IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (WAKI, NAMBUYE & KOOME JJA

CIVIL APPEAL NO. 305 OF 2012

KAPA OIL REFINERIES LIMITED.....APPELLANT
VERSUS
KENYA REVENUE AUTHORITY.....1ST RESPONDENT
COMMISSIONER OF INCOME TAX.....2ND RESPONDENT
COMMISSIONER OF VALUE ADDED TAX.....3RD RESPONDENT
COMMISSIONER OF DOMESTIC TAXES.....4TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Wendoh, J.) Dated 2nd September, 2011

in

HC J.R. Misc. Appl. No. 283 of 2009)

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JUDGMENT OF THE COURT

The appeal arises from the Judgment of the High Court of Kenya at Nairobi (**R.V.Wendoh, J**.) Dated 2nd September, 2011 in HCJR Misc. Application 283 of 2009.

The background to the appeal is that the appellant filed JR proceedings against the Respondents vide a Notice of Motion dated 14th May, 2009, essentially premised on **section 8(2)** of the Law Reform Act Cap 26 laws of Kenya and Order LIII Rule 3(1) of the Civil Procedure Rules (CPR). Three of the JR remedies sought orders of certiorari to quash: the decision of the respondents converting the discounts granted to **Gourock Ropes and Canvas (Z) Limited (Gourock)** into a commission or agency fee paid to **Kinsum Industries Limited** (**Kinsum)** and subjecting them to Income, withholding and VAT Taxes; the decision of the respondents made in or about January 2009 issuing assessments on Income tax (IT), pay as you earn (PAYE), Value Added (VAT) and withholding taxes (WT) against the appellant for the total sum of Kshs. 116,770,519; the decision of the respondents made in or about February , 2009 issuing assessment of VAT, interest and penalties against the appellant for the total sum of Kshs. 52,165,043/-

Five of the reliefs sought orders of prohibition restraining the Respondents from: classifying the appellant's payments of discounts to **Gourock** as commission or agency fees to **Kinsum**; classifying the appellant's payments to the **Advertising Company Limited** (TAC) in the year 2005, 2006 and 2007 as subject to WT despite advise by the respondents to the contrary; classifying the payments made to **J. Ogode** a Management, consultant as salary for an employee of the appellant; collecting or recovering by way of distress or distraint, agency notice or by any other means the sum of Kshs. 116,770,579/-based on the assessments on IT, PAYE, VAT & WT Taxes made against the appellant and communicated in the letters dated 3rd October, 2008 Ref. P00609324W and 26th January, 2009; and lastly, collecting or by any other means recovering the sum of Kshs. 52,165,043/- based on the assessment on VAT made against the appellant and communicated in the letter dated 23rd February, 2009 Ref. P000709324W.

The notice of motion was supported by a statutory statement of 12th May, 2009, verifying affidavit together with annextures thereto filed on 12th May, 2009, a further affidavit filed by **Nitin Shah** dated 9th of November, 2009 together with annextures thereto.

In summary, it was the appellant's averments that it is a large tax payer registered under PIN No. P000609324W & VAT No. 0010609L; that it used to file its IT returns on a self-assessment basis; that in the year 2007 and 2008, it made a claim for refund of excess Tax paid to the respondents to the total tune of Kshs. 486,647,437.00, prompting the Respondents to carry out an IT and VAT Audit on the appellant covering the years of 2005 to May, 2009, pursuant to which the respondents purported to uncover unpaid corporate taxes, WT, VAT & PAYE. The appellant took issue with the respondents contention that the appellant's payment of discounts to **Gourock** was not an expense related to generating income on the part of the appellant but was a commission or Agency fees paid to **Kinsum** on behalf of **Gourock** and for the benefit of **Gourock,** a trading partner of **Kinsum;** that the appellant's payments to TAC for the years 2005-2007 made pursuant to advise from the respondents were subject to WT; that one **J. Ogode** was an employee of the appellant between the period of 2001 to 2008 and all

payments made to him were salaries therefore subject to PAYE deductions.

The reasons appellant advanced in opposition to the respondents impugned actions were as follows: that they were manifestly unfair, arbitrary, inconsistent, capricious, oppressive, punitive, unjust and amounted to abuse of power, if not illogical and incorrect infact. They also violated the principle of certainty in taxation. They constituted an illegal exercise of discretion which according to the appellant had been exercised capriciously for purposes of exerting preasure and or in abid to punish the appellant for lodging a genuine demand for Tax Refund. They were also unreasonable in law as the reasons given to charge Tax on the discounts given to **Gourock** were erroneous. Those to charge PAYE on payments made to **J. Ogode** were based on an error of fact. The notice and the period given within which to meet the respondents demands were unreasonably short and therefore, unfair, belated and retrospective. The failure to deduct WT from payments made to TAC was well founded on the respondents own letter dated 7th November, 2001 in which the respondents advised the appellant not to deduct any WT from payments made to TAC only for the respondents to belatedly and unreasonably change mind eight (8) years later and retrospectively demand payments of the same, which in the appellant's view was unreasonable, unjust, oppressive and an abuse of due process.

In rebuttal, the 1st and 4th respondents (the respondents) filed a replying and further replying affidavit both deposed by **Maurice O. Oray** on 28th July, 2009 and 24th November, 2009 respectively. In them, the respondents admitted that the appellant was subjected to an IT and VAT audit for the years 2005, 2006, 2007 up to 7th May, 2008, which in the respondents' view was independent of the Tax refund demands, the appellant had raised with them; that the appellant used to submit self-assessment Tax Returns (TR) and that it was not until a Tax audit was carried out on the appellant's records that the respondents discovered that the self-assessment TRS variously submitted by the appellant over the period of Tax Audit did not portray a true reflection of the Taxes the appellant ought to have paid to the respondents; that in law payment of charges or retainer fees to TAC and **Kinsum** by the appellant were amenable to WT under **section 35(3) (f)** of the IT Act (**the Act).** The respondents conceded that the appellant's agents inquired from them as to whether payments to **Gourock** and **Kinsum** were amenable to payment of Taxes to which the respondents replied in the negative; that it was not until they carried out the Tax Assessment Audit (TAA) on the appellant's record that they discovered that the inquiry to which they had replied advising the appellant not to charge Taxes on those payments was based on non-disclosure of material information regarding those payments; that upon verification of the correct nature of those payments, they arrived at the conclusion that those payments were subject to taxes payable under **sections 35(1) (a)** of the Act and **6(6)** of the VAT Act. That likewise, verification of the appellant's own records, revealed that remuneration to **Mr. Ogode**, by the appellant's was that of an employer paying an employee monthly salary and were also therefore subject to PAYE.

The notice of motion was canvassed by way of written submissions filed by learned counsel for the respective parties. The trial court analyzed the record, rival affidavits, submissions and case law relied upon by the respective parties in support of their opposing positions, frame eight (8) issues for determination and made findings thereon *inter alia* as follows: that both **sections 52B** of the Act and **section 13** of the VAT Act allow self-assessment of tax, while section **56(1)** of the Act and **section 30**(1) of the VAT Act authorize the respondents to carry out Tax Assessment Audits only in circumstances where there are grounds or good reason for doing so; that there was a sales distribution agreement between the appellant and **Gourock** dated 24th January, 2003 for the sale of the appellant's products in Zambia by **Gourock;** that from the evidence on record, both **Kinsum** and **Gourock** were trading partners with the appellant; that besides evidence on the execution of the aforestated-agreement between the appellant and **Kinsum**, there was no other evidence to demonstrate that any business transaction took place between the appellant and **Kinsum.**

The trial court also found that on 30th July, 2008, the appellant's agents sought clarification from the respondents as to whether the above mentioned payments made way back between 2005-2007 were subject to tax to which the respondents replied in the negative. Construing **section 3(1)** & **35 (1)** of the Act and considering these in light of the above conclusion, the Judge ruled that payments made to **Kinsum** were an income subject to WT.

On the manner the Tax Assessment Audit were carried out, the trial court took into consideration the decision in the case of **Coastal Bottlers Ltd Versus Commissioner of Domestic Taxes Misc. Application No. 1756 of 2005** and dismissed the appellants complaint, holding, *inter alia,* that JR procedures are concerned with reviewing not the merits of the decision in respect of which the application for JR is made but the decision making process; that delving into the considerations as to how the assessment was done by the respondents and the methods applied, would be tantamount to the court usurping the statutory mandate of the respondents. Secondly, there was a clear procedure under the Act on how a decision of the respondents on the merits could be challenged, namely before a local committee set up under **section 82** of the Act or alternatively, before a Tribunal set up under **section 83** of the Act; and that in the event of any grievance arising from the decisions of the above named entities, an appeal lies to the court as deemed fit.

On penalties, the trial court stated that **section 35(6)** of the Act allows the respondents to impose penalties on a person who fails to deduct tax and remit the sums deducted to the respondent. There was therefore no basis for faulting the respondents for issuing demand notice to the appellant both for the taxes as per the Tax Assessment Audit together with attendant penalties as these were well founded in law.

As for payment made to Tac, the trial court made observations that from the record, the appellant had been making WT deductions from payments made to Tac and remitting these to the respondents. The appellant made inquiries from the respondents as to whether they should continue making those deductions and remitting them to the respondents without disclosing to the respondents that they had been paying to Tac a retainer fee of Kshs. 600,000.00, for professional services rendered to the appellant following an agreement with the appellant over and above what KBC paid to Tac for services rendered to the appellant.

It was not until the respondents carried out an audit on the appellant's records, that they unearthed the correct information regarding those payments and on the basis of which they rescinded the contents of their letter dated 7th November, 2001 and demanded resumption of deductions of WT from payments made to Tac and remitting these to the respondents as previously done. The trial court upheld the respondents' action for the reason that, in the trial court's view, it would be wrong to allow the appellant to benefit from the respondents' no objection letter of 7th November, 2001 as the contents of the said letter were occasioned by the appellant's own misrepresentation to the respondent of the correct information with regard to payments made to Tac.

As to whether the respondents were estopped from demanding Kshs. 116,770,579/-as assessed taxes and Kshs. 52,166,043/- as penalties for the failure to remit the assessed sum, the trial court ruled that the respondents could not be estopped from demanding the Tax assessed from the appellant as it had been occasioned by the appellant's own misrepresentations and concealment of material facts regarding the nature of payments made both to **Kinsum** and **TAC**. Secondly, the respondents were carrying out a statutory mandate which according to the trial court was exercised properly and within the law. The respondents' actions were therefore not amenable to sanctioning through JR reliefs.

As to whether **J. Ogode** was the appellant's employee or consultant, the trial court reviewed the undisputed documentary evidence generated and supplied by the appellant, and relied upon by the respondents in support of their assertion that **Mr. Ogode** was appellant's employee and drew out the following conclusion:

> "***From a consideration of the duties and responsibilities of Mr. Ogode, which are set out in the above, referred documents and the fact that he was described as a Human Resource Manager, and an employee of the applicant, earned a regular salary, reported to work like an employee, had a job description etc, I am satisfied that Mr. Ogode was an employee of the applicant. There was total lack of independence in the performance of his duties and was totally answerable to the applicant. Section 37(1) of the Income Tax Act requires an employer to deduct PAYE from an employee's emoluments and account for tax.***
>
> ***...***
>
> ***Section 37(5) provides for sanctions against an employer who deducts and fails to remit Tax to the commissioner. The Rules made under section 130 relating to collection of Tax and imposition of interest come into play. Under Rule 1 and 12 of the income Tax (PAYE) Rule 1, where an employer fails to pay PAYE or account for it, the commission has power to ascertain and certify to the best of his knowledge and belief the amount of tax which the employer would have been liable to pay under Rule 10, in the month in question had he complied with the provisions of Rule 12 for purposes of the recovery of tax which an employer would have been liable to pay under Rule 10 had he complied with the provisions of these Rules, that employer shall be deemed to have been appointed an agent of his employee under section 96 of the Act.***
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> ***In the instant case, the applicant was deemed to have been appointed as an agent for the Respondents for purposes of collecting PAYE that was due from Mr. Ogode. By the applicant holding out Mr. Ogode as a consultant when he was a regular employee, it is obvious that KAPA was evading the payment of PAYE to the Respondents and I find that the demand made by the Respondents is lawful. The Respondents acted in accordance with the law."***

As to whether the Tax Assessments Audit were retrospective, the trial court construed **section 79 (1)** of the Act and considering it in light of the appellant's complaint ruled that the assessment subject of the JR proceedings was done within the seven (7) years period as stipulated the law.

Turning to the legal status of the 2nd and 3rd respondents, the trial court took into consideration gazette notice No. 4381 of 10th June, 2005 creating the 4th respondent and on that account, ruled that no orders could issue against the 2nd and 3rd respondents as in law they were nonexistent.

Turning to the JR reliefs prayed for by the appellant, the trial court reviewed the case of **Council of Civil Service Union and others versus the Minister for the Civil Service [1985] AC374** and rendered itself as follows:

> ***"I find that there is no evidence to prove any of the above grounds. Order of certiorari cannot issue because the impugned decision has made within the law. There is no evidence that the respondents acted outside the law, or that the applicants were denied rules of natural justice because there was protracted correspondence between the parties before the applicant came to court, there is no evidence that the respondents abused their powers or discretion or that the decision arrived at is also absurd that it lacks logic. All the grounds must fail.***
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> ***There were also prayers for orders of prohibition to issue against the respondents to prohibit the classifying of the discounts to Gourock as agency fees or commission, classifying the Applicant's payments to TAC as withholding Tax, or classifying Mr. Ogode as an employee of the applicant and prohibiting the Respondents from collecting or recovering the claimed sum from the applicants. I have said earlier that applicants (sic) have acted within the law and none of the alleged grounds were proved as against the Respondents and those orders cannot lie. The prayers sought in the Notice of motion are declined and the Notice of Motion is hereby dismissed. Costs to respondents***."

The appellants were aggrieved and filed this appeal raising ten (10) grounds of appeal, which may be paraphrased as follows: that the learned Judge erred:

> ***1. In holding that discounts granted to Gourock by the appellant and paid to Kinsum on the instructions of Gourock were a commission subject to both withholding and value added Taxes.***
>
> ***2. In failing to hold that the appellant was entitled to act on the respondents' express instructions to them that payments made to TAC were not amenable to both withholding, and Value added Taxes.***
>
> ***3. In failing to hold that J. Ogode was a consultant and not an employee of the appellant and payments to him by appellants were not salaries and therefore were no amenable to PAYE deductions.***
>
> ***4. In failing to hold that the respondents Tax assessment Audit and demand for payment of Kshs. 116,770,519/- and Kshs. 52,165,043 was retroactive and therefore tainted and the appellant was not liable to the respondents for the recovery of the said***

sums.

5. In failing to find that the implementation of the respondents' decision was arbitrary, oppressive, punitive in bad faith and was being done for an improper motive or for purposes of victimizing the appellant for applying for VAT refunds which were due to it.

The appeal was canvassed by way of written submissions, adopted and highlighted by counsel for the respective parties. Learned counsel **Mr. Kelvin Mogeni** appeared for the appellant, while learned counsel **Mr. Chabala** holding brief for **Mr. P.M. Mutuku** appeared for the Respondents.

Supporting the appeal, learned counsel **Mr. Mogeni** addressing all grounds of appeal as one and faulted the trial court for the failure to properly appreciate and take into consideration the undisputed position that it was the appellant's action of lodging a claim against the respondents for refund of excess tax paid, that triggered the Tax assessment Audit exercise resulting in the demands issued by the respondents against the appellants triggering the JR proceedings; that **Gourock**'s instructions to the appellant to remit to **Kinsum** discounts payable to **Gourock** by appellant did not of itself turn the remittances into a commission or Agency fee and that the respondents sole intention in distorting facts about the said discounts was to pressurize the appellant to give up its claim for VAT refunds.

On payments to **TAC**, counsel faulted the trial court for the failure to properly appreciate and sustain the appellant's contention that it was entitled to act on the respondents' advise that payments to TAC were not amenable to WT and were therefore not liable to make payments to the respondents of the amounts assessed as the shortfall on the Taxes remitted by them to the Respondents.

On the non-remittance of PAYE on behalf of **Mr. J. Ogode**, counsel submitted that the documents tendered in evidence by the appellant demonstrated clearly that **Mr. Ogode** was engaged as a registered Human Resource Consultant and did not therefore qualify as an employee of the appellant.

On the demands made by the respondents for payment of the Tax Assessment Audit sums of Kshs. 116,770,519/- , and Kshs. 52,165,043/- as assessed penalties, counsel faulted the trial court for allowing them arguing that since there was demonstration that the respondents had acted beyond their authority and contrary to the express provisions of the Act, their actions were in the circumstances amenable to JR procedures.

To buttress the above submissions, counsel cited the cases of **Abok James Odera T/A A.J. Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR; Makibe versus Nyamiro [1983] KLR403**, both on the role of a first appellate court; the case of **Kenya National Examination Council versus Republic Exparte Geoffrey Gathanji Njoroge & 9 others [1997] eKLR** on the scope and efficacy of the orders of prohibition and certiorari; the case of **Associated Provincial Picture House Ltd versus Wednesbury Corporation [1948] 1KB 223** in support of the appellant's submission that in arriving at the impugned decision, the trial court took into consideration extraneous matters not relevant to the issue in controversy as between the parties to this appeal. The case of **Council for Civil Service Union versus Minister for Civil Service [1983] A.C. 374**, in support of the submission that the appellant having undisputably acted on the respondents representations with regard to payments made by them both to **TAC** & **Kinsum,** they had sufficiently demonstrated that the respondents were estopped from demanding from the appellants the assessed amount; the case of **F7 S.**

Scientific Ltd versus Kenya Revenue Authority and another Nairobi Civil Appeal No. 162 of 2014 and the case of **Ranslay versus the City Council of Nairobi [2006] 2EA311;** in support of the submissions that the JR proceedings were sustainable and the trial court therefore fell into error when it disallowed the same.

In his opposition to grounds 1 and 3 of the appeal, **Mr. Chabala** rehashed the trial court's reasoning on the construction of **sections 3(1)** and **35(1) (a),** of the Act and urged us to affirm that position taken by the trial court as it was based on the evidence and the law.

In opposition to grounds 2, 4 & 5, counsel submitted that the trial court fully appreciated the totality of the record in light of the respondents submissions with regard to the relationship between the appellant and **Gourock** and arrived at the correct conclusion that payments made by appellant to **Kinsum** on the instructions of **Gourock** were an income earned by **Gourock** from services rendered to the appellant by **Gourock**, but received by **Kinsum** on behalf of **Gourock,** a Trading partner with **Kinsum.**

On ground 6, counsel submitted that the trial court properly appreciated the correspondences exchanged between the respondents and the appellant and arrived at the correct conclusion that the appellant had misrepresented the facts with regard to the true nature of the relationship between the appellant and **TAC** hence the erroneous response by the respondents to the appellant that payments made by them to **TAC** were not amenable to WT.

On ground 7, counsel urged that the trial court cannot be faulted for properly appreciating the record and arriving at the correct conclusion that **Mr. Ogode** who had erroneously been described as a Human Resource Consultant in the appellant's records was in fact an employee of the appellant as he earned a regular salary, reported to work regularly like any other employee of the appellant, had a job description, lacked independence in the performance of his duties as he was totally answerable to the appellant. **Section 37A** of the Act therefore required the appellant as an employer of **Mr. Ogode** to deduct PAYE from his salary and account for the same to the Respondents; while **section 37(5)** of the Act on the other hand provided for sanctions against the appellant for the failure to deduct PAYE and remit the same to the respondents, a position which was well founded on the facts and the law and urged us to affirm the trial court's decision to sanction the respondents demand for payment of the same by the appellant.

On ground 8, on the appellant's complaints on alleged retrospective assessment of Tax by the respondents, counsel submitted that the action of the respondents were well founded on **section 79(1)** of the Act and were therefore properly sanctioned by the trial court.

On grounds 9 &10, counsel submitted that the respondents demand from the appellant for payment of Kshs. 116,770,519/- and Kshs. 52,165,043/= as assessed Taxes and penalties were well founded both on the facts and the law. There is therefore nothing in the said decision

that could be termed arbitrary, oppressive, punitive, done in bad faith, or for an improper motive aimed at victimizing the appellant for applying for VAT Refunds.

To buttress the above submissions, counsel cited the case of **Kenya Commercial Bank Limited versus Kenya Revenue Authority [2016] eKLR** in support of the submission that payments made to **Kinsum** by appellants were liable to WT under **section 35(1)** as these in law constituted income to **Kinsum** a non-resident recipient; **Cortec Mining Kenya Limited versus Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR**, in support of the submission that the trial court properly evaluated and appreciated the record and arrived at the correct finding that the appellant had not established that the respondents' decisions/actions were tainted with illegality, irrationality, or procedural impropriety to warrant the granting of the JR remedies appellant had sought from the court; the case of **Municipality Council of Mombasa versus Republic & Umoja Consultants Civil Appeal No. 185 of 2001,** in support of the submission that complaints raised by the appellant against the Tax Assessment Audit were a challenge to the merits of the respondents decision making ,which fell outside the scope and efficacy of the JR proceedings; the case of **Commissioner of Lands versus Kunste Hotel Ltd [1997] eKLR** in support of the submission that the respondents acted within their mandate, firstly by carrying out the Tax Assessment Audit and secondly by issuing a demand for payment of the resulting assessed amount of taxes together with attendant penalties. The case of **Oindi Zaippeline & 39 others versus Karatina University & another [2015] eKLR**, in support of the submission that the trial court's finding that there was misrepresentation of facts to the respondents by the appellant resulting in the respondents erroneous responses that payment to **Gourock** and **TAC** were not amenable to WT.

This is a first appeal. Our mandate is to re-appraise the evidence and draw out own inferences of fact. See **Rule 29(1) (a)** of CAR and also **Selle & Another versus Associated Motor Boat Company & others [1968] EA 123** where the Court stated:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that is has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A 270."***

The dispute herein arises from the trial court's decision declining to grant the JR remedies the appellant had sought from the High Court. The principles that guide the High court in the exercise of JR Jurisdiction were aptly restated by this Court in **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR** as follows:-

> ***"Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. See Child Welfare Society of Kenya –versus-Republic and 2 others, Exparte Child in Family Forces Kenya [2017] eKLR."***

From the above exposition, Judicial Review is a discretionary remedy. Our mandate therefore when determining as to whether the trial court exercised its discretion judiciously when it declined to grant the orders of certiorari and prohibition as sought by the appellant is as was set out in **United India Insurance Company Limited –versus East African Underwriters Kenya Ltd [1985] KLR 898** which we fully adopt. These are that we can only interfere with the exercise of that discretion if we are satisfied that the Judge misdirected himself in law, misapprehended the facts, took account of considerations which they should not have taken into account, failed to take into account a consideration of which they should have taken into account, or that his decision, albeit a discretionary one, is plainly wrong.

In light of the above threshhold, only one core issue falls for our determination, namely; whether the trial court exercised its discretion judiciously when it declined to grant the JR remedies sought by the appellant. In **Ransa Company Ltd versus Mania Frances Co. & Others [2015] eKLR,** the Court expressed itself as follows:

> ***".....a court sitting on Judicial Review exercises*** *a sui generis* ***jurisdiction which is very restrictive indeed in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction rather than the merit of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties."***

See also In **Re National Hospital Insurance Fund Act versus Central Organization of Trade Union, Kenya, Nairobi HCMA No. 1747 of 2004 [2006] 1EA47,** Nyamu, J (as he then was) held the view *inter alia* that:

> ***"While it is true that so far the jurisdiction of a judicial review court had been principally based on the "3'1's" namely, illegality,***

irrationality and impropriety categories of intervention by the court."

The JR reliefs appellant sought from the Court as already alluded to above were *certiorari* and *prohibition*. The scope and efficacy of both of which were aptly restated by the court in the case of **Kenya National Examination Council versus Republic Exparte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** as follows:

> "***an order of certiorari will issue: if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."*** While, an order of ***prohibition is*** "***an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the law of the land. It lies, not only fort excess of jurisdiction or absence of it but also for a depalive from the rules of natural justice. It does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..."***

The undisputed facts in this appeal are, *inter alia,* as follows: that the appellant is a major tax payer. The legal duty to ensure that the appellant complies with the law on assessment and payment of Taxes as correctly found by the trial court is cast on the Commissioner of Income Tax as stipulated for in the Act. The mode of self-assessment and remittance of tax to the respondents, employed by the appellants in the discharge of that obligation is well founded in **sections 52B** of the Act and **13** of the VAT Act. The respondents had a corresponding policing power obligation under **section 56(1)** of the Act and **30(1)** of the VAT Act to carry out periodic Tax Assessment Audits for a period not in excess of seven years for purposes of checking the correctness of the amounts arrived at by the appellants in the course of carrying out their mandate of self-Tax Assessment exercise.

Tax Refunds in instances where there is proven excess payment of Tax is also provided for hence the legitimacy of the appellant's request for Tax Refunds to the total of Kshs.486,647,437; subject to verification by the Respondents that the same were well founded both in fact and in law. The appellant has consistently contended both in the JR proceedings and now on appeal that the above demand for Tax Refunds is what triggered the Tax Assessment Audits carried out by the Respondents in a bid to block their demand for the same contrary to the respondents assertion that although it was correctly contended that they swung into action to carry out a Tax Assessment Audit on the appellant soon after those demands had been lodged. This was a routine exercise permissible under the law specified above. It is also common ground that the appellant had a trading relationship with **Gourock** for provision of services in relation to the sale of its products in Zambia. The consideration for the said services was provision of discounts which in law are not amenable to WT and VAT Taxes. Instead of **Gourock** receiving those alleged discounts benefits itself, it assigned them to and accordingly instructed the appellant to be remitting the same to its nominee **Kinsum**, which from the records scrutinized by both the respondents and the trial court was **Gourocks** Trading Partner. Apparently no services were rendered directly by **Kinsum** to the appellant. Likewise, **TAC** also rendered services to the appellant over the same period namely 2005-2007 in respect of which the appellant paid consideration and dutifully remitted to the respondents both WT and VAT taxes as when these fell due. It was not until May, 2008, that the appellant inquired from the respondents whether payments made by them both to **Kinsum** and TAC for services rendered to them were amenable to both WT and VAT Taxes to which the respondents replied in the negative. The position however changed when in the cause of carrying out the aforesaid Tax Assessment Audit that the respondents unearthed records containing the correct information regarding the correct nature of the payments made by the appellant both to **Kinsum** and **TAC** and on that account concluded that those payments were amenable to payment of both WT and VAT Taxes, hence the demand notices for payment of Kshs. 116,770,043 as the assessed Taxes payable and Kshs. 52,165,043/- as penalties for non-payment of the assessed taxes. In the same vein, the respondents discovered that one **J. Ogode** described by the appellants in their records as a management consultant was infact a full time employee of the appellant and therefore amenable to payment of PAYE.

Turning to the relevant provisions of the Tax law applied in the impugned Judgment, **Section 3(1) &(3)** of the Kenya Revenue Authority Act Cap 469 Laws of Kenya establishes the Kenya Revenue Authority for purposes of Revenue collection mandate under **section 5(1) (a)** as an agent of the government for purposes of Revenue collection is to enforce the written laws with regard to assessment , collection and accounting for all revenue in accordance with the Income Tax Act Cap 470 and the Value Added Tax Cap 476 of the Laws of Kenya.

Section 2 of the Income Tax Act defines "an assessment" to include self-assessment. Under the same Act "**authorized Tax Agent"** means any person who among others collect, and accounts for tax collected to the Respondent under the Act;

"**Discount"** ***means:***

> ***" interest measured by the difference between the amount received on the sale, bond satisfaction or redemption of any debt, bond, loan claims, obligation or other evidence of indebtedness and the price paid on purchase or original issuance of the bond or evidence of indebtedness or the sums originally levied upon the creditors of the loan claim or other obligation.***
>
> ***Section 3(1)*** of the Act stipulates that***, "Income Tax is chargeable for each year of Income of a person, whether resident or non-resident which accrued in or was derived from Kenya,*** while ***section 3(2), provides that Income upon which Tax is chargeable under the Act is Income in respect of-***
>
> ***(a) Gains or profits from;***
>
> ***(i) A business for whatever period of time carried on;***
>
> ***(ii) Employment or services rendered;***
>
> ***(iii) A right granted to another person for use or occupation of property***
>
> ***....."***

Section 5(1) makes provision that ***"for purposes of section 3(2) (a) (1) gains or profits are taxable in any year of Income. These include but are not limited to Wages, salary.....commission or other allowance received in respect of employment or services rendered, and any amount so received in respect of employment or services rendered in a year of income for the benefit of a resident of Kenya or derived from services rendered to a non-resident but with a permanent establishment in Kenya."***

Section 35(1) of the Act obligates a person upon payment of an amount to a non-resident person not having a permanent establishment in Kenya in respect of-

(a) ***a management or professional fee.... which is chargeable to tax, to deduct therefrom tax at the appropriate nonresident rate in the normal manner. Under section 37(A) of the Act, an employer paying emoluments to an employee has an obligation to deduct therefrom, and account for tax thereon to such extent and in such a manner as may be prescribed***." **subsection (2)** thereof provides for sanction against an employer paying emoluments to an employee and who fails to deduct and account for tax deducted thereon is liable to pay "**a penalty**" equal to thirty four percent of tax involved thereon; or ten thousand shillings whichever is greater and which is recoverable as if it were Tax due from the employer. **Section 53 B (b**) obligates a Tax agent to forward to the Commissioner a return of Income including a self-assessment of tax or Income during the statutory prescribed period. **Section 72B** provides for imposition of penalties against an authorized tax agent who fails to remit any additional tax charged. **Section 72(1**) makes provision for imposition of a penalty for any tax that remains unpaid on its due date, **Section 79(1)** makes it mandatory for Tax Assessment Audits at any time prior to the expiry of seven (7) years after the years of Income to which the assessment relates, subject to objection to such assessment as provided for under **section 84** of the Act and or appeal consequent thereon. **Section 82(1)** entrenches local committees for purposes of hearing complaints that may arise from any Tax assessments, while **section 83(1)** entrenches a tribunal for the same purpose. **Section 84(1)** entrenches the right to object to Tax assessment to the Minister by way of notice in writing, while **section 85** entrenches the obligation of the Commissioner upon receipt of such a notice of objection to initiate procedures provided for thereunder. **Section 87(1**) entrenches the right of appeal to a court of law from decisions of the local committee or the Tribunal as the case may be. **Section 88 (1)** provides for finality of assessment of Tax where no objection has been filed as provided for the Act.

Turning to the provisions of the VAT Act, **section 5** makes provision that VAT is chargeable on the supply of goods and services in Kenya and on the importation of Goods and or services, **Section 18(1)** mandates the Commissioner of Income Tax to recover Taxes by way of distress in addition to the right to recover the same by way of a civil debt under **section 22** of the Act. **Sections 30** and **31** mandate the Commissioner of Income Tax to call for Tax records for purposes of inspection, while **sections 32** & **33** on the other hand entrenches an inbuilt Appeals tribunal.

We have considered the above provisions of applicable Tax law and applied them to the rival positions herein. On the specific issue raised; number 1 relates to payments made by the appellant to **Kinsum** on behalf of **Gourock.** As already highlighted above, the trial court rejected the appellant's contention that these were "**discounts",** in favour of the respondents' contention that these were income due from the appellant to **Gourock** for services rendered to the appellant by **Gourock** but paid to **Kinsum** on the instructions of **Gourock.** We have considered the trial court's reasoning as to why it rejected the appellant's assertions in favour of the respondents' assertion in light of the definition of what amounts to a "**discount"** and "**Income"** in **sections 2** and **3(2**) of the Act. We find no fault in the Judge's finding that the payments were an income paid to **Kinsum** by the appellant on the instructions of **Gourock** for services rendered to the appellant by **Gourock.** The trial court's finding was therefore well founded both on the undisputed existence of a trading relationship between **Gourock** and appellant, while none existed directly as between the appellant and **Kinsum,** a trading partner of **Gourock** which would have attracted payments from the appellant other than that for services rendered to the appellant by **Gourock.**

Issue number 2 relates to payments made to TAC. We have considered it in light of the reasons the trial court gave for rejecting the appellant's contention, that it was entitled to act on the advice the respondents had given to them in response to their inquiry from the Respondents as to whether those payments were amenable to payments of WT and VAT

Taxes. When rejecting the appellant's assertion, the trial court relied on the undisputed facts that (i) the appellant had dutifully been deducting WT & VAT Taxes from payments made to **TAC** for the years 2005,2006 and 2007 (ii) that it was only in 2008 that it raised the issue as to whether it should continue deducting WT and remitting the same to the respondents; (iii) that upon carrying out a TAX assessment Audit pursuant to **section 56(1)** of the Act, and **30(1)** of the VAT Act, the Respondents discovered that the appellants were making additional payments of Kshs. 600,000/- special allowances to TAC besides payments of commission received by TAC from KBC. The documentary exhibits on the basis of which the respondents acted to reach that conclusion were those accessed in the course of duty as provided for in **sections 30** and **31** of the VAT Act. They were therefore lawfully accessed. There was no dispute that these were documents originated and kept by the appellant in the ordinary course of business with regard to its relationship with TAC which undoubtedly rendered services to the appellant and in respect of which the appellant was obligated to pay for. There is no provision of law that was cited before us by the appellant to suggest that the respondents could only take action in the manner done upon withdrawing the no objection response they had given to the appellant. We therefore find no basis for faulting the trial court on the conclusions reached that payments made to TAC were amenable to withholding Tax. Secondly, it is also our finding that the respondents no objection response to the appellant's inquiry regarding those payments were rightly recanted by the respondents as they had been occasioned by non-disclosure of material particulars as to the true nature of those payments, a position found by the trial court to be the correct position and which we affirm.

As for the appellant's obligation to deduct and remit PAYE on behalf of **Mr. J. Ogode**, as already highlighted above, the trial court set out the reasons supported by documentary exhibits scrutinized and assessed by it. The appellants never disputed to have originated those documents all of which pointed to **Mr. J. Ogode** as a regular employee of the appellant and not a consultant for the reasons given by the trial court. Section 37(A) of the Act obligated the appellant as the employer of **Mr. Ogode** to deduct PAYE and remit the same to the respondents. The only issue raised by the appellant to counter the above position was a letter to a hospital stating that, **Mr. Ogode** was obligated to meet his own medical expenses at that particular point in time. We find this lone episodes does not operate to oust the wealth of documentation scrutinized and believed by the trial court as authentic before arriving at the conclusions reached. We find nothing on the record to suggest any misapprehension of the contents of those documents and or misapplication of the law to those facts. We affirm those conclusions.

With regard to alleged retroactivity of the respondents' action, the appellant's own averments indicated that the respondents' Tax Assessment Audit exercise covered the years of 2005,2006,2007, 2008 up to February, 2009, while according to the respondents Tax assessment Audit exercise covered the years 2005, 2006, 2007 upto May, 2008. We reiterate **section 35(1) (a)** of the Act and 6(6) of the VAT Act permit verification of Tax records originated and maintained by a Tax agent. While **section 56(1**) of the Act and **30(1)** of the VAT Act authorize the Respondents to carry out Tax Assessment Audits for periods not in excess of seven (7) years. In terms of the provisions of **section 79(1)** of the Act. In light of the above which in our opinion is the correct position in law, we find appellant's complaint that the respondents action was retroactive displaced, and does not therefore operate to vitiate the said action, which in our view, does not exceed the seven years statutory period allowed by law assessed above.

With regard to the appellant's complaints that it is under no obligation to meet the respondents demands against it for the payment of Kshs. 116,770,519/- additional Tax and Kshs. 52,165,043/- as penalties imposed for non-remittance of the above additional Tax. In this regard we bear in mind the applicable provisions of the law as assessed above and proceed to make findings thereon as follows; the Kenya Revenue Authority Act Cap 469, establishes the Kenya Revenue Authority (KRA) with a mandate executed on its behalf by the commissioner of Income Tax, to oversee the enforcement of all written laws governing assessment; collection and accounting for all Revenue in accordance with the provisions of the Tax laws among them the Act, and the VAT Act which featured prominently both in the determination of the JR proceedings and this appeal.

It is common ground as we have already highlighted above, that the Commissioner of Income Tax discharges his functions under the Tax laws through Tax agents, into which category the appellants fell as a self-assessment Tax agent. It is also not disputed that the appellant carried out its mandate as a self-assessment agent, and dutifully remitted the resulting amounts to the respondents as and when they fell due. Likewise, it was in the discharge of their oversight policing mandate that the respondents called for and carried out a Tax Assessment Audit on the appellant's records resulting in the amounts demanded of the appellant.

The appellant could have availed itself of the inbuilt dispute resolution mechanism under **sections 82(1), 83(1)** and **84(1)** if it was aggrieved with the said demands.

The position in law as highlighted above is that, where no objection has been raised against such demands by the respondents as in the instant appeal , these demands become final and therefore recoverable together with the penalties imposed for non-remittance either voluntarily or by way of distress in addition to civil action.

Turning to the last appellant's complaints against the respondents' action, it is not disputed that the appellant's JR proceedings were substantively premised on **section 8(2)** of the law Reforms Act Cap 26 Laws of Kenya and **Order LIII Rules 3(1)** of the CPR. This being the position, the approach the trial court was enjoined to take and which to us on appeal are also obligated to take is as was succinctly put by the court in the case of **Ransa Company Ltd versus Mamia Frances Co. & others** (supra), namely, that, ***a court sitting on judicial Review exercise a sui generis jurisdiction which was restrictive indeed in the sense that it principally challenges the process and other technical issues like excessive jurisdiction rather than the merits of the case.***

We find nothing in the Tax Assessment Audit together with the attendants' demands by the respondents that those payments be made as set out above to suggest any illegality, irrationality and impropriety as the respondents action complained of were well founded both on the facts and in law. The trial court was therefore entitled to dismiss the JR proceedings, a position which we affirm as delving into the merits of the respondents' decision making process fell outside the JR proceedings powers. The trial court rightly declined Jurisdiction to interfere. Secondly, it is also our finding as did the trial court that the appellant had an alternative efficient and efficacious remedy namely to fall back on to the inbuilt dispute resolution mechanism with the Tax law applied.

The upshot of all the above assessment and reasoning is that we find no merit in the appeal. The same is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 11th Day of October, 2019.

P.N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

…….……..

JUDGE OF APPEAL

M. K. KOOME

…….……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.