Kenya Revenue Authority & 2 others v Doshi Iron Mongers Limited (Civil Appeal 66 of 2021) [2024] KECA 640 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KECA 640 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 66 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 7, 2024

BETWEEN

KENYA REVENUE AUTHORITY ..... 1ST APPELLANT

THE COMMISSIONER OF CUSTOMS SERVICES ..... 2ND APPELLANT

THE COMMISSIONER INVESTIGATIONS AND ENFORCEMENT .... 3RD APPELLANT

AND

DOSHI IRON MONGERS LIMITED ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 25th September 2020 in Petition No. 49 of 2012)

JUDGMENT

1. This appeal arises from the decision in Mombasa High Court Petition No. 49 of 2012, which was consolidated with Mombasa JR No. 98 of 2010 (the Judicial Review Application). The Judicial Review Application was initially commenced for purposes of having the documents seized from the respondent by the 1st appellant returned. Following the return of some of the seized documents, the character of the litigation changed as a result of which the respondent filed the petition.

   Subsequently, the respondent sought leave to amend the petition in order to incorporate the subject matter of the judicial review application into the petition, and leave was granted on 4th October 2017. Accordingly, an amended petition was filed on 27th October 2017. The amended petition therefore subsumed the judicial review application by incorporating the only substantive prayer in the judicial review application as part of the petition.

2. That petition was founded on sections 75 to 80 of the retired Constitution of Kenya, the *Kenya Revenue Authority Act*, 1995, the *Value Added Tax Act*, East Africa Community Customs Management

Act, *Tax Procedures Act* No. 29 of 2015, as well as the *Access to Information Act* 2016. It sought the following orders:

a. A declaration that the respondent's right to fair administrative action as guaranteed by Article 47 of *the Constitution* has been and/or will be infringed by the proposed actions to audit/ test compliance by the appellants in light of the pending determination of High Court Misc. Application No. 98 of 2010 and the consequent constitutional application therein.

b. A declaration that the respondent's right to fair hearing to have a dispute that should be resolved by the application of the law and decided in a fair hearing before a Court of Law, as guaranteed by Article 50(i) of *the Constitution* of Kenya has been and/or will be infringed by permitting the appellants to rein to carry out further audits/compliance checks upon the respondent prior to the hearing and determination of High Court Misc. Application No. 98 of 2010 and the Constitutional application thereunder.

c. A declaration that the respondent's right to information and means to access justice and defend itself/herself in a fair trial as safeguarded under Articles 35, 48 as read together with Article 50 of *the Constitution* of Kenya have been and/or will be infringed by the actions of the appellants to carry out further audits/checks upon the respondent prior to the determination of the High Court Misc. Application. No. 98 of 2010 [Mombasa].

d. A declaration that the refusal or failure on the part of the appellants to release and return to the respondent the remainder of the seized documents, files, software, books, materials, computers and equipment violates Articles 35,47, 48 and 50 of *the Constitution* thus rendering the Tax Demand Notices Ref: KRA/CUS/MIB/INV/2/2007 dated 30th May, 2007 and 26th June, 2007, Ref: KRA/1006/14 dated 8th November,2007, 10th July, 2008, 16th July, 2008, 18th August, 2010 and the Notices under Section 42 of the Tax Procedure's Act, 2015 dated April 28, 2016 invalid, a nullity and unclaimable/unpayable.

e. A declaration that the Tax Demand Subject of Notices Ref: KRA/CUS/MIB/INV/2/2007 dated 30th May, 2007, 26th June, 2007 and Ref:KRA/1006/14 dated 8th November, 2007, 10th and 16th July, 2008, 18th August, 2010 and the Notices under Section 42 of the Tax Procedure's Act, 2015 dated April 28,2016 are invalid, a nullity and unclaimable/unpayable on account of the appellants' violation/infringement of the respondent's rights under Articles 35, 47, 48 and 50 of *the Constitution*.

f. That by way of Judicial Review an Order of PROHIBITION to issue to prohibit the appellants their officers, agents, servants, authority and/or any other body appointed for that purpose from executing, pursuing, considering, issuing, action upon and/or in any other manner whatsoever or howsoever from effecting and/or demanding local taxes, to wit, Income Tax and Value Added Tax as set out in their letter dated 18th August, 2010 for the recovery of these alleged taxes totalling the alleged sum of Kshs.2,363,606,424.69or any part thereof.

g. That by way of Judicial Review an Order of PROHIBITION to issue prohibiting the appellants, their officers, agents, servants, authority and/or other body constituted/appointed for that purpose and/or acting on behalf of the Respondent for that purpose and/or acting on behalf of the appellants for that purpose from proceeding with any threatened demand and enforcement action against the Applicant for the alleged sum of Kshs. 2,363,606,424.69 or any part thereof, allegedly due to the appellants.

h. That by way of Judicial Review an Order of PROHIBITION to issue prohibiting the appellants, their officers, agents, servants, body and/ or authority, including the Kenya Police

from arresting, threatening to arrest the Applicant's Directors namely, ASHOK DOSHI and AMIT DOSHI and or their employees with regard to the alleged assessed taxes of Kshs. 2,363,606,424.69 allegedly owed to the appellants.

i. That by way of Judicial Review an Order of MANDAMUS to Issue to compel the RESPONDENTS to release/return the Applicant's records, documents, files, computers, software and everything the appellants seized and detained on or about the 26th March,2007 and March, 2003.

j. An order of Judicial Review do issue to prohibit the appellants, their agents, servants, officers and/or body/authority appointed for that purpose from executing, pursing, acting upon or in any manner whatsoever effecting the audit/checks contemplated in the appellants letter dated 11th October, 2011 and 18th April, 2012.

k. An order of certiorari do issue removing to the High Court for the purpose of being quashed the Respondent's letter dated 11th October, 2011 and 18th April, 2012.

l. Damages for the violation/infringement of the respondent's constitutional rights.

m. The Honourable Court to issue such orders and give such directions as it may deem fit and necessary to meet the ends of justice.

n. The costs of the Petition be awarded to the respondent.

3. According to the respondent, during the months of March and April 2007, the appellants, without any warrants, court order or notice, carried several raids on the respondent's premises where it operated bonded warehouse No. 204 and carted away files, computers, equipment, software materials and books of accounts (hereinafter referred to as documents, equipment and data) which they considered evidenced tax evasion; that it was alleged that the said evasion was by diverting transit goods into the domestic market; that, contrary to the relevant legal provisions, no copies were left behind during that process; that the said seizure was followed with a tax assessment and demand for Kshs. 124,720,037 on account of diverted exports into the local market; that, simultaneously with the demand, the appellants seized and locked under seal the respondent's bonded warehouse No. 204 and retained and refused to cancel some seven (7) insurance bonds in favour of the appellant in various sums aggregating to Kshs 276,000,000; and that the appellants refused to renew the respondent's license to operate the bonded warehouse.

4. It was disclosed in the petition that, in light of what the respondent considered to be unfairness and arbitrariness, the respondent challenged the appellants' action by instituting proceedings in Nairobi Misc. Application No. 192 of 2008, Nairobi Misc. Application No. 1244 of 2007, Misc. Application No. 1062 of 2007 and Misc. Application No. 1243 of 2007. The respondent contended that while the question of the demanded tax was still pending in court, the appellants demanded from the respondent Kshs. 2,363,606,424.69 and 73,282,781 for taxes on account of diverted imports and domestic taxes respectively; that all the demands were responded to and contested by Ms. Strategic Tax Services on behalf of the respondent; that, by this time, the appellants had by a letter dated 8th March 2010 absolved the respondent from liability to pay the demanded sum subject of Misc. Application No. 1062 of 2008; that, despite the absolution and cancellation of bonds intended and purposed to secure the taxes, the appellants persisted with their demand for taxes based on the same facts; and that this conduct was capricious, arbitrary, unreasonable, oppressive and ultra vires.

5. The respondent complained that the appellants continued in such persistence and in demanding audits notwithstanding the fact that they were withholding the documents, equipment and data seized,

and which had the information on payable taxes; that in issuing notices for audit while withholding the requisite information, the appellants negated and acted contrary to the constitutional principles embodied in Articles 47 and 50 of *the Constitution* and thus demonstrated unreasonableness in that there could not be a fair and genuine audit prior to and before returning the materials; that withholding the books and materials for a period in excess of 10 years was unreasonable and contrary to the principle of legitimate expectation by the respondent since no meaningful and fair investigation could ensue; and that the appellants' actions were an affront to the respondent's right to fair administrative action and the right to access information.

6. According to the respondents, notwithstanding the recording of a consent in Judicial Review Application No. 98 of 2010 for the return of all the materials and books seized, the order was not fully complied with, and only a small fraction of the items was returned. Therefore, it was asserted that the respondent has been disabled in its ability to respond to the demand and the ensuing dispute, and thus denied its right under Article 48 of *the Constitution*. It was the respondent's case that its rights under various Articles in the bill of rights and, in particular, Articles 35, 47, 48 and 50 were violated and continued to be threatened with violation.

7. The petition was supported by the affidavits of Ashok Doshi sworn on 8th May 2012, 27th October 2017 and 12th March 2018 as well as one sworn by one George Mkua Obira on 12th March 2018. A summary of the said affidavit is what is stated hereinabove.

8. The appellants opposed the petition by way of affidavits sworn by Doreen Mbingi on 11th February 2011, Cyrell Waigunda on 6th July 2012 and three other affidavits sworn by Justus Musan Kiuvu, Nelly Kasiso Ngovi and Fridah Gakii Mwongera and filed with the amended petition on the 26th February 2018.

9. According to Justus Musau Kiuvu, the manager of 1st appellant's Investigations and Enforcement department, the raids were legally carried out at the respondent's premises on 23rd March 2007 and in early April 2007 pursuant to the provisions of sections 56(1) of the *Income Tax Act*, sections 30 and 31 of the VAT Act and 157 of the East African Community Customs Management Act (EACCMA); that those provisions permit the 1st appellant to demand and take into its possession any documents necessary for the commissioners' examination and determination of a tax payer's due taxes; that the said provisions permit the 1st appellant to demand documents from any person, to enter such person's premises without warrants and demand documents and take possession thereof including locking up the premises; that there was no violation of the respondent's rights; that the assessments and tax demands made were lawful and not amenable to being faulted; that the majority of the seized documents were returned and inventories made, and that the returned documents were sufficient for the respondent to defend itself against the assessment; that it was the duty of the respondent to point out which of the unreturned documents were more important to it and this the respondent had not done; that the assessment was done under three tax heads and not arbitrary, but was based on the documents seized, which revealed that there had been under-declaration of the taxes due; that the dispute was largely a tax dispute and not a matter for constitutional reference and therefore ought to have been dealt with by the Tax Appeals Tribunal as opposed to a constitutional court; and that in deference to the principle of exhaustion, the court should have declined to assume jurisdiction. It was urged that the petition be dismissed.

10. In his replying affidavit, Nelly Kasiso Ngovi, an Investigating Officer with the 1st appellant, deposed that she took part in tracing and retrieving the subject documents, but not in the seizure; that, indeed, there was a seizure on the 23rd March 2007, and that an inventory was prepared and duly signed by the appellant's officers as well as the 1st respondent and its auditors; that the reason for seizure was

to investigate suspicion of non-payment of due taxes by the respondent; that part of the documents were returned to the respondent on or about 14th February 2014 and an inventory thereof prepared and signed by all concerned; that there was a challenge in tracing and recovering all the documents belonging to the respondent, but that a huge number was handed over to the respondent on 25th July 2017 when an inventory was made out of the returned and unreturned documents; that, in the circumstances, there was partial compliance with the consent recorded for the return of the documents.

11. Fridah Gakii Mwongera, an Assistant Manager in the department of Investigations and Enforcement of the 1st appellant, tasked with the supervision, tracing and retrieving of the subject documents, adopted the same position.

12. In his judgement, the learned Judge (P. J. O Otieno, J.) identified the following issues his determination:

    a. Whether a constitutional question has been established.

    b. Whether the respondent was entitled to an order for the release of all the documents, files, computer hard and software.

    c. Whether the seizure of the items was in compliance with the tax statutes the 1st appellant is mandated to administer and enforce.

    d. Whether the respondent's constitutional rights were infringed or violated by the respondent.

    e. Is the petitioner entitled to the declarations and judicial review orders sought or any of them.

    f. Whether the respondent was entitled to any damages.

    g. What orders should be made as to costs.

13. Appreciating that the prayers in the petition were intertwined and interrelated, the learned Judge adopted a global analysis of the evidence in answer to all the issues.

14. On the competence of the petition, the learned Judge, while appreciating that not every violation qualifies for litigation as a constitutional issue, found that the facts of the case as narrated by the respondent were not materially disputed by the appellants; that the point of departure was whether, in carrying out its statutory mandate, the 1st appellant did so according to law; that the fact of seizure was unequivocally admitted by the 1st appellant; that the fact that the materials taken were necessary to help the 1st appellant in execution of its mandate was also an admitted fact; that it was not in dispute that parties agreed before court and a consent was recorded on 8th June 2017 for the release of the materials within 35 days from that date, but that only partial release was made; that, by the time the matter next came back to court on 14th July 2017, the return of the remaining materials had not been effected; that, on that day, the appellants' counsel assured the court that all the documents and materials had been traced and found, and that the 1st appellant was ready and willing to hand the same over; and that as a consequence of such an assurance, the matter was once again adjourned on 25th July 2017.

15. The learned Judge noted that the parties agreed on a handing over exercise for which they prepared two inventories, one for returned documents and the other for the documents yet to be returned; that those inventories were common to the parties from which it became apparent that an agreed number or quantity of the material was yet to be released to the respondent; that the consent was not only a contract but also a court order, which remained undisturbed, and that the parties were bound by it; that the rule of law demanded that the documents and materials which had not been returned to the respondent be returned to it; and that, pending that return, the respondent's right to information

and fair administrative action had been and continued to be violated and threatened with continued violation.

16. The learned Judge noted the 1st respondent's position that the unreturned material was not relevant nor material to the respondent for purposes of answering to the assessment and tax demands and considered that position to be self-defeating in that the revenue statutes which empower the respondent to seize materials do circumscribe the purpose and object of such seizure. He based his decision on sections 30 and 31 of the *Value Added Tax Act*, section 56 of the *Income Tax Act* as well as sections 159(2) and 235 of the East African Community Customs Management Act to underscore the fact that a proper or authorised officer may only demand and take possession of materials as may be relevant to reveal full information on tax liability and compliance with revenue collection statutes; that those Revenue Statutes also impose a duty on the 1st appellant to avail to the owner of the seized documents certified copies thereof, in cases where it cannot return the documents; that, under section 60 of the *Tax Procedures Act*, a duty is imposed for the return of seized documents and materials within 6 months from the date of seizure; that nowhere in all the relevant statutes is it provided that the seizure results in loss of ownership rights by the taxpayer, and neither is it provided that the 1st appellant acquires any proprietary interests in the seized materials; that, having admitted the seizure, it cannot be contended that the material seized was immaterial or irrelevant since the authorised office can only seize them if he had reasonable grounds to believe in their relevance; and that, being relevant for the investigation and execution of the 1st appellant's mandate, they must equally be relevant to the respondent for the purposes of resolution of any tax dispute, including any contestation over the assessed and demanded tax.

17. As regards the contention by the appellants that release of the documents, equipment and data to the respondent, could prejudice the investigations and recovery of the taxes, the learned Judge was unimpressed by the fact that it had taken the appellants more than 10 years to decide on what action to take in the matter. In the learned Judge's view, the concern that the release of the documents would prejudice investigations could not be valid as the 1st appellant always had the option to make and retain copies in a lawful way, but did not have the option of forfeiture or merely confiscating the documents and materials for good. In the learned Judge's view, even if that position was supported by the law, it would still not be a valid and must be taken to have been spent the moment parties agreed to have the documents released.

18. The learned Judge found that, in refusing to return the respondent's documents, equipment and data, the appellants violated the respondent's rights under Article 40(2)(b) of *the Constitution*, as it amounted to unlawful deprivation of property and compromised the respondent's capacity to present its case, thus denying it a fair hearing; that it would not be just to allow the appellants to push on with their demand while continuing to hold the documents, equipment and data that may be of assistance to the respondent in the audits; that the respondent demonstrated past violation as well as threat to future violation of its rights under Articles 35, 47, 48 and 50; and that, for that reason of violation, it was entitled to reliefs from the court.

19. In arriving at that determination, the learned Judge clarified that the decision did not amount to a prohibition against the appellants from ever collecting the tax due from the respondent as that statutory mandate must be executed, but emphasised that it must done in compliance with statute law and *the Constitution*. The Judge expressed himself as follows:

> "If today the respondent deems it right to return the outstanding books and materials the petitioner will be obligated to answer any queries raised and assessment of tax demanded. For avoidance of doubt, nothing in this judgment should be deemed to hinder the respondents

mandate to engage with the tax payer for the period outside that of which documents were taken and such engagement must remain within the law."

20. On general damages, the learned Judge found that, although the violation was capable of mitigation in the past, the 1st appellant chose not to; that a constitutional remedy goal is not compensatory, but the vindication of a violated right and to avoid further violation. In the circumstances, the learned Judge awarded the respondent the sum of Kenya Shillings Two Million as damages for violation by the 1st appellant.

21. In conclusion, the learned Judge granted the following reliefs:

    a. An order of mandamus directed at the appellants compelling them to return and release to the respondent all records, documents, files, computers, software and everything the 1st appellant seized and detained from the petitioner's premises between march 2003 and 26.03.2007.

    b. A declaration that the respondent's right to fair administrative action as guaranteed by Article 47, right to a fair hearing guaranteed by Article 50[1], right to information guaranteed by Article 48 as read with 50 of *the Constitution* have been and will continue to be violated and infringed by any audit/ test compliance by the appellants unless all the material seized from the petitioner's premises and subject to the litigation in JR 89 of 2010 are released.

    c. A declaration that the Tax Demand Subject of Notices Ref: KRA/CUS/MIB/INV/2/2007 dated 30th May, 2007, 26th June, 2007 and Ref:KRA/1006/14 dated 8th November, 2007, 10th and 16th July, 2008, 18th August, 2010 and the Notices under Section 42 of the Tax Procedure's Act, 2015 dated April 28,2016 cannot be legally enforced against the respondent unless and until all the materials subject to the order of mandamus issued herein shall have been released.

    d. By way of Judicial Review an Order of prohibition to issue to prohibit the appellants their officers, agents, servants, authority and/or any other body appointed for that purpose from executing, pursuing, considering, issuing, action upon and/or in any other manner whatsoever or howsoever from demanding and or enforcing any demand, in anyway and manner including arrest of the petitioner's directors for Income Tax and Value Added Tax as set out in their letter dated 18th August, 2010 for the recovery of the alleged taxes totalling the alleged sum of Kshs. 2,363,606,424.69 or any part thereof unless and until the order of mandamus issued herein shall have been complied with.

    e. Only If the 1st respondent shall not have released the records in terms of the order of mandamus issued herein, and upon the lapse of 60 days from today, an order of certiorari do issue removing into the High Court, for the purpose of being quashed, the 1st appellant's letter dated 11th October, 2011 and 18th April, 2012.

    f. Kshs 2,000,000 being damages for the violation/infringement of the respondent's constitutional rights.

    g. The costs of the petition awarded to the respondent.

22. Aggrieved by that decision, the appellant lodged the present appeal in which it is contended in the amended memorandum of appeal dated 4th April 2022 that the trial court erred in law and in fact: in holding that the respondent did not have access to the relevant documents affecting its tax assessment of Kshs 2,303,606,424.69 without regard to the fact that the appellants submitted all relevant documents to the court and served the same upon the respondent as annextures to the replying affidavit sworn by Doreen Mbingi on 11th February 2011; by failing to appreciate that the provisions of sections 73,

74 and 77 of the *Income Tax Act* allowed and empowered the appellants to raise the tax assessment of Kshs 2,303,606,424.69; by failing to appreciate that the appellants seized the respondent's documents pursuant to sections 56(1) of the *Income Tax Act*, sections 30 and 31 of the *Value Added Tax Act* and section 159 of the East African Community Customs Management Act; by failing to consider that the appellants, in fulfilment of carrying out its statutory duty to investigate suspected tax evasion schemes, was empowered to seize and retain the respondent's documents with all material necessary for the appellants to determine the taxes evaded; in conditionally quashing audits contemplated in the appellants' letters dated 11th October 2011 and dated 18th April 2012; by failing to fully appreciate the statutory mandate of the appellants as per section 5 of the *Kenya Revenue Authority Act*, and section 56 of the *Income Tax Act* and section 30 of the *Value Added Tax Act*; in holding that the respondent was entitled to both mandamus orders compelling the return of the seized materials and damages of Kshs 2,000,000, which orders are punitive in nature, serving to punish the appellant for merely fulfilling its statutory duty; by introducing, in his judgement, extraneous evidence, which was never adduced at the hearing by the appellants nor the respondent; in holding, without any basis, that the appellants intentionally failed to return all documents and equipment that belonged to the respondent; by failing to appreciate the weighty tax issues involved in this case together with high revenue yield, while ignoring that all relevant financial documents had been returned; and by failing to consider weighty issues raised in the sworn affidavits by the appellants with respect to the tax assessment of Kshs 2,303,606,424. 69 and the issue of documents in this case.

23. It was sought to have the appeal allowed; the judgement of the High Court and all consequential orders and awards made on 25th September 2020 be set aside and substituted for an order dismissing the same; that the tax assessment of Kshs 2,303,606,424.69 be upheld; and that the appellant be awarded the costs of the appeal and in the High Court.

24. We heard this appeal on the Court's GoTo Meeting virtual platform on 27th February 2024 during which learned counsel, Mr. Nick Osoro held brief for Ms. Odundo for the appellants while learned counsel, Mr. Mogaka, appeared for the respondent. Learned counsel relied on their written submissions, which they briefly highlighted.

25. The appellants' submissions were dated 9th June 2022 and were filed by Beatrice A. Odundo, Advocate, in which ground 2 in the memorandum of appeal was dropped while the rest of the grounds were summarised as follows:

    i. whether the learned Judge erred in law and in fact in finding that the respondent's constitutional rights had been infringed (grounds 1, 3, 4, 8, 9 and 10);

    ii. whether the learned Judge erred in law and fact in arriving at the conclusion that the respondent was entitled to judicial review orders (grounds 5 and 6);

    iii. whether the trial court erred in awarding the respondent damages of Kshs 2,000,000 (grounds 6 and 7); and

    iv. to whom should the costs be awarded.

26. In arguing the grounds comprised in (i) above, it was submitted that the appellants undertook their task of ensuring that taxes were duly paid pursuant to Article 210(1) of *the Constitution*; that from the affidavit sworn on 21st September 2010 in support of the judicial review application by Ashok Doshi, it was stated that the period covered by the appellants was January 2003 to March 2007 and that the documents were seized on 26th March 2007 and early April 2007; that it was unreasonable, illogical and utterly absurd for the learned Judge to state that the documents requested by the 1st appellant for the period January 2010 to March 2012 were seized by the 3rd appellant on 26th March

2007; that the respondent's right to information under Article 35 of *the Constitution* was not violated and to the contrary, the respondents were at all stages informed by the appellants of their intention to commence audit and compliance checks; that the documents being demanded by the respondent for the period covering January 2010 to March 2012 were not in possession of the appellants and ought to be produced by the respondent for the purpose of carrying out compliance checks and audits; and that pursuant to Article 210 of *the Constitution*, every citizen must pay the taxes however painful or huge it may be (see Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64 and Republic v Commissioner of Domestic Taxes, Large Tax Payer's Office exp Barclays Bank of Kenya Ltd [2012] eKLR); that the learned Judge erred in his finding in paragraphs 36 and 37 of the judgement by finding that the documents seized in 2007 were relevant to the period of 2010 to 2022.

27. According to the appellants, the respondent's rights under Articles 40, 47 and 50 of *the Constitution* were not infringed by the act of securing the premises and seizure of the respondent's documents and equipment, which was done in accordance with the law.

28. As regards the second set of grounds of appeal (grounds 5 and 6), it was submitted that the learned Judge erred by issuing the order of prohibition, certiorari and mandamus against the appellants based on the failure to release all the documents to the respondent; that the seizure of the respondent's documents, equipment and data and finally issuing of tax assessment was justified in law; that on the authority of the case of Municipal Council of Mombasa v Republic & Umoja Consultants Limited [2002] eKLR, the court should not sit as an appellate court over the decision of the appellants; that the appellants acted in accordance with the powers conferred upon them by the law.

29. According to the appellants, instead of challenging the actions of the appellants through the procedure laid down under the *Value Added Tax Act* by lodging an appeal with the Tax Appeals Tribunal after the assessment, the respondent instead sought judicial review orders; that, on the authority of the case of the Speaker of the National Assembly v James Njenga Karume [1992] eKLR, the respondent should have resorted to the procedure prescribed by the law; that, based on the respondent's previous history of non-compliance, tax evasion, malpractices and irregularities, the Court should adopt the position in Kenya Ports Authority v Fadhil Juma Kisuva [2017] eKLR that no party should gain from an illegality; that, on the authority of Kenya Revenue Authority v Keroche Industries Limited Civil Appeal No. 2 of 2008, Grain Bulk Handlers Ltd v Kenya Revenue Authority & 2 Others [2018] KLR and Kenya Revenue Authority & 2 Others v Darasa Investments Limited Mombasa Court of Appeal Civil Appeal No. 24 of 2018, there being alternative dispute resolution mechanisms provided in law, the respondent ought not to have sought the aid of the High Court for reliefs in judicial review; that an order of certiorari cannot, in the absence of bad faith, issue to quash a notice made pursuant to statutory provisions and regulations; that the appellants had not acted in excess of jurisdiction or in contravention of the rules of natural justice; and that the court should not concern itself with the merits of the case (See Pili Management Consultants v Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007).

30. Regarding the order of prohibition, it was submitted, on the authority of Republic v Kenya National Examination Council [1997] eKLR, that such an order can only issue to prevent a contemplated decision and not one already made such as in this case where the assessment of Kshs 2,363,600,424.69 had already been done. Regarding the order of mandamus, it was submitted that the respondent did not demonstrate what statutory duty the appellants failed to perform, and for which the court ought to have granted relief; that the appellants explained why some of the documents belonging to the respondent that were seized could not be released, and that compelling them to release the same was unreasonable as they could not be traced.

31. Without expounding, it was submitted that the learned Judge introduced extraneous evidence concerning the appellants which was never adduced at the hearing.

32. On damages, it was submitted that although the award of damages is discretionary and the appellate court can only interfere where it is shown that the trial court took into account an irrelevant factor or left out of account a relevant one, or that the award is wholly an erroneous estimate of the damage, in this case the respondent did not prove its case and, therefore, it was wrong for the trial court to have awarded damages based on irrelevant facts. To support this line of submissions, the appellant relied on Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] eKLR. It was submitted that, in this case, the basis of the award and the violation of the respondent's rights, were not proved. According to the appellants, the sum awarded of Kshs 2,000,000 was so inordinately high in the circumstances of the case, and therefore an erroneous estimate warranting intervention. It was submitted that the trial court did not show how it arrived at that figure and, based on the case of Ol Pejeta Rancing Limited v David Wanjau Muhoro [2017] KLR, it was contended that it was necessary that the factors that the court took into account be stated; and that, to award the said damages while also compelling the appellants to return the documents seized, was punitive.

33. On costs, we were urged, on the authority of Jasbir Singh Rai & 3 Ors v Tarlochan Sigh Rai & 4 Ors [2014] eKLR, to award costs to the appellants.

34. On behalf of the respondents, the firm of Mogaka Omwenga & Mabeya Advocates filed submissions dated 22nd February 2024. It was submitted that the actions and inactions on the part of the appellants in raiding the respondent's premises, impounding the respondent's documents and equipment, and carting them away without notice and without supplying the respondent with certified copies thereof, was contrary to the rule of law and contravened the relevant tax laws; that while the East African Community Customs Management Act, 2004 (EACCMA) at section 159[2] read together with sections 234[4], 235 and 236 gives the 1st appellant a discretion to inspect records and documents and to take copies of any entries and seize and detain the same if in its opinion it may afford evidence of the commission of an offence under the Act, it makes it mandatory that the owner is entitled to a copy of the document certified under the hand of the responsible officer; that the Value Added Tax Cap 476 (VAT Act) in section 30(1) (b) read together with section 31[a] obligates the Commissioner or an authorized officer to retain the books, documents, records and information produced for such period as may be reasonable for their inspection and examination, and for taking copies of the produced and impounded records, books and data information; that the *Income Tax Act* Cap 470 in section 56(a) read together with 56(b) obligates a tax• payer, on being served with a written notice, to produce to the commissioner documents and records for examination and inspection, and that the commissioner may take copies of any entries therein and retain them for such a period as may be reasonable for examination; and that the actions and inactions of the appellants were unfair, irrational, illegal, capricious, unreasonable, in bad faith and an abuse of power intended to disadvantage and arm-twist the respondent.

35. It was observed that the appellants' case was that they scrutinized, reviewed and made an in• depth forensic analysis of the impounded records, documents, books, data and materials and extracted therefrom information of alleged tax evasion resulting in the issuance and service on the respondent Tax Demand Notices dated 30th May 2007, 26th June 2007, 8th November 2007, 10th July 2008 and 16th July 2008; that the appellants ought to have returned the seized materials after they were through with them; that, although Messrs. Strategic Tax Services Limited requested on behalf of the respondent release of all the seized and impounded documents, equipment and data, to enable them accurately respond to the tax demand notices issued and demonstrate compliance with tax laws, the appellants failed to return them or supply the respondent with certified copies.

36. In support of its submissions, the respondent relied on the case of Republic v Kenya Revenue Authority Ex parte Cosmos Limited [2016] eKLR where the court held that a power which is abused should be treated as a power which has not been lawfully exercised. According to the respondent, the appellants demonstrated a callous disregard for the rights of the respondent behaving as if they had no obligation to return the records and data and failed to provide any explanation as to why they had not complied with the stipulations set out in *Income Tax Act* Cap 470, EACCMA and VAT Act as regards to, taking of copies by a proper officer or supplying the respondent with certified true copies of the records and books when seized and/or soon thereafter within reasonable period. Reliance was placed on the case of Fleur Investments v Commissioner of Domestic Taxes & Anor [2018] eKLR for the proposition that persons charged with statutory powers and duties ought to exercise the same reasonably and fairly and that, where allegations of abuse of power is made, the court is perfectly entitled to intervene.

37. It was noted that the aforementioned tax statutes provide f or retention of a tax payer's records within a reasonable period; that, in the instant matter, records and data were seized and impounded on 26th March 2007 and in April 2007, resulting to tax notices dated 30th May 2007, 26th June 2007, 8th November 2007, 10th July 2008 & 16th July 2008; that the Judicial Review Application was filed over three [3] years from date of seizure, two [2] years after issuance of last tax demand of 16th July 2008; that Constitutional Petition No. 49 of 2012 was lodged six [6] years after 26th March 2007, which was the date of seizure and impoundment; that the unexplained inordinate delay involved in the release of records and documents can only be said to be unfair, whimsical, capricious, irrational, unreasonable, abuse of power and breach of rule of law; and that the principle of legality dictates that the exercise of public power is legitimate only when within the bounds of the law. The case of Republic v Kenya Revenue Authority Ex parte Cosmos Limited [2016] eKLR was cited for the proposition that, if public bodies fail to act fairly, the High Court may intervene either by prerogative order to prohibit, quash or direct a determination as may be appropriate, or by declaring the duty of the agency. The case of Kenya Revenue Authority v Export Trading Co. Ltd [2022] KESC 31 [KLR] in which the Supreme Court emphasised the need to act fairly and lawfully.

38. The respondent relied on the case of Timothy Njoya v Attorney General & Anor [2017] eKLR in which the decision of Ncgobo, J (as he then was) in Brummer v Minister for Social Development a nd Others (10013/07) [2009] ZAWCHC 22 was cited in support of the importance of facilitating the public to access information held by the State in order to promote transparency, and for the realisation of the rights guaranteed in the Bill of Rights. According to the respondent, it was denied the right to access information when its request for return of the seized documents, equipment and data, was not complied with by the appellants.

39. It was further submitted that the consent recorded on 8th June 2017 for the release of the d ocuments, materials and equipment seized from the respondent had a contractual effect which, pursuant to the decision in Wasike v Wamboko [1988] KLR 429, could only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled, and which are not carried out. It was contended that, save for extension of time within which to comply, the contents of the consent order were neither set aside nor reviewed, and were therefore binding on the parties. It was submitted based on this Court's decision in Shimmers Plaza Limited v National Bank of Kenya [2015) eKLR that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the due administration of justice, a position reinforced in the case of Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatial Shah & Another- Civil Application No. 39 of 1990.

40. The respondent asserted that the impounded records, documents and data remain their property which is protected under Article 40 of *the Constitution* as they were not the subject of forfeiture or destruction; that no justifiable grounds were given as to why the said records, documents and data were in continuous possession and control of the appellant; that the acts of the appellants violated the right to access to information, private property, fair administrative action, access to justice and fair hearing guaranteed under Articles 35, 40, 47, 48 & 50 of *the Constitution*; and that the Learned Judge did not err in awarding damages of Kshs.2,000,000 for the violations or infringements. In this regard, the respondent relied on the case of Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others (2012] eKLR where the Court invoked the doctrine of adverse inference that, if such evidence was produced, it would be adverse to such a party where a party has custody or is in control of evidence which that party fails or refuses to tender or produce.

41. According to the respondent, the appellants in the discharge of their statutory duties ought to carry out their duties diligently, including that of ensuring that tax payers impounded records, documents and data in their possession and custody is secure and safe to be restored to the owners within reasonable time as required by the tax statutes. In this regard, reference was made to the case of Fleur Investments v Commissioner of Domestic Taxes & Anor (2018] eKLR on the responsibility placed on the appellants to take proper charge of such documents and ensure that they are kept in safe custody.

42. Since the appellants' earlier position was that all the impounded records as held by them were relevant as they afforded evidence of commission of an offence of tax evasion, and that they were relevant and being held to be produced before a court of law in an intended criminal prosecution of the respondent and its directors, it was submitted that it was irrational for the appellants to take the position that what has been retrieved and returned is sufficient for the Respondent's purposes, and that those not returned are irrelevant and immaterial and no longer important. On the authority of Republic v Institute of Certified Public Secretaries of Kenya, Ex parte Mundia Njeru Geteria [2010] eKLR, t he respondent s u b m i t te d t h a t t he a p p e l l a n t s must not be allowed to approbate and reprobate.

43. It was therefore urged that the High Court properly intervened as regards the appellants' violation of the respondent's rights pursuant to the raid, seizure/impoundment and carting away of records and documents on 26th March 2007 and April 2007 to date for the tax period between 2001 to April, 2007. A c c o r d i n g l y , orders (a), (b), (c), (d), (f) and (g) in the High Court's decision of 29th September 2020 should be upheld for the tax period between January 2001 a n d April, 2007 with costs.

44. However, the respondent conceded the a ppeal as regards Audit/Compliance Notices dated 11th October 2011 limited to tax period between May 2007 a n d December 2009 and t h e o n e dated 18th April 2012 for t h e period b e t w e e n January, 2010 to December, 2012.

45. We have considered the issues raised before us in this appeal.

We agree with the appellants that the issues that fall for our determination in this appeal are as hereunder:

i. whether the jurisdiction of the High Court was properly invoked;

ii. whether the learned Judge erred in law and in fact in finding that the respondent's constitutional rights had been infringed;

iii. whether the learned Judge erred in law and fact in arriving at the conclusion that the respondent was entitled to judicial review orders;

iv. whether the trial court erred in awarding the respondent damages of Kshs 2,000,000; and

v. to whom should the costs be awarded.

46. Although the petition was determined on the basis of affidavit evidence, it is our view that on a first appeal, the principles that apply to oral hearing largely apply to cases where a determination is arrived at based on affidavit evidence subject to the rider that the caution that applies to the court's handicap of not hearing and seeing the witnesses does not apply to cases where there was no oral hearing. Nevertheless, the court still has to reconsider the evidence, whether in an affidavit form or presented orally evaluate it and draw own conclusion of facts and law (See Selle & another vs. Associated Motor Boat Co. Ltd & others (1968) EA 123). Having done that, the findings of fact by the trial court must be given their rightful place, and the first appellate court will only depart from such findings if they were not based on evidence on record, and where the said court is shown to have acted on the wrong principles of law as was held in Jabane v Olenja (1986) KLR 661; or where its discretion was exercised injudiciously as was held in Mbogo & Another v Shah (1968) EA 93.

47. The first issue relates to the jurisdiction of the court in entertaining the matter. It was contended that the provisions of the *Tax Procedures Act* prescribe the procedure for challenging assessment of tax and that, there being alternative dispute resolution mechanisms provided in law, the respondent ought not to have sought the aid of the High Court in seeking redress. On their part, the respondent insisted that, considering the nature of the allegations made and the reliefs sought, the right forum for their determination was the High Court.

48. It is true that section 51 of the *Tax Procedures Act* provides for objection to a tax decision to the Commissioner. Section 52 provide for an appeal against the decision on objection to the Tax Appeals Tribunal. *The Constitution*, in Article 159(2), provides that:

> In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> a. justice shall be done to all, irrespective of status;
>
> b. justice shall not be delayed;
>
> c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
>
> d. justice shall be administered without undue regard to procedural technicalities; and
>
> e. the purpose and principles of this Constitution shall be protected and promoted.

49. Article 159(2) (c) therefore enjoins the court to promote alternative dispute resolution mechanisms. Where such mechanisms are provided by statute, resort to them is not by choice but, depending on the language used, may be obligatory. The spirit of this Article was captured before the 2010 Constitution was promulgated in the afore-cited case of Speaker of National Assembly vs Njenga Karume [2008] 1 KLR 425, where this Court held that:

> " Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure....In our view, there is considerable merit in the submission 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. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."

50. The principle of availability of alternative remedies has given rise to the doctrines of exhaustion, judicial restraint, abstention and avoidance. This Court, in a decision made after the 2010 Constitution in Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR, while expressing itself on the doctrine of exhaustion, held 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

51. In the same vein, the Supreme Court in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023*) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) held that:

> " [106] The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in United Bank of India vs Satyawati Tondon & Others; (2010) 8 SCC to state as follows:
>
> > '44. ...we are conscious that the powers conferred upon the High Court under Article 226 of *the Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of *the Constitution*.
> >
> > 45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of *the Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.'"

52. Dealing with judicial abstention, the Supreme Court cited its earlier decision in Benson Ambuti Adega & 2 others vs. Kibos Distillers Limited & 5 others SC Petition No. 3 of 2020 [2020] eKLR in which it expressed itself as follows:

> "(51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine

certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue."

53. The question of exhaustion of statutory remedies was also settled by the Supreme Court of Kenya in Albert Chaurembo Mumba & 7 others vs Maurice Munyao & 148 Others [2019] eKLR in the following words:

"(116) The foregoing verdict also finds support in an adage principle in administrative law of "Exhaustion of Administrative Remedies" and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. see Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd [2008] eKLR Narok County Council case v Trans Mara County Council [2000] 1 EA 161 Kones vs Republic & Another ex parte Kimani wa Nyoike & 4 Others (2008)3 KLR (EP); Speaker of the National Assembly vs Njenga Karume (2008)1 KLR (EP) 425, Francis Mutuku vs Wiper Democratic Movement - Kenya & Others [2015] eKLR; David Ochieng Babu v Lorna Achieng Ochieng & 2 others [2017] eKLR among other cases not referred to."

54. However, in order for a legal provision relied upon to support the doctrine of exhaustion and constitutional avoidance to pass muster, it ought to meet certain tests, and these are that the reliefs prescribed in the alternative forums must be available, effective and sufficient and, as set out in the decision of the African Commission of Human and People's Rights in the case of Dawda K. Jawara vs. Gambia ACmHPR 147/95- 149/96:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of

local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

55. The Supreme Court in *Nicholus v Attorney General & 7 others* (supra) similarly explained that:

> " [107] Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet. No. 15 of 2020)* [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment)."

56. The issue before us is whether the dispute between the appellants and the respondent was purely an objection to a tax decision. The respondent's case, as set out at the commencement of this judgement, was not restricted to the tax decision. It encompassed not only the decision itself, but raised issues of violation of the respondent's constitutional rights. We are not to be understood to be saying that mere allegation of violation of fundamental freedoms and human rights suffices for the purposes of bypassing an alternative dispute resolution mechanism. In words of the Court in Harrikinson v Attorney General of Trinidad and Tobago [1980] AC 265:

> " The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

57. Our consideration of the petition reveals that the issues raised therein were not frivolous, vexatious or abuse of the process of court. They raised the issues of the right to fair hearing, protection of the right to property and the right to fair administrative action which, in our view, transcend the assessment made by the appellants. The same applies to the reliefs sought, which included declarations of violation of the respondent's constitutional rights, judicial review reliefs and award of damages. Apart from merely submitting that there was an alternative dispute resolution mechanism provided by statute, the appellants did not address itself to the effectiveness and sufficiency of the reliefs available under that mechanism. We find that, in the circumstances of this case, the mechanism available under the *Tax Procedures Act* were ill equipped to deal with the subject matter of the dispute as well as the reliefs sought. The respondent was well advised to invoke the jurisdiction of the High Court. Accordingly, we find no merit in this ground.

58. The appellants submitted that the respondent's rights under Articles 40, 47 and 50 of *the Constitution* were not infringed by the act of securing the premises and seizure of the respondent's documents and

equipment, which was done in accordance with the law; that the said action was aimed at establishing the authenticity of the respondent's exports and to determine the true value of the respondent's imports as well as the actual values of local sales; that the respondent ought to have enumerated in detail which specific missing documents they wished to rely upon, together with an explanation as to what exactly is contained in those documents or records which would justify a discounting of the taxed amount; that the appellants explained that the bulk of the documents were returned, and that those that were not returned could not be traced, and hence it was unreasonable for the learned Judge to have compelled the appellants to release the documents that could not be traced; that the returned documents constituted the bulk of the financial records, exports imports, sales and documents relating to the respondent's business, some of which were relied upon in raising the assessment, and that they were annexed to the replying affidavits; that this Court should therefore review the judgement of the High Court and set it aside.

59. On the other hand, the respondent's case was that the seized documents were required by it in order to defend itself on the assessment and the allegations made against it by the appellants. In the respondent's view, the relevant law required the appellants to return the said documents or copies thereof to the respondent within a reasonable time, and that the appellants failed to do so.

60. It is not disputed that the appellants are mandated to ensure that taxes are paid, and to take necessary legal steps to ensure that the tax payers meet their statutory obligations. However, if in the course of doing saw they step outside their mandate or do so in a manner not contemplated by law, the court is entitled to intervene. This was the position of the Supreme Court in case of *Kenya Revenue Authority v Export Trading Co. Ltd [2022] KESC 31 [KLR]* in which it was held that:

> " ... The Superior Courts concerned themselves with ensuring that the process of demanding the duty was fair and whether the appellant acted fairly or not. It was the findings that if fair procedure was not followed, every court is bound to come to the assistance of an aggrieved party irrespective of the merits of the allegations against a party, as the High Court and Court of Appeal did. This Court in Martin Wanderi & 106 others v. Engineers Registration Board & 10 others, SC Petition No. 19 of 2015; [2018] eKLR found that the question of legality or the lawfulness of an act lies at the core of Article 47(1) by finding...Where the act done was ultra vires the mandate of the administrative entity, the act is void ab initio and the inquiry stops there as there is an outright violation of *the Constitution*.

61. Sections 30(1)(b) of the *Value Added Tax Act* provides that:

> For the purpose of obtaining full information in respect of the tax liability of any person or class of persons or for any other purposes the Commissioner or an authorized officer may require—
>
> (b) the production forthwith, for retention for such period as may be reasonable for the examination thereof, of any records, books of account and other documents which he may specify;

62. On the other hand, section 31(1) (A) and (b) of the *Value Added Tax Act* provides that:

> 1. An authorized officer may, at all reasonable times, enter without warrant any premises upon which any person carries on business, or in which he has reasonable grounds to believe that a person is carrying on business, in order to ascertain whether this Act is being complied with (whether on the part of the occupier of the premises or any other person) and on entry he may —

a. require the production of, and may examine, mark and take copies of, any record, book, account or other document kept on the premises relating, or appearing to relate, to the provision of any taxable supply;

b. take possession of and remove any record, book, account or other document which he has reasonable ground for suspecting to be, or to contain, evidence of the commission of any offence under this Act;

63. It is clear from the foregoing provisions that the appellants had the right to require the respondent to avail to them any records, books of accounts and other documents as specified by the appellants for the purposes of determining the respondent's tax liability. The appellants also had the right not only to require the production of, and examine, mark and take copies of, any record, books, accounts or other document in the respondent's possession, but to take possession of and remove any record, book, account or other document which they had reasonable grounds for suspecting to be, or to contain, evidence of the commission of any offence under the *Value Added Tax Act*. Section 56 of the *Income Tax Act* is worded in similar terms as section 30 of the *Value Added Tax Act*. However, section 30 expressly provides that the retention ought to be for reasonable period. In this case, the retention seemed to have spanned over several years until the respondent sought the intervention of the court.

64. Sections 159(2) of the East African Community Customs Management Act deals with the production of similar items and provides that:

2. On the production of such books or documents the proper officer may inspect and take copies of any entries in the books or documents; and the proper officer may seize and detain any such book or document if, in his or her opinion, it may afford evidence of the commission of an offence under this Act.

65. Under the said provision, the proper officer may not only inspect and take copies of entries in the books or documents, but may also seize and detain any such book or document.

Section 235 of the said Act provides for the period within which such documents may be required to be produced as 5 years from the date of importation, exportation or transfer or manufacture of the goods in question.

66. Section 60 of the *Tax Procedures Act* reinforces the powers conferred on the appellants by stating that:

1. The Commissioner or an authorised officer shall, with a warrant, have full and free access to any building, place, property, documents, or data storage device for the purposes of administering a tax law.

2. The Commissioner or an authorised officer may secure the building, place, property, documents, or data storage device to which access is sought under subsection (1) before obtaining a warrant.

3. In the exercise of the power under subsection (1), the Commissioner or authorised officer may —

a. make an extract or copy of any documents or information stored on a data storage device to which access is obtained under subsection (1);

b. seize any documents that, in the opinion of the Commissioner or authorised officer, may be material in determining the tax liability of a taxpayer and retain such documents for the period specified in subsection (9);

c. seize and retain a data storage device when a physical copy or electronic copy of information stored on the device has not been provided for in the period specified in subsection (9);

d. require the owner or lawful occupier (including an employee) of a building or place to which access is obtained under subsection (1) to answer questions relating to any document found in the building or place, whether on a data storage device or otherwise, or to any entry in the document, and to render such explanation and give any information that the Commissioner or authorised officer may require in relation to a tax law;

e. require the owner or lawful occupier (including an employee) of a building or place to which access is obtained under subsection (1) to provide access to decryption information necessary to decrypt data to which access is sought under this section;

f. at the risk and expense of the occupier of the premises to which access is obtained under subsection (1), open and examine any package found in the premises; or

g. take and retain without payment such reasonable samples of any goods as the Commissioner or authorised officer may think necessary for the exercise of functions under a tax law.

4. The Commissioner or an authorised officer may require a police officer to be present for the purposes of exercising any power under this section.

5. An authorised officer shall not enter or remain in any building or place if, upon request by the owner or lawful occupier, the officer is unable to produce written authorization by the Commissioner permitting that officer to exercise the powers conferred by this section.

6. The owner or lawful occupier of a building or place to which an exercise of a power under this section relates shall provide all reasonable facilities and assistance to the Commissioner or authorised officer in the exercise of the power.

7. A person whose documents have been seized under this section may examine them and make copies of the seized documents, at that person's expense, during the business hours of the Authority.

8. A person whose data storage device has been seized under this section may have access to the device during the business hours of the Authority on such terms and conditions as the Commissioner or an authorised officer may specify.

9. The Commissioner or an authorised officer shall not retain any document or a data storage device seized under this section for a period longer than six months unless the document or data storage device is required for the purposes of any proceedings under this Act or any other written law.

10. This section shall have effect despite—

a. any law relating to privilege or the public interest with respect to access to premises, or the production of any property or documents, including documents in electronic format; or

b. any contractual duty of confidentiality.

67. It is clear from our reading of section 60(9) of the *Tax Procedures Act* that the appellants can only retain the documents seized for 6 months. After that, it has to return them to the tax payer unless the documents or data storage device seized are required for the purposes of any proceedings under the Act or any other written law, the burden of proving that fact falling squarely on the appellants. In this case, the seizure took place during the months of March and April 2007.

By a letter dated 29th June 2007, about 2 months after the seizure, the respondents sought the return of the seized documents and data:

> "...to enable us demonstrate to you that physical export took place, kindly avail to us the documents listed here below which are still in your possession."

68. By a subsequent letter dated 19th November 2007 sent through the respondent's tax consultant, the respondent reminded the appellants of the said request cautioning them that:

> " to avoid further dispute and unnecessary delay in resolving the above issues, we kindly request you to return to our client all the Books and documents collected from their premises to enable us accurately respond to your queries and demonstrate to you how they recorded their business transactions as contained in their final accounts submitted to your office."

69. These requests went unheeded and, in 2010, three years after the seizure, the judicial review application was filed. The petition itself was filed in 2012. Clearly, the period within which the appellants were entitled to retain the seized documents, equipment and data had lapsed. The justification for retaining the said items seems to be justified by the appellants vide an affidavit sworn by Doreen Mbingi on 23rd May 2011 in which she stated that:

> " In any event, the Respondents retain the right to withhold the documentation for purposes of adducing evidence of commission of economic crimes before a Court of law in the course of a criminal prosecution against the Ex-parte Applicant and its principal officers."

70. It was further deposed by the same deponent that:

> " That in response to paragraphs 3 & 15 of the Ex- parte Applicant's Affidavit, the preliminary findings on the examination of the documents obtained from its premises indicate that the it has not been complying with the provisions of the *Value Added Tax Act*, the *Income Tax Act* and the East African Community Customs Management Act, 2004 and there are reasonable grounds for believing that the Ex-parte Applicant's companies, if given copies of the documents could unduly prejudice the investigations and/or the recovery of outstanding dues to the Authority."

71. Two reasons are advanced here for the continued retention of the documents and date. Firstly, that it was intended that they be adduced as evidence of commission of economic crimes before a court of law in the course of a criminal prosecution. While that is a ground for retaining the documents, the appellants cannot retain the documents indefinitely without any indication as to whether such proceedings were intended to be commenced. To do so clearly violated the tax payer's rights under Article 47 of *the Constitution*, which provides that:

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

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

72. This being a constitutional imperative, the appellants' argument that the respondent did not bring itself within the set parameters of judicial review must fall by the wayside since, as was appreciated by Githinji, JA. in Judicial Service Comission vs. Mbalu Mutava [2015] eKLR at para 23:

> "Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

73. Constitutionally, not only should the intended commencement of criminal proceedings be expeditious, the tax payer was also entitled to reasons as to why the retention was necessary. Three years suspense as to what course of action, if any, the appellants intended to take, was neither expeditious nor efficient. We agree with the sentiments expressed by the learned Judge when he noted that:

> " The second is that the observation is made giving regard to the respondent's position as deponed by Doreen Mbigi (sic) in her Replying Affidavit at paragraph 53 where she asserts that if 'the documents are released to the petitioner then investigations and recovery of the tax could be prejudiced'. It is of note that Affidavit was sworn and filed in court during the year 2011, some four years after the materials were seized and many more years before some of the materials were returned in 2014 and the subsequent consent order made in 2017. One would wonder the magically demonic evidence in the retained documents which would prejudice investigations more than ten years after those investigations began. The court takes the view that expeditious execution of public duty is now an indispensable norm and that a period spanning more than ten years can never be deemed reasonable for the purpose of conducting investigation. To the contrary I do find that it is inordinately too long and that the conduct by the 1st respondent and its officers, in handling this matter all through, suggest an undeclared desire not to seek recovery of any due taxes."

74. In our view, it must have been that realisation that informed the decision by the parties to record a consent on 8th June 2017 to the effect that:

> " the documents, materials and equipment seized from the Petitioner on the 26.03.2007 and 2004 be released and returned to the Petitioner within 35 days from today in accordance with the inventory taken at the time of seizure."

75. It is not disputed that the said consent order was not complied with fully notwithstanding subsequent reassurances of compliance and thereafter, extension of the period of compliance. The appellants instead contended that what had been retrieved and returned was sufficient for the respondent's purposes, and that those not returned were irrelevant, immaterial and no longer important.

This argument must be considered against the background of the very reason for the seizure of documents and data. Under section 60(3) (b) of the *Tax Procedures Act*, the appellants' authorised

officers are only permitted to seize documents that, in the opinion of the Commissioner or authorised officer, may be material in determining the tax liability of a taxpayer. The presumption therefore is that the documents, equipment and data seized from the respondent were material for determining the respondent's tax liability. That being the case, the respondent was entitled to return of the said documents, and it cannot lie in the mouth of the appellants to claim that the documents were irrelevant, immaterial and no longer important. The learned Judge properly directed himself when he held, in respect of Articles 47 and 50 of *the Constitution* that:

> " The petitioner asserts that its right to fair administrative action and the right to a fair hearing have been violated, and are threatened with continued violation by the respondents. I have to agree with the petitioner. As I have stated elsewhere, the Tax Demand by the respondents were based, reportedly, on assessments done using the seized documents and materials. It logically follows that for the petitioner to defend itself in any proceedings it will require those very same documents and materials, and without them, its capacity to mount a competent defense is compromised, thus denying it a fair hearing."

76. In any case, this argument was overtaken by the recording of the unconditional consent for the release of the documents and data.

77. The same position applies to the second reason given by the appellants for not returning the documents, equipment and data: that the return of the items would prejudice the investigations and or the recovery of outstanding dues to the Authority. If no step had been taken to bring the respondent to book for ten years, one wonders how long the appellants required to complete their investigations and take the necessary step to that end.

78. The appellants also contended that, to be entitled to the return of the items seized, the respondent ought to have enumerated in detail which specific missing documents they wished to rely upon, together with an explanation as to what exactly is contained in those documents or records which would justify a discounting of the taxed amount. By seizing the items from the respondent, the appellants must have formed the view that they were important for the purposes of determining the respondent's tax liability. That being the case, the appellants cannot in the same breadth be seen to pass the buck to the respondent to show how relevant the items were when they themselves seized because of their importance in determining the tax liability.

79. In our view, the fact that section 60(9) of the *Tax Procedures Act* prescribes the time within which the seized documents are to be returned is an appreciation that there remains property value attached to them. Such value is protected under Article 40 of *the Constitution*. We therefore find that the respondent's right to property was violated by the lengthy period of seizure of the documents, equipment and data, and that failure to release them even after a consent was recorded was in breach of their constitutional right as claimed.

80. The appellant's excuse that some of the documents could not be traced cannot be a justification for not granting an otherwise deserved remedy. It was upon the appellants, knowing that it had the duty to return the items after investigations, to ensure that they were safely kept. Accordingly, they must suffer the consequences of their inefficiency. That was this Court's view in Fleur Investments v Commissioner of Domestic Taxes & Anor [2018] eKLR where the Court noted that:

> "..... the respondents upon receipt of all tax records and any other documents from a taxpayer has the responsibility to take proper charge of such documents and ensure they are kept in safe custody. That is a responsibility it cannot shirk or abdicate and expect another person to take care of. In point of fact a tax payer who misplaces or for any other reason

needs to refer to any of their documents in the custody of the respondents should be able to get certified copies of the same from the respondents on application and not the other way round. This is what is expected of every responsible state organ or officer in a position such as the respondents'.

81. In view of the foregoing, we reach the inescapable conclusion that the learned Judge was right in holding that:

> "In refusing to return it, the respondent is acting in violation of the cited Article of *the Constitution*, as it amounts to deprivation of property unlawfully. The respondents have not shown the court any provision of the Revenue Statutes that allow the Ist Respondent to appropriate to itself seized material in the circumstances as asserted by the respondents."

82. After considering the materials placed before us, we find that the respondents constitutional rights were violated by the appellants' actions and inactions.

83. We now turn to consider the issue as to whether the respondent was entitled to the judicial review remedies in question. In light of the finding that the respondent's right to fair hearing was compromised by failure by the appellants to return the documents seized, it was only reasonable for the learned Judge to have barred the appellants from taking action against the respondent based on the seized documents, equipment and data. The respondent could not be expected to adequately present its case when the materials that the appellants deemed relevant and important for the purposes of determining the respondent's tax liability had been seized by the appellants and unjustifiably detained by the appellants.

84. However, with that disclosure that some of the seized documents could not be traced, we agree with the appellants that it was a misdirection on the part of the learned Judge to grant an order of mandamus compelling the appellants to "return and release to the respondent all records, documents, files, computers, software and everything the 1st appellant seized and detained from the petitioner's premises between march 2003 and 26.03.2007" without finding that the appellants' contention was not true. Mandamus being a discretionary remedy, the law is that the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. The exercise of the discretion must be based on evidence of sound legal principles. Even where the court has jurisdiction, it may still decline to grant it if to do so would be in vain. The court would also decline to grant the remedy when it is no longer necessary or; has been overtaken by events or; where issues have become an academic exercise or where its issuance would serve no useful or practical significance. Its grant may be withheld where there has been delay or; where a body concerned has done all that it can be expected to do to fulfil its duty; where the remedy is not necessary or; where its path is strewn with blockage or; where it would cause administrative chaos and public inconvenience, or where the object for which application is made has already been realised. See Newton Gikaru Githiomi & Anor v Attorney General and Public Trustee Nairobi High Court JR No. 472 of 2014 (UR).

85. In this case, the appellants stated that, despite efforts, the documents and data in question could not be traced. To grant an order of mandamus in circumstances where the court is not certain that the order will be complied with would be in vain. The danger of granting the order for mandamus in the manner in which it was crafted is that the appellants risk being cited for contempt of court for failing to comply with the order in respect of which it had brought to the court's attention was not capable of compliance. A holistic consideration of the judgement reveals that the intention of the learned Judge in granting the relief was to bar any intended actions against the respondent, unless the appellants were

capable of returning the seized documents and data. In that event, the orders could have been better drafted.

86. Regarding the award of Kshs 2,000,000 as general damages, the law is that an award of general damages is in the discretion of the court. In arriving at that decision, the learned Judge expressed himself as hereunder:

> " On general damages, the finding that the various rights of the applicant have been violated and threatened with continued violation leave me with no room but to consider an award of damages in addition to the declarations made. In this case I consider the violation wanton and wholly capable of mitigation in the past but the respondent chose not to. Having said so, it is the measure of such damages that has caused me anxiety. Anxiety because of two things. The first is the appreciation that a constitutional remedy goal is not compensatory but the vindication of a violated right and to avoid further violation. Secondly, I am hesitant to believe that the Kenya Revenue Authority Board and the commissioner General are all aware that documents that were all available on the 14.07.2017 and were due for release to the tax payer are yet to be released in full so that I award damages as a way of showing disapproval of the misconduct by the Authority. On that basis I award to the petitioner the sum of Kenya Shillings Two Million as damages for violation by the respondent."

87. This Court in *Commissioner of Customs & Excise v Emmanuel Hatangimbabazi Mombasa Civil Appeal No. E016 of 2020* (UR), while dealing with circumstances when an appellate court interferes with an award of damages, expressed itself as follows:

> "...it is an established principle that for this court to disturb an award of damages, the appellant is obliged to demonstrate that the same is so inordinately high or low so as to represent an entirely erroneous estimate or that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect with the consequence that the trial court arrived at an inordinately high or low amount. See Butt v Khan [1978] eKLR. The appellant has not done so."

88. The learned Judge justified the award of general damages on the appellants' conduct, which undoubtedly caused the respondents tremendous albeit unquantifiable difficulty, loss and damage. We have no reason to fault the learned Judge in so finding because it is clear that the appellants failed to release all the seized documents and materials even after consenting to do so. As this Court held in *Price & Another v Hilder* [1986] KLR 95, it would be wrong for the Court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different. In any event, no basis has been laid for us to interfere with the award of general damages.

89. We also take to mind the fact that the respondent rightly conceded the appeal as regards the Audit or Compliance Notices dated 11th October 2011 limited to the tax period between May 2007 a n d December 2009, and the notice dated 18th April 2012 for th e period between January 2010 and December 2012. The seized documents and data were not relevant to those notices.

90. In the premises, pursuant to the section 3(2) of the *Appellate Jurisdiction Act*, and in order to clarify the orders that ought to have been made, we hereby set aside the orders given by the learned Judge and substitute therefor the following:

    a. A declaration that the respondent's right to fair administrative action as guaranteed by Article 47, the right to a fair hearing guaranteed by Article 50[1], the right to information guaranteed by Article 48 as read with 50 of *the Constitution*, have been and will continue to be violated and

infringed by any audit/ test compliance by the appellants unless all the material seized from the respondent's premises and subject to the litigation in JR 89 of 2010 are released.

b. A declaration that the Tax Demand Subject of Notices Ref: KRA/CUS/MIB/INV/2/2007 dated 30th May 2007, 26th June 2007 and Ref:KRA/1006/14 dated 8th November 2007, 10th and 16th July 2008, 18th August 2010 and the Notices under Section 42 of the Tax Procedure's Act, 2015 dated April 28 2016 cannot be legally enforced against the respondent, unless and until all the all records, documents, files, computers, software and everything the 1st appellant seized and detained from the respondent's premises between march 2003 and 26th March 2007 are released.

c. By way of Judicial Review, an Order of Prohibition to issue to prohibit the appellants their officers, agents, servants, authority and/or any other body appointed for that purpose from executing, pursuing, considering, issuing, action upon and/or in any other manner whatsoever or howsoever from demanding and or enforcing any demand, in anyway and manner including arrest of the petitioner's directors for Income Tax and Value Added Tax as set out in their letter dated 18th August 2010 for the recovery of the alleged taxes totalling the alleged sum of Kshs. 2,363,606,424.69 or any part thereof, unless and until all the records, documents, files, computers, software and everything the 1st appellant seized and detained from the respondent's premises between March 2003 and 26th March 2007 are released.

d. Kshs 2,000,000 being damages for the violation/infringement of the respondent's constitutional rights.

e. The costs of the petition awarded to the respondent.

91. As the appellants have partly succeeded in the appeal, we make no order as to the costs of this appeal.

92. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE, 2024.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR