

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR APPL. NO. 119 OF 2021**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE COMMISSIONER OF KENYA REVENUE AUTHORITY .....**

**.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTORATE OF CRIMINAL INVESTIGATIONS**

**.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS .....**

**..... 3<sup>RD</sup>RESPONDENT**

**THE CHIEF MAGISTRATES COURT AT NAIROBI**

**.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**THE TAX APPEALS TRIBUNAL..... INTERESTED PARTY**

**MOHAN GALOT.....1<sup>ST</sup> EXPARTE APPLICANT**

**LONDON DISTILLERS (K) LTD .....2<sup>ND</sup> EXPARTE APPLICANT**

**JUDGMENT**

1. The Application that is before me for the determination is the one dated 8<sup>th</sup> August 2022 wherein the Applicants seek the following orders: -

- a. This Honourable Court be pleased to issue an order of Certiorari to bring before this Honourable Court the decision by the 3<sup>rd</sup> Respondent contained in the Charge Sheet dated 19:07:2021 vide **Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd** for the purposes of being quashed.
- b. This Honourable Court be pleased to issue an order of Prohibition, stopping the 1<sup>st</sup> Respondent from amending or substituting any further charges in the Charge Sheet dated 19:07:2021 vide **Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd** against the *ex parte* Applicants pending the hearing and determination of **TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority** before the Tax Appeals Tribunal and the exhaustion of any further subsequent proceedings attendant thereto under the Tax Procedure Act,2015.
- c. This Honourable Court be pleased to issue an order of Prohibition, stopping the 1<sup>st</sup> Respondent from taking any other adverse action against the *Exparte* Applicants amounting to enforcement measures on the basis of the Assessment Notice dated 18:03:2021 and the objection decision dated 09:06:2021 pending the hearing and determination of **TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority** before the Tax Appeals Tribunal and the exhaustion

of any further subsequent proceedings attendant thereto under the Tax Procedure Act,2015.

d. Any other Order that this Honourable Court may deem just to grant.

e. Costs

### **The Applicants Case;**

2. The Application is supported by the supporting and the supplementary affidavits of 1st Applicant who is the Principal Shareholder and Chairman of the Board of Directors of the 2<sup>nd</sup> Applicant.
3. The 2<sup>nd</sup> Applicant is a limited liability Company incorporated in the Republic of Kenya in conformity with the provisions of the Companies Act.
4. On 21.07.2021 the Applicants herein were arraigned before the 4<sup>th</sup> Respondent in Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd Which was instituted by the 3<sup>rd</sup> Respondent before the 4<sup>th</sup> Respondent pursuant to investigations carried out by the officers of the 2<sup>nd</sup> Respondent
5. The support documents in the trial court according to the Applicant emanate from the Tax Assessment by the 1<sup>st</sup> Respondent contained in its letter dated 09.06.2021, which is now subject of the Appeal vide TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority.

**6.** It is the Applicants' case that the proceedings before the Tax Appeals Tribunal challenged the 1st Respondent's objection decision dated 09.06.2021 reiterating the tax assessment and computation of the alleged tax owed by the 2nd Applicant under cover of its Notice of Assessment vide letter dated 18.03.2021, a step which was expressly appreciated by the 1st Respondent whom in its letter advised as follows:

*“You are however, reminded of your right of appeal as provided in Section 52 of the Tax Procedures Act, 2015 and Section 13 of the Tax Appeals Tribunal Act...”*

**7.** The 2<sup>nd</sup> Applicant thereafter lodged with the Tax Appeals Tribunal, its Notice of Appeal and thereafter the said Appeal.

**8.** The 1st Respondent has been conducting investigations into the 2<sup>nd</sup> Applicant's tax affairs for the years of 2015 up to 2019.

**9.** It is their case that by its letter dated 06.09.2020 the 1st Respondent sought to visit the 1<sup>st</sup> Applicant's premises on a date to be mutually agreed to physically verify and take actual stocks of the items subject of the investigations.

**10.** By letter dated 13.10.2020 inter alia the Applicants argue that they responded to the 1<sup>st</sup> Respondent as follows:

*“...Meanwhile you have expressed your intention to visit our client's premises for further review and verification of facts on the ground. This is wholeheartedly welcome and could provide a more practical confirmation of facts...”*

- 11.** On 03.03.2021 the National Police Service summoned the Applicants to appear before one Peter M. Kiboro The Directorate of Criminal Investigations under the 3<sup>rd</sup> Respondent herein, who was seconded to the Kenya Revenue Authority the 1<sup>st</sup> Respondent.
- 12.** On 05.03.2021 the 1st Applicant requested to be provided with the specific details to enable the Applicants to appear before the said Peter M. Kiboro as directed. One Joseph Mutesa responded in the following terms:

*“Good after noon your latter has been received and your request to be finished with more information on investigation to enable you prepare for statement recording is noted.*

*However, we require you to attend as summoned, during the meeting should we note that you are not aware of the allegation, you will be informed of the basis of complain and you will have time to respond. As at now we will not give more details.*

*thank you*

*Regards*

- 13.** It is the Applicants case that the refusal by the writer to furnish them with the details of the investigations was not only unwarranted but against the spirit, intention, meaning, purport and effect of The Fair Administrative Actions Act, No. 4 of 2015 which is intended to give effect to the provisions of Article 47 of the Constitution.

- 14.** It is the 1<sup>st</sup> Applicants case that it was only when he appeared before the said officers of the 2<sup>nd</sup> Respondents on 09.03.2021 that it was disclosed to him that the issue of the alleged tax evasion subject of the said Summons were the findings contained in preliminary investigation report.
- 15.** It is the Applicants' case that the matter was still at a preliminary stage as they were still awaiting for an indication from the investigating officers of the date when they would visit the 2<sup>nd</sup> Applicant's distillery for the purposes of verification of the stocks and documents in its possession to enable the parties reconcile their contested positions as they had requested and therefore the issue of tax evasion could not have arisen.
- 16.** It is argued that without even visiting the distillery of the 2<sup>nd</sup> Applicant for the purposes of verification of the facts and stock the 1<sup>st</sup> Respondent nonetheless proceeded to issue to the 2<sup>nd</sup> Applicant the assessment of its alleged tax liability.
- 17.** This informed the filing of an objection against the 1<sup>st</sup> Respondent's decision as required by the law and after the objection decision, an Appeal was instituted before the Tax Appeals Tribunal.
- 18.** It is The Applicants case that prior to being arraigning in court on 21.07.2021 to face the charges subject matter thereof, the Applicants were never summoned by the 1<sup>st</sup> to 3<sup>rd</sup> Respondents to record a further statement on the basis of the said assessment and subsequent objection decision dated 09.06.2021 which formed the basis of the 18 counts preferred against the Applicants.

- 19.** The criminal trial and the attendant process that is going on is predicated on the same statement that the 1<sup>st</sup> Applicant recorded on 22.03.2021. This is what the 1<sup>st</sup> to 3<sup>rd</sup> Respondents is relying on for the purposes of prosecuting the Applicants.
- 20.** The applicants argue that the action by the 2<sup>nd</sup> Respondent to charge them without first recording the 1<sup>st</sup> Applicant's further statement has impeded the Applicants right to be given notice of the nature and reasons for the decision to bring the criminal charges against them and an opportunity to be heard in contravention of Section 4 (3) of The Fair Administrative Actions Act.
- 21.** They argue that the decision-making process by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent in having them arraigned before the 4<sup>th</sup> Respondent before recording statement on the same amounted to condemning us unheard.
- 22.** The Applicants argue that the decision making process adopted by the 1<sup>st</sup> Respondent that culminated in the issuance of the tax assessment of alleged tax due before visiting the 2<sup>nd</sup> Applicant's premises for the purposes of the verification of the stock and other disputed items as per its letter dated 06.09.2020 violated their legitimate expectation that the decision to be made by the 1<sup>st</sup> Respondent would be arrived at after confirmation of facts and not on the basis of its whimsical decisions.
- 23.** The decision-making process culminating in charging the Applicants had not crystallized. In any event the decision on which the criminal charges is based was to their knowledge actively before the Tax Appeals Tribunal vide TAT No. 408 of 2021 London Distillers (K) Ltd

vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority for determination on the amounts due if any, was therefore irrational, unfair, biased and unreasonable.

- 24.** Section 7 (1) of The Fair Administrative Actions Act, No. 4 of 2015 to review an administrative action or decision, if the person who has made the decision has acted in excess of jurisdiction or power conferred under any written law and has been reasonably suspected of bias, as we were denied, as the persons to whom the administrative action or decision relates, a reasonable opportunity to state their case.
- 25.** Section 49 of The National Police Service Act No.11A of 2011 provides that a police officer shall perform his duties and exercise his powers in a manner that is lawful, must respect the law and to the best of their capability, prevent and oppose any violations in the event of violation through abuses of any powers.
- 26.** The 1st to 3rd Respondents are actuated by a desire to oppressing us the Applicants into acceding to demands by brandishing the sword of punishment under the criminal justice system and which is not a desire to punish on behalf of the public a crime that has actually not been committed.
- 27.** It's their case that though the 2nd Respondent has the right to investigate complaints made to him, the decision to prosecute is the sole prerogative of the 3<sup>rd</sup> Respondent.
- 28.** The statement as recorded by the 1st Applicant formed the basis preliminary findings of its investigations and it is on the basis of the charge.

- 29.** The decision by the 3<sup>rd</sup> Respondent to merely rubberstamp the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents so as to have the Applicants charged unreasonable irrational.
- 30.** It is their case therefore that in making the decision to institute the criminal proceedings, the 3<sup>rd</sup> Respondent has breached its duties under Article 157 (1) of the Constitution which requires him to always act judiciously and not in perpetuation of an unfair and malicious criminal complaint.
- 31.** The Applicants believe that the 3<sup>rd</sup> Respondent ignored his primary duty of ensuring that the right to a fair trial cannot be limited thus raising the bar in the determination of the question on whether or not to prosecute by not making whimsical decisions and in violation of Articles 50(1) and 157(1) of the Constitution.
- 32.** Article 157 of the Constitution commands the 3<sup>rd</sup> Respondent to ensure that the need to prevent and avoid abuse of the legal process through the criminal justice system is ensured, and to this end this Court has the jurisdiction to stop any process of prosecution that can lead to abuse of power.
- 33.** They argue that this Honourable Court has the jurisdiction and powers to interrogate any question as to whether on the basis of the investigations by the 2<sup>nd</sup> Respondent and the impugned decision by the 3<sup>rd</sup> Respondent to prosecute us before the 4<sup>th</sup> Respondent is consistent with Article 157 of the Constitution , and where these expectations have not been met as in the instant case , terminate the proceedings so as to secure the ends of justice and restrain the abuse of its processes that may lead to harassment and persecution.

- 34.** Pursuant to the leave that was granted by this Court on 19<sup>th</sup> February 2024, the Applicant filed a Supplementary Affidavit sworn on 28<sup>th</sup> February 2024 availing the Judgment delivered on 4<sup>th</sup> November 2022 by **Tax Appeals Tribunal in Tax Appeal No. 408 of 2021: London Distillers (K) Limited v. Commissioner of Investigation and Enforcement (“the Appeal”)**.
- 35.** It is argued that the objection decision of 9<sup>th</sup> June 2021 by the Respondent was as follows: -
- “ You are however, reminded of your right of appeal as provided in Section 52 of the Tax Procedures Act, 2015 and Section 13 of the Tax Appeals Tribunal Act.”*
- 36.** The 2<sup>nd</sup> Applicant filed a Notice of Appeal dated 1<sup>st</sup> July 2021 in the Tax Appeals Tribunal (**“the Tribunal”**) in respect thereof and subsequently filed a Memorandum of Appeal dated 12<sup>th</sup> July 2021 which was filed in the Tribunal on 19<sup>th</sup> July 2021, pursuant to **Section 52 of the Tax Procedures Act, 2015 and Section 13 of the Tax Appeals Tribunal Act.**
- 37.** During the pendency of the said Appeal **19<sup>th</sup> July 2021**, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents at the behest of the 1<sup>st</sup> Respondent instituted criminal proceedings against the Applicants.
- 38.** It is submitted that this was based on the Notice of Assessment dated 18<sup>th</sup> March 2021 and the objection decision of 9<sup>th</sup> June 2021 being **Nairobi CMC Criminal Case No. 802 of 2021; Republic -vs- Mohan Galot & London Distillers (K) Limited (“the criminal case”)**. The Charge Sheet dated **19<sup>th</sup> July 2021** has many counts.

- 39.** It is submitted that in the Judgement of the Tribunal, the objection decision dated 6<sup>th</sup> June 2021 by the 1<sup>st</sup> Respondent was set aside in totality, thereby upholding the 2<sup>nd</sup> Applicant's objection dated 16<sup>th</sup> April 2021 to the effect that no taxes were due and owing to the 1<sup>st</sup> Respondent as per the Notice of Assessment dated 18<sup>th</sup> March 2021.
- 40.** The said Judgement is in full force and effect as at the time of filing these submissions, since the same has not been set aside on appeal or otherwise.
- 41.** The Applicants submit that the Tribunal held and concluded, *inter alia*, as follows:

*“157. From an analysis of the two parties' cases, it is, firstly, clear to the Tribunal that the Respondent undertook a visit to the Appellant's premises after the assessment dated 18<sup>th</sup> March 2021, the objection decision dated 9<sup>th</sup> June 2021 and a notice of appeal to the Tribunal by the Appellant dated 1<sup>st</sup> July 2021 had been issued. This visit was supposed to physically verify issues surrounding bottles in a bid to get further clarification on the input-output analysis it had undertaken. To the extent that this visit happened after the assessment and the objection decision were issued, the question that arises is "what was the aim of the said visit at the time it was undertaken?"*

*158. A review by the Tribunal of the correspondences between the two parties has also established that the Appellant provided, at different times, various clarifications on the issues raised. Specifically, the Appellant provided an analysis of bankings on 28<sup>th</sup> July 2020 and on 30<sup>th</sup> July 2020. Further, on*

*4<sup>th</sup> July 2020, the Appellant provided a clarification on stamps from spirit and ready to drink product as well as an excise stamps clarification on bottles. Also, in the letter dated 4<sup>th</sup> July 2020, the Appellant provided a work in progress report on input-output analysis. Thereafter, in its letter of 18<sup>th</sup> August 2020 the Appellant submitted its clarifications on input-output analysis. Additionally, in its letter dated 13<sup>th</sup> October 2020, the Appellant responded to the issues raised by the Appellant's letter of 6<sup>th</sup> September 2020 covering excise stamps reconciliation and input-output analysis of bottles.*

*159. The Tribunal has further observed that at no point does the Respondent refer to having reviewed actual production records maintained at the Appellant including the outcome of a review of flow meter readings or data from the Appellant's factory's production accounting system as installed under the supervision of the Respondent, its resident officer's involvement in the exercise nor the outcome of a physical verification of bottles at the factory as had been agreed with the Appellant.*

*167. It is also not lost to the Tribunal that the Respondent's witness on 27<sup>th</sup> July 2022, confirmed that in its investigative exercise, the Respondent's investigative team neither verified production records including flow meter readings at the Appellant's premises nor reviewed any records and/information maintained by its resident officer stationed at the Appellant's factory.*

172. It is the Tribunal's view that the Respondent, in this Appeal, did not dispense with the above requirements of the Evidence Act in respect to tax evasion. Furthermore, the standard of proof in such cases is distinctively higher than the normal standard of the balance of probability and the Respondent did not attain or satisfy that proof. Under the circumstances therefore, the Tribunal noted that other than merely stating that there were issues relating to tax evasion involving the Appellant herein, the Respondent failed to prove it on the part of the Appellant to the satisfaction of the Tribunal.

178. In this regard, the Tribunal is unable to establish the basis of the Respondent's computed variance of 168,088 litres of ready to drink product. Further, and as has been discussed in depth in the Appellant's submissions, the Respondent did not respond to the Appellant's explanations on the Appellant's ready to drink stamps usage neither did the Respondent verify the same when it visited the Appellant's premises.

180. Consequently, the Tribunal finds that the Respondent did not justify, either in law or otherwise, its Corporation Tax, Excise Duty and VAT assessment on the Appellant.

#### *FINAL DECISION*

181. In view of the foregoing and evidence before us, we find the Appeal to be merited.

Accordingly, the Tribunal makes the following orders: -

*a) The Appeal be and is hereby allowed.*

*b) The Respondent's decision dated 9<sup>th</sup> June 2021 be and is hereby set aside."*

- 42.** They submit that it is trite that Judicial Review is concerned with the legality and fairness of the decision-making process undertaken by administrative bodies. The primary focus is whether the process leading to the impugned decision was lawful, procedurally fair, and within the jurisdiction of the decision-making body.
- 43.** The Applicants submit that according to the findings of the Tribunal in the said Judgement, the following matters were clearly settled by the Tribunal: -
- a. The 1<sup>st</sup> Respondent's assessment process which led to the Notice of Assessment dated 18<sup>th</sup> March 2021 was procedurally flawed. In particular, the 1<sup>st</sup> Respondent failed to conduct a physical visit to the 2<sup>nd</sup> Applicants premises prior to issuing the assessment and the objection decision. This was contrary to the tenets and rules of Natural Justice and a clear breach of Article 47 of the Constitution on Fair Administrative Action.
  - b. The 1<sup>st</sup> Respondent did not consider the clarifications provided by the Applicants before issuing the Notice of Assessment dated 18<sup>th</sup> March 2021 and in making its objection decision on 9<sup>th</sup> June 2021. As such, the process of assessment was fundamentally defective and unfair and also contrary and inconsistent with the Rules of Natural Justice as well as Article 47 of the Constitution.

- c. Due process was not followed in the 1<sup>st</sup> Respondent's assessment that formed the basis of the criminal case against the Applicants. The criminal case proceedings are therefore unlawful and a breach of the Applicants' Constitutional Rights. In any event, they ought not have been initiated during the pendency of the Appeal before the Tribunal.
44. Judicial Review is an administrative remedy that is meant to put checks and balances when an administrative body abuses its power against a party in dispute.
45. Reliance is placed in the case of **Republic v Attorney General & 4 others Exparte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR, (pages 88-111 of the Applicants' Bundle of Authorities see page 101)**; and held as follows: -
- “... Judicial review Applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard be/ore it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...”*
46. They submit that Section 7(1) of the **Fair Administrative Actions Act, No. 4 of 2015** to review an administrative action or decision, if the person who has made the decision has acted in excess of jurisdiction or power conferred to him under any written law and has been reasonably suspected of bias having denied the persons to whom

the administrative actions or decision relates, a reasonable opportunity to state their case.

47. They submit that this is exactly what the 1<sup>st</sup> Respondent did before issue the Notice of Assessment dated 18<sup>th</sup> March 2021 and the objection decision of 9<sup>th</sup> June 2021.
48. They submit that the immediate effect of the 1<sup>st</sup> Respondent's flawed assessment process as determined by the Tribunal, is that the alleged tax liability upon which the criminal case is based had not been properly and accurately established at the time the charges were preferred. A procedurally flawed and defective administrative action, such as the 1<sup>st</sup> Respondent's tax assessment and objection decision renders the criminal case null and void and therefore invalid.
49. In **Patrick Macharia Nderitu v Director of CID & another [2017] KEHC 4275 (KLR) (pages 1-9 of the Applicants' Bundle of Authorities see page 6)**; the Court (**Aburili J.**) held as follows: -

*“As correctly discussed by **Honourable Justice Odunga J in JR 130/2013**, in order for an Application for judicial review to succeed, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality or 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.*

*Irrationality is where there is such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standard. Procedural impropriety is where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision.”* **Emphasis added.**

**50. In Republic v Kenya Revenue Authority (KRA) & 4 others; New Flamingo Hardware & Paints Limited & 22nd others (Ex Parte) [2020] KEHC 10284 (KLR) (pages 10-25 of the Applicants’ Bundle of Authorities see page 22);** the Court **(W. Korir J. as he then was)** held as follows:

**“In Republic v Public Procurement Administrative Review Board & 2 others [2019] eKLR; Nairobi HC Misc. Civil Application No. 187 of 2018** it was postulated that:

*“29. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness. **Lord Diplock** noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred,*

*even where such failure does not involve any denial of natural justice," is a form of procedural impropriety....*

*... In a broader sense the ultra vires principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The ultra vires principle thus conceived provided both the basis for judicial intervention and also established its limits.”*

*An ultra vires action is one which is taken either when the administrator does not have the capacity to make a particular decision or take a particular action; or where the administrator has the capacity but fails to follow the laid down procedure for making such a decision or action. KRA was established with the mandate of assessing and collecting revenue, and the administrative enforcement of the laws relating to revenue. Even though KRA has the authority to collect taxes, including unpaid taxes, the exercise of such powers must still be done according to the law.*

*The Respondents (KRA) in exercising their authority failed to follow the proper procedure before making demands for unpaid taxes. By failing to provide the Applicants with amended tax assessments, failing to give them not less than 30 days to respond, and not informing them of their option for*

*objecting to the proposed actions, the Respondents acted ultra vires and failed to follow the due process. **Emphasis Added.***

51. In **Skydive Diani Club v Ministry of Interior and Coordination of National Government & another [2019] eKLR (pages 26-33 of the Applicants’ Bundle of Authorities see page 31)**; the Court (**Ogembo J.**) held as follows: -

*“This Court associates itself with **the Canadian Supreme Court decision 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.” **Emphasis added.***

52. Similarly, **Sergon J.** in **Ali v Mohammed & 3 others [2022] KEHC 13769 (KLR) (pages 34-39 of the Applicants’ Bundle of Authorities see page 38)**; the Court (**Sergon J.**) observed as follows:

*“... If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must*

*be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material". **Emphasis added.***

- 53.** The criminal case is predicated upon the Notice of Assessment dated 18<sup>th</sup> March 2021 and the objection decision of 9<sup>th</sup> June 2021 by the 1<sup>st</sup> Respondent. The Tribunal in its Judgement aforesaid set aside the said objection decision and indeed the assessment. The Judgement of the Tribunal is in full force and effect since the same has not been set aside on Appeal or otherwise. Most importantly according to them the Tribunal in its Judgement held as follows regarding the taxes that are in issue in the criminal case:

*“180. Consequently, the Tribunal finds that the Respondent did not justify, either in law or otherwise, its Corporation Tax, Excise Duty and VAT assessment on the Appellant. “*

54. They reiterate that the process leading to Notice of Assessment dated 18<sup>th</sup> March 2021 and the objection decision dated 9<sup>th</sup> June 2021 by the 1<sup>st</sup> Respondent was flawed, unfair, defective and inconsistent with the Rules of Natural Justice and contrary to Article 47 of the Constitution.
55. In **Republic v Director of Public Prosecutions & 2 others; Kinyua (Exparte Applicant); Atta Kenya Limited & another (Interested Parties) [2024] KEHC 13596 (KLR), (pages 40-54 of the Applicants’ Bundle of Authorities see page 47)**; the Court (**Sewe J.**) observed as follows:

*“The same position was reiterated by the **Court of Appeal in Joram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, as follows:***

*“... Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court.”*

*As for Certiorari, the **Court of Appeal held as follows in Kenya National Examination Council v Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 others (supra):***

*“...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...”*

**56.** The 3<sup>rd</sup> Respondent is bound by **Article 157(11) of the Constitution** which states that:

*“In exercising the powers conferred by this Article, the Director of Public Prosecutions [DPP] shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”(Emphasis Added)*

**57.** In the case of **Douglas Maina Mwangi vs KRA & Another, Constitutional Petition No. 528 of 2013 (pages 55-60 of the Applicants’ Bundle of Authorities see page 59)**; the court stated that:

*“When dealing with the decision as to whether or not to prosecute, the office of the DPP exercises independent judgment as envisaged under Article 157(1) of the Constitution and Section 5 of the DPP Act, 2013; and the court cannot interfere unless it is shown that the exercise is contrary to the Constitution, is in bad faith and amounts to an abuse of the process.”*

58. In the case of **Otieno v Director of Public Prosecutions & another [2023] KEHC 160 (KLR) (pages 61-65 of the Applicants' Bundle of Authorities see page 63)**;

*"I hold the considered view that if the Tribunal determined that the petitioner did not owe any arrears of VAT and of Income Tax, it would be an exercise in futility for the KRA to pursue criminal prosecution founded upon its contentions in that regard."* **Emphasis Added.**

59. In light of the findings of the Tribunal in its Judgement set out herein above, the criminal charges against the Applicants in the criminal case have been mounted for collateral purposes other than the sanctification of the criminal justice system.
60. It is submitted that this Court has the jurisdiction and powers to interrogate any question as to whether on the basis of the flawed assessment by the 1<sup>st</sup> Respondent, the impugned decision by the 3<sup>rd</sup> Respondent to prosecute the Applicants before the 4<sup>th</sup> Respondent is consistent with **Article 157 of the Constitution** and where these expectations have not been met as in the instant case, terminate the proceedings so as to secure the ends of justice and restrain the abuse of its processes that may lead to harassment and prosecution as was held in **Cyrus S.K. Jirongo vs. Soy Developers Limited & 9 Others [2021] eKLR (pages 66-87 of the Applicants' Bundle of Authorities see page 83)**.
61. The Supreme Court in **Cyrus S.K. Jirongo Case (Supra) (Applicants' Bundle of Authorities page 83)**; expressed itself as follows:

*(71)...the ODPP...ought always to act judiciously and not in perpetuation of an unfair and malicious criminal complaint...in doing so, that office must always be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination Of the question whether to prosecute or not...*

*(82).. where it is shown that the expectations of Article UT(11) have not been met, then the High Court under Article 165(3)(d) (ii) can properly interrogate any question arising therefrom and make appropriate orders...*

*(83)..the DPP is enjoined ..to have regard to the need to prevent and avoid abuse of the legal process. The Court is required to oversee that the DPP and the Inspector General undertake these functions in accordance with the law. If it comes to the attention of the Court that there has been a serious abuse of power, it should in our view express its disapproval by stopping it in order to secure the ends of justice and restrain abuse of power that may lead to harassment or persecution....”*

- 62.** It is submitted that it is crystal clear that the decision by the 3<sup>rd</sup> Respondent to commence the said criminal proceedings was motivated by extraneous purposes other than those recognized by law, is pre-judicial to the Applicants by all means and standards. Further, the said criminal proceedings were not made in good faith and the same are meant to achieve some ulterior motives and purposes other than the sanctification of the criminal justice system.

- 63.** They submit and reiterate that the clear findings of the Judgment by the Tribunal in the Tax Appeal aforesaid, confirm the procedural improprieties of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents actions, rendering the criminal case and charges against the Applicants premature, unlawful, irregular, unfounded and an abuse of the court process.
- 64.** They submit that Article 157 (10) of the Constitution requires the Director of Public Prosecutions to act independently in the discharge of his duties. This position is replicated in Section 6 of the Office of the Director of Public Prosecutions Act.
- 65.** The decision to institute Criminal Proceedings is a high calling imposed upon the Office of the Director of Public Prosecutions by the law and must be exercised in a manner that leaves no doubt that the decision was made independently.
- 66.** They submit that where the decision is surrounded by doubt or even mere reasonable suspicion that a person has a hand in the prosecution, such a decision cannot be allowed to stand.
- 67.** Criminal proceedings commenced to advance other gains other than promotion of public good ought not to be allowed to stand for being vexatious.
- 68.** It is submitted that Article 22(1) of the Constitution of Kenya 2010 provides that any party whose right has been infringed or where there exists a likelihood of such infringement, then the aggrieved party can approach the Court as a matter of right and seek protective orders such as by way of Judicial Review.

69. Reliance is placed in the case **George Ngugi v Inspector General of Police & 6 Others [2017] eKLR** Justice Mativo rightly held that:

*“...A criminal trial premised on unfair and questionable partisan investigations or a decision to charge arrived at unfairly and without any reasonable basis would in my view open the door to an unfair trial...”*

70. They submit that where an Applicant has demonstrated that the criminal proceedings that the DPP intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

71. They submit that in the instant Application, the Applicants contend that they were arraigned in Court vide **Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd** to answer to charges of alleged tax evasion, which arose from preliminary findings which were still to be subjected to further physical verification of records of the 2nd Applicant after an intended visit to its distillery by officers of the 1st Respondent and which visit has never been undertaken and hence the process had not yet been completed and the decision to charge them was premature.

72. The decision to charge them was hurriedly done before the 1st Applicant was even summoned by the 2nd Respondent to record any statement in respect to the assessment and objection decision dated 19/6/2021 which is also the subject of challenge in the proceedings before the Tax Appeals Tribunal vide TAT NO. 408 of 2021 London Distillers Kenya vs The Commissioner of Investigations and

Enforcement of The Kenya Revenue Authority, the decision to charge them through the institution of Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd was ill motivated and meant to steal a march as against them as the 2nd Applicant's liability had not yet crystallised.

73. They address the same issues relating to the 2nd Applicant's alleged tax liability and which are the same issues being addressed in TAT No. 408 of 2021 London Distillers Kenya (K) Ltd vs The Commissioner of Investigations and Enforcement of The Kenya Revenue Authority and are an abuse of the process of the Court for being parallel proceedings.
74. The decision to charge the Applicants vide **Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd** in view of the pendency of TAT No. 408 of 2021 London Distillers Kenya (K) Ltd vs The Commissioner of Investigations and Enforcement of The Kenya Revenue Authority was with malicious intent on account of these being parallel proceedings and amounts to an abuse of the court process.
75. They argue that Criminal proceedings in Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd is actually civil dispute disguised as criminal proceedings and as such a tool which serves to maliciously abuse the court process.
76. In the case of **Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot [2020] eKLR** Hon. Mativo J. (as he then was) held that malicious

institution of criminal proceedings to punish party to a civil dispute amounts to abuse of the court process. He held as follows:

*“...Closely related to the issue under consideration is the fact that the private criminal prosecution can no matter the outcome serve to advance or assisting one party in the civil disputes. It follows that the private criminal prosecution is actuated by ulterior motive, hence, it amounts to abuse of court process...”*

77. The Exparte Applicants are thus challenging the decision-making process culminating in their arraignment to answer to charges.
78. Section 80 (1) of the Tax Appeal Tribunal Act provides that a person shall not be the subject of both the imposition of a penalty and the prosecution of an offence in respect to the same act or omission in relation to a tax law.
79. In *Rana Auto Selection Limited & 2 others v Kenya Revenue Authority & another* [2021] eKLR Hon. Mr. Justice Ogola found that taxes in dispute under Section 52(2) of the Tax Procedures Act are not taxes due and recoverable until the determination of the Appeal. In staying the proceedings vide the criminal charges preferred against the Applicants he held as follows:

*“...The Respondent’s decision to prosecute the Exparte Applicants deliberately undermines the jurisdiction of the Tax Appeals Tribunal which is seized of appeals over the said Tax objection decisions. Whereas the objection decisions are being questioned by the Tribunal on appeal, the Respondents are, on*

*the other hand, invoking their power to prosecute under Section 107 of the Tax Procedures Act fully cognisant of the fact that their tax demand notices and assessment may not be conclusive, and may not be the basis of a charge in a criminal court during the pendency of an Appeal before the Tribunal under Sections 51, 52, 53 of the same Act. The absurdity of the criminal proceedings...”*

**80.** The Supreme Court in **Cyrus S.K. Jirongo vs Soy Developers and 9 others 2021 eKLR** expressed itself as follows:

*(71) ...the ODPP...ought always to act judiciously and not in perpetuation of an unfair and malicious criminal complaint... in doing so, that office must always be guided by the principle that the right to a fair trial cannot be limited thus raising the bar in the determination of the question whether to prosecute or not...*

*(82)... where it is shown that the expectations of Article 157(11) have not been met, then the High Court under Article 165(3)(d) (ii) can properly interrogate any question arising therefrom and make appropriate orders...*

*(83)...the DPP is enjoined ..to have regard to the need to prevent and avoid abuse of the legal process. The Court...is required to oversee that the DPP and the Inspector General undertake these functions in accordance with the law. If it comes to the attention of the Court that there has been a serious abuse of power, it should in our view express its disapproval by stopping it in order to secure the ends of justice*

*and restrain abuse of power that may lead to harassment or persecution...”*

**81.** In **Republic v Chief Magistrate’s Court at Mombasa Ex Parte Ganijee & another [2002] eKLR** it was observed as follows:

*“...where however in the process of detecting and punishing crime and redressing wrongs and violations of the law, people are persecuted and bashed about with a resultant disrespect for the law and where there is reckless or ill-timed or disproportionate indulgence in an excessive criminal process, the Courts will interfere and stop the process...”*

**82.** The Court then went ahead to hold as follows:

*“...the Interested Party in this matter is more actuated by a desire to punish the Applicant or to oppress him into acceding to his demands by brandishing the sword of punishment under the criminal law, than in any genuine desire to punish on behalf of the public a crime committed. The predominant purpose is to further that ulterior motive. And that is when the High Court steps in...”*

**83.** In the case of **Republic v Attorney General & 4 others Ex-Parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] eKLR:**

*“... Judicial review Applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines 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...”*

**84. In Republic vs Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Exparte Applicant: Pravin Galot [2020] eKLR**, Hon. Mativo J (as he then was) affirmed that this Court has the jurisdiction to issue the orders to quash criminal proceedings where institution of the same is ill motivated to actuate abuse of the court process. He held as follows:

*“...The core issue here is for this Court to determine the circumstances under which the High Court in exercise of its vast jurisdiction can halt, stop, prohibit or quash a criminal prosecution. Courts have an overriding duty to promote justice and prevent injustice. From this duty there arises an inherent power to 'stay' an indictment (or stop a prosecution) if the Court is of the opinion that to allow the prosecution to continue would amount to an abuse of the process of the Court or infringement of a citizens' fundamental rights. Abuse of process has been defined as something so unfair and wrong with the prosecution that the Court should not allow a prosecutor to proceed with what is, in all other respects, a perfectly supportable case... The provisions of the Constitution conferring powers upon the High Court to grant such remedies as certiorari, prohibition, mandamus or permanent stay of proceedings are a device to advance the rule of law. In the exercise of this wholesome power, the High Court is entitled to*

*quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the Court or that the ends of justice require that the proceedings ought to be quashed...”*

- 85.** In the case of **Republic vs Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Exparte Applicant: Pravin Galot [2020] eKLR** Hon Mativo J. (as he then was) in terminating the private prosecution further stated as follows regarding this Court’s power to quash criminal proceedings, in exercise of its duty to prevent harassment of litigants through criminal prosecutions:

*“...The saving of the High Court’s inherent powers, both in civil and criminal matters is designed to achieve a salutary public purpose which is that a Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceedings in the interest of justice...”*

- 86.** It is their case that unless an order of Certiorari issues to quash the impugned criminal proceedings, an order of Prohibition, stopping the 1st Respondent from taking any other adverse action against the Exparte Applicants, there is every reasonable apprehension that the imminent malicious criminal prosecution will result into improper use of judicial time to the detriment of us, the Applicants.

## **The 1<sup>st</sup> Respondents Case;**

- 87.** It is its case that under Section 5(1) of the Kenya Revenue Authority Act, Kenya Revenue Authority (KRA) is an agency of the Government for the collection and receipt of all revenue. Further, under Section 5(2) of the said Act, KRA administers and enforces all provisions of the written laws set out in Part I and II of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.
- 88.** They argue that the 1<sup>st</sup> Respondent received intelligence that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants bank accounts showed a 66% increase in deposits between January 2019 and August 2019 compared to the same period in 2018 hence there was need for investigations to establish their tax compliance.
- 89.** It is submitted that these deposits came at a time when the Central Bank of Kenya conducted a demonetization exercise of the old one thousand Kenyan Shillings notes (Kshs. 1,000) pointing to the likelihood of illicit financial inflows.
- 90.** The 1<sup>st</sup> Respondent embarked on an investigation covering the period between 2015 and 2019 to confirm the veracity of allegations and in particular whether the 2<sup>nd</sup> Applicant, an established manufacturer, distiller and trader in spirits and other beverages had declared its income for tax purposes.
- 91.** During the investigations, the 1<sup>st</sup> Respondent sought and examined the following documents: audited financial statements, excise stamp

records (both physical and from EGMS), daily production reports, sales and purchase ledgers and bank statements.

- 92.** It is its case that in conducting the investigations, the 1st Respondent carried out several tests to establish the taxes payable including; financial statement analysis, bank receipt reconciliation, excise stamp reconciliation, analysis of tax returns from the 1st Respondent's internal systems, analysis of raw materials, packaging and labelling materials as well as declaration of production and deliveries analysis.
- 93.** During the investigations, the 1st Respondent conducted an in-depth banking analysis of the 1st and 2nd Applicants' bank accounts held at Diamond Trust Bank, Absa Bank, Prime Bank and Co-operative Bank which had been obtained and upon conclusion.
- 94.** The 1st Respondent established that the resultant income from bankings were higher compared to the declared turnover for income tax pointing to understatement of turnover.
- 95.** It is their case that the banking analysis of the 1st and 2nd Applicants' bank accounts held at Diamond Trust Bank, Absa Bank, Prime Bank and Co-operative Bank disclosed that the 1st and 2nd Applicant had omitted from the Applicant's tax returns sales an amount which ought to have been included contrary to Section 97 (a) as read with Section 104(3) of the Tax Procedures Act, 2015.
- 96.** The 1st Respondent argues that it further carried out various tests in the reconciliation of Non-activated excise stamps and upon conclusion of the exercise, the 1st Respondent made findings as follows:

- a) For the Ready to Drink products, the Applicants had been issued with 1,785,000 stamps for the period January 2016 to December 2018
- b) Out of 1,785,000 stamps delivered to the Applicants, only 1,610,150 stamps had been declared by the Applicants as activated (used) in the Excisable Goods Management System (EGMS.) This implies that the Applicants did not account for 174,850 excise stamps through omission from their excise duty returns.
- c) It is noteworthy that the Applicants claimed 90,507 stamps were damaged constituting 5% of issued stamps compared to the allowable limit (under Regulation 14(3) of the Excise Duty EGMS Regulations 2017) being 1% of the issued stamps.
- 97.** The 1st Respondent also reconciled the equivalent volumes represented by the activated excise stamps (in Ready to Drink) with the declared volumes by the Applicants on which taxes were paid.
- 98.** The 1st Respondent established that the activated stamps (used); after adjusting for opening and closing stocks, represented production equivalent of 527, 250 litres of finished goods.
- 99.** The Applicants declared and paid taxes on only 359,162 litres for the same period thereby under-declaring the volume of Ready to Drink product by 168,088 litres attributable to undeclared production.
- 100.** After factoring in the above findings, the 1st Respondent established a tax liability of Kshs. 22,187,616 being the total Excise Duty and Value Added Tax (VAT) from the Ready to Drink excise stamps issued.

- 101.** The 1st Respondent did a further analysis on the input-output of bottles used with a view to quantify the Applicant's production volumes and the same was compared with the declared product volumes delivered.
- 102.** From the analysis of the bottles used in production of excisable goods established that the Applicants under declared excise duty amounting to Kshs. 1,471,921,554, Kshs. 533,185,104 being the VAT due and **Kshs. 33, 389, 055** being the Corporation tax payable therefrom.
- 103.** It is argued that upon conclusion of the investigations and the analysis indicated above, the 1st Respondent established that the Applicants have a tax liability of **Kshs. 2,681,871,986** being Corporation Tax, Excise Duty and VAT due.
- 104.** The 1st Respondent shared the Preliminary Investigations Findings with the Applicants vide a letter dated 3rd July 2020 thus giving the Applicants an opportunity to explain the discrepancies noted in their tax returns and the existence of tax liability which was followed by several correspondences and a visit to the Applicants Premises on which culminated to a reviewed Tax Assessment of **Kshs. 2,055,304,414**, which was communicated to the Applicants through a letter, dated 18th March 2021. The Applicants objected to the said Tax Assessment on 16<sup>th</sup> April 2021.
- 105.** Having considered the documents and explanations provided, the 1st Respondent issued an objection decision on 9th June 2021, confirming that principal taxes of Kshs. **2,055,304,414** being Corporation Tax, Excise Duty and VAT were due and payable by the 2nd Applicant.

- 106.** Upon conclusion of the investigations, the 1st Respondent forwarded the investigation file with recommendation to prosecute the Applicants to the 3rd Respondent whom upon perusing the file and being satisfied that tax offences under the Excise Duty Act, 2015 and the Tax Procedures Act have been committed and there being enough evidence to prove the same, the 3rd Respondent directed that the 1st and 2nd Applicants be charged with tax offences. This is seen in the letter dated 2nd March 2021 addressed to the 1st Respondent by the 3rd Respondent.
- 107.** On 21st July 2021, the 1st and Applicants were arraigned in court and charged with various counts in **Milimani Chief Magistrate Court Criminal Case No. E802 of 2021.**
- 108.** The 1st Respondent is aware that the Applicants appealed against the said Objection Decision to the Tax Appeals Tribunal; the Interested Party herein, in ***Nairobi Tax Appeals Tribunal Appeal No. 408 of 2 021 London Distillers (K) Ltd vs The Commissioner of investigations and Enforcement of the Kenya Revenue Authority where in*** judgment in the said Appeal was delivered on 4th November 2022, which judgment has since been introduced before this Honourable Court.
- 109.** The 1st Respondent, being dissatisfied with the said judgment in its entirety, filed its Memorandum of Appeal and Record of Appeal on 16th December 2022 and the suit is ongoing as **H.C.I.T.A NO. E096 of 2022.**

**The 1<sup>st</sup> Respondents Submissions:**

- 110.** The 1<sup>st</sup> Respondent submits that the Judicial Review Application lacks merit.
- 111.** The 1<sup>st</sup> Respondent submits that contrary to the Applicant's assertions, their tax liability has crystallized and that was the reason why they filed an Appeal before the Tribunal being Nairobi Tax Appeals Tribunal Appeal No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigations and Enforcement of the Kenya Revenue Authority.
- 112.** It submits that for an Appeal to be validly lodged before the Tax Appeals Tribunal, the same must be anchored on an appealable decision, such as the objection decision in this case issued on 9<sup>th</sup> June 2021, which confirmed that principal taxes of Kshs. 2,055,304,414 being Corporation Tax, Excise Duty and VAT were due and payable by the 2<sup>nd</sup> Applicant.
- 113.** Section 12 of the Tax Appeals Tribunal Act provides that:
- “A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal...”*
- 114.** It is therefore misleading for the Applicants to state that their tax liability had not yet crystallized as at the time of the criminal charges being instituted against them.
- 115.** It invites the Court take judicial notice that the 1<sup>st</sup> Respondent has since preferred an Appeal being **H.C.I.T.A NO. E096 of 2022:**

**Commissioner of Investigations and Enforcement vs London Distillers (K) Limited** against the decision of the Tribunal issued in the said Tax Appeals Tribunal Appeal No. 408 of 2021 as the 1<sup>st</sup> Respondent's case remains that the taxes as demanded from the Applicants are still due and payable.

- 116.** The 1<sup>st</sup> Respondent submits that Section 193A of the Criminal Procedure Code Cap 75 Laws of Kenya provides for parallel trial of civil and criminal proceedings. The Section reads:

*“193A. Concurrent criminal and civil proceedings*

*Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”*

- 117.** In **Republic v Inspector General of the National Police Service & another Ex parte Beatrice Hilda Omunia; Peter Nganga Chege & 2 others (Interested Parties) [2019] eKLR**, Hon. Justice John Mativo J. as he was then, while commenting on the above provision held as follows at paragraph 32 of his Judgement:

*“Even though it is not for this court to consider the defense of the accused persons, which is basically a function of the trial court, the core issue raised by the exparte Applicant is that the dispute is purely civil. Section 193A of the Criminal Procedure Code permits parallel civil and criminal proceedings, hence, even if there was a civil suit in court, the existence of a parallel*

*civil case is not bar to criminal proceedings. [14] The offence being investigated is known to the law, hence, the cited provision. The conduct under investigation can attract a criminal sanction if proved.”*

- 118.** Section 107 of the Tax Procedures Act allows the 1<sup>st</sup> Respondent, subject to the direction of the Director of Public Prosecutions, to prosecute a person accused of committing an offence under a tax law.
- 119.** The 1<sup>st</sup> Applicant being the director of 2<sup>nd</sup> Applicant was held accountable and culpable for the offences committed by the 2<sup>nd</sup> Applicant.
- 120.** The 1<sup>st</sup> Respondent forwarded the investigation file with recommendation to prosecute the Applicants to the 3<sup>rd</sup> Respondent whom, upon perusing the file and being satisfied that tax offences under the Excise Duty Act, 2015 and the Tax Procedures Act had been committed and there being enough evidence to in support, the 3<sup>rd</sup> Respondent directed that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants be charged with the tax offences contained in the charge sheet.
- 121.** The 1<sup>st</sup> Respondent submits that in rendering its decision, the Tribunal limited its determination on the issue of whether the 1<sup>st</sup> Respondent erred by raising the Corporation Tax, Excise Duty and VAT assessments on the Applicants and not whether the Applicants were involved in fraudulent evasion of taxes.
- 122.** The criminal charges faced by the Applicants are based on alleged violations of the law, which are clearly stated on the charge sheet.

- 123.** It submits that the Tribunal's judgement does not exonerate the Applicants from the criminal charges in any way without the benefit of a full trial and more so considering that the Applicants tax liability has been appealed at the High Court by the 1<sup>st</sup> Respondent.
- 124.** The Applicants have alleged that the Criminal Proceedings in MCCR No. E082 of 2021 are contrary to Section 80 (1) of the Tax Procedures Act, 2015. The Section provides as follows:

*“80. General provisions relating to administrative penalties and offences*

*(1) A person shall not be subject to both the imposition of a penalty and the prosecution of an offence in respect of the same act or omission in relation to a tax law.*

*(2) If a person has committed an act or omission that may be liable under a tax law to both the imposition of penalty and the prosecution of an offence, the Commissioner shall decide whether to make a demand for the penalty or to prosecute the offence.*

*(3) If a person has paid a penalty under a tax law and, in respect of the same act or omission for which the penalty was paid, the Commissioner commences a prosecution, the penalty shall be repaid to the person as a refund of tax under section 47, and the person shall not pay a penalty, in the case of a prosecution, unless the prosecution is withdrawn.”*

- 125.** The 1<sup>st</sup> Respondent submits that the import of the above Section is that the Commissioner must elect to either impose a penalty or prosecute an offence relating to a tax liability.
- 126.** It is its submission that even where any penalty had been levied and collected by the 1<sup>st</sup> Respondent/Commissioner and a criminal proceeding subsequently commenced, that penalty must be refunded.
- 127.** The 1<sup>st</sup> Respondent has not demanded any penalties from the Applicants neither have they paid any penalties and therefore Section 80 does not apply in this case.
- 128.** No penalties have been imposed on the Applicants' tax liabilities and the Criminal Proceedings in MCCR No. E802 OF 2021 are properly before that court.
- 129.** It submits that the Applicants have controverted the judgment in **Rana Auto Selection Limited & 2 others v Kenya Revenue Authority & another [2021] eKLR** in a bid to confuse this Honourable Court and the 1<sup>st</sup> Respondent wishes to set the facts straight as hereunder:

*Section 52(2) of the Tax Procedures Act quoted by the Applicants at paragraph XX of its Notice of Motion Application as well as on paragraph 20 of its submissions does not apply in this case, as there are no admitted taxes/taxes not in dispute in this case.*

- 130.** The Applicants appealed against the whole of the objection decision issued by the 1<sup>st</sup> Respondent on 7<sup>th</sup> June 2021. Therefore, the taxes demanded from the Applicants do not fall under Section 52(2) Tax

Act, as the Applicants have not admitted to owing the same, the entire tax is in dispute, hence their Appeal. Section 52(2) states that: -

*“A Notice of Appeal to the Tribunal relating to an assessment shall be valid if the Tax payer has paid the tax not in dispute or entered into an arrangement with the commissioner to pay the tax not in dispute under the assessment at the time of lodging the Notice.”*

- 131.** The charges faced by the Applicants are not based on any assessed tax due. It submits that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal.
- 132.** Where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.
- 133.** Reliance is placed in **Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR** and in **Republic v Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR** as follows: -

*“I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or the 'wrongness' or error in interpretation or Application of the law is not appropriately tested in a judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs.”*

- 134.** The 1<sup>st</sup> Respondent's submissions are therefore that the orders sought by the Applicants to quash the criminal proceedings amount to asking this Honourable Court to determine contested matters of fact, which then would mean that this Honourable Court has no jurisdiction to determine such a dispute.
- 135.** They submit that the judicial authorities/ case law quoted by the Applicants at paragraphs 21-23 of its submissions, that is **Cyrus SK Jirongo vs. Soy Developers & 9 Others (2021) eKLR & Republic vs Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Anor (2002) eKLR** are not applicable to this case as the Applicants have failed to materially prove how prosecuting them for tax offences is an abuse of power on the part of the 1<sup>st</sup> & 3<sup>rd</sup> Respondents nor proved that there has been ulterior motive in prosecuting them.

- 136.** The High Court in **Alfred Kioko Muteti v Timothy Miheso & Another [2015] eKLR** held that a party can only discharge its burden upon adducing evidence. Merely making pleadings/allegations is not enough.
- 137.** The 1<sup>st</sup> Respondent thus avers that the Applicants have failed to discharge their burden and this Honourable Court ought to disregard the said allegations.
- 138.** Since the law provides for parallel criminal and civil proceedings, the 1<sup>st</sup> Respondent prays that this Honourable Court allows the criminal proceedings to proceed full conclusion.
- 139.** Based on all the above, the outstanding question thus remains: should the orders of certiorari and prohibition sought be granted?
- 140.** It is trite law 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.
- 141.** On the issue of costs, the 1<sup>st</sup> Respondent submits that having made out its case that this Judicial Review Application lacks merit, then it follows that the same should be dismissed with costs to the 1<sup>st</sup> Respondent.
- 142.** The High Court in the case of **Cecilia Karuru Ngavu VBarclays Bank of Kenya & Another [2016] eKLR** where the Court relied on the case of Republic vs Rosemary Wairimu Munene, held as follows: -

*“The issue of costs is the discretion of the Court as provided under the above section. The basic rule on attribution of costs is that costs follow the event It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”*

### **Analysis and Determination:**

Upon perusing the Application, the responses by the various parties for and in opposition to the Application, the rival submissions and authorities cited by counsel, the following issues call for determination;

- 1) Whether the Applications have merit.
- 2) Who shall bear the costs.

### **Whether or not the Application has merit.**

- 143.** This court will first deal with the issue of the locus standi of the 1<sup>st</sup> Applicant to sue. The company is a different and independent legal entity from its directors.
- 144.** In the suit before this court, the 1st Applicant would have lacked the legal capacity to sue had it not been for the fact that he has been charged alongside the 2nd Applicant in the criminal court as evinced by the impugned charge sheet.
- 145.** This court finds that the only redress avenue available to the 1st Applicant to challenge the said impugned criminal proceedings lies in

this Court under The Fair Administrative Action Act, Order 53 of The Civil procedures Rules and Article 165 of the Constitution.

- 146.** As such this court finds that he has the requisite locus standi to seek the prerogative orders as sought in the Application that comes up for determination.

**Can this court conduct a merit analysis;**

- 147.** The court has looked at the 1st Respondent Replying Affidavit and the court notes that the deponent has advanced a lot of evidence consisting of the investigations content. It has inter alia, that includes a lot of analysis and detailed documents, bank entries, reconciliations, stamps assessments, number of bottles amongst others that the 1st Respondent argued it used during the investigation that culminated in the investigations. The Applicants have also done the same. They invite the court to conduct a merit review.

- 148.** This court is a judicial review court, which cannot conduct a merit analysis. The analysis of the foregoing is best done by the specialized tribunal like the Tax Tribunal. It has actually already done that as set out in its detailed judgment that was introduced into this case by the Applicants through a Supplementary Affidavit.

- 149.** These are contents that are useful to the criminal court or Tax Tribunal during the hearing and determining cases where it is able to call in the documents and call the witness, review statements and carry out chief and cross examination of witnesses.

- 150.** The Judicial Review court doesn't have that capacity, and I so hold. The said details cannot add value to the case before this court which

focuses of the process and the procedure that was adopted in arriving at the impugned decision and I so hold.

**The court will now address its mind to the question whether criminal proceedings can run concurrent with civil proceedings.**

- 151.** Section 193A of the Criminal Procedure Code Cap 75 Laws of Kenya provides for parallel trial of civil and criminal proceedings. The Section reads:

*“193A. Concurrent criminal and civil proceedings*

*Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”*

- 152.** In **Republic v Inspector General of the National Police Service & another Ex parte Beatrice Hilda Omunia; Peter Nganga Chege & 2 others (Interested Parties) [2019] eKLR**, Hon. Justice John Mativo J. as he was then, while commenting on the above provision held as follows at paragraph 32 of his Judgement:

*"Even though it is not for this court to consider the defense of the accused persons, which is basically a function of the trial court, the core issue raised by the ex parte Applicant is that the dispute is purely civil. Section 193A of the Criminal Procedure Code permits parallel civil and criminal proceedings, hence, even if there was a civil suit in court, the existence of a parallel*

*civil case is not bar to criminal proceedings. [14] The offence being investigated is known to the law, hence, the cited provision. The conduct under investigation can attract a criminal sanction if proved.”*

- 153.** The court is in agreement with the forgoing position. The fact that there are proceeding that are pending before Tax Tribunal is not a bar to the impugned criminal proceedings that are pending before the criminal court that the Applicants seeks to challenge. The court agrees with the 1st Respondent on this.

**The next issue that the court looks at is the legality of decision to charge the Applicants:**

- 154.** The Applicants raised a host of concerns around the refusal by the Respondents to furnish them with the information surrounding the investigations and the decision to charge them. This carried the bulk of their case.
- 155.** The Respondents have not denied the fact that on 05:03:2021 the 1st Applicant requested to be provided with the specific details to enable them appear before the investigator.
- 156.** Instead the 1st Applicant got a response from one Joseph Mutesa in a letter in the following terms:

*“Good after noon your latter has been received and your request to be finished with more information on investigation to enable you prepare for statement recording is noted.*

*However, we require you to attend as summoned, during the meeting should we note that you are not aware of the allegation, you will be informed of the basis of complain and you will have time to respond. As of now we will not give more details.*

*Thank you*

*Regards”*

- 157.** This clearly shows that the said officer out rightly deliberately and expressly denied the Applicants the information that was within his custody. By using the language ‘as of now’, one why and the Applicants were left in the dark as to when the decision to furnish them with the said critical information was going to take place. This is a clear abuse of authority.
- 158.** It is the 1<sup>st</sup> Applicant case that it was only when he appeared before the said officers of the 2<sup>nd</sup> Respondents on 09:03:2021 that it was disclosed to him that the issue of the alleged tax evasion that was the subject of the said summons was the findings contained in preliminary investigation.
- 159.** As of 22:03:2021 the matter was still at a preliminary stage and the Applicants were still awaiting an indication from the said officers for the date when they would come to the distillery of the 2<sup>nd</sup> Applicant for the purposes of verification of the stocks and documents that were in its possession to enable the parties reconcile the contested positions as they had requested and therefore the issue of tax evasion could not have arisen.

- 160.** The Respondents have not tendered any evidence to counter the fact that prior to being arraigned in court on 21<sup>st</sup> July 2021, the 1st Applicant was never summoned by the 1st to 3rd Respondents to record any further statement on the basis of the said assessment and subsequent objection decision dated 09:06:2021 which formed the basis of the 18 counts preferred against the Applicants.
- 161.** It is the same statement that the 1<sup>st</sup> Respondent recorded on 22:03:2021 that has been relied on by the 1<sup>st</sup> to 3<sup>rd</sup> Respondent for the purposes of the criminal trial.
- 162.** The action by the officers of the 2<sup>nd</sup> Respondent to proceed to charge the Applicants without first recording the 1st Applicants statement on the basis of the 1<sup>st</sup> Respondent's letter dated 09:06:2021 has impeded the Applicants right to be given notice of the nature and reasons for the decision to bring the criminal charges against Applicants.
- 163.** This denied the Applicants the opportunity to be heard in contravention of Section 4 (3) of The Fair Administrative Actions Act, No. 4 of 2015 and I so hold.
- 164.** The decision making process adopted by the 1st Respondent that culminated in issuing the Applicants with the impugned tax assessment of alleged tax due before visiting the 2<sup>nd</sup> Applicant's premises for the purposes of the verification of the stock and other disputed items as per its letter dated 06:09:2020 violated the Applicants' legitimate expectation that the decision to be made by the 1<sup>st</sup> Respondent would be arrived at after confirmation of practical facts and not on the basis of its whimsical decisions.

- 165.** In the court's view, the decision making process that culminated in having the Applicants charged for alleged tax evasion vide Nairobi Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd for amounts in respect of which their alleged liability had not crystallised was not only tainted with material procedural impropriety, it was grossly irrational, unfair, biased and unreasonable.
- 166.** Section 7 (1) of The Fair Administrative Actions Act, No. 4 of 2015 allows this court to review an administrative action or decision, if the person who has made the decision has acted in excess of jurisdiction or power conferred under any written law and has been reasonably suspected of bias.
- 167.** The Applicants to whom the administrative action or the impugned decision relates were denied the reasonable opportunity to state their case.
- 168.** In the circumstances, the court agrees with the Applicants that the decision to charge them by the 3<sup>rd</sup> Respondent was merely a step to rubberstamp the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents so as to have the Applicants charged which I find to have been unreasonable, and irrational.
- 169.** This court finds that in making the decision to institute the criminal proceedings, the 3<sup>rd</sup> Respondent breached its duties under Article 157 (1) of the Constitution which required him to act judiciously and not in perpetuation of an unfair and malicious criminal complaint.

- 170.** Charging the Applicants when on the basis of incomplete investigations was actuated by malice ill will and ulterior motives since there was on going expectation on the part of the Applicants who were seeking information that was not availed to them.
- 171.** The 3<sup>rd</sup> Respondent ignored his primary duty of ensuring that the right to a fair trial cannot be limited thus raising the bar in the determination of the question on whether or not to prosecute by not making whimsical decisions and in violation of Articles 50(1) and 157(1) of the Constitution.
- 172.** Article 157 of the Constitution commands the 3<sup>rd</sup> Respondent to ensure that the need to prevent and avoid abuse of the legal process through the criminal justice system is realized and to this end this Court has the jurisdiction to stop any process of prosecution that can lead to abuse of power.
- 173.** This Court has the jurisdiction to interrogate any question as to whether the impugned decision by the 3<sup>rd</sup> Respondent to prosecute the Applicants is consistent with Article 157 of the Constitution. Where these expectations have not been met as in the instant case this court has the power to terminate, the proceedings to secure the ends of justice and restrain the abuse of its processes that may lead to harassment and persecution.
- 174.** The Applicants requested for information around the decision to charge them with the offences before the trial court. They were not furnished with the critical information. There was no explanation as to why that was not done.

- 175.** Since the Applicants challenged the decision to charge them and sought for information very early in the investigation process, this court would have expected The director of public prosecution discharge its duty to promote the rule of law and fairness by at the minimum furnishing the court with tangible evidence to justify the decision to charge the Applicants. This was it done.
- 176.** The foregoing confirms that the decision to charge the Applicants is tainted with improprieties contrary to article 47 of the Constitution which guarantees an Applicants the right to fair hearing. One is left to conclude that the decision to charge the Applicants was not inspired by objectivity.
- 177.** The 1st Respondent argued that upon conclusion of the investigations, the 1st Respondent established that the Applicants have a tax liability of **Kshs. 2,681,871,986** being Corporation Tax, Excise Duty and VAT due.
- 178.** The court has no doubt that a decision to charge the Applicants was made by the 3rd Respondent.
- 179.** It was the 1st Respondents case that upon conclusion of the investigations, the 1st Respondent forwarded the investigation file with recommendation to prosecute the Applicants to the 3rd Respondent whom upon perusing the file and being satisfied that tax offences under the Excise Duty Act, 2015 and the Tax Procedures Act have been committed and there being enough evidence to prove the same, the 3rd Respondent directed that the 1st and 2nd Applicants be charged with tax offences through ***the letter dated 2nd March***

***2021 addressed to the 1st Respondent by the 3rd Respondent.***

- 180.** Clause 3.1.1 of the guidelines on the decision to charge stipulates that the decision to charge or not to charge requires an objective and independent analysis of the case. This sits well with the Fair Administrative Action Act.
- 181.** When making decision to charge, the prosecutors must be objective and must not let personal views based on ethnic or national origin, gender, disability, age, religion or belief, sexual orientation, status, or gender identity of a suspect, accused person, victim or any witness influence their decision. They must at all times remain apolitical.
- 182.** In all cases prosecutors must complete the Decision to Charge Form ODPP 1A and lodge this in the relevant Prosecution File. This form was not availed to the Applicant. The only plausible conclusion that I can safely arrive at in the circumstances is that the decision to charge the Applicants was informed or arrived at on the basis of ulterior motives and that the process and the outcome was tainted with a illegalities and fundamental procedural improprieties. The applicants had a legitimate expectation that they would be furnished with the decision given that the issue of the decision to charge them features prominently in their case.
- 183.** Everybody including the Applicants have a right to access to information in the custody of an independent Constitutional bodies like the 3<sup>rd</sup> Respondent the ODPP whenever it is exercising, its powers under Article 157.

- 184.** The ODPP must at all times be at the forefront in, ensuring that suspects of crime are informed of the decision to charge them and not leave them in limbo.
- 185.** The ODPP's duty to disclose the Decision to Charge through Form ODPP 1A to suspects of crime or accused person cannot be gainsaid. The duty is elevated a notch higher where a person who is exposed request for this critical information. This is the only way that we shall talk of a process that is expeditious, efficient, lawful, reasonable and procedurally fair.
- 186.** The ODPP will not suffer any prejudice if decision to charge is disclosed to a suspect or an accused person immediately the decision to charge is made.
- 187.** This disclosure or the discovery will go a long way in promoting, our national values and the principles of governance as guaranteed under Article 10 of the Constitution in so far as the criminal justice system is concerned. This will further accord with Article 48 of the Constitution which promotes the right to access to justice.
- 188.** In any event, the decision to charge guidelines 2019 are a public document that is not supposed to benefit only the ODPP 's office. It is meant for the people of Kenya under Article 1 of the Constitution who voted in The Constitution. The investigations, and the running of the office of the ODPP is funded by the people through the taxes. As such the people have a legitimate expectation that they will have access to the results or the outcomes of investigations and in particular the decision to charge them with offences whenever they commit crime as under Form 1A.

**189.** A time has come when more awareness creation programmes were rolled out to inform Kenyans and in particular suspects upon arrest that they have a right to access to the guidelines and decision to charge in Form 1A. This will go a long way in promoting the tenets the social transformation through access to justice blue print of The Chief Justice. This critical call must start at the doorsteps of the Office of The Director of Public Prosecutions.

**190.** The decision to charge marks a point in the prosecution journey, when a suspect, or an accused person becomes a very vulnerable member. The Decision to Charge Form ODPP 1A must be availed to an accused person immediately the decision is made. It matters not whether or not they request for it. They must enjoy the right to access to information under Article 35 of the Constitution very early in the criminal justice system chain and not later.

**191.** Section 2 of the Fair Administrative Action Act provides that;

*“administrative action;*

*ii) includes-any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;*

*‘administrator’*

*means a person who takes an administrative action or who makes an administrative decision. This includes the ODPP when deciding to charge.*

*Section 4 further stipulates that;*

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

*(2) Every person has the right to be given written reasons for any administrative action that is taken against him.*

*(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-(d) a statement of reasons pursuant to section 6.”*

- 192.** An early disclosure and discovery of the Decision to Charge in Form ODPP 1A will open up early alternative dispute resolution possibilities very early reducing the number of cases in the criminal court that would have been resolved at the pre court stage promoting Article 159 of The Constitution.
- 193.** This approach will also help reduce the number of cases in the judicial review court where the judges have to deal with Applications for certiorari orders like the one before the court where many accused persons are seeking to stop prosecutions in the criminal courts after plea has been taken.
- 194.** Section 6(1) of the Fair Administrative Action Act provides that every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her Application for an appeal or review in accordance with Section 5 (2) The information referred to in subsection (1), may include-(a) the reasons for which the action was

taken; and(b) any relevant documents relating to the matter. (3) The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the Applicant, in writing, the reasons for the administrative action.

- 195.** The well-intended Decision to Charge Guidelines and the decision to charge in Form ODPP 1 cannot be said to be in conformity with Section 6 of the FAA if all that the ODPP does is to complete the decision to charge Form ODPP 1a and keep it in the file. More needs to happen in favour of the suspect and not just the plea taking.
- 196.** The supreme court in the case of **Githiga & 5 Others V Kiru Tea Factory Company Ltd (Petition 13 Of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment)** held that under Article 50(2) of the constitution procedural fairness in the administration of justice involved the fair hearing rule that required a decision maker to inter alia afford a person an opportunity to be heard before making any decision affecting his/her interests.
- 197.** The Decision to Charge Guidelines must be aligned with the disclosure of information contained in the decision to charge Form to the affected person if the same is to be counted as a tool that will form part of the right to fair hearing which will not be complete without this kind of dialogue.
- 198.** In the case of **Pastoli Vs Kabale District Local Government Council & Others, (2008) 2 Ea 300**, where it was held that:

*“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 BukobaGymkhana 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).*”

- 199.** With the analysis above, this court has arrived at the safe conclusion that the Respondents and the office of the director public prosecutions acted illegally in failing to furnish the Applicants with the information they sought as well as the decision to charge them thereby offending the principles as enunciated in the **Pastoli Vs Kabale District Local Government Council & Others, (2008) 2 Ea 300 case (supra)** and I so hold.
- 200.** The Applicants had a Legitimate expectation that the Respondents would accord them process that was not only fair, but legitimate. From the forgoing, the applicants have proven that this was not done.
- 201.** The sum totality of forgoing is that the impugned prosecution in the trial court is tainted with illegality and massive procedural improprieties that justify the insurance of the orders as prayed for in prayer number 1 of the Application which I hereby allow.
- 202.** The Applicants have not challenged the jurisdiction or the proceedings that are pending before the Tax Tribunal. The Tax Tribunal has the statutory power to attend to the tax issues like the one the Applicants are faced with. In the circumstances, the court will not interfere with affairs of the said Tribunal unless when called upon to which is not the case in this suit. A judgment has already been rendered by Tax Tribunal in any event.

The court now looks at the question whether or not the order of prohibition can be issued as sought.

**203.** In the case of **Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**, the Court stated the grounds upon which such an order of prohibition may issue as follows;

*“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&39; S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128”*

**204.** In the instant case, the court has already made a finding that the Respondents acted illegally and issued an order of Certiorari.

**205.** In the circumstances, it would be remiss of this court to allow the proceedings in the criminal court cannot be sustained. The Prayer for an order of prohibition is hereby granted as prayed in so far as the criminal Proceedings are concerned.

**206.** In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334*, the Court of Appeal held that: “As a general proposition under Section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is

however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.” It follows that the initial burden of proof was with the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case and the evidence tendered.

**207.** The court finds that the Applicants have proven their case.

**The issue of costs;**

**208.** In **Halsbury’s Laws of England**, 4<sup>th</sup> ed Re-Issue (2010), Vol. 10, para. 16:

*“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; **it must not be exercised arbitrarily but in accordance with reason and justice**”* [emphasis supplied].

**209.** In **Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J.** thus observed:

*“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is*

*the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, **where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so.** In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].*

**210.** The Civil Procedure Act (Cap. 21, Laws of Kenya), the primary law of Judicial Procedure in civil matters, thus stipulates (Section 27(1)):

*“Subject to such conditions and limitations’ as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:*

*Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order” [emphases supplied].*

**211.** The Applicants are entitled to costs.

## **Disposition;**

**212.** The Application has merit to the extent as set out in the orders.

## **Order;**

- 1) An order of Certiorari to bring before this Court the decision by the 3<sup>rd</sup> Respondent contained in the Charge Sheet dated 19:07:2021 vide **Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd** for the purposes of being quashed is hereby issued.
- 2) An order of Prohibition, stopping the 1<sup>st</sup> Respondent from amending or substituting any further charges in the Charge Sheet dated 19:07:2021 vide **Criminal Case No. E802 of 2021 Republic vs Mohan Galot and London Distillers (K) Ltd** against the Exparte Applicants pending the hearing and determination of **TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority** before the Tax Appeals Tribunal and the exhaustion of any further subsequent proceedings attendant thereto under the Tax Procedure Act, 2015 is hereby issued.
- 3) An order of Prohibition, stopping the 1<sup>st</sup> Respondent from taking any other adverse action against the Exparte Applicants amounting to enforcement measures on the basis of the Assessment Notice dated 18:03:2021 and the objection decision dated 09:06:2021 pending the hearing and determination of **TAT No. 408 of 2021 London Distillers (K) Ltd vs The**

**Commissioner of Investigation and Enforcement of the Kenya Revenue Authority** before the Tax Appeals Tribunal and the exhaustion of any further subsequent proceedings attendant thereto under the Tax Procedure Act,2015 is hereby moot since judgment has already been rendered by the Tax Tribunal.

4) The prayer for an order of prohibition touching on the proceedings in TAT No. 408 of 2021 London Distillers (K) Ltd vs The Commissioner of Investigation and Enforcement of the Kenya Revenue Authority iTax Appeals Tribunal is moot since judgment has already been rendered by the Tax Tribunal.

5) Costs to the Applicants.

**Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of November, 2025.**

.....

**J. CHIGITI (SC)**  
**JUDGE**