



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO 293 OF 2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
BY WAY OF ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS AGAINST THE
KENYA REVENUE AUTHORITY**

**IN THE MATTER OF SECTION 90 (1) AND 95 (4) OF THE CUSTOMS AND EXCISE ACT
CHAPTER 472 OF THE LAWS OF KENYA, SECTION 8 OF THE LAW REFORM ACT,
CHAPTER 26 OF THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE
RULES 2010**

REPUBLIC..... APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY..... RESPONDENT

AMSCO KENYA LIMITED.....EX-PARTE

JUDGEMENT

Introduction

1. By a Notice of Motion dated 27th August, 2013, the *ex parte* applicant herein, **Amsco Kenya Limited**, seeks the following orders:

1. **THAT this honourable court do grant the *Ex-Parte* Applicant by way of Judicial Review an order of mandamus and prohibition against the Commissioner of Domestic Taxes Kenya Revenue Authority and/or his/her agents to unseal and reopen the premises of the *Ex-Parte* Applicant which were sealed on the 29th January 2013.**
2. **THAT an order be granted to the *Ex-Parte* Applicant by way of Judicial Review for an order of prohibition to prohibit the Commissioner of Customs from levying and demanding the sum of Kenya Shillings 8,290,800.00 or any other sum from the *Ex-Parte* Applicant.**
3. **THAT an Order be granted to the *Ex-Parte* Applicant by way of Judicial Review for Order of Certiorari to bring unto this court for quashing the demand notice dated 6th June 2013 for the sum of Kenya Shillings 8,290,800.00 or any other sum**
4. **THAT the Court to order a stay of the demand notice issued by the Respondent to the *Ex-Parte* Applicant for the payment of the sum of Kenya Shillings 8,290,800.00 or any other amount and that the premises of the *Ex-Parte* Applicant be unsealed and reopened**
5. **THAT costs of this application be provided for.**

Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by **Nathan Mumo**, the applicant's Operation Manager on 12th August, 2013.
3. According to the deponent, sometimes in the month of September 2012, the Applicant received a letter from the Respondent advising them of the provisions of Legal Notice number 69 published in July 2011 requiring all Excise Licensees engaged in the production of spirits and spirituous beverages of which the Applicant was one, to install a flow meter in their production plants.
4. He deposed that as a requirement of the law, the Applicant is required to take out an annual Excise Licence at the beginning of the calendar year and in readiness for this, the Applicant duly submitted an Application dated 31st October 2012 to the Respondent which was received by the Respondent on the 1st November 2012 and was acknowledged vide a letter dated 1st November 2012 and clearly indicated how the Applicant's application for an Excise License was being treated by the Respondent. The Applicant dutifully embarked on the acquisition of the proper flow meter and corresponded with the department of Weights and Measures under the Ministry of Trade and vide its letter dated 9th November 2012, duly informed the Respondent of its efforts to obtain the flow meter from the supplier who was based overseas and required time before they could deliver the flow meter to the Applicant.
5. It was deposed that on the 16th January 2013, the Applicant was issued with a Tax Compliance Certificate by the Respondent confirming that the Applicant had complied with their obligation to file relevant tax returns and to pay taxes due as provided for under the law and on the 5th February 2013, the Applicant was issued with the Alcoholic Drink Licence for the Manufacture of Alcoholic Drinks classified under the Law by the District Commissioner Langata District.
6. However, due to circumstances beyond the control of the Applicant, the supplier of the flow meter did not deliver it in good time and therefore, the Respondent proceeded to close the premises of the Applicant on the 29th January 2013 on the ground that the applicant was Operating without Excise Licence and Flow Meter contrary to Section 90 and 95. 4 of the ***Customs and Excise Act***, Chapter 472 (hereinafter referred to as the Act).
7. On the 12th April 2013, upon receipt of the flow meter, the Applicant wrote to the Respondent asking them to reopen the premises to enable the installation and commissioning of the flow meter and proceeded to also pay the required fees for the issuance of the Excise Licence. on delivery of the above mentioned documents to the Respondent the Applicant was served with a Demand Letter dated 25th March 2013, for the payment of Value Added Excise Duty in the sum of Kenya Shillings Five Million Four Hundred Ninety Nine Thousand (Kshs. 5,499,000.00) only within fourteen (14) days being the value of spirit lifted from Spectre International and failed to account for, for the period covering November 2010 to October 2011. According to the deponent, this demand came as a surprise to the Applicant considering that the Applicant had been remitting the Excise duty promptly ever since the operation commence in essence in November 2010 without any objection or query by the Respondent during the period under review. The Applicant wrote to the Respondent on the 23rd April 2013 objecting to the computation of the Excise Tax and confirming that the computation that they had used was actually imparted to the accountant of the Applicant by an official of the Respondent before the Applicant commenced operations as they did not wish to be found in breach of the law.
8. In response to this letter, the Respondent wrote to the Applicant another letter, dated 24th April 2013, and now demanded the payment of Kenya Shillings 8,290,800.00 as Excise Duty payable by the Applicant to the Respondent invoking the provisions of Section 177 (1) b, of the Act.
9. According to the deponent, the provisions of the above section of the law empowers the Respondent to request for the production of records by any person who is suspected of any offence if the same may afford evidence of commission of a crime. However no such information has been requested from the

Applicant and the Respondent is merely relying on information purportedly from a third party without providing the these records to the Applicant to comment on the same and also affording the Applicant an opportunity to produce its own records. Further, if the Applicant had been suspected of having under declared or failed to declare any value of spirits lifted then the same would constitute a cognizable offence under law however the Applicant has not been served with any summonses or notice of commission of any offence.

10. The deponent averred that the Respondent has deliberately failed to observe the principles of natural justice in demanding for the payment of the sum of Kenya Shillings 8,290,800.00 or any other sums by failing to offer the Applicant an opportunity to comment on the same before imposing the demand and despite pleas and commitment by the Applicant to the Respondent for factory premises to be reopened so that operations can resume and the issue of the amounts demanded sorted out mutually between the parties, the Respondent has refused and/or neglected to budge from its position and insists on the payment of the full amounts in dispute before the factory premises are reopened. On the 7th July 2013 the Applicant's Advocates on record wrote a demand letter to the Respondent demanding that they reopen the factory as the Applicant's had complied with the reasons for closure of the factory and that the Excise Duty demanded was in dispute and contested but the Respondent replied to the demand letter vide their letter dated 29th July 2013 insisting on the payment of the full amount of Kshs. 8.290.090.00 before the premises can be reopened and this time stating that the duty was due from 49,000 litres of spirit purchased from yet another Company namely Agro-Chemical Food and Company Muhoroni and not Spectre International as stated in the very first demand.

11. To the deponent, the Applicant has never had any dealings with the said Agro –Chemical Food and Company Muhoroni and all its lifting were from Spectre International and therefore it appears from the above mentioned confusion of the facts by the Respondent in their own correspondence coupled by their failure to call for any records from the Applicant as required by the law and to offer the applicant a chance to comment on the demand that the Respondent, is not even sure of the source of the contentious spirits and if really it was lifted by the Applicant as they are attempting to portray.

12. It was therefore contended that if the Respondent is allowed to proceed and levy the demand from the Applicant, it will result in extreme prejudice and loss to the Applicant considering that the applicant already made the payments to the Respondent based on computations and formulae advised by representatives of the Respondent. Further, the Applicant has continued to incur heavy costs and losses as a result of the illegal closure of its factory by the Respondent and it is in the interests of justice that the Respondent be allowed to resume its operations after complying with all the conditions that were laid out in the notice of closure of 29th January 2013.

13. It was the deponent's case that the computation of the Excise Duty stated in the demand is clearly made in bad faith, unconscionable and illegal and would be injurious to the Applicant and it is in the interest of justice that it is set aside fully since the Respondent clearly did not give the Applicant an opportunity to be heard before issuing the demand for the Excise Duty in question and has ignored the law and the rules of natural Justice and the Constitution of Kenya before making this unjust demand against the Applicant. Further, the Respondent's actions run contrary to the letter, spirit and practice of good governance and democracy in a just and equitable society as envisioned in the law and if nothing is done about it the Applicant stands to suffer irreparable harm and damage.

14. In his view, the orders sought are important because the Respondent has shown prima facie that it is unwilling to follow the spirit and letter of the law hence the demand by the Respondent and continued closure of the Applicant's premises is a gross abuse of their powers and is contrary to the due process of the law is malicious, arbitrary oppressive and prejudicial to the Applicant and also represents a blatant abuse of office by the Respondent's officials and a violation of the Fundamental rights of the Applicant to a fair hearing, to natural justice and fair play hence the orders sought.

Respondent's Case

15. In response to the application, the Respondent filed a replying affidavit sworn by **Joseph**

Moywaywa, its officer in the Domestic Taxes Department on 19th September, 2013

16. According to him, the captioned company was first licensed in 2010 to manufacture excisable products, and in particular, portable spirits and opaque beer which products attract excise duty at the rates specified under the Fifth Schedule of the *Customs and Excise Act*, Cap 472, of the Laws of Kenya.

17. While the company has complied with the Provisions of Sections 90(1) and 05(4) of the said Act, documents received from the distillery, M/s Spectre International Limited where the *Ex parte* Applicant purchased raw spirits reveals that 89,000 litres were lifted and excise duty paid in accordance with the provisions of the Law. However, on compounding, the *Ex parte* Applicant underpaid excise duty by applying an *ad valorem* rate which yields lower tax as compared to specific rate which yield a higher tax. It was deposed that in accordance with the provisions of Regulation 179 (1) of the Act, excise duty is payable at the distillery before lifting at the rate in force by the compounder which tax is remitted to the Commissioner by the distillery licensee. A further excise duty on value addition is payable by the compounder after sale in accordance with Section 134(1) of the aforementioned Act on its becoming due. Since all other players in the industry are paying value addition taxes, the *Ex-parte* Applicant should not be an exception whatsoever because that will amount to unfair treatment of those already accounting for the duty as per law required.

18. It was deposed that one purchase of one litre raw spirit of 96.5% strength from distillery, attracts excise duty at the rate of 120/=. However upon compounding (dilution of raw spirit by adding water to reduce strength to 40% strength consumable label), the strength of one litre or Raw spirit = 96.5% divided by 40% you gives 2.41 litres out of one litre of raw spirit. Under this formula/procedure, 2.41 litres (portable-ready for consumption spirit) is what is referred to as the value added product and the same attracts excise duty at the same rate of 120/= less the 120/= that was paid at the distillery (point of lifting). Out of the total raw spirits purchased by the *Ex parte* Applicant i.e. 89,000 litres, excise paid at distillery (89,000 x 120.00 = Kshs. 10,680,000.00 and that the 89,000 litres multiplied by 2.41 litres gives 214,490 litres of portable spirits and when the 214,490 litres is taxed at the rate of Kshs. 120.00, the amount of excise duty is Kshs. 25,748,800.00. (In simpler terms, excise duty payable on compounded spirits should be Kshs. 169.20 per litre of raw spirit) i.e. $(2.41-1) = 1.41 \times 120 = 196.20$. He explained that the amount of excise duty due and payable is the difference between that which is payable on portable spirit less what was earlier paid at the distillery before lifting (i.e. Kshs 25,738,800.00 less, Kshs. 10,680,000.00) = Due, Kshs. 15,058,800.00 (excise duty on value addition) less payments made (Kshs. 103,168.00).

19. After tabulating the sum due, the deponent averred that the excise duty under dispute was computed based on the purchase figures that were available when the demand was raised and that the new quantities of purchase made obtained from the Respondent's Resident officer stationed at the distillery which is even higher than the ones used to assess the taxpayer; thus, based on the new figures, the taxpayer owes the Commissioner of Domestic Taxes excise amounting to Kenya Shillings 15,022,800.00 less monthly payments made but excluding penalties. It was therefore contended that based on the above quoted evidence, the outstanding amount is due because the *Ex parte* Applicant had not provided or produced any evidence to the contrary to wit payment of duty in respect of value addition.

20. To the deponent, instead of paying the demanded amount or part to date, the *ex parte* applicant instead, in their letter to the Authority dated 27th May, 2013, alleged that the tax was computed wrongly based on an advice given to them by an unnamed Respondent's officer hence merely sifting liability to where it does not belong. It further claimed that it under-priced its products and sold the same in the market and no profits were made to cater for the demanded additional excise duty hence admitting that additional excise duty is due but the *Ex parte* Applicant is unable to pay.

21. It was averred that upon application for licence the *Ex parte* Applicant was notified of other requirements to be fulfilled before its licence could be renewed among them accounting previous spirits lifted by production of excise duty payments made to the Respondent. From the documents available, it was deposed that the amount due on value addition should be Kshs 15,022,800.00 less monthly payments as shown in the table and not what was earlier demanded. He added that in the event that the *Ex parte* Applicant had paid any excise duty on value addition, the Respondent was ready and willing to have the

same deducted from the outstanding amount upon production of such evidence. To him, the contention that the Authority slapped the applicant with a demand based on a contentious computation does not hold water and such an assertion has its place in an appeal to the relevant technical body for review but not in these proceedings.

Applicant's Rejoinder

22. In a rejoinder the applicant filed a further affidavit sworn by the same deponent on 25th September, 2014 in which he deposed that the dispute that the Ex-Parte Applicant has brought before this Court is not about how the tax in dispute was computed but rather on the procedure that the Respondent adopted in demanding for the disputed Tax after having issued a Tax Clearance Certificate to the Applicant. It was deposed that at no time was the Ex-Parte Applicant invited by the Respondent to make any representations before the additional tax was demanded.

23. It was reiterated that the Respondent's position has been changing as frequently as it suits them since they had even claimed at one point that the Ex-Parte Applicant Lifted Spirit from Agro Chemical Company Muhoroni and no proof of such lifting has been provided before this Honourable Court. According to the deponent, it is not the duty of this Honourable Court to compute Tax but rather to ensure that the proper procedure is followed in demanding for any outstanding tax from a tax payer. It was averred that the Respondent has spent a lot of effort in computing that tax rate without providing any explanation as to whether its procedure of demanding outstanding Tax from the Ex-Parte Applicant was legally sound and procedural considering that the Respondent had issued the *Ex-Parte* Applicant with a Tax Compliance Certificate on the 16th January 2013 for the period under review.

24. The deponent contended that the disputed tax that forms the basis of the *Ex-Parte* Applicant's case was from the correspondence issued from the Respondent for a defined period from November 2010 to October 2011 while the Respondent has now provided workings that go up to 27th March 2012 which has never been provided to the *Ex-parte* Applicant before to comment upon.

25. To him, the requirement to account for previous liftings was a pre-condition to the issuance of a Tax Compliance Certificate which was issued on the **16th January 2013**, thereafter it was incumbent upon the Respondent to observe the rules of natural Justice and procedure while demanding for any tax for the period for which the Tax Compliance Certificate covered which the Respondent failed to observe.

26. He reiterated that on the closure of the Ex-Parte Applicant's premises, the notice served required the Ex-Parte Applicant to obtain a flow meter and an Excise Licence which was paid for but never issued and that contrary to the assertion in the Replying Affidavit the relevant technical body to deal with the matter of the contentious tax was not in place at the point of filing this matter and was only gazette by the Cabinet Secretary on the 30th August 2013 after the Ex-Parte Applicant had already commenced this matter before this Honourable Court and in any case the challenge was on the procedure adopted by the Respondent not the technical aspects of the claim.

27. The ex-Parte Applicant therefore sought the protection of this Honourable court to issue appropriate orders of judicial review by way of certiorari, prohibition and mandamus to stop and quash the actions of the Respondent against the Ex-Parte Applicant and to compel the Respondent to unseal and reopen the Ex-Parte Applicant's premises as the Respondent has manifestly failed to follow the law and in the process has trampled upon the rights of the Ex-Parte Applicant.

Determinations

28. Section 93 of the *Customs and Excise Act*, Cap 472, Laws of Kenya, provides:

(1 (1) The Commissioner may revoke, suspend or refuse to renew a licence
)

where he is satisfied that—

- (a) (a) the licensee has been guilty of an offence under this Act;
- (b) (b) the licensee has been convicted of an offence involving dishonesty or fraud;
- (c) (c) the licensee has become a bankrupt or has entered into an arrangement or composition with or for the benefit of his creditors;
- (d) (d) the factory, or the plant therein, is of such a nature or so maintained that the excisable goods manufactured therein are likely to be adversely affected;
- (e) (e) the factory is so designed, equipped or sited as to render difficult the supervision thereof for excise purposes;
- (f) (f) the licensee has failed the licensee has failed to comply with the provisions of [section 95](#).

2. *Where the Commissioner revokes, suspends or refuses to renew a licence under this section, then he shall forthwith give notice of that fact to the licensee.*

29. It is therefore clear that before a Commissioner may exercise the powers conferred upon him under the foregoing paragraph he has to **be satisfied**.

30. How then does the Commissioner become “satisfied”? In my view, for the Commissioner to be said to have been satisfied, he must consider all the relevant factors. The word “consider” was defined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

“To consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”

31. In order to be sufficiently satisfied, it is therefore clear that the provisions of Article 47 of the Constitution must be adhered to. The said Article provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

32. In my view, an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. Further an administrative action cannot be said to be procedurally fair where a decision is arrived at based on an opinion formed as a result of the consideration of the version of only one side since by a consideration of one side one cannot be said to have felt certain about the truth of the matter in dispute. Where one's right or fundamental freedom is likely to be affected by an administrative action, that person has a right to be given written reason for the action. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817** 6 where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

33. In this case, the ex parte applicant contends that it had been given Tax Compliance certificate for the year 2003. That contention was not controverted by the Respondent. In **Republic vs. Kenya Revenue Authority & Another ex parte Trade Winds Agencies [2013] eKLR** this Court held:

“In this case, it is contended by the applicant that after its auditors complained to the respondent vide their letter dated 22nd September 2006 about unilateral debit of Kshs Kshs.10,104,030/00 undertaken on the account on 18th September 2003, a letter to which there was no response, the applicant continued to receive Tax Compliance Certificates from the 1st Respondent confirming that the Applicant is current with tax returns, is up to date on tax payments and is in fulfilment of all tax obligations as required by law. Although the respondent contends that a person who complies with the provisions of the Seventh Schedule paragraph 7 is eligible for a Tax Compliance Certificate because the said person has filed tax returns and paid what he has assessed himself as due to the Commissioner and that a Tax Compliance Certificate does not mean that a person's accounts are perfect or beyond reproach and only an audit conducted by the First Respondent can certify accounts to be beyond reproach for tax purposes the same certificates indicate that the authority reserves the right to withdraw the certificate if new evidence materially alters the tax compliance status of the recipient. Why would the certificate be withdrawn if it is not evidence of compliance? If it is only evidence of submission of remission of taxes in which event it is not binding on the authority there would be reason for it to be withdrawn by the authority. The only conclusion one would draw is that the certificate is prima facie evidence of compliance and until withdrawn the same is proof of fulfilment of the obligation to pay taxes.”

34. In my view a person to whom a Tax Compliance Certificate has been issued acquires a legitimate expectation that he will enjoy the benefits which accompany the said certificate and that the same will not be withdrawn unless he is afforded a hearing in respect thereof. It is my view and I so hold that the decision taken by the Respondent was contrary to the *ex parte* applicant's legitimate expectations that before any adverse action was taken it would be afforded an opportunity of presenting its case and challenging the said decision. It is settled law that a benefit cannot be withdrawn until the reason for withdrawal has been given and the person concerned has been given an opportunity to comment on the reason. As was held in **Republic vs. Kenya National Examinations Council ex parte Geoffrey Gathenji and 9 Others Civil Appeal No. 266 of 1996:**

“the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”

15. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240:**

“.....legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. 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... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. 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..... Statutory power must be exercised fairly.

35. Citing the English case of Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531 where it was held that “*The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural*”, the learned Judge continued:

...It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due. It stems from illegality, improper exercise of law, disregard of legitimate expectation, in violation of Government regularity, in breach of the rule of law, abuse of power and in total disregard of constitutionalism. All these are proper grounds of intervention by this court...The respondents’ argument that the applicant came to court prematurely without exhausting the internal tax objection process as regards each category of tax, is a serious misdirection because as it has been stated elsewhere in this judgment the issues raised were greater than any of the internal tribunals could handle. The task before the court is not, and has not been that of counting the shillings, it has been one of adjudicating on illegality, the doctrine of *ultra vires*, irrationality, procedural impropriety, Wednesbury unreasonableness, oppression, malice, bias, discrimination and abuse of power...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance...The courts have a role long established, in the public law. They are available to the citizen who has a genuine grievance if he can show that it is one in respect of which prerogative relief is appropriate. I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed upon the revenue are complex and call for management decisions in which discretion must play a significant role.”... Independent decision making power of the Judiciary also comprises jurisdiction over all issues of a judicial nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. No organ other than the courts themselves should decide on its own competence as defined by law...While this court has due deference to the Tribunals, the applicant in this matter had a genuine apprehension that the respondents were bent to take drastic actions against it, in a manner contrary to the applicable law and they were just about to abuse their powers. These are certainly not issues the Tribunals would have had the competence or jurisdiction to deal with, determine or give relief. I reject the argument that the applicant came to the court prematurely. It was under a threat which only this court could

prevent or avert. It is for the courts of law to define the limits of their competence. Even in the field of tax law judicial issues cannot be left to the tax bureaucrats. If the courts were to do this, it would be serious abdication of their core role or duty... From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors...The court has in each case analysed the relevance of each ground to the outcome herein. Of great significance is the principle of certainty of law especially on taxation in a democratic state such as ours. Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. While the applicants are evidently successful on all the judicial review grounds as indicated above, I think it is significant to stress on the ground of certainty of law as an ingredient of the rule of law because it is easy for public authorities and bodies to overlook it in their decision making processes, as has happened in this case. The respondent's argument that the applicant should not have come to court before exhausting the internal objection arrangements in respect of each tax regime should also be considered from the standpoint of the rule of law. While judicial review could be a collateral attack, the right of access to court is a fundamental principle and cannot be taken away except in exceptional cases. It is the basis of an orderly society and the rule of law. The rule of law is the cog upon which all the provisions of the Constitution turn...My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – see *Benett case (supra)*. Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law.”

36. In arriving at the conclusion that the change of tariff and its retrospective application are a threat to the rule of law and the principle of legitimate expectation and constitutes abuse of power, the learned Judge cited the House of Lords' decision in the case of *Bennett vs. Horse Ferry Road Magistrate's Court and Anor [1993] 3 All ER at page 150* where the following significant observations were made by Lord Griffiths:

“1. ...there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain” 2. ...if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and

as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court, that, there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.”

37. The Learned Judge therefore held:

“I hold that where there is proof of abuse of power and a violation or threat to the rule of law, the court must wholly stop what the perpetrator of those ills intended to do. I apply the principle in the *Benett case* above. The reason for this is that only the might and majesty of law can prevent or act as a deterrence against the temptation to abuse power and also, send the right signals, that public administration must adhere to the rule of law. In the result, I find that the applicant company is entitled to the reliefs claimed. The judicial review orders sought to forthwith issue as prayed with costs to the applicant. ”

38. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** it was held:

“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

39. It must however be appreciated that it is not the duty of this Court to determine whether or not a person is liable to pay tax and how much. That is a matter which ought to be determined by the bodies which are specially empowered by legislation to do so. 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.”

40. 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*.

41. 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.”

42. 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.”

As was held in **Tradewise Case** (supra):

“Whereas this Court cannot hold that the applicant was not obliged to pay any taxes, the 1st respondent was expected to notify the applicant of any discovery of new evidence which was likely to materially alter the applicant’s tax compliance status and hear the applicant’s side of the story before taking an action which was contrary to its earlier conduct. By not affording the applicant an opportunity to explain its position after issuing the tax compliance certificates, it is my view and I so find that the 1st respondent was guilty of abuse of power.”

44. It is my view and I so hold that the Respondent having by its conduct led the ex parte applicant to believe that the applicant had satisfied its tax obligations by issuing the said Tax Compliance, the Respondent could not arbitrarily and unilaterally demand from the ex parte applicant taxes which were allegedly due from the ex parte applicant during the period preceding the issuance of the said Certificate without affording the applicant a hearing in respect thereof.

45. In light of my findings hereinabove, the inescapable conclusion I come to is that the Notice of Motion dated 27th August, 2013 is merited. However on the prayers that ought to be granted, as was held in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA. No. 1747 of 2004 [2006] 1 EA 47**, once a quashing order is given the decision making body has to act in accordance with the law and the Court cannot make the decision for the challenged body. Since the purpose of certiorari is to bring up and quash the impugned orders, that having been done there is no necessity for an order of prohibition since there is no longer any threat present of an illegal action. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**.

46. In this application, once the impugned decision is quashed there is no warrant for grant of the order of prohibition in the manner sought since this Court does not deal with the merit hence the Court cannot prohibit the Respondent from claiming taxes which are legally due as long as the due process is adhered to.

Order

47. Consequently the orders which commend themselves to me and which I hereby grant are as follows:
- a. **An order of Certiorari is hereby issued removing into this Court for the purposes of being quashed the demand notice dated 6th June 2013 for the sum of Kenya Shillings 8,290,800.00 which decision is hereby quashed.**
 - b. **An order of mandamus is hereby issued directed to the Commissioner of Domestic Taxes Kenya Revenue Authority and/or his/her agents compelling them to unseal and reopen the premises of the *Ex-Parte* Applicant which were sealed on the 29th January 2013.**
 - c. **The costs of this application are awarded to the Applicant.**

Dated at Nairobi this 7th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odida for the Applicant

Cc Patricia