



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 283 OF 2013**

**REPUBLIC .....APPLICANT**

**VERSUS**

**COMMISSIONER OF INVESTIGATION & ENFORCEMENT.....1<sup>ST</sup> RESPONDENT**

**LOCAL COMMITTEE FOR NAIROBI AREA.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**ELDORET GRAINS LIMITED**

**JUDGEMENT**

The ex-parte Applicant, Eldoret Grains Limited is a duly registered company in the Republic of Kenya carrying on the business of milling, selling and transporting grains. The 1<sup>st</sup> Respondent, the Commissioner of Investigation and Enforcement derives his powers from the Income Tax Act, with the core mandate of enforcing the collection of taxes. The 2<sup>nd</sup> Respondent, the Local Committee for Nairobi Area on the other hand derives its functions and powers from Section 82 of the Income Tax Act, Chapter 470 Laws of Kenya and is governed by the Income Tax (Local Committees) Rules, 1974. Local committees hear appeals from taxpayers whose objections to assessment of taxes have been rejected by the Commissioner.

Briefly, the 1<sup>st</sup> Respondent acting on information received from an informer that the Applicant was under-declaring taxes conducted investigations into the Applicant's tax affairs. The information received by the 1<sup>st</sup> Respondent from one Mr. Ibrahim Magonga Ratemo, a former employee of the Applicant was that the Applicant was using two accounts in the name of the ex-employee at the Eldoret branch of the Kenya Commercial Bank (KCB) to evade payment of taxes. The Applicant denied this allegation but the 1<sup>st</sup> Respondent nevertheless slapped the Applicant with a bill of Kshs. 567,920,538.89 being additional taxes for the years 2005 to 2010. The Applicant was aggrieved by the assessment and raised an objection which was overruled. The Applicant then filed an appeal with the 2<sup>nd</sup> Respondent and the 2<sup>nd</sup> Respondent upheld the decision of the 1<sup>st</sup> Respondent.

The Applicant subsequently sought and obtained leave from this Court to commence judicial review proceedings. In the substantive Notice of Motion dated 12<sup>th</sup> August, 2013 the Applicant therefore seeks the following orders:

- “1. An Order of Certiorari to remove into the High Court for purposes of it being quashed the decisions and orders made in the letter of 23<sup>rd</sup> July 2013 by the 1<sup>st</sup> Respondent. An Order of Certiorari to remove into the High Court for purposes of it being quashed the decisions and orders made in the Ruling of 18<sup>th</sup> July 2013 by the 2<sup>nd</sup> Respondent.**
- 2. An Order of Mandamus compelling the 1<sup>st</sup> Respondent to rescind its decisions and or its agency notices made on the 23<sup>rd</sup> July 2013 in the letter/notice. An Order of Mandamus compelling the 2<sup>nd</sup> Respondent to rescind its Ruling made on the 23<sup>rd</sup> June 2013**
- 3. An Order of Prohibition against the Respondents, its agents or representatives from issuing any notices to the Applicants, its bankers or any other third parties affiliated or associated with the Applicants demanding any payment whatsoever.**
- 4. An Order that the respondent do pay the cost of the proceeding.”**

The application is based on the grounds on its face, the verifying affidavit of Swaleh Ahmed Taib sworn in his capacity as the Managing Director of the Applicant, the statement of facts and the chamber summons application for leave.

According to the Applicant’s Managing Director, the Applicant has at all times remitted and declared all its earnings and has never failed in fulfilling its tax obligations. It is his case that in the month of November, 2011 a former employee Mr. Ibrahim Magonga Ratemo informed the 1<sup>st</sup> Respondent that the company had used his personal accounts for conducting business in order to avoid paying tax. He asserted that the informant was a disgruntled employee who had worked for them for ten years and had been dismissed from employment owing to misappropriation of funds. He contended the Applicant had also instituted both civil and criminal proceedings against the former employee with the sole purpose of recovering the misappropriated money. The Managing Director specifically cites **Eldoret Chief Magistrates Court Civil Suit No. 793 of 2010.**

According to him, through a letter dated 6th December, 2011 the 1<sup>st</sup> Respondent asked them to explain their conduct and the company complied by supplying all the necessary documentation. He asserted that the information given by the informant was given out of spite and malice.

It was his case that the 1<sup>st</sup> Respondent purportedly carried investigations and came to the conclusion that the money in the accounts of the informer was undeclared earnings and without any reference to the Applicant, requested the Applicant to pay Kshs. 567,920,538.89. He averred that they wrote to the 1<sup>st</sup> Respondent denying ownership of the two accounts and seeking particulars. After being furnished with the information they discovered that the accounts belonged to their former employee, Ibrahim Ratemo Magonga and his company Salrazak Investment Limited.

He contended that they objected to the additional assessment of taxes raised for the years 2005 to 2010, but the objection was overruled by the 1<sup>st</sup> Respondent.

According to him the company was given the last opportunity of appealing under Section 84(2) of the Income Tax Act, Cap 470 Laws of Kenya. That is when the Applicant filed an appeal against the decision of the 1<sup>st</sup> Respondent and the matter was referred to the 2<sup>nd</sup> Respondent as provided under the Income Tax Act.

It was his case that the 2<sup>nd</sup> Respondent failed to adhere to the rules under which it was created and the rules of natural justice by not immediately informing the Applicant of the allegations made against it. He

asserted that although the matter was set down for hearing on 4<sup>th</sup> July, 2013, the 1<sup>st</sup> Respondent served it with the documents it was to rely upon on 1<sup>st</sup> July, 2013 and it did not have sufficient time to respond to the application. He therefore averred that this amounted to a breach of the rules of natural justice as it was not accorded a fair hearing. He further asserted that the documents served were a massive bundle and a lot of time was required to peruse and respond to the same.

He contended that, even though they were short of time in which to prepare a proper defence they drafted two affidavits which demonstrated that they had a good defence against the allegations being levelled against them. He averred that the affidavits were rejected thus denying them an opportunity to mount a proper defence and therefore the 2<sup>nd</sup> Respondent could not have issued an impartial decision.

It was his case that on the 18<sup>th</sup> July, 2013 the 2<sup>nd</sup> Respondent delivered a ruling based on information supplied by a former employee. He contended that the 2<sup>nd</sup> Respondent found the company liable to pay taxes for funds held in two personal accounts of the said former employee and in the process failed to appreciate that the Applicant is a duly incorporated company and is in law distinct from an individual. Further, that the company could not have held bank accounts in the name of an individual who was not even a director.

It was his case that without any consultation and regard for the law the 1<sup>st</sup> Respondent on 23<sup>rd</sup> July, 2013 issued agency notices to its Senior Deputy Commissioner authorising him to be an agent of the Applicant for the purposes of collecting and forwarding the sum of Kshs. 567,920,538 from the Applicant. The Managing Director of the Applicant averred that the Commissioner for Large Taxpayers was in the process of enforcing the agency notice by attaching the Applicant's bank accounts. He contended that the 1<sup>st</sup> Respondent neither had the power or jurisdiction to issue the said notice without exhausting the remedies provided in the Income Tax Act, namely reference to a tribunal.

He deposed there is no predictability in the actions of the 1<sup>st</sup> Respondent as is required of public bodies, further contending that the Applicant has a legitimate expectation of being treated in a certain way by the 1<sup>st</sup> Respondent arising from the fact that the 1<sup>st</sup> Respondent had received and continues to receive income tax from the Applicant.

The application was opposed by the 1<sup>st</sup> Respondent through the replying affidavit sworn on 23<sup>rd</sup> September, 2013 by Sylvester Okello Ogello in his capacity as the acting Senior Assistant Commissioner in the Investigations and Enforcement Department.

According to him, following intelligence information on tax evasion by the Applicant, they conducted investigations and found that the Applicant is the largest maize miller in the North Rift region but with a poor tax compliance history.

He deposed that the information which was received in the month of November 2011 implicated the Applicant together with some of its directors and managers in accounting malpractices which led to massive tax evasion. The information indicated that sales proceeds were being deposited in employees' personal bank accounts leading to non-payment of taxes on the sales proceeds.

The informer, Mr. Ibrahim Magonga Ratemo confessed that his two accounts with KCB, Eldoret branch were being used to execute the schemes. What would happen is that the company made fictitious purchases from non-existent farmers in effect inflating the production costs and under-reporting profits. The names of real and genuine farmers were being used but the payments meant for the farmers would end up in the pockets of the Applicant's directors.

The 1<sup>st</sup> Respondent was satisfied that there was need to conduct investigations and went ahead to carry out the investigations. The investigations revealed that various employees and sales persons used to deposit money in the accounts on the instructions of the Operations Manager. Some of the employees swore affidavits but others declined to do so for fear of reprisals as they still had business dealings with

the Applicant.

The investigations also revealed deposits running into millions in the informer's bank accounts. The investigations also revealed that the Operations Manager one Mr Mohammed Omar Bajoh was a signatory to one of the accounts held by Mr Magonga, a fact which Mr Bajoh admitted but proceeded to deny that the money in the account belonged to the company. The findings of the investigations were communicated to the Applicant through a letter dated 12<sup>th</sup> July, 2012 and the Applicant responded by denying any knowledge of the accounts and requested for copies of the bank statements. He contended that they thereafter had several meetings with the aim of resolving the issue which culminated into the Applicant filing an appeal with the 2<sup>nd</sup> Respondent.

He averred that the Applicant wilfully and deliberately under-declared its sales by banking the sales proceeds in the bank accounts operated by two employees namely Mr Ibrahim Ratemo Magonga and Mr Mohammed Omar Bajoh.

According to Mr Ogello, the Applicant had established an elaborate tax evasion scheme, where the sales proceeds were banked in the accounts of Mr Ibrahim Ratemo Magonga who would then withdraw the amounts and hand it over to the Operations Manager Mr Mohammed Omar Bajoh. He deposed that the accounts were conduits whose purpose was to conceal from the taxman income from sales.

He contended that it defied logic to have an employee running businesses with huge deposits being retained in employment and yet the Applicant's directors and the Operations Manager had full knowledge of these deposits. He contended that Mr Bajoh was a mandatory signatory for one of the accounts and this confirms that the money in Mr Ratemo's accounts belonged to the company. Mr Ogello in his affidavit gives a detailed account as to why they concluded that the money in Mr Ratemo's accounts belonged to the Applicant.

It was his case that in an attempt to cover up the tax evasion scheme the Applicant initiated proceedings against Mr Ratemo in **Eldoret CMCC No. 793 of 2010, Eldoret Grains Ltd – v – Ibrahim Ratemo Magonga** but the case was decided in favour of the former employee. He averred that he was not aware of any criminal proceedings that had been instituted against Mr Ratemo as alleged by the Applicant.

Mr Ogello contended that the Applicant filed an appeal with regard to the assessments for the years of income 2005 to 2012 and it was incumbent on the Applicant, as the appellant, to attach all documentary evidence it intended to rely on during the appeal. He contended that paragraph 6(1) of the Income Tax Act (Local Committee) Rules of the Income Tax Act provides that among the documents to accompany the memorandum of appeal is **“a statement, signed by the appellant, setting out the facts on which the appeal is based and referring to any documentary or other evidence which it is proposed to adduce at the hearing of the appeal;”** According to Mr Ogello, this provision is couched in mandatory terms and it places an obligation on an appellant to attach all the documentary evidence it intends to rely on at the time of filing the appeal.

It was his case that since the appeal was dismissed the 1<sup>st</sup> Respondent was entitled to the recovery of the assessed tax. He asserted that Section 93(1)(c) of the Income Tax Act allows the Commissioner to recover taxes after the determination of an appeal.

Mr Ogello averred that additional taxes are raised when the Commissioner, following an audit realises that a taxpayer has not made a full disclosure of his tax status.

In a rejoinder to the Applicant's verifying affidavit he asserted that even though the Applicant had been declaring its earnings and paying taxes, it has a poor tax compliance history and declares low profit or losses in most cases.

He refuted the Applicant's claim that criminal proceedings had been instituted against Mr Magonga asserting only civil proceedings were instituted where the Applicant had sued for the recovery of Kshs. 654, 590/= but the case was dismissed for want of prosecution. He further asserted that the Applicant had

all along been made aware of the bank statements and had the opportunity to rebut the assessments by providing evidence to prove that the amounts should not be taxed on the Applicant. He further averred that the affidavit of Mr Bajoh which the Applicant claimed was rejected by the 2<sup>nd</sup> Respondent had the same contents with the statement Mr Bajoh had submitted during investigations and that the same statement had been annexed to the documents tabled before the 2<sup>nd</sup> Respondent by the 1<sup>st</sup> Respondent. It was his case that the 1<sup>st</sup> Respondent was able to adduce evidence demonstrating why the evidence of one Mr Bajoh should not be used to exonerate the Applicant.

He contended the pleadings by the 1<sup>st</sup> Respondent clearly demonstrated fraud by the Applicant and asserted that the 2<sup>nd</sup> Respondent arrived at a proper decision in finding that there was a nexus between the deposits in Mr Ratemo's accounts and the Applicant.

He asserted that they were able to prove, before the 2<sup>nd</sup> Respondent, the fraudulent nature of the transactions and the nexus between the ex-employee and the company. He asserted that the agency notices were issued to the Senior Deputy Commissioner of Finance to remit any tax refunds that may be found due and payable to the Applicant and not to the bankers as alleged by the Applicant.

Mr Ogello averred that the veil of a corporation could be lifted especially where the transaction is a sham or an illusory transaction or where the same is a ruse meant to avoid the payment of taxes. In support of his proposition he cited the decisions of the Supreme Court of India in **SUNIL SIDDARTHBAI v CIT, AHMEDABAD (1985)** and **JUGGILAL KAMLAPT v CIT (1969)**.

The application was opposed by the 2<sup>nd</sup> Respondent through the replying affidavit of Jackline Matara sworn on the 19<sup>th</sup> February, 2014. She averred that she is an advocate by training and has worked for the 2<sup>nd</sup> Respondent for seven years as a clerk. She stated that she is well versed with the Income Tax Act and its provisions and she is bound to follow the lawfully given directions issued by the Chairman of the 2<sup>nd</sup> Respondent. She is charged with the responsibility and duty of preparing and presenting a list of tax appeals to the Chairman once satisfied that they are proper.

It was her case that at a meeting held on the 6<sup>th</sup> June, 2013 she presented a list of the pending appeals, inclusive of the one lodged by the Applicant through their representatives PSK Associates. It was during the meeting that she confirmed that the Applicant had complied with the rules specifically Rule 6 (1)(c) of the Income Tax Act (Local Committee) Rules, 1974.

It was her case that acting on the directions of the Chairman she issued notices for the hearing of the appeal on 20<sup>th</sup> June, 2013 but on the hearing date the matter was adjourned to 4<sup>th</sup> July, 2013 in order to allow the 1<sup>st</sup> Respondent to serve some documents on the Applicant and the 2<sup>nd</sup> Respondent.

When the appeal came up for hearing on 4<sup>th</sup> July, 2013 the Applicant presented its case and proceeded to refer to documents and statements it filed in accordance with the rules.

As to what happened on the hearing date, Ms Matara avers in paragraphs 13, 14 and 15 of her affidavit:

**“13. THAT at the hearing on 4<sup>th</sup> July 2013, the Applicant presented its case relying on statements of facts and referred to documents filed in accordance to the said Rules. Annexed hereto and marked JM-4 is a copy of the Register duly signed by the Applicant.**

**14. THAT before concluding its presentation the Applicant sought to adduce evidence from documents not availed to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.**

**15. THAT the Chairman of the 2<sup>nd</sup> Respondent intervened and ruled that the Applicant could not adduce evidence from documents not served on the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.**

**16. THAT the 1<sup>st</sup> Respondent proceeded to present its response on the issues in accordance to Rule 10 of the said Rules.”**

Ms Matara swore that the 2<sup>nd</sup> Respondent carefully deliberated on the issues raised in accordance with the law and in a ruling delivered on 18<sup>th</sup> July, 2013 dismissed the Applicant’s appeal. She averred that the Applicant was given an opportunity to prosecute its appeal in accordance with the Income Tax Act (Local Committee) Rules, 1974 and the rules applied by the 2<sup>nd</sup> Respondent when conducting appeals. It was her case that the 2<sup>nd</sup> Respondent acted in a proper manner and denies allegations of impropriety in its deliberations.

I have gone through the pleadings, the submissions and heard the arguments of the parties and I am of the view that the issues due for determination by this Court are as follows:

1. Whether the rules of natural justice were breached;
2. Whether the respondents acted without jurisdiction; and
3. Who will have the costs of these proceedings?

A look at the court record shows that the parties herein at some point or another sought leave to file supplementary affidavits. Leave and corresponding leave were indeed granted but it would appear that no further affidavits were filed.

The Applicant’s major contention is that it was not given a fair hearing during the conduct of the proceedings by the 2<sup>nd</sup> Respondent and further that the time it was given to reply to a document containing 200 pages, served upon them by the 1<sup>st</sup> Respondent four days to the hearing, meant that it could not mount a proper defence and thus was unable to prosecute the appeal. In countering this argument the respondents submitted that the Applicant was given ample time in which to prosecute the appeal. It is the respondents’ case that the rules governing appeals placed the onus, of attaching all the necessary documents to be relied upon in the appeal, on the appellant and that the Applicant being the appellant in the matter ought to have provided all the documents at the time of filing the appeal.

The Applicant also contended that the rules of natural justice were breached as it was not informed of the allegations it was facing. To this assertion, the respondents replied that since the Applicant was the appellant, it ought to have known its case and the 2<sup>nd</sup> Respondent had no information to give to the Applicant.

The Applicant further contended that two affidavits which were to demonstrate its case were blocked from being admitted in the proceedings. The respondents countered that the Applicant was given ample time in which to prosecute its appeal including being granted extension of time to file documents.

It is important, at the outset, to establish the purpose of judicial review. In the case of **MUNICIPAL COUNCIL OF MOMBASA v REPUBLIC & UMOJA CONSULTANTS LIMITED, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** the Court of Appeal stated that in judicial review:

**“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review.”**

The circumstances under which orders of judicial review can issue were elaborated by Justice Kasule in Ugandan case of **PASTOLI v KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS [2008] 2 EA 300** at pages 303 to 304 thus:

**“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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision 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.....**

**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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is 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. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

The reach of the judicial review orders was laid down by the Court of Appeal in **KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS**, Nairobi Civil Appeal No. 266 of 1996 when it stated:

**“That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See **HALSBURY’S LAW OF ENGLAND**, 4<sup>th</sup> Edition, Vol. 1 at pg.37 paragraph 128.....**

**The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to **HALSBURY’S LAW OF ENGLAND**, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

At paragraph 90 headed “the mandate” it is stated:

**“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

**What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....**

**Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

Having established the applicable law, I will now proceed to apply the law to the facts of this case.

The Applicant also attacked the decisions of the respondents by stating that the accounts in issue belonged to an employee and the tax should therefore have been assessed on the employee. The Applicant argued that the 2<sup>nd</sup> Respondent in reaching its decision overlooked the fact that Applicant being a company is a different entity from its employees and its owners. In response to this latter argument the respondents submitted that the corporate veil can be lifted in certain circumstances and those circumstances existed in the case of the Applicant.

In my view, the decision as to whether or not the corporate veil of the Applicant could be lifted and was indeed lifted by the 1<sup>st</sup> Respondent is a matter that goes to the merits of the decision. The facts that led to the decision of the 1<sup>st</sup> Respondent were placed before the 2<sup>nd</sup> Respondent and it is only the 2<sup>nd</sup> Respondent which could determine whether this was a proper matter for the lifting of the corporate veil. This is a no-go-area for a judicial review court. In regard to this particular issue, the Applicant ought to have filed an appeal.

The Applicant has not established any other grounds for the review the 1<sup>st</sup> Respondent’s exercise of statutory power. The 1<sup>st</sup> Respondent acted within the law by carrying out investigations and issuing tax demands based on the information.

I will now consider the issue as to whether there was a breach of the rules of natural justice. Natural justice also connotes the issue of procedural fairness i.e. the duty to follow procedure that has been laid down.

The concept of natural justice was outlined in the case of **RIDGE v BALDWIN (NO 1) [1963] APP.L.R. 03/14**. It must be noted that the concept of fair hearing is well ingrained in our legal system. The same has no fixed form or rules of application.

Whether a person has received a fair hearing or not can only be deduced by considering the circumstances of each case. This principle was espoused in the case of **R V GAMING BOARD FOR GREAT BRITAIN, EX P. BENAIM [1970] APP.L.R. 03/23** thus: **“it is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject matter.”**

The doctrine of natural justice was outlined by the learned authors of **HALSBURY’S LAWS OF ENGLAND, Vol 1(1) at page 218 para 95 as follows:**

**“Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo iudex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct.”**

In this case the question is whether the Applicant was condemned unheard? The Income Tax Act, (Cap. 470) provides the procedure to be followed when a taxpayer is aggrieved by assessment of taxes.

Among the Applicant’s arguments in support of its case is that the rules of natural justice were violated as it was not immediately informed of the allegations it was facing. This contention has no foundation since it was the Applicant who filed the case before the 2<sup>nd</sup> Respondent. The Applicant was well versed with its complaint and the 2<sup>nd</sup> Respondent had no duty to remind the Applicant what its case was all about.

The question that should really be of concern to this Court is whether the Applicant received a fair hearing. The Applicant claims that it was served with the 1<sup>st</sup> Respondent’s documents a few days to the hearing. On the hearing date the Applicant attempted to rely on two affidavits but those affidavits were rejected by the Chairman of the 2<sup>nd</sup> Respondent. I have reproduced in this judgement some paragraphs of the 2<sup>nd</sup> Respondent’s replying affidavit in which it is admitted that the Applicant was indeed denied the opportunity of relying on certain documents.

The respondents contend that whoever files an appeal should at the same time file all documents to be relied upon. The respondents asserted that even though the 2<sup>nd</sup> Respondent could exercise discretion and admit the documents, the onus was on the Applicant to ensure that all the documents were filed at the time of filing the appeal. It is the respondents’ case that the Applicant had been given sufficient time to file documents.

The facts however disclose otherwise. The Applicant was served with the 1<sup>st</sup> Respondent’s response on 1<sup>st</sup> July, 2013 for a hearing scheduled for the 4<sup>th</sup> day of the same month. This was indeed short notice. The Applicant was entitled to reply to the 1<sup>st</sup> Respondent’s defence but it was not given time to do so.

On the hearing date the Applicant attempted to rely on certain documents in response to the 1<sup>st</sup> Respondent’s case but it was denied an opportunity to do so. At stake was a tax claim of over 500 million shillings. That tax assessment had been arrived at based on information received from a sacked employee. There are many reasons that can make an employee to give false information against the former employer. Whether the information was given in good faith is also in question. Why didn’t the employee give this information during his employment? The Applicant was indeed entitled to respond to the 1<sup>st</sup> Respondent’s case and the 2<sup>nd</sup> Respondent was under an obligation to give the Applicant an opportunity to reply to the 1<sup>st</sup> Respondent’s case. The Applicant was served by the 1<sup>st</sup> respondent two days to the hearing and it cannot be blamed for not filing a response in good time.

I therefore find that the Applicant was not given a fair hearing and issue orders as follows:

1. The ruling made by the 2<sup>nd</sup> Respondent on 18<sup>th</sup> July, 2013 is removed into this Court and quashed;
2. The Applicant’s appeal to the 2<sup>nd</sup> Respondent is remitted back to the 2<sup>nd</sup> Respondent for fresh hearing by members other than those who made the decision that resulted in these proceedings;
3. Consequently, the agency notices dated 23<sup>rd</sup> July, 2013 are called into this Court and quashed;
4. The bank guarantee of Kshs. 100 million provided by the Applicant in compliance with the order issued by this Court on 2<sup>nd</sup> August, 2013 is discharged; and
5. The parties shall bear their own respective costs.

**Dated, signed and delivered in Nairobi this 14<sup>th</sup> day of November, 2014**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**