**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI MILIMANI LAW COURT**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO E019 OF 2022**

**(CORAM: CHARLES KARIUKI – J)**

**IN THE MATTER OF AN APPLICATION BY UNIVERSAL CORPORATION TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS AGAINST THE DECISION OF THE COMMISSIONER OF CUSTOMS AND BORDER CONTROL FOR CONTRAVENING SECTION 7 AND 8 OF THE MISCELLANEOUS LEVIES ACT NO 29 OF 2016 AND DECLINING TO REFUND IMPORT DECLARATION FEES AND RAILWAY DEVELOPMENT LEVY**

**IN THE MATTER OF THE MISCELLANEOUS LEVIES ACT NO 29 OF 2016 LAWS OF KENYA**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS BY WAY OF MANDAMUS**

**REPUBLIC…..........................................................................APPLICANT**

**-VERSUS-**

**THE COMMISSIONER CUSTOMS AND BORDER CONTROL……...RESPONDENT**

**EX PARTE…….UNIVERSAL CORPORATION LIMITED EX PARTE APPLICANT'S**

# RULING

## INTRODUCTION:

1. The Applicant moves Court via before this Honorable Court seeks a refund of Import Declaration Fees (hereinafter "IDF") and Railway Development Levy (hereinafter "RDL") from 2016 to 2020 as per the

provisions of the Miscellaneous Fees and Levies Act (Hereinafter "the MFL Act”) The MFL Act only imposes IDF and RDL on goods that are imported for home use. In contrast, the Ex Parte Applicant (hereinafter referred to as "the Applicant") imports products primarily for export, whose exports are exempt from payment of IDF and RDL.

2. The Applicant prays for an order of mandamus compelling the Respondent and any of its agents responsible to act to refund the taxes totaling Kshs. 137,579,975.83 to the Applicant as per the MFL Act as well as the Tax Procedures Act.

**BACKGROUND:**

3. The Applicant sought a tax refund of Ksh. $ 137,579,975.83 for the aforementioned period, as per a letter dated July 6, 2022. The said letter was duly received by the Respondent's Legal Services and Co-ordination department on the same date. Despite this, there has been no response or decision regarding the refund sought.

4. In light of this, the Applicant filed a Chamber Summons Application before the Judicial Review division of the High Court for leave to institute judicial review proceedings against the Respondent through an order for mandamus. The following documents were filed in the Ex Parte chamber summons Application dated October 18, 2022, and annexed thereto four volumes of record detailing the payment between 2016 and 2020, marked as follows:
    i. RDL & GOK YEAR (2017). PAGES 1-145
    ii. RDL & GOK YEAR 2016 PAGES 1-160
    iii. RDL & GOK YEAR 2018 PAGES 1-605
    iv. RDL & GOK YEAR 2019 PAGES 1-508

5. On November 21, 2022, Honorable Justice Jairus Ngaah issued directions referring the matter for determination by the Commercial and Tax Division of the High Court.

6. In July 2023, the matter was then transferred to this division for determination, and the parties were given directions on how to file their responses. The Applicant was granted leave to file the substantive Application. Thereafter, the Applicant filed the Notice of Motion application (substantive Application) dated October 9, 2023.

7. In response, the Respondent filed Grounds of Opposition dated November 24, 2023; however, Justice Mabeya's directions that the Respondent ought to get an officer to interrogate the records availed by the Applicant, as the grounds of opposition did not respond to the evidence availed by the Applicant, giving a timeline of 6 months.

8. Thereafter, the Respondent filed a Replying Affidavit sworn by Joram Tororei, sworn on October 11, 2024, that, on review, does not interrogate the substance of the entries availed by the Applicant nor present any evidence to controvert the fact that the Applicant paid RDL and IDF upon import of goods for the said period.

9. As such, the Applicant avers that there is no evidence to controvert the payment slips of taxes to the Respondent at the point of import or export of the goods, and for this reason alone, we beseech this Honorable Court to find that the Application and the evidence thereto are uncontroverted.

10. In response, the Applicant filed a Supplementary Affidavit sworn by Susan Cheruiyot on February 7, 2025, wherein the Applicant cross-references and summarizes the various bundles filed before the Court, demonstrating the importation of the raw materials as well as the exportation of the goods by the Applicant.

**APPLICANT SUBMISSIONS:**

11. The Applicant submits under the following;
    a) Whether the Application before this Honorable Court is competent and the Applicant has discharged the burden of proof.
    b) Whether the Respondent’s action in failing to refund the IDF and RDL is ultra vires its statutory powers.
    c) Whether the Respondent's actions violated the Applicant's right to fair administrative action under Article 47, including the right to legitimate expectation.
    d) Whether the Respondent's actions are taken in bad faith, thereby prejudicing the Applicant's business.
    e) Whether the Application before this Honorable Court is competent and the Applicant has discharged the burden of proof.

12. It is submitted that the legal framework that provides for a refund of IDF and RDL is as follows: Section 8 of the Miscellaneous Fees and Levies Act provides that:

    *"There shall be paid a levy to be known as the railway development levy, on all goods imported into the country for home use."*

    **Section 7 of the Miscellaneous Fees and Levies Act** states;

*"That there shall be paid a fee to be known as the import declaration fee, on all goods imported into the country for home use."*

**Section 9B of the Miscellaneous Fees and Levies Act** provides

*"The provisions of section 47 of the Tax Procedures Act, 2015 shall apply for:*

*i) An application for refunds, ascertainment, and repayment of fees and levies overpaid or paid in error under this Act; or*

*ii) The determination by the Commissioner of penalties and interests on fees and levies that remain unpaid."*

**Section 47 of the Tax Procedures Act 2015** provides as follows:

*"(1) When a taxpayer has overpaid a tax under a tax law, the taxpayer may apply to the Commissioner, in the approved form, for a refund of the overpaid tax within five years of the date on which the tax was paid."*

*(2) The Commissioner may, for purposes of ascertaining the validity of the refund claimed, subject the claim to an audit.*

*(3) The Commissioner shall notify in writing an applicant under subsection (1) of the decision in relation to the Application within ninety days of receiving the Application for a refund.*

*(4) ………………………..*

*(5) The Commissioner shall repay the overpaid tax within a period of two years from the date of Application, failure to which the amount due shall attract an interest of 1% per month or part thereof of such unpaid amount after the period of two years."*

13. The Respondent in its Grounds of Opposition avers that the Applicant has failed to exhaust the available alternative forms of dispute resolution as per the Fair Administrative Actions Act; however, section 9B of the MFL is clear that the proper procedure is encompassed under section 47 of the Tax Procedures Act (hereinafter 'the TPA'). An application for the refund was made within the prescribed timeline, in accordance with the TPA 2015 (as amended for the relevant period in this matter, which is 2022). The Respondent failed to comply with the mandatory requirement of responding to the Application for refund within 90 days, resulting in the filing of this matter to compel the Respondent to remit the overpaid taxes.

14. It is submitted that the Respondent's failure to respond to the mandatory requirements of section 47 of the TPA cannot be used to deny the Applicant an opportunity to seek a tax refund. The Respondent is an administrative body responsible for administering and enforcing revenue laws. As such the proper forum where the Applicant is aggrieved with such administrative action is as prescribed under section 9(1) of the FAA which provides: Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution. Having demonstrated that there was no alternative remedy available to the Applicant, this Court is urged to find that the Application before it is merited and worthy of consideration.

15. The Respondent further avers that the Applicant has failed to satisfy the evidentiary burden as per section 107 of the Evidence Act. Respondents

submit that the Applicant has provided evidence of the entries of the period of review meticulously breaking down the various commercial transactions from the raw materials imported by the Applicant (Refer to paragraph 14 of the Supplementary Affidavit) to the exports, as well as the payment confirmations and receipts issued by the Respondent (Refer to paragraph 15 to 18 of the Supplementary Affidavit).

16. The Applicant has tabulated all entries for the review period and further itemized each payment made to the Respondent, providing invoices, Import Declaration Forms, Certificates of Exportation, and SAD forms detailing the RDL and IDF remitted to the Respondent. Reliance made on ***Bamburi Cement Plc V Commissioner of Customs and Border Control (2024) eKLR***, which emphasized the importance of documents such as a certificate of export and endorsed customs documents to confirm the goods' exit. The exporter must maintain the documentation of their supply chains and export processes.

17. The Applicant has complied with this requirement and provided all the evidence necessary that the Respondent has not controverted. Effectively, the burden of proof has thus shifted to the Respondent herein.

**a) Whether the Respondent's action in failing to refund the IDF and RDL is ultra vires its statutory powers.**

18. The Applicant has hereinabove demonstrated that the MFL Act only imposes IDF and RDL on goods imported for home use and tendered evidence to show that it exported the goods and therefore is entitled to a refund of RDL and IDF.

19. In view of the foregoing, the Applicant thus submits that the Respondent acted Ultra vires by failing to refund the Ksh 137,759975.83 for the aforementioned period as required by section 47 of the Tax Procedures Act. The Applicant relies on this Court's finding in ***Commissioner of Domestic Taxes v Sony Holdings Limited [2021] eKLR***. When a taxpayer submits a refund application, the correct procedure should be followed. The Court in ***Krystalline Salt Limited vs Kenya Revenue Authority [2019] eKLR*** discussed the importance of following the procedures laid down in law when it stated that:

> ***"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures. See also in Commissioner of Domestic Taxes v Sony Holdings Limited [2021] eKLR reiterated what was held in Russell (Inspector of Taxes) vs. Scott [1943] AC 422 at 433:"***

20. The upshot of the foregoing is that, from a strict reading and interpretation of the law, the MFL Act does not impose IDF and RDL taxes on exports; therefore, the same should be refunded to the Applicant, as provided by the statute.

21. It is the Applicant's further submission that the Respondent's Act of denying the Applicant its rightful claim for IDF and RDL amounts to abuse of power. See Republic v Kenya Revenue Authority Ex-Parte: ***Cosmos Limited [2016] eKLR. Republic v Kenya Revenue Authority Ex Parte Cooper K- Brands Limited [2016] eKLR***.

22. The taxing authority is mandated to take only what is required by law and not in excess, as tax laws cannot be inferred. If there is an overpayment of tax, it should be refunded to the tax subject as required by the Tax Procedures Act. Further, tax laws must be interpreted strictly, and the role and interpretation of tax laws, see ***Republic Vs Kenya Revenue Authority Ex parte Bata Shoe Company (kenya) Limited (2014) eKLR***:

23. The Applicant therefore submits that the Respondent is obligated by law to refund the taxes due to the Applicant, and a failure to do so is an action beyond its mandate and authority.

**b) Whether the Respondent's actions violated the Applicant's right to fair administrative action under Article 47, including the right to legitimate expectation**.

24. The Applicant submits that the Respondent violated the Applicant's right to fair administrative action by failing to refund IDF and RDL following the Applicant's Application. **Article 47** of the Constitution of Kenya guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. This provision is further buttressed by the Fair Administrative Action Act of 2015. Reliance made on ***De Smith, Woolf & Jowell in "Judicial Review of Administrative Action" 6th Edition Sweet & Maxwell page 609: Republic v Kenya Revenue Authority Ex parte Aberdare Freight Services Ltd & 2 Others, Keroche Industries Limited v Kenya Revenue Authority & 5 Others, Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223 Louis Dreyfus Company (K)***

***Limited v Kenya Revenue Authority [2021] eKLR Kenya Revenue Authority & 2 others v Darasa Investments Limited MLD Civil Appeal No. 24 of 2018 [2018] eKLR***, ***Pollard, Papworth and Hughes, Constitutional and Administrative Law; Text with Materials (4th Ed), P. 583: Commissioner of Domestic Taxes v Unga Limited [2021] eKLR Republic v Kenya Revenue Authority Ex-Parte: Cosmos Limited [2016] eKLR 158, R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]***

25. Based on the aforesaid determinations, the Court is urged to find that the Respondent has acted contrary to the law and ought to refund the RDL and IDF due to the Applicant.

**c) Whether the Respondent's actions are taken in bad faith, prejudicing the Applicant's business.**

26. The Applicant submits that the monies withheld by the Respondent constitute its capital intended to be reinvested. Thus, denial of the same abnegates the Applicant's capacity to earn from its business. Reliance made ***on Republic v Kenya Revenue Authority Ex Parte Cooper K-Brands Limited [2016] eKLR and Kenya Data Networks Limited v Kenya Revenue Authority [2013] eKLR***.

**RESPONDENTS' SUBMISSIONS:**

27. The Respondent submitted on two main issues for determination, namely:

    a) Whether the Ex Parte Applicant has exhausted all the remedies available before approaching this Court for relief;

    b) Whether the Respondent was justified in failing to process the refund claimed.

a) **Whether the Applicant has exhausted all the remedies available before approaching this Court for relief.**

28. Firstly, the Respondent submits that the Ex Parte Applicant, being aggrieved by the decision of the Respondent not to process its alleged refund application, ought to have sought redress before the Tax Appeals tribunal. Refunds of IDF and RDL are to be processed under the provisions of Section 47 of the Tax Procedures Act, as clearly provided in Section 9B of the Miscellaneous Fees & Levies Act. The said Section 9B provides that:-

    *"The provisions of section 47 of the Tax Procedures Act (Cap. 469B) shall apply for: An application for refunds, ascertainment and repayment of fees and levies overpaid or paid in error under this Act; or the determination by the Commissioner of penalties and interests on fees and levies that remain unpaid."*

29. Therefore, in respect to this case, in the absence of a response to their Application for refund as alleged, the Ex Parte Applicant ought to have moved under Section 47(13) of the Tax Procedures Act, which provides as follows:

    *a)"A person aggrieved by a decision of the Commissioner under this section may appeal to the Tribunal within thirty days after being notified of the decision."*

30. Indeed, the parties agree that the proper procedure for refund applications under the Miscellaneous Fees and Levies Act is spelt out in Section 47 of the Tax Procedures Act, which the Ex Parte Applicant has failed to adhere to.

31. In this case, the Ex Parte Applicant alleges that despite having made a refund application for the period 2016-2020, the Respondent failed to respond to the same within the timelines stipulated under Section 47 of the Tax Procedures Act. The recourse then would have been for the Ex Parte Applicant to move the Tax Tribunal to obtain such orders against the Respondent for their omission to process the refund claim as alleged.

32. Section 2 of the Fair Administrative Action Act provides that:

> *"…unless the context otherwise requires— "administrative action" includes— (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) 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."*

33. An examination of the Application at hand reveals that the Applicant relies on various Articles of the Constitution, as well as the Fair Administrative Actions Act 2015, to support its case against the Respondent.

34. Indeed, under Section 7 of the Fair Administrative Action Act, an aggrieved person can bring an application for judicial review to this Court on the various grounds stated therein.

35. The Respondent's omission to process the alleged refund claim lodged by the Ex Parte Applicant constitutes an administrative action within the meaning assigned under the Fair Administrative Action Act. It therefore

follows that the provisions of Section 9(1) (2) (3) & (4) of the Fair Administrative Action Act do apply in this case. Specifically, the requirement for exhaustion of available remedies applies.

a. Section 9(1)(2)(3) & (4) provides thus: -

*Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.*

*The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms, including internal mechanisms for appeal or review and all remedies available under any other written law, are first exhausted.*

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

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

36. The word ***"Shall"*** in the above-cited section is worth emphasizing. Hon Mativo J (JJA) in Judicial Review Application No. 359 of 2018: Krystalline Salt Limited vs. Kenya Revenue Authority held that:

***"…The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive; it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command, exhortation, or what is legally mandatory. Ordinarily, the words 'shall' and 'must' are mandatory, and the word 'may' is directory."***

37. The Respondent associates itself fully with the above pronouncements and emphasizes that the Applicant has not demonstrated exceptional circumstances on which this Honourable Court may exempt it from the obligation to exhaust the available remedy before the Tax Appeals Tribunal for the omission to process a tax refund application.

38. On many occasions, Courts have pronounced themselves on the doctrine of exhaustion of administrative remedies available before approaching the High Court for redress.

39. In Nairobi Judicial Review Application No. 447 of 2018: ***Republic vs. Kenya Revenue Authority & Another, Ex parte Centrica Investments (2019) eKLR, Hon. Justice Mativo (JJA)*** opined that:

i. *"It is convenient to start by stating that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The Court must decide whether to review the*

ii. *agency's action or to remit the case to the agency, permitting Judicial Review only when all available (emphasis mine) administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya".*

40. The Court of Appeal provided the constitutional rationale and basis for the doctrine in Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others (2015) eKLR, where it stated that: -

***"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that judicial consideration of matters is postponed to allow a party to be diligent in protecting their own interests within the existing mechanisms for resolution outside the courts. This accords with Article 159 of the Constitution, which commands Courts to encourage alternative means of dispute resolution."***

41. It therefore follows that the Applicant ought to have sought redress at the Tax Appeals Tribunal before approaching this Honourable Court. In his judgment in ***Krystalline Salt Limited vs. Kenya Revenue Authority (2019) eKLR, Hon. Mativo J(JJA)*** held that:

***"…...As previously concluded, before me is a tax dispute that reveals an appealable decision under the Act. The above discussion leads me to conclude that this case contravenes Section 9(2) of the Fair Administrative Action Act. The Applicant did not apply for an exemption, as the law requires, nor has it satisfied the exceptional***

***circumstances requirement under section 9(4) of the Fair Administrative Action Act. I find and hold that the Applicant's Application offends the doctrine of exhaustion of statutory available remedies…."***

42. In Republic vs. Kenya Revenue Authority Ex parte Keycorp Real Advisory Limited Judicial Review Application No. 448 of 2018, the Court, in dismissing the Ex parte Applicant's Application, stated that:

***"It is my conclusion that the ex parte applicant ought to have exhausted the available mechanism before approaching this Court. First, I find that this case violates Section 9 (2) of the Fair Administrative Action Act. Second, the ex parte applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the Fair Administrative Action Act. Third, the ex parte applicant did not apply to this Court as provided under section 9(4) cited above. Consequently, I find and hold that this suit offends the doctrine of exhaustion of statutory available remedies. It must fail. I dismiss it on this ground."***

43. Secondly, the Applicant has not demonstrated any exceptional circumstances that would invoke the jurisdiction of this Honorable Court, thereby warranting judicial review orders.

44. The Court of Appeal decision in ***Republic v National Environmental Management Authority [2011] eKLR*** while dealing with the issue, held that: -

***"The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that determining whether an exception should be made and judicial review granted, the court needed to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…."***

45. It is submitted that the Applicant has failed to demonstrate what exceptional circumstances exist in this particular case, which would remove it from the ambit of the appeal process set out in Section 47(13) of the Tax Procedures Act.

46. There must be a clear demonstration that the alternative remedy is not available, not adequate, and not sufficient to address the grievances in question. In the instant case, the remedy under Section 47(13) of the Tax Procedures Act is not only available, but also practical and sufficient. Hon. Justice Mativo in ***Republic v Kenya Revenue Authority & another; Director of Criminal Investigations & another (Interested Party) Ex parte CMC DI Ravenna-Itinera JV [2020] eKLR***, held the following on the issue of exceptional circumstances: -

***"The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare, but they must be truly exceptional rather than***

***the rule. I am unable to discern any exceptional circumstances in this case, nor was it demonstrated that there are exceptional circumstances in this case."***

47. Hon Justice Ngaah in ***Republic v Kenya Revenue Authority Ex parte Convex Commodity Merchants Limited [2021] e KLR*** held that: -

    ***"The decisions I have cited, coupled with these provisions, are self-explanatory and point to the conclusion that as long as the Applicant has not exhausted the mechanisms that are otherwise available for resolution of a particular dispute, the institution of a suit in Court for the same purpose would be premature, at the very least. ….It is for the foregoing reasons that I find the Applicant's motion dated August 7, 2018, misconceived and an abuse of the due process of the Court. It is hereby dismissed with costs."***

48. Thus, it is submitted that this matter is before the wrong forum as the Applicant has not exhausted the available remedies before the Tax Appeals Tribunal, and this matter ought to be dismissed with costs to the Respondent.

**b) Whether the Respondent was justified in failing to process the refund claimed.**

49. On this issue, the Respondent submits that the Ex parte Applicant failed to justify the refund it seeks. Furthermore, the Applicant failed to provide evidence in support of its allegations that it engaged in commercial

transactions involving transit goods/ goods for export, and that these specific goods are the subject matter of its refund claim.

50. The Ex Parte Applicant has annexed intelligible documents/proof in support of its alleged refund application to its Application, which the Respondent submits is a stranger, as the same have not been presented and explained to the Commissioner as the law provides.

51. It is a trite law that he who alleges must prove. This is well enshrined under Section 107 of the Evidence Act. The Respondent submits that the burden is on the Ex Parte Applicant to provide sufficient and relevant documents in support of its refund application, which burden it has failed to discharge. ***In Commissioner of Investigations & Enforcements Vs Dr. Evans Kidero (2022) eKLR***, the Court stated that;

> ***"The duty imposed on the taxpayer to keep records and the provisions on the burden of proof all go to support the Kenyan tax collection regime, which is centered on a system of self-assessment. This system relies on the taxpayer making full and good faith disclosures in their tax declaration and affairs, thereby empowering the Commissioner to demand documents from time to time when investigating the affairs of a taxpayer. Whether the taxpayer has provided sufficient evidence to meet the threshold of proof required to discharge its burden must, of course, depend on the nature of the subject or transaction and the circumstances of the case, bearing in mind the aforesaid duty placed on the taxpayer to keep records."***

52. It is the Respondent's submission that the Ex Parte Applicant has presented to this Court huge bundles of documents with no logical explanation given as to their correlation with the refunds sought for IDF

and RDL. By so doing, the Ex Parte Applicant deliberately seeks to superimpose its burden of proof on the Respondent and this honorable Court to sort out the documents, interpret the same, and make a case for the refund application. However, that burden solely rests with the Applicant. The Respondent thus maintains that it is justified in failing to process the refund in the absence of comprehensible documents that adequately support the Application.

53. On the averments that the Respondent's actions violated the Applicant's rights under Article 47 of the Constitution, including the right to legitimate expectation, the Respondent submits as follows: that the doctrine of legitimate expectation as propounded by the Applicant is not only erroneous but also misleading.

54. In Republic vs. ***Kenya Revenue Authority Ex parte Shake Distributors Limited [2012] eKLR***, it was held that there was a legitimate expectation that is

> *"A promise made to a party by a public body that it will act or not act in a certain manner, and for the promise to hold, the same must be made within the confines of law since a public body cannot make a promise which goes against the express letter of the law".*

Reliance also made on ***R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19], R vs. Jockey Club ex p RAM Racecourses [1993]2 All ER 225, 236h-, De Smith, Woolf & Jowell, "Judicial Review of Administrative Action" 6th Edn. Sweet & Maxwell page 609:***

55. In this case, the Respondent reiterates that it had not, at any given time, given any promise or undertaking to the Applicant that it would be issued a refund of taxes as claimed, without the lawful due process being followed.

56. Lodging a refund application does not guarantee that the Commissioner will accept the refund application automatically without following the due process of audit verification. A legitimate expectation cannot arise contrary to law/statute. Additionally, the Applicant has failed to prove how the Respondent has acted ultra vires in not refunding taxes claimed, in the absence of sufficient documents/ comprehensible supporting the refund claim.

57. The Respondent submitted on two main issues for determination, namely,

a) Whether the Ex Parte Applicant has exhausted all the remedies available before approaching this Court for relief;
b) Whether the Respondent was justified in failing to process the refund claimed.

**ISSUES ANALYSIS AND DETERMINATION:**

58. After reviewing the pleadings, affidavits, and parties' submissions, I find that the issues are: whether the Applicant has exhausted all available remedies before approaching this Court for relief; if not, whether circumstances exempt alternative remedies; and if so, whether the Application has merit and whether costs are applicable.

c) **Whether the Applicant has exhausted all the remedies available before approaching this Court for relief, and if not, whether circumstances exempted the same alternative remedies**

59. Firstly, the Respondent submits that the Ex Parte Applicant, being aggrieved by the decision of the Respondent not to process its alleged refund application, ought to have sought redress before the Tax Appeals Tribunal. Refunds of IDF and RDL are to be processed under the provisions of Section 47 of the Tax Procedures Act, as clearly provided in Section 9B of the Miscellaneous Fees & Levies Act.

60. The Respondent's rejoinder is that the failure to respond to the mandatory requirements of section 47 of the TPA cannot be used to deny the Applicant an opportunity to seek a tax refund. Furthermore, we must submit that the Respondent is an administrative body tasked with administering and enforcing revenue laws.

61. As such the proper forum where the Applicant is aggrieved with such administrative action is as prescribed under section 9(1) of the FAA which provides: Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

62. The provisions of Section 9B provide that: -

> ***"The provisions of section 47 of the Tax Procedures Act (Cap. 469B) shall apply for – b) An application for refunds, ascertainment and repayment of fees and levies overpaid or paid in error under this Act; or the determination by the***

***Commissioner of penalties and interests on fees and levies that remain unpaid.”***

63. Therefore, in respect to this case, in the absence of a response by the Respondent to the applicants' Application for refund as alleged, the Ex Parte Applicant ought to have moved under Section 47(13) of the Tax Procedures Act, which provides as follows:

> ***“A person aggrieved by a decision of the Commissioner under this section may appeal to the Tribunal within thirty days after being notified of the decision.”***

64. Indeed, there is a census by the parties herein that the proper procedure for refund applications under the Miscellaneous Fees and Levies Act is spelt out in Section 47 of the Tax Procedures Act, which the Ex Parte Applicant has failed to adhere to. In this case, the Ex Parte Applicant alleges that despite having made a refund application for the period 2016-2020, the Respondent failed to respond to the same within the timelines stipulated under Section 47 of the Tax Procedures Act.

65. The recourse then would have been for the Ex Parte Applicant to move the Tax Tribunal to obtain such orders against the Respondent for their omission to process the refund claim as alleged. Section 2 of the Fair Administrative Action Act provides that:

> ***“…unless the context otherwise requires - “administrative action” includes - (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) 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."***

66. An examination of the Application at hand reveals that the Applicant relies on various Articles of the Constitution, as well as the Fair Administrative Actions Act 2015, to support its case against the Respondent. Under Section 7 of the Fair Administrative Action Act, an aggrieved person can bring an application for judicial review to this Court on the various grounds stated therein.

67. The Respondent's omission to process the alleged refund claim lodged by the Ex Parte Applicant constitutes an administrative action within the meaning assigned under the Fair Administrative Action Act. It therefore follows that the provisions of Section 9(1) (2) (3) & (4) of the Fair Administrative Action Act do apply in this case. Specifically, the requirement for exhaustion of available remedies applies.

68. **Section 9(1)(2)(3) & (4)** provides thus: -

*Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.*

*The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms, including internal mechanisms for appeal or review and all remedies available under any other written law, are first exhausted.*

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

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

69. The word “***shall***" in the above-cited section is worth emphasizing. A Judicial Review Application No. 359 of 2018: ***Krystalline Salt Limited vs. Kenya Revenue Authority*** held that:

> ***"…The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive; it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command, exhortation, or what is legally mandatory. Ordinarily, the words 'shall' and 'must' are mandatory and the word 'may' is directory.”***

70. Various Courts have pronounced themselves on the doctrine of exhaustion of administrative remedies available before approaching the High Court for redress.

71. In Nairobi Judicial Review Application No. 447 of 2018: ***Republic vs. Kenya Revenue Authority & Another, Ex parte Centrica Investments (2019) eKLR***, Hon. Justice Mativo (JJA) held that:

> ***"It is convenient to start by stating that the question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The Court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available (emphasis mine) administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya".***

72. The Court of Appeal provided the constitutional rationale and basis for the doctrine in ***Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others (2015) eKLR***, where it stated that: -

> ***"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that judicial consideration of matters is postponed to allow a party to be diligent in protecting their own interests within the existing mechanisms for resolution outside the courts. This accords with Article 159 of the Constitution, which commands Courts to encourage alternative means of dispute resolution."***

73. It therefore follows that the Applicant ought to have sought redress at the Tax Appeals Tribunal before approaching this Court. In his judgment in ***Krystalline Salt Limited vs. Kenya Revenue Authority (2019) eKLR***, Hon. Mativo J(JJA) held that:

> ***"…...As previously concluded, before me is a tax dispute that reveals an appealable decision under the Act. The above discussion leads me to conclude that this case contravenes Section 9(2) of the Fair Administrative Action Act. The Applicant did not apply for an exemption, as the law requires, nor has it satisfied the exceptional circumstances requirement under section 9(4) of the Fair Administrative Action Act. I find and hold that the Applicant's Application offends the doctrine of exhaustion of statutorily available remedies…."***

74. In ***Republic vs. Kenya Revenue Authority Ex parte Keycorp Real Advisory Limited Judicial Review Application No. 448 of 2018***, the Court, in dismissing the Ex parte Applicant's Application, stated that:

> ***"It is my conclusion that the ex parte applicant ought to have exhausted the available mechanism before approaching this Court. First, I find that this case is in violation of Section 9 (2) of the Fair Administrative Action Act. Second, the ex parte applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the Fair Administrative Action Act. Third, the ex parte applicant did not apply to this Court as provided under section 9(4) cited above. Consequently, I find and hold that this suit offends the***

***doctrine of exhaustion of statutory available remedies. It must fail. I dismiss it on this ground."***

**EXCEPTIONAL CIRCUMSTANCES:**

75. Secondly, the Applicant must demonstrate exceptional circumstances that would invoke the jurisdiction of this Honorable Court, so that judicial review orders are granted. The Court of Appeal decision in ***Republic v National Environmental Management Authority [2011] eKLR*** while dealing with the issue, held that: -

    ***"The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that determining whether an exception should be made and judicial review granted, the court needed to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…."***

76. The Applicant has failed to demonstrate what exceptional circumstances exist in this particular case, which would remove it from the ambit of the appeal process set out in Section 47(13) of the Tax Procedures Act. There must be a clear demonstration that the alternative remedy is not available, not adequate, and not sufficient to address the grievances in question. In the instant case, the remedy under Section 47(13) of the Tax Procedures Act is not only available, but also practical and sufficient.

77. In the case of ***Republic v Kenya Revenue Authority & another; Director of Criminal Investigations & another (Interested Party) Ex parte CMC DI Ravenna-Itinera JV [2020] eKLR***, the Court held the following on the issue of exceptional circumstances:

> ***"The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare, but they must be truly exceptional rather than the rule. I am unable to discern any exceptional circumstances in this case, nor was it demonstrated that there are exceptional circumstances in this case."***

78. Hon Justice Ngaah in ***Republic v Kenya Revenue Authority Ex parte Convex Commodity Merchants Limited [2021] e KLR*** held that: -

> ***"The decisions I have cited, coupled with these provisions, are self-explanatory and point to the conclusion that as long as the Applicant has not exhausted the mechanisms that are otherwise available for resolution of a particular dispute, the institution of a suit in Court for the same purpose would be premature, at the very least. .….It is for the foregoing reasons that I find the Applicant's motion dated August 7, 2018, misconceived and an abuse of the due process of the Court. It is hereby dismissed with costs."***

79. Thus, it is this Court's finding that this matter is before the wrong forum as the Applicant has not exhausted the available remedies before the Tax

Appeals Tribunal thus the Court rather than dismissing the motion, it strikes the same out, as Applicant ought to have sought redress at the Tax Appeals Tribunal before approaching this Court and is at liberty to do so if it can navigate its way to the Tribunal.

80. Therefore, the Court issues the following orders.

   **i) The matter is herein struck out with orders that the parties bear their own costs.**

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI**

**THIS 14TH DAY OF NOVEMBER, 2025**

…………………………………

**CHARLES KARIUKI**

**JUDGE**