REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 51 OF 2013

REPUBLIC

VERSUS

THE COMMISSIONER FOR INVESTIGATIONS &

ENFORCEMENT.....THE RESPONDENT

EX-PARTE

WANANCHI GROUP KENYA LIMITED.....THE APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 26th February, 2013, the *ex parte* applicant herein, **Wananchi Group Kenya Limited,** seeks the following orders:

1. **An order of Certiorari to remove into the High court for purposes of it being quashed the decision and order of the Respondent - The Commissioner for Investigations & Enforcement dated 7th February 2013 in an Agency Notice issued to Commercial Bank of Africa – the Applicant's bankers requiring the said bankers to pay to the Respondent the sum of Kshs.124,866,992.80 alleged as tax due from the ex-parte Applicant to the Respondent.**
2. **An order of Prohibition to prohibit the Respondent. The Commissioner for Investigations & Enforcement from demanding the Value Added tax on the items qualifying for remission granted to the ex-parte Applicant by the Minister of Finance pursuant to section 23 of the Value Added Tax Act Cap 476 for the remission of tax and in particular decoders/Set top boxes.**
3. **An order that the Respondent do pay the costs of these proceedings.**

EX PARTE APPLICANT'S CASE

2. The same application is based on a Statement filed on 11th February, 2013 and the verifying affidavit sworn by **Richard Bell**, the applicant's Chief Executive Officer, sworn on 11th February, 2013.
3. According to the deponent, the Applicant on various dates applied to the Minister of Finance for remission of Value Added Tax (hereinafter referred to as VAT) in respect of its investment network infrastructure for the provision of digital television and fibre-optic cable services total investment for the project is in the region of USD $118,067,098 as at December 2012. The said application was considered by the said Minister who granted the approvals sought
4. According to him, the Applicant was further required to notify the Minister at the time each

equipment imported was made so as to ascertain that it fell within the remission granted and the Minister would in turn inform the Respondent that the equipment qualified for the remission of the VAT applicable.

5. However, the Respondent has without any lawful right or authority refused to effect the VAT remission granted in respect of certain items and in particular the decoders/set top boxes, coaxial cables, lashing wires, drop cables collectively referred to as customer premises equipment on the grounds that the items are accessories yet specific approval was applied for and granted by the Minister for the decoders/set top boxes. In the deponent's view, given that the decoders are not sold to its customers and remain the Applicant's property, the Applicant was in any event acting within the conditions of the remission granted by the Minister and the relevant regulations.
6. As a result of the foregoing, the Applicant was compelled to make a substantial payment of Shs 27 million to the Respondent as the Respondent had withheld the clearance of its equipment without the VAT being paid which payment was made purely on a without prejudice basis to allow a determination of the matter as between the Minister and the Respondent. According to him, he is not aware of any action taken by the Respondent to have the matter clarified and determining the Minister of Finance yet the Respondent's actions were adversely affecting the Applicant's roll out operations and services to its customers.
7. In his further affidavit sworn on 30th April, 2013, the deponent deposed that the Respondent appears to be inviting this honourable court to delve into the merits or otherwise of the decision made by the Minister in granting the exemptions from duty of the items imported by the ex parte Applicant which this court has no jurisdiction to do and reiterated that the ex parte Applicant seeks to quash the Respondent's decision dated 7th February 2013 in an agency notice to ex parte Applicant's bankers and to prohibit the Respondent from levying any VAT on the importation of its goods and equipment that qualified for remission pursuant to the Ministerial approval granted to the Applicant. Whereas the Respondent contends that the ex-parte Applicant was not fully complying with conditions of remission granted to it by the Minister, it has not adduced any evidence of the non-compliance or a report to the Minister of any breach of the conditions imposed.
8. According to the deponent, the jurisdiction to deal with any breaches of the terms of the exemption granted lies with the Minister under the ***Value Added Tax (Remission) (Investments) Regulations, 2004*** (hereinafter referred to as the Regulations) and not by the actions taken by the Respondent. To him, the ex-parte Applicant has not imported any spare parts and accessories for goods granted the exemption as alleged by the Respondent and none have been listed in the Respondents affidavit. In his view, whereas the Respondent wishes to have the items granted Remission treated as not qualifying as they are, in the Respondents view, either non-capital in nature or are to be classified as accessories, the Respondent's treatment of the items granted Remission as non qualifying is tantamount to challenging the Minister's statutory powers which neither the ***Value Added Tax Act,*** Cap 476 (hereinafter referred to as the Act) nor the Regulations have conferred upon the Respondent yet the Remission granted by the Minister was lawful.
9. He reiterated that the letter dated 21st June 2012 and the payments made were all on a without prejudice basis and was meant to break the impasse created by the Respondent pending clarification from the Minister and that the ex-parte Applicant did not waive any of its rights granted by the Minister. Though the ex-parte Applicant wrote to the Minister through the Permanent Secretary Ministry of Finance the letter dated 18th October 2012, the Minister did not revoke the exemptions given to the ex-parte Applicant for any of the items disputed by the Respondent. It was contended that section 25(1) and (2) of the Act do not confer any powers upon the Respondent to investigate and interrogate the Minister's orders granting exemptions or to declare that the Minister's orders were erroneous as alleged. The deponent denied that the decision in question was made on the basis of non-cooperation by the ex-parte Applicant and that there was no such evidence.
10. With respect to the issue whether the decoders are accessories it is the applicant's case that this honourable court has no jurisdiction to determine the nature of the items granted Remission as that would be for the Minister to decide at the time of considering the application for exemption or if the Respondent had made an application to the Minister to revoke the Remission granted pursuant to regulation 8 of the Regulations which application was never made. It was further contended that the Respondent has not stated that the decision in question was issued for the purposes of the

"separate Investigations" and the allegation of abuse of the remissions granted denied. To the applicant, if that had been the case, nothing would have been easier than the Respondent making an application to the Minister to revoke the exemption on that ground yet no such application to the Minister was made.

11. It was the applicant's case the general powers conferred upon the Respondent under section 131 of the ***East Africa Community Customs Management Act, 2004*** (hereinafter referred to as the EACCMA) does not grant jurisdiction to the Respondent to impugn, set-aside or revoke the decision of the Minister and the report referred to in the Respondent's affidavit had no legal basis as the Minister's order on granting Remission could not be declared by the Respondent to have been irregular. The applicant's position was that it was under no legal obligation to pay the taxes demanded when it had been granted remissions for that tax.
12. It was the applicant's position that the court is presently dealing with the decision dated 7th February 2013 on the legality of the agency notice and has not been called upon to examine the process leading to the granting of the Remission as no application has been made by the Respondent in that regard. It was further deposed that the Minister in granting the exemption was alive to the fact that the investment undertaken by the ex-parte Applicant would generate far more benefits and taxes and no substantial loss would occur as alleged by the Respondent.

RESPONDENTS' CASE

13. In opposition to the application, the respondent on 18th April, 2013 filed a replying affidavit sworn by **Kamau Kamau**, a Revenue Officer within the Investigations & Enforcement Department of the Respondent on 16th April, 2013.
14. According to him, as part of compliance audit in the Investigations & Enforcement Department, when he was tasked to evaluate the Import Duty and VAT remission schemes in the Telecommunications Sector in which the applicant is a major player, he noted that the ex-parte applicant were not fully complying with the conditions of the remission granted to them by the Minister of Finance in accordance with the provisions of Sections 23(1) and 23(3) of the Act. In the months of January and February 2012 he carried out a preliminary analysis of data held in the Customs Statistics Unit of the Respondent in respect of goods imported into Kenya by the x-parte applicant during the years 2010 and 2011 and after further analysis and investigations into the Applicant's business activities during the period between 1st October 2009 to 12th March 2012 he discovered that the Applicant was not complying fully with the requirements of section 23(3) of the ***VAT Act***, the VAT (Remission) (Investments) Regulations 2004 and also with the Minister's Condition attached to the grant of the remission which clearly stated that "SPARE PARTS AND ACCESSORIES DO NOT QUALIFY FOR THIS REMISSION" which was clearly imprinted at the end of each remission letter. According to him, the ex-parte applicant had imported goods which were non-capital in nature but were accessories which did not qualify for the remission granted by the Minister and these non-qualifying goods were accessories which the Minister had clearly stated did not qualify for the remission. The total VAT remitted in respect of these non-qualifying goods is Ksh.124,866,992.80.
15. On 6th March 2012 the Commissioner of the Investigations & Enforcement Department of the Respondent wrote to the ex-parte applicant advising them to pay the sum of Ksh.124,866,992.80 being VAT payable in respect of non-qualifying goods imported into the country by the ex-parte applicant. The Commissioner also provided the ex-parte applicant with a detailed schedule of all the non-qualifying goods. However, on 5th April 2012 the ex-parte applicant replied to the demand for Ksh.124,866,992.80 through their tax agents and insisted that the goods classified as accessories were capital items which qualified for remission to which the Commissioner of the Investigations & Enforcement Department of the Respondent replied on 27th April 2012 and explained in detail the basis for his decision to classify items such as decoders and internet modems located at the ex-parte applicants customers' premises as accessories to the ex-parte applicant's main infrastructure such as fibre optic network cables and base stations. Apart from this, during the months of April and May 2012 the Commissioner of the Investigations & Enforcement Department of the Respondent organized several meeting with the ex-parte applicant and invited them to make presentations and provide further documents in support of their position

with a view of resolving this matter amicably. On 13th June 2012 the ex-parte applicant intimated that they were willing to make a proposal for settlement of the taxes demanded by the Respondent and on 21st June 2012 the ex-parte applicant wrote to the Commissioner of the Investigations & Enforcement Department of the Respondent and made a proposal to pay the sum of Kshs.52,691,622 as a final settlement based on the demand for the amount of VAT remitted in respect Set Top Boxes (STBs) or Decoders imported by themselves into the country between June 2011 and June 2012. Pursuant thereto, on 21st June 2012 the ex-parte applicant paid the sum of Kshs.27 Million to the respondent. To the deponent, the ex-parte applicant was in effect conceding that the STBs or decoders are indeed accessories which did not qualify for VAT remission.

16. On 20th September 2012 the Commissioner of the Investigations & Enforcement Department of the Respondent wrote to the ex-parte applicant demanding the payment of Ksh.25,669,992.80 being the balance of the sum of Kshs.52,669,992.80 which the ex parte applicant had agreed to pay on 21st June 2012 but on 27th September, 2012 the ex-parte applicant wrote to the Commissioner of the Investigations & Enforcement Department of the Respondent informing him that they had deferred the payment of the balance of Ksh.25,669,992.80 and had referred the matter to the Minister of Finance for final determination. On 16th January 2013 the Commissioner of the Investigations & Enforcement Department of the Respondent again demanded full and final settlement of the established tax liability being the VAT remitted irregularly in respect of goods classified as accessories.
17. According to the deponent, the Commissioner has lawful authority to investigate and interrogate whether the items imported qualify for remission pursuant to Section 25(1) and (2) which gives the Commissioner power (jurisdiction) to demand for any taxes erroneously remitted or refunded as is the present case; and further that Regulation 6 of the Regulations, obliges the recipient of the remission to allow and facilitate the inspection of the goods and avail the records of such goods for purposes of inspection and audit hence the basis of the compliance audit and the demand for remitted taxes against the ex-parte applicant. In his view, the nature of the decoders is that they are accessories to the main infrastructure laid down by the applicant in the sense that the applicant can still transmit its signals without the decoders which are only a pre-requisite for a person who wishes to receive the said pay-TV signals at their own cost; they are essentially domestic appliances used by the end consumer for their own household or personal use. Under Regulation 7 of the Regulations the Minister of Finance has the power to and may attach further conditions to a remission as he/she considers necessary and always attached the following condition to each remission granted to the applicant in the present case: “NOTE: Spare parts and accessories do not qualify for this remission”.
18. It is further the taxpayer was neither compelled to pay the 27 million nor were any of her goods refused clearance at any time pending payment of amounts demanded in the current case. To the contrary at a mutually arranged meeting the applicant undertook a self assessment of what in their opinion were qualifying plant/machinery and what were non-qualifying accessories and actually came up with a schedule of accessories whose VAT amounts was USD 1,682,234 which was even above the demand amount but they proposed to pay only a component of that i.e. Kshs52 million which was falling within the preceding 12 months then and hence claimable under the Act and that it is only after the ex-parte applicant turned down the respondent’s invitations to amicably settle the matter that they unilaterally appealed to the Ministry of Finance for their intervention which intervention the deponent as at the time of swearing the affidavit was not aware of.
19. According to him, after the Commissioner of the Investigations & Enforcement Department of the Respondent commenced investigations of the non-qualifying decoders, the ex-parte applicant has since been paying the requisite VAT on those items and that the ex-parte applicant has not been fully complying with the remission granted to them by the Minister of Finance and that there is another separate investigation where the same ex-parte has imported six motor vehicles under a remission of VAT scheme contrary to the express provisions of section 23(3)(a) of the Act. Even after conceding on the error the ex-parte applicant has not settled this matter one year later despite various reminders. The respondents endeavoured to invite the taxpayer for discussions to try find an amicable settlement without much success as evidence through our various correspondences; however the taxpayer abandoned these efforts and sought to appeal to the Ministry of Finance.
20. According to him, under Section 131 of the EACCMA the Commissioner has lawful authority to

appoint agents in respect of the applicant for purposes of tax collection s provided for under the Act and arising from the compliance audit and investigation carried in January and February 2012 the deponent prepared a report and on 6th March 2012 and the Applicant was subsequently served with a demand notice for Kshs.124 34,530,906.00 being the sum of the VAT which had been remitted irregularly which were acknowledged by the ex-parte applicant. It was further deposed that the ex-parte applicant has failed to pay the taxes due as demanded and the Respondent is justified to act as it did in order to safeguard government revenue. To the deponent, the VAT and the EACCMA empower the Respondent to demand taxed owed as it did.

21. To the deponent, what a Judicial Review Court would be examining in arriving in its decision is whether the process leading to the assessment and actual demand was fair or not but the Court is not to adjudicate on the liability or otherwise of the applicant on the actions of its agent hence the motion discloses no reasonable cause of action and is totally unfounded and ought to be dismissed since orders of *Certiorari* cannot issue because the Respondent has not acted unreasonably without or in excess of their jurisdiction. Similarly, the orders of Prohibition cannot issue because the Respondent has not acted unreasonably without or in excess of their jurisdiction. To him, there will be substantial loss to the government in terms of revenue, if the orders prayed for by Applicant are granted.

EX PARTE APPLICANT'S SUBMISSIONS

22. On behalf of the applicant, it was submitted that the Minister having granted approvals for remission of VAT for each specified item as required pursuant to the powers granted to him under section 23 of the Act, the Respondent had no jurisdiction to challenge the validity of or countermand that decision since the Respondent has no such powers. According to the applicant sections 25(1) and (2) of the said Act only applies in so far as the remission under section 23 is in issue after revocation has been made by the Minister pursuant to Regulation 8 of the Regulations but do not apply prior to such a step by the Minister. In light of the fact that the remissions are still valid, it was submitted that the Respondent has acted in excess of its jurisdiction. Further, without evidence that the application of regulation 6 of the Regulations. According to the applicant what the Respondent wants the Court to do is to determine that the items in question qualified for the remission granted by the Minister or not a course which the Court has no jurisdiction to embark on since it would go to the merits and usurp the powers of the Minister. Citing **The Commissioner of Lands vs. Kunste Hotel Limited Civil Appeal No. 234 of 1995** and **Chief Constable of North Wales Police vs. Evans [1982] 1 WLR 1155**, it was submitted that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process since its purpose is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reached on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. It is therefore submitted that the Respondent by embarking on a process of challenging, countermanding and finally concluding that the Minister acted irregularly when he granted the remissions to the ex parte applicant, fell into error. Further by so doing the Respondent could not have acted fairly as it was not authorised by law to decide whether the remission should be revoked under the said Regulations since the same do not confer upon the Respondent the jurisdiction to do so which jurisdiction remains with the Minister.
23. The applicant having been granted the remission by the Minister, until the same was revoked by the Minister, the ex parte applicant is lawfully permitted to rely thereon under the principle of legitimate expectation as expounded in **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited and Others Misc. Appl. No. 946 of 2004** and **Council of Civil Service Unions vs. Minister for Civil Service [1995] AC 374**.
24. According to the applicant the Respondent cannot rely on its illegal acts to compel the ex parte applicant to make the payments under the decision in question which is a nullity since based on **Patterson vs. Kanji [1956] 23 EACA 106** there can be no estoppel against statute.
25. The applicant cited **Said Bin Seif , a minor by his next friend and duly appointed Guardian Sir Ali Bin Salim vs. Shariff Mohamed Shatry, Civil Appeal No. 29 of 19388 Vol. XIX Part 1 – 1940 page 9 at page 10** cited in **Rajlakshmi Dasee vs. Katyayani Dasee, 38, Cal 639**, where it was held:

"If a court has no jurisdiction over the subject matter of the litigation, its judgement and orders, however precisely certain and technically correct, are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the court in which they are rendered, but shall be declared void by every court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a court by consent of parties and any waiver on their part cannot make up for lack or defect of jurisdiction."

26. It was therefore submitted tat the Respondent lacks jurisdiction to demand the tax and issue the agency notice dated 7th February 2013. Further there is no provision of the Act which empowers the Respondent to challenge the validity of the remission granted by the Minister save by an application or representation made to the minister under the Regulations.
27. According to the applicant, both actions are unlawful and invite this court's supervisory jurisdiction over the respondent hence the orders sought ought to be granted.

RESPONDENT'S SUBMISSIONS

28. On the part of the Respondent, it was submitted while reiterating the contents of the replying affidavit that contrary to the applicant's contention, the applicant was given an opportunity to be heard and time to pay the demanded taxes and this is evident from the record. Further after the Respondent commended investigations into the issue of non-qualifying decoders the applicant has since been charging and remitting the requisite VAT on those items.
29. According to the Respondent, whereas the applicant was granted remission of VAT in respect of its investment in the network infrastructure, for the provision of digital television and fibre optic cable services by the Minister for Finance, the remission was not absolute but had conditions attached to it hence the Respondent has a statutory mandate to ensure that the stipulated conditions are complied with. Therefore in conducting compliance audit to establish if the Applicant was complying with the Minister's conditions, the Respondent did not revoke or adjust the same but was merely exercising its powers granted by Section 25(1) of the Act. It is submitted that the Respondent is entitled to demand payment of taxes in respect of the goods imported by the applicant which were excluded from the remission while under section 131 of the EACCMA the Commissioner has lawful authority to appoint agents in respect of the applicant for purposes of tax collection.
30. It was further submitted that under section 23(2), the Respondent has lawful authority to investigate and interrogate whether the items imported qualify for remission while section 25(1) and (2) give the Commissioner power (jurisdiction) to demand for any taxes erroneously remitted or refunded as is the present case while Regulation 6 allow for inspection of the goods and records in issue. Citing ***Black's Law Dictionary (8th Edition)***, it was submitted that "capital goods" mean "Goods.....used for the production of other goods or services". Further Regulation 5 exclude, inter alia, stocks in trade from the grant of remission which stocks are defined by ***Stroud's Judicial Dictionary Words &Phrases (7th Edition) 2006*** as "all chattels as are acquired for the purpose of being sold, or let to hire, in a person's trade; but probably utensils in trade are also included in the phrase". It was therefore submitted that the STBs (Decoders) are accessories to the main infrastructure of fibre optic network cables in the sense that the applicant can transmit its signals without the decoders.
31. On legitimate expectation, the Respondent submitted based on **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012** that "such an expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken). It was however submitted that in the said case it was held that there must be a promise or representation made by a public body that it will act in a certain manner. However, the claim for legitimate expectation must be made within the confines of the law, i.e. a public body cannot make a promise or representation that is against the law. It is the Respondent's contention that in view of the express provisions of section 25(1) of the Act as read with Regulation 6 of the Regulations, there cannot be legitimate expectation to the applicant since legitimate expectation cannot arise in the face of clear statutory provisions. Since the applicant

was not complying with the conditions for the remission and there was no representation made that the applicant would not be subjected to an inspection and audit of the goods imported under the remission, the applicant cannot benefit from the non-compliance with the said conditions. In support of this submission the Respondent relied on **Celtel Kenya Ltd vs. The Commissioner of Customs & Excise and Another HCMisc. Appl. No. 165 of 2006**; **Aberdare Freight Service Limited vs. KRA HCMisc. Appl. No. 946 of 2004**; **Coastal Bottlers Limited vs. The Commissioner of Domestic Taxes HCMisc. Appl. No. 1756 of 2005**.

32. According to the Respondent, the orders sought are not merited moreso in respect of the prayer for prohibition since a demand has already been made and **Republic vs. Kenya National Examination Council Application No. 266 of 1996** was relied upon.
33. Whether the set top boxes are accessories or spare parts which are excluded from the remission granted by the Minister, it is submitted based on **Pili Management Consultants Ltd vs. Commissioner of Income Tax Kenya Revenue Authority Civil Appeal No. 154 of 2007**, that it is not the role of this court to determine the correctness or otherwise of the decision hence the application ought to be dismissed.

DETERMINATIONS

34. Judicial review, it is now trite, 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). 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).
35. In the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** it was held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.....When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object

intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory."

36. Section 23 of the Act provides:

(1) Subject to subsection (3), the Minister may, by order in the Gazette, remit wholly or partly tax payable in respect of any taxable goods or taxable services, if he is satisfied that it is in the public interest to do so.

(2) Where any remission is granted under this section on a condition that tax shall be payable in the event of the breach of any term or condition or on the occurrence of any event, the tax shall, on the breach of that term or condition or on the occurrence of that event forthwith become due and payable by such persons as may be specified in the order concerned.

37. Subsection (3) of the section enumerates areas where remission is applicable. It follows that any remission which is given outside the specified areas would be ultra vires the powers of the Minister.
38. It is agreed by the parties herein that in the exercise of the powers conferred upon him by the aforesaid section the Minister did grant the applicant remission of payment of VAT in respect of its investment network infrastructure for the provision of digital television and fibre-optic cable services. However, and regrettably so, none of the parties have deem it fit to exhibit a copy of the Gazette Notices by which the remission was granted. It is however clear that the remission, for it to be valid could only apply to items mentioned under section 23(3) of the Act.
39. It is the applicant's case that the decision by the Respondent to disallow remission and demand that the applicant pays VAT amounting to Kshs 124,866,992.80 amounts to challenging and countermanding the Minister's decision a power which the Respondent does not have hence the Respondent has acted in excess of its jurisdiction.
40. That such an action would be in excess of the Respondent's jurisdiction is not, in my view, doubtful since in my view, where the Act gives the Minister the powers to grant remission, such power cannot be challenged or countermanded by the Respondent. For the Respondent to do so would not only amount to insubordination but would also amount to trespassing into the powers of the Minister, an act which would no doubt be ultra vires the powers of the Respondent and would justify this Court in interfering by quashing the same.
41. The Respondent's position, however, is that it has not countermanded the decision of the Minister. According to the Respondent, the said remission was subject to the conditions imposed by the Minister and the provisions of the law. I have already held that the Minister's power to grant remission was circumscribed under section 23(3) of the Act and he could not grant any remission outside the four corners of the said provision. If he purported to do so, the said decision would be null and void. It is however my view that even if that was the situation, the Respondent would not have the power to overrule the Minister.
42. The Respondent has however contended that it never overruled the Minister. Its position is that the remission was conditional and was not applicable to spare parts and accessories. Further, the power to determine whether the items imported by the applicant fell within the remitted items was

the Respondent's hence in determining that the STBs or decoders were not subject to the remission the Respondent was exercising powers granted to it. I have already decried the fact that the Gazette Notice, if it existed was never exhibited so that this Court has been denied the opportunity by both parties of perusing the exact terms of the Gazette Notice in order to find what conditions were imposed therein by the Minister. However, the Court must assume that the Minister in granting the remission acted intra vires his powers under section 23(3) of the Act.

43. The next issue is who would be in a position to determine whether or not the items imported by the applicant were the items to which the remission applied? In my view, if such powers were granted to the Respondent, then the decision by the Respondent whether or not the items were the subject of the remission would be a decision made on merits subject to it not falling foul of the rule against irrationality, illegality and procedural impropriety, the Court would not be justified in interfering therewith. Under Regulation 6 of the Regulations, the person to whom a remission has been granted is enjoined to allow and facilitate the inspection of the goods in respect of which the remission relates and avail to the Commissioner the records of such goods for purposes of inspection and audit. In my view the remission is not absolute but there is a residual power given to the Respondent to ensure that the goods or items for which the remission is clamed are the actual goods for which the remission was granted by the Minister. What then happens after the inspection and audit? In my view the inspection and audit may reveal that the items for which remission is claimed are the actual items remitted in which event the VAT is not claimable by the Respondent. However, where the audit reveals that the remission is not applicable to the said items the provision of section 25(1) come into play. That section provides:

Where any tax has been remitted or refunded, or any rebate of tax has been allowed in error, the person to whom the refund, remission or rebate has been erroneously made or allowed, shall, on demand by the Commissioner, pay the amount erroneously remitted or repay the amount refunded in error, or in respect of which rebate has been allowed in error, as the case may be.

44. In that event the Respondent would be properly entitled to demand payment in respect of tax remitted in error after affording the tax payer an opportunity of being heard on the issue. To demand payment of taxes in such circumstances would not, in my view amount to usurping the powers of the Minister. To the contrary, to do so would be implementing such decision so as to ensure that only the actual items remitted are exempted from payment of VAT. For the Respondent to fail to do so would amount to abdication of the Respondent's duty. It is not disputed that the Respondent is an employee of Kenya Revenue Authority which Authority is established under the ***Kenya Revenue Authority Act***, Cap 469, Laws of Kenya. Under section 5(1)(a)(i) of the said Act, the Authority is enjoined to administer and enforce all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws. One of those Laws is the ***Value Added Tax***, Cap 476, Laws of Kenya.

45. In this case, I have no doubt in my mind that it is the Respondent's responsibility, after a remission is granted by the Minister to give meaning to that remission by ensuring that only the items remitted are exempted from payment of VAT.

46. Once such a determination is made by the Respondent, as rightly submitted on behalf of the applicant, this Court has no power to determine whether or not the items for which the VAT is claimed were items exempted from the said remission. As was held by the Court of Appeal in **Pili Management Consultants Ltd vs. Commissioner of Income Tax Kenya Revenue Authority** (supra):

"As the trial Judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili's account at the Bank was or was not liable to tax. No material was placed before the Judge on that point."

47. Similarly, for me to make a determination that VAT was not payable, I would have to make a

finding that the STBs or decoders were subject of the Minister's remission. I have no evidence before me which can enable me arrive at such a finding.

48. To do that would amount to this Court sitting on appeal on the decision made by the Respondent. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"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…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

49. Similarly, 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.***

50. It must be reiterated 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.

51. It was contended that since demand has been made for the payment of the taxes, an order of prohibition cannot be granted. Whereas the Court is conscious of the fact that where a decision has been made prohibition would not lie since prohibition would not quash a decision already made, where the decision is in the process of implementation, it is my view that as long as the decision has not been completed, there is no bar to the Court granting an order prohibiting the decision from being fully implemented.

52. It was also contended on behalf of the Respondent that to grant the orders sought herein would lead to substantial loss to the government in terms of revenue, I wish to draw the Respondent's attention to **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA NO. 743 of 2006 [2007] 2 KLR 240,** where **Nyamu, J** (as he then was) expressed himself as follows:

"In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality. In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the *quantum* of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of

tariff amounts to abuse of power."

53. It was also contended that since the applicant conceded to pay part of the sum which was demanded, the applicant is precluded from contesting the same more so in light of the fact that despite the fact that the remission has not been reversed by the Minister, the applicant is currently paying taxes on the said decoders. In my view whereas it is true that the decision whether or not to grant judicial review orders is an exercise of discretion and the conduct of the parties especially the applicant as well as the prevailing circumstances may influence the Court in deciding whether or not to grant the orders sought, such conduct is not the determinant fact in such determination. In my view the mere fact that the applicant has acceded to the decision does not sanitise or legalise an otherwise illegal decision and whereas the Court may decline to grant the particular applicant the orders sought, such a decision still remains illegal. In any case the circumstances under which the said payments were and are being made is contested by the parties herein.
54. I have however considered the material on record and I have not been able to find any basis for invoking the principle of legitimate expectation. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. I have not seen any evidence that the Respondent or the Minister promised the applicant that the applicant would not pay VAT on the STBs or Decoders.
55. It is therefore my view that the applicant has failed to satisfy the Court that the Respondent acted in excess of his statutory jurisdiction. I am also not convinced that the Respondent's decision was unreasonable. In other words the grounds upon which the court exercises its judicial review jurisdiction have not been proved to my satisfaction.

ORDER

56. It follows that I find no merit in the Notice of Motion dated 26th February, 2013 which I hereby dismiss with costs to the Respondent.

Dated at Nairobi this 7th day of February 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gachuhi for the applicant

Mr Wanderi for the Respondent