Respondent ought to be quashed by this Honourable Court and the orders sought herein granted as the notice of Agency to the Applicant's banker seeking the remittance of Kshs. 6, 162, 159 being tax due by the Applicant is premised on the erroneous levying of taxes on the loan advanced to the Applicant during the year of incorporation.
13. It was submitted on behalf of the Applicant that the credit agreement availed by it was sufficient and there was no need to avail the loan agreement. According to the Applicant, it is not seeking to appeal the decision of the 2nd Respondent but to show that the decision was tainted with illegality, irrationality and procedural impropriety hence amenable to quashing by the Court. In support of this submission the Applicant relied on **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43**.
14. Based on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, it was submitted that the Respondents' decision was illegal as it was based on fundamental errors of law and fact; was ultra vies and arrived at in error of jurisdiction as the Respondents in the process of fulfilling their statutory mandate acted without jurisdiction; was irrational and unreasonable s assessed on a loan which is quite illogical and the decision tainted with procedural impropriety as the Respondents failed to observe the procedural rules.

15. It was contended that the decision to base the taxation on a loan was based on misunderstanding and fundamental error of fact since a loan does not fall under income upon which tax is chargeable under section 3(2) of the Act.
16. It was contended that the 2nd Respondent had the duty of entertaining the appeal and making a finding in line with the law that a loan is not chargeable to tax. It was therefore submitted based on **Peter Okech Kadamas vs. Municipal Council of Kisumu [1985] KLR 954**, **Zacharia Wagunza & Anor vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR**, **Associated Provincial Pictures Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223** and **R vs. Minister of State for Immigration and Registration of Persons JR 361 of 2012** that the decision was founded on gross error of law and was irrational.
17. It was submitted that by demanding tax from an assessment on a loan, the 1st respondent was acting outside the scope of its powers as provided by the Act by imposing tax where none was provided for in the Act. In supplicant relied on **Re Hebtulla Properties Ltd [1979] KLR 96**, **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** and **Republic vs. Institute of Certyified Public Accountants of Kenya exp Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA 285 of 2006**.
18. It was submitted that since section 79 of the Act limits the time for making assessments to seven years from the date of receipt of the income and as the income was received in 2003 and the audit concluded in 2011 after the said seven years, the 1st respondent could not demand the tax.
19. It was further submitted that under section 78 of the Act, there is a need to serve a notice of assessment. However this was not complied with as there was no notice of assessment served the Respondents failed to comply with the laid down procedure in demanding tax. It was therefore submitted that the 1st respondent cannot therefore claim additional tax and relied on **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] KLR** where it was held:

    "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 tax payer's attention to the consequences of failure to comply with the law and the opportunity provided by the law to contest the finding...the Company's rights to fair administrative action afforded by Article 47(1) were violated by issuing the Tax Demand dated 20th June, 2011 and acting upon it to enforce the collection of taxes. Consequently any action based upon it cannot lie and as such the Agency Notices dated 6th August 2012 are hereby quashed..."

20. Although third procedural irregularity was raised with the 2nd Respondent, the Applicant submitted that the same was ignored.
21. It was further submitted that the 2nd Respondent showed open bias in favour of the 1st Respondent and bad faith against the Applicant. According to the Applicant although it raised the issue of assessment notices under section 78 of the Act, the 2nd Respondent instead referred to notices of confirmation of assessment under section 85 of the Act and proceeded to conclude that the 1st Respondent had issued valid notices. It was therefore submitted that the 2nd Respondent considered irrelevant facts but failed to consider relevant ones. Since assessments under section 78 are distinct from notices of confirmation of assessment under section 85 of the Act hence did its best to ensure the decision of the 1st Respondent was upheld. The bias was further evidenced by the failure by the 2nd Respondent to consider the applicant's submissions on the evidence of the credit agreement and unavailability of bank statements but proceeding to consider the 1st Respondent's submissions on the omission of the loan agreement. In this respect the Applicant relied on **Peter Okech Kadamas Case** (supra), **East African Railways Corp. Vs. Anthony Sefu [1973] EA 327** and **Republic vs. Kenya National Examinations Council exp Gathenji CA No. 266 of 1996**.

1st Respondent's Case

22. The 1st Respondent opposed the application vide a replying affidavit sworn by **James O. Nyereki**, an Audit Manager within the Domestic Taxes Department of the Kenya Revenue Authority Thika Station, a department headed by the 1st Respondent.
23. According to the deponent, the Application herein as filed is misconceived, bad in law and a total abuse of the court process for the following reasons;

    i. The Applicant has sought the wrong forum and procedure to ventilate is issues as there is a proper procedure provided for under the ***Income Tax Act*** Cap 470 Laws of Kenya that the Applicant has chosen to ignore hence an abuse of the court process.

    ii. The Applicant seeks as against the 1st Respondent to quash the decision contained in a letter dated the 31st October 2011 which is a period of more than 6 months since it was delivered hence such an order cannot issue by dint of Order 53 Rule 4 of the ***Civil Procedure Rules***.

    iii. That be it that the application is proper before the court, judicial review process such as this one concerns itself with the decision making process and not with the merits of the decision.

24. According to the deponent, the Applicant herein is bogging down the court with the merits of the decision rather than question the decision making process hence the application is a total waste of precious judicial time. In his view, the Applicant being a tax-payer registered as such at the Thika office of the Kenya Revenue Authority, its books of account were sometime in the year 2011 audited for the years of income 2006-2011 which audit resulted to an additional assessment. The said audit revealed a foreign currency loan of U.SD 287,200 i.e. Kshs. 60,391,451.00 in the Appellant's Audited Financial Statements of 2007.
25. It was deposed that the Applicant this as a loan that was taken out in 2004 in its year of incorporation but failed to avail documents in terms of the loan agreement, a statement of loan account showing payments and the loan interest paid together with the withholding tax charged on the loan interest paid. Upon failing to produce supporting documentations the loan of Kshs 60,391,451 appearing in the Applicant's audited accounts for the year 2007 and 2008 was disallowed in total. The loan interest of Kshs 6,517,490 in 2007 and Kshs 8,311,519 for the year 2008 were disallowed and the Applicant was advised that this was due to failure to produce document hence the existence of such a loan could not be ascertained.
26. While the 1st Respondent admitted that letters of guarantee, letters of credits and loans have not been specifically sated as incomes chargeable to tax under Section 3 of the ***Income Tax Act*** Cap 470, the circumstances under which the loans have been brought to charge of tax have been in this particular case were occasioned by the Applicants failure to provide proof that indeed the said loans existed and was actually received and spent for the purposes of producing the Applicant's trade income. It was therefore the deponent's view that the failure to prove existence of the loan; how it was received, how the interest and principal was repaid can only mean that the alleged loans were non-existent and therefore fictitious trade liabilities meant at understating the Applicant's taxable income. Further failure to account for the loan; how he received it, how it was spent and even fails to provide a loan statement showing the loan movement over the years, would mean that the said amount of money was not actually loan but funds from undisclosed sources in the hands of the Applicant that accrued in or was derived from Kenya hence taxable under Section 3(2)(e) of the ***Income Tax Act*** Cap 470.
27. It was therefore the foregoing is what informed the respondent to arrive at an additional assessment of the Applicant income and upon an objection to the 1st Respondent, the assessment was sustained and this again was due to failure to provide documentation to usurp its position. However upon appeal to the 2nd Respondent, the 2nd Respondent sitting on the 16th of April 2013 delivered a ruling that the letters of guarantees and letters of credit are not income chargeable to tax, a decision which the 1st Respondent respect and are bound by though with respect to the foreign currency loan, the committee directed that the Applicant provides documentation relating to the said loan within 14 days from the date of the ruling.

28. It was deposed that the 2nd Respondent indeed indulged the Applicant on several occasion to provide the said documents and Applicant never availed the said documents. It was the failure to produce such documents that led to the 2nd Respondent to arrive at its decision sustaining the taxation of the loan amount while disallowing taxation of letters of credit and letters of guarantee.
29. To the 1st Respondent, to date, the Applicant has never supplied any documents for the alleged loan. Whereas the Applicant argues that he said loan was obtained in the year 2003/2004, the years of income under audit are 2007/2008. The item of loan allegedly obtained in the year 2003 was picked out in the year 2007 accounts for verification and authentication and it was upon the Applicant to prove that the same was a loan taken out in 2003 a fact that he failed to do. It was after realization that the Applicant had only maintained the loan item as a running balance in the audited accounts for all the years of income 20013/2004 to 20007/2008 without any movement save only for exchange gains and losses that the anomaly had to be corrected in the year 2007. Hence Section 79 of the Act could only apply if the year of income 2003 was the year under audit.
30. It was averred that the 1st Respondent was well within the scope of the Act in assessing the Applicant for additional tax as it did by dint of Section 3(2) of the ***Income Tax Act*** and that it is curious for the Applicant to state that the 2nd Respondent herein was bias yet the 2nd Respondent vide its ruling disallowed the 1st Respondent additional assessment as to letters of credit and letters of guarantee. It is further curious for the Applicant to state that the 2nd Respondent was bias and failed to consider its submissions and the 2nd Respondent disallowing assessment for taxation on letters of credit and letters of guarantee and it is indeed the Applicant who failed to provide supporting documentation leading to the 2nd Respondent sustaining the additional assessment.
31. It was averred that though the Applicant was assessed for additional tax way back in 2011, the same is yet to be collected from the Applicant which is a taxpayer.
32. It was submitted on behalf of the 1st Respondent that since judicial review should be sought as a last resort remedy, the Applicant in filing these proceedings is circumventing justice by deliberately choosing the wrong forum to ventilate its issues. It was submitted that sections 84 and 86 of the Act provide for the procedure for resolving disputes arising under the Act. To the 1st Respondent, the 2nd Respondent having delivered its decision on 4th April, 2014, it was incumbent upon the Applicant to proceed under section 86(2) and the Local Committee Appeal Rules to file an Appeal to the High Court within 15 days which the applicant ignored. Having failed to file the Appeal it was submitted that the 1st Respondent was right to demand the taxes due and it was only 80 days later upon the issuance of the Agency Notice that these proceedings were instituted. In support of this submission the 1st Respondent relied on **Republic vs. National Environmental Management Authority Civil Appeal No. 84 of 2010**, **Attorney General vs. Inspector General of Police & Another exp Raphael Mungai Goko Nginya [2014] eKLR**.
33. While conceding that the availability of an avenue for appeal is not in itself a bar to institution of Judicial Review Proceedings, it was contended by the 1st Respondent that the court has to look at the issues brought forth for determination whether there are those that fall within the purview of judicial review. In this case, it was submitted that the issue is whether the 1st Respondent was right to subject the Applicant to tax so demanded an issue for determination through the statutory forum for determination of income tax disputes. In this case, it was submitted the Applicant seeks to quash the decision of the 2nd Respondent on issues of law and not procedure yet section 86(2) is clearer that Appeal on issues of law from the 2nd Respondent ought to be to he High Court and reliance was placed on **Kapa Refineries Limited vs. The Kenya Revenue Authority, The Commissioner of Customs Services and the Attorney General High Court Petition No. 203 of 2012**.
34. While admitting that even where there is another statutory remedy orders in judicial review can be entertained where the Applicant questions the decision of a statutory authority on grounds of abuse of power, it was submitted that in terms of unreasonableness, the degree thereof must be such that no reasonable authority could have made it and not merely because they think it is a bad decision. In this respect the 1st Respondent referred to ***John Alder in General Principles of Constitutional and Administrative Law, 4th Edn. Pages 382-383*** and **Pastoli vs. Kabale District Local Government Council and Others** (supra).

35. It was submitted that in this case the Applicant questions not how, but the rationale with which the 1st Respondent arrived at the amounts in questions and reference was made to **Contact Network Limited vs. Commissioner General, KRA & Another H C Misc. Appl. No. 181 of 2007** for the proposition that to answer this question of why the amounts were subjected to taxation, the court would be called upon to open the Applicant's books of account which is not within the ambit of judicial review.
36. It was submitted that the 1st Respondent in carrying out its audit looked into the Applicant's books of account for the period 2007-2011 and it is where the amount of 60,391,451/= was picked from and that the Applicant's books for the year 2004 were never brought to audit hence section 79(1) does not apply.
37. According to the 1st Respondent, the Applicant was required pursuant to section 56(1) of the Act to produce documents in support of the contention that the said amount was loan obtained in the year 2004. To the 1st Respondent, section 56(1) empowers the Commissioner to require documents he may deem necessary hence the 1st Respondent's action was not irrational and without a loan agreement, statement of loan account indicating repayments and interest and withholding tax thereon there was no evidence of such loan more so as the loan was reflected in the Applicant's books of 2007 rather than those of 2004.
38. It was therefore submitted that the Commissioner was within the parameters of law and exercised his discretion rationally in requiring further documentations which documentations the Applicant failed to produce even at the appeal level. In the absence of such documentation, it was submitted that the 1st Respondent was entitled to assess the tax payable in accordance with sections 73(3) and 77 of the Act. It was submitted that in such circumstances section 87(d) of the Act shifts the onus of proving that the assessment or decision appealed from is excessive or erroneous on the applicant.
39. It was submitted that in this case circumstances existed warranting the 1st Respondent to estimate the Applicant's taxes and cannot be faulted for doing so in absence of evidence to prove the Applicant's position.
40. On the issue of non-service of the assessment notice, it was submitted that having objected to the assessment under section 84(1) of the Act, it is self-defeating for the Applicant to allege not to have been issued with the assessment notice and the Applicant is estopped from alleging that it was not issued with the assessment notice.

Determination

41. I have considered the application, the verifying as well as the affidavit in opposition thereto, the submissions and authorities filed and relied on herein.
42. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held that:

"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."

43. It is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area**

ex parte Brake [1996] COD 248.

44. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

45. Judicial review, it has been held time and again, 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.

46. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

47. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

48. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

49. It is not disputed that the Applicant, being aggrieved by the 1st Respondent's decision to assess the tax payable by it objected to the assessment to the Commissioner. That objection must have been made pursuant to section 84(1) of the Act which provides:

> ***A person who disputes an assessment made upon him under this Act may by notice in writing to***

the Commissioner object to the assessment.

50. That objection was based on assessment of tax based on guarantees, letters of credit and loans all of which the Applicant contended ought not to have been chargeable for tax purposes in terms of section 3(2) of the Act. The Applicant's objection did not end with the 1st Respondent but proceeded to the 2nd Respondent and at the end the Applicant was absolved from paying taxes in respect of the said guarantee and the letters of credit but with respect to the alleged loan the Respondents found that there was no sufficient evidence on the basis of which the Applicant's contention could be upheld.
51. In those circumstances, can the Applicant fall back on the allegation that it was not served with the assessment notice to quash the Respondent's decision? In my view that ought to have been the ground for challenging the 1st Respondent's decision. Having opted to challenge the said decision before the 2nd Respondent, I agree that the Applicant is now estopped from relying on the ground that the assessment notice was not served in order to justify this Court in quashing the Respondents' decision. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. *In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief*. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

52. The Applicant having partly derived benefit from a process undertaken on the premise that the Applicant had been served with the assessment notice cannot now turn round and have the decision found not favourable to it quashed on the basis of an alleged procedural lapse.
53. The Applicant contends that the Respondents had no jurisdiction to find that the Applicant was liable to pay taxes on a loan since a loan does not fall under income upon which tax is chargeable under section 3(2) of the Act. However, as was appreciated in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** in which **Nyarangi, JA** while citing ***Words and Phrases Legally Defined*** **– Vol. 3: I-N page 13 held:**

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. *If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the*

***existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction*; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. "** [Emphasis mine]

54. In this case, the alleged issue of jurisdiction depended on a finding of fact that the amount in question was in actual fact a loan. The Respondents seem to have formed a different view. Their view was based on the fact that the Applicant was unable, despite having been afforded ample opportunity to do so, to prove to their satisfaction that the said sum was in fact a loan. Whereas based on the facts presented an appellate Court may well find that the the amount in question was in fact a loan, it cannot be said that the finding to the contrary amounted to acting in excess of jurisdiction. As was held in **East African Railways Corp. vs. Anthony Sefu [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

55. In other words for this Court to find that the Respondents had no jurisdiction it would have to overturn the finding that the amount in question was in fact not a loan. Such a decision can only be determined by a Tribunal tasked with a merit investigation rather than a judicial review court. That issue would have been appropriately dealt with had the Applicant opted to Appeal to the High Court under section 86 of the Act rather than challenge the said decision by way of judicial review. Without overturning the decision by the Respondents that the amount was not in fact a loan, I cannot find that the Respondents had no jurisdiction to arrive at the decision they did.
56. Whereas this Court would have been entitled to interfere with the said decision if the finding that the amount was in fact a loan was irrational, in light of the provisions of section 56(1) as read with section 77 of the Act, I cannot find that in the exercise of his powers the 1st Respondent was irrational. Section 56(1) empowers the Commissioner to require production of documents which the Commissioner considers necessary. In this case the Commissioner sought for the original loan agreement, loan statements and loan interest as well as withholding tax. The Applicant was unable

to produce these documents and gave reasons for failing to do so. The 1st Respondent had a discretion to believe the Applicant's explanation or not and the mere fact that it did not cannot in the circumstances of this case be termed irrational. Having been dissatisfied with the explanation proffered by the Applicant for its inability to furnish the documents requested, the 1st Respondent was entitled to invoke the provisions of section 77 of the Act and any challenge to such decision cannot be on the basis of jurisdiction, irrationality or abuse of power or even bias but could only be challenged by way of an appeal.

57. I associate myself with the decision in **Contact Network Limited vs. Commissioner General, KRA & Another** (supra) where it was held:

"It is clear from a reading of the said provisions that the Respondents are indeed clothed with powers to estimate taxes payable in certain circumstances. The Respondents have sufficiently shown that those circumstances existed in the Applicant's case. The Applicant did not dispute the fact that it had presented itself as a tour operator and travel bureau which fell in a tax-exempt sector whereas in truth it was in the business of events organisation which attracted tax. Honesty is crucial in self-assessment. The moment the Applicant gave false information about his business, it invited the Respondents to conclude that its tax returns were not true or correct."

58. Since the Applicant was contending that the amount in its books of accounts was a loan, the onus of presenting evidence showing that this was in fact the case was on it and it failed to do so to the satisfaction of the Respondents. When it comes to the issue of sufficiency of evidence, as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra) that is a matter best dealt with by the Tribunal clothed with the jurisdiction to determine the matter or an appellate Tribunal or Court where an appeal is provided for as in this case.

59. It was further contended by the Applicant that even if the 1st Respondent was justified the assessment was time barred in that the section 79 of the Act limits the time for making assessments to seven years from the date of receipt of the income and as the income was received in 2003 and the audit concluded in 2011 after the said seven years, the 1st respondent could not demand the tax. This position similarly assumes the factual position that the income was received in 2003. According to the Respondents, the item of loan allegedly obtained in the year 2003 was picked out in the year 2007 accounts for verification and authentication and it was upon the Applicant to prove that the same was a loan taken out in 2003 a fact that he failed to do hence section 79 of the Act could only apply if the year of income 2003 was the year under audit. Therefore in order to find that the claim was time barred, a finding will have to be made with respect to the actual year in which the said sum was received. That is a factual matter and the parties are not agreed on the same.

60. However, proceedings of this nature, ordinarily, do not deal with the merits of the case but only with the process. In other words these proceedings, it has traditionally been appreciated determine, *inter alia*, whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made, whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters, whether the decision violate the applicant's legitimate expectation or is otherwise irrational. It follows that where an applicant brings such proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction to determine such a matter and will leave the parties to resort to the usual forums where such matters ought to be resolved, which is this case is an appeal to the High Court pursuant to section 86(2) of the Act.

61. According to the Respondents, the Applicant ought to have proceeded to the High Court through an avenue of an appeal rather than instituting judicial review proceedings. I appreciate the decision in **Republic vs. Commissioner of Income Tax exp SDV Transami Civil Application No. 212 of 2002** in which **Ojwang, J** (as he then was) held that any person aggrieved by a decision of another on a matter bearing legal consequence must have recourse to the Court. The Court in that case held and rightly in my view that where what is being questioned is purely the exercise of public power by a public body, judicial review would imminently be an appropriate recourse. However where what is being challenged is not just the exercise of public power but the failure to

consider or sufficiently consider the applicant's case and the improper application of the relevant law to the facts that is in issue, that decision may not be of any assistance to the applicant.

62. **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998** appreciated that*:*

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief..."

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

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

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

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

(2) The High Court or a subordinate court under subsection

(1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

66. In this case, the applicant has not proffered any reason why it abandoned the course it had initiated under the ***Income Tax Act*** midstream without seeing it through to its logical conclusion.

67. Having considered the issues raised before me in these proceedings, I am not satisfied that this is a matter in which an exemption ought to be considered. As was held in **Republic vs. National**

Environment Management Authority Civil Appeal No. 84 of 2010 in which the Court of Appeal expressed itself as follows:

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

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

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

69. The substance of my findings hereinabove is that the issues raised herein would have been better dealt with by the High Court in the exercise of its appellate jurisdiction under section 86(2) of the Act. By failing to go that route and instead opting for the route of judicial review the Applicant has squandered the opportunity to challenge the findings of fact made by the Respondents.
70. I find no merit in Notice of Motion dated the 18th July, 2014.

Order

71. In the result, the said Motion is dismissed with costs to the Respondents.
72. It is so ordered.

Dated at Nairobi this 10th day of November, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kirugi for the Respondent

Cc Patricia