



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, KOOME & G.B.M. KARIUKI, JJ.A**

**CIVIL APPEAL NO. 61 OF 2011**

**BETWEEN**

**CIMBRIA (EA) LIMITED.....APPELLANT**

**AND**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

*(An appeal from the Judgment and Order of the High Court of*

*Kenya at Nairobi (Wendoh, J.) dated 14<sup>th</sup> October, 2010*

*in*

*H.C. Misc. Application No. 1388 of 2002)*

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**JUDGMENT OF THE COURT**

**CIMBRIA (EA) LIMITED** (the appellant) is a Limited Liability Company incorporated in Kenya, but is a subsidiary company of A/S Cimbria that is headquartered in Denmark.

Kenya Revenue Authority (the respondent), on the other hand is a body corporate established under Section 3 of the Kenya Revenue Authority Act (Cap 469 of the Laws of Kenya), which is capable in its corporate name, of suing and being sued. It is also a Government agency for the collection and receipt of all revenue.

By a letter dated 24<sup>th</sup> October, 2002 addressed to The Directors Cimbria E.A. Ltd, the respondent informed the appellant that it had carried out investigations on its accounts for the period 1993 – 2001, and had come to the conclusion that the appellant owed the respondent withholding tax to the tune of Kshs. 10,685,665/= and demanded payment of that amount.

In response to the said letter, the appellant, through its auditors/accountants, Mugo & Company wrote to the respondent explaining that there was no withholding tax, or penalties owing to the respondent, and asked the respondent to vacate the said letter. The respondent replied promptly, and stood its ground but re-assessed the amount owed to Kshs. 9,437,373/= for which it demanded payment in two days. The payment was not forthcoming and a few days later, on 22<sup>nd</sup> November, 2002, the respondent wrote to the

Manager Citi Bank, and the Manager Barclays Bank of Kenya Ltd, Karen Branch appointing the banks as its agents to recover Kshs. 8,982,649/= from any money including pensions, salary wages or any other remuneration that the said banks would be holding on behalf of the appellant.

These agency notices are what appears to have propelled the appellant to move to the High Court by way of Judicial Review in **Miscellaneous Civil Application No. 1338 of 2002** seeking the following reliefs:-

*(a) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the letters dated 24<sup>th</sup> October 2002 and 6<sup>th</sup> November 2002 written by Mrs. T. W. Kibinge for the Senior Assistant Commissioner Investigations Branch of the Income Tax Department of the Kenya Revenue Authority and addressed to the applicant.*

*(b) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the letter dated 18<sup>th</sup> November 2002 written by S.O. Aboge the Senior Assistant Commissioner Investigations Branch of the Income Tax Department of the Kenya Revenue Authority and addressed to the applicant.*

*(c) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the Agency Notice dated 22<sup>nd</sup> November 2002 written by S.O. Aboge, the Senior Assistant Commissioner Investigations Branch of the Income Tax Department of the Kenya Revenue Authority and addressed to The Manager, Citibank, P.O. Box 30711-00200 Nairobi.*

*(d) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the Agency Notice dated 22<sup>nd</sup> November 2002 written by S.O. Aboge, the Senior Assistant Commissioner Investigations Branch of the Income Tax Department of the Kenya Revenue Authority and addressed to the Manager, Barclays Bank of Kenya Ltd, Karen Branch, P.O. Box 24189 Nairobi.*

*(e) AN ORDER OF PROHIBITION to prohibit the respondent or any of its agents from further demanding from the applicant or its agents, the sum of Kshs. 8,982,649.00 or any sum at all, with respect to this suit.*

*(f) AN ORDER OF PROHIBITION to prohibit the respondent or any of its agents from issuing any further Agency Notice to the Applicant's bankers for payment of the sum of Kshs. 8,982,649.00 or any sum at all, with respect to this suit.*

The application was supported by the verifying affidavit of Jorgen T. Nielsen, the appellant's managing director, who deposed on 3<sup>rd</sup> December, 2002 that the heart of the dispute in the Judicial Review matter, which is also the main issue for determination in this appeal is the interpretation of **Section 35(1) of The Income Tax Act** as read together with **Section 2** thereof. Each party had a different interpretation.

According to the appellant, the correct interpretation of **Section 35(1) of the Income Tax Act (Cap 470 Laws of Kenya** (hereafter referred to as the Act)), as read with **Section 2** thereof, is that the appellant was not required to pay withholding tax on income due but not received, on interest, management fees, or external assistance before the same had been received.

The appellant, through Mr. Jorgen Nielsen also contended that withholding tax on consultancy, agency or contractual fees for residents, to include non-individuals became effective on 1<sup>st</sup> July, 2000 and the same could not be recovered from payments made in 1998 and 1999 regarding amounts paid locally with respect to external assistance.

According to the respondent however, the said provisions required withholding tax to be paid on interest, whether or not the said interest had been received or not. The respondent also contended that since payment was made to the appellant's parent company, the same attracted withholding tax under **Section 35 of the Income Tax Act**.

After it became clear that the parties were not able to agree on the interpretations, the appellant requested that the matter be settled in accordance with the Income Tax Act Appeals Procedure. The appellant proceeded to serve its Memorandum of Appeal and statement of facts upon the local committee in accordance with the Income Tax Act, but contemporaneously filed the application for Judicial Review before the High Court.

Parties filed their submissions for and against the application. After considering the arguments proffered by both sides, the learned Judge (Wendoh, J.) observed that the appellant had failed to disclose the fact that it had referred the matter for alternative dispute resolution to the local committee under **Section 83** of the Act and instead of following it through, moved to the court for Judicial Review orders.

The appellant nonetheless explained that for it to get any reprieve from the local committee, it was required to deposit the amount in dispute before it was heard, which money it did not have.

The learned Judge made a finding that if the appellant was disputing the findings of fact, then it ought to have pursued the matter before the Tribunal and not by way of Judicial Review. The Judge made a finding to the effect that the applicant had not disputed the entries in its accounts, which the respondent had relied upon to make the contested assessment, and therefore deemed these entries to have been admitted.

The learned Judge went ahead and made a finding that the payments for which tax was being demanded had been made; and went on to interpret the meaning and purport of **Section 35(1)(d)** and **Section 2 of the Income Tax Act**; and particularly the meaning of the words “paid” and “upon payment”.

The learned Judge also agreed with the respondent that the appellant, being a subsidiary of the parent company, any profits received or losses suffered would benefit or affect the whole group and the non-payment of interest was beneficial to the whole group because the monies received were used for joint ventures; and that it was immaterial whether interest was paid or the whole sum received was retained by the appellant.

Ultimately, the learned Judge found that withholding tax was owed; it was not paid; that **Section 35** was/is not ambiguous that the words “upon payment” has the same meaning as “paid” and that the appellant failed to deduct withholding tax from interest and management fees and income paid to its parent company, which it was obligated to pay.

The learned Judge consequently dismissed the notice of motion with costs to the respondent. That dismissal is the subject of this appeal in which the appellant has proffered five grounds, which in paraphrase, these grounds are as follows:-

*That the learned Judge erred in failing to find that the appellant had not made any payment in respect of which the respondent was entitled to demand withheld taxes; the learned Judge erred in her interpretation of Section 35(1)(e) of Income Tax Act; in not finding that the tax claimed was not clearly and unambiguously due from the appellant; and that the respondent had not acted unlawfully or capriciously, which conduct was amenable to Judicial Review.*

The appellant prays that the impugned decision be set aside and the same be replaced with an order allowing its motion for Judicial Review dated 3<sup>rd</sup> December, 2002. It also prays for costs both here and before the High Court.

Parties filed written submissions, the plaintiff’s submissions having been filed on 19<sup>th</sup> November, 2015, while those for the respondent were filed on 25<sup>th</sup> November, 2015. Both parties are in agreement that the gravamen of this case is the interpretation of **Section 35(1) of the Income Tax Act**, and more particularly, the meaning of the words “upon payment”.

Before we go into the different interpretations advanced by the parties to this phrase, it is necessary that we reproduce in full the said section.

*Section 35(1). A person shall upon payment of an amount to a non-resident persons not having a permanent establishment in Kenya in respect of:-*

*(a) a management or professional fee or training fee except:-*

*(i) a commission paid to a non-resident agent in respect of flowers, fruits or vegetables exported from Kenya and auctioned in any market outside Kenya and audit fees for analysis of maximum residue limits paid to a non-resident laboratory or auditor; or*

*(ii) a commission paid by a resident air transport operator to a non-resident agent in order to secure tickets for international travel.*

*(b) a royalty;*

*(c) a rent, premium or similar consideration for the use or occupation of property, except aircraft;*

*Provided that:-*

*(ii) where a non-resident person disposes of a bond, loan, claim, obligation or other evidence of indebtedness acquired from a person exempt under the First Schedule of a financial institution specified in the Fourth Schedule, tax shall be deducted upon final redemption from the difference between the final redemption price and the acquisition price, if the exempt person or financial institution certifies the acquisition price to the satisfaction of the Commissioner; and*

*(d) a dividend;*

*(e) interest, including interest arising from a discount upon final redemption of a bond, loan, claim, obligation or other evidence of indebtedness measured as the original issue discount;*

*(f) a pension or retirement annuity; provided that for the purposes of this paragraph, contractual fee within the meaning of ‘management or professional fee’ shall mean payment of work done in respect of building, civil or engineering works.*

*(g) an appearance at, or performance in, a place (whether public or private) for the purpose of entertaining, instructing, taking part in a sporting event or otherwise diverting an audience; or*

*(h) an activity by way of supporting, assisting or arranging an appearance or performance referred to in paragraph (g), which is chargeable to tax, deduct therefrom tax at the appropriate non-resident rate.*

According to the appellant, the tax liability being imposed on it was in respect of payments it was obligated to make to its “parent company”, being interest on advances, management fees and external assistance that was due from it and due to the parent company.

The appellant however maintained that it was making losses, and that no interest or other management fees had been paid to the parent company and therefore, no tax liability could attach. The appellant was of the firm belief that the respondent had not established that any payments had been made and it could not therefore demand payment of withholding tax on a whim.

On its part however, the respondent maintained that all that mattered was that payment was due and as far as it was concerned, once payment was due, liability to tax had attached and the threshold of **Section 35(1) of Cap 470** had been met. It was immaterial whether actual payment had been made.

The appellant’s interpretation of the words “upon payment” meant once payment had actually been received. On the other hand, the respondent’s interpretation was that as long as the money in question was

owed, whether it was actually paid or not, withholding tax had to be paid.

Although this was the singular issue that needed to be resolved in order for the dispute to be put to rest, the appellant chose to move the court by way of Judicial Review for orders of quashing the several demand letters, that the respondent had sent to the appellant demanding payment of withholding tax and the quashing of the agency notices served on the appellant's banks.

As stated earlier, the learned Judge analysed all the material before her, interpreted the meaning and purport of **Section 35(1) of the Income Tax**, and came to the conclusion that indeed, the tax in question was due and payable. She therefore dismissed the application, but not before making the following finding which we find important to repeat here:-

*“On the question of whether or not payments were made to the parent company, it is my view that this Court is not in a position to verify those allegations because that would go to the merits of whether or not any income or interest were earned and it also goes to the issue of assessment and that would best be determined by the Tribunal set up under **Section 83 of the Income Tax Act**. Judicial Review is concerned not with the merits of the decision made by the respondent but the fairness of the process by which the decision was arrived at.”*

We are in total agreement with the learned Judge on that finding.

A closer look at the judgment now impugned, shows that the learned Judge's main reason for dismissing the appellants application was its failure to disclose the existence of an appeal that had been filed with the local committee pursuant to **Section 83 of the Income Tax Act**.

The learned Judge stated:-

*“Failure to disclose the existence of an appeal imputes bad faith or lack of candour on the applicant. He who comes to this Court must approach it with clean hands. Failure to disclose disentitles the applicant of the remedy of Judicial Review.”*

The appellant urges this Court to find fault with that finding as filing the appeal contemporaneously with the Judicial Review proceedings could not have disentitled the appellant from being heard on Judicial Review.

On this issue, we can say that although we have several authorities from this Court that provide that the fact that an alternative remedy, other than Judicial Review exists cannot bar a party from being heard on Judicial Review, it is an abuse of the process of the court to have two live proceedings over the same subject matter in different courts or other dispute resolution organs.

We hold the view that the appellant ought to have withdrawn the appeal before filing its application for Judicial Review, or in the alternative as a demonstration of good faith, the appellant ought to have disclosed to the court that the appeal was pending and that it had decided not to pursue it in favour of seeking judicial review orders. The trial court found that non-disclosure fatal and based on that non-disclosure arrived at the conclusion that the appellant was disentitled to orders of Judicial Review. What we need to do now is to exercise the mandate given to us on first appeal such as this one, by **Rule 29(1) (a)** of the Rules of this Court, and succinctly enunciated in several decisions of this Court (See **Selle vs Associated Motor Boat Company Limited [1968] EA 123**; **Seascope Ltd vs Development Finance Company of Kenya Ltd [2009] KLR 384**.)

We have analysed the evidence adduced before the trial court, as contained in the application itself and the rival affidavits. We have also analysed the issues arising from Judicial Review matter and the law applicable.

From the outset, it is important to note that the subject of this appeal is a matter that is premised on Judicial Review proceedings under the former **Order LIII of the Civil Procedure Rules**, and **Section 8**

and **9 of the Law Reform Act**. As often stated by this Court, a court's jurisdiction under Judicial Review is very restricted indeed. It is neither criminal nor civil but a jurisdiction "*sui generis*". It questions the procedure followed in decision making rather than the merits of the decision itself. This Court pronounced itself succinctly on this issue in its decision in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, where it held:

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”**

See also **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**.

It also questions decisions arrived at in excess of jurisdiction by a judicial or quasi-judicial organ. That is to say, where a body though clothed with jurisdiction to make a particular decision arrives at the decision in excess of its jurisdiction, then such a decision is amenable to quashing by way of judicial review. The High Court in the case of **R vs Judicial Commission of Inquiry & 3 others ex parte Saitoti Misc Civil Application No.102 of 2006**, when defining parameters of Judicial Review held that where there is an abuse of power, the court should invoke its judicial review jurisdiction to prevent such an abuse of power.

In the present case, we understand the appellant to be saying that although the respondent has jurisdiction to demand payment of tax rightfully owed, in this case, no tax was owed and the respondent had no business demanding the amount of tax it did, and it had therefore overstepped its mandate when it issued the agency notices, against the appellant, before even waiting for the dispute to be resolved.

The basis on which the appellant contends there was lack of jurisdiction on the part of the respondent is what it believes to be the wrong interpretation of **Section 35 (1)** of the Income Tax Act as read with **Section 2** of the same Act. To the appellant, the interpretation is simple and straightforward. “Upon payment”, means “paid”; or for lack of better enunciation “already paid”. According to the appellant, the tax being imposed was on “payments it was obligated to make” to its parent company but which it had not made yet. According to the respondent however, as long as a credit entry had been reflected on one side of the balance sheet and a debit on the other, and accounts balanced, whether actual money had been received or not, withholding tax was indeed due upon demand. According to the respondent, it had calculated and demanded that tax; it was not paid and so it was in order and within the law for it to issue agency notices like it did.

The other issue placed before the learned Judge for determination was for her to make a finding that withholding tax on consultancy, agency or contractual fees for residents to include non-individuals became effective on 1<sup>st</sup> July 2000, and so the same was not recoverable from payments made in 1998 and 1999 regarding amounts paid locally with respect to external assistance.

According to the appellant, the respondent had acted capriciously and with malice in issuing the agency notices when the dispute as to whether the tax was owed or not had not yet been determined.

These were the issues before the Judicial Review court. We have earlier on brought out the findings made by the learned Judge on these issues. The learned Judge went ahead and interpreted the meaning of **Section 35 (1)** as read with **Section 2** of the Income Tax Act. As a first appellate Court, we need to address this issue and come to our own conclusion as to whether that was within the ambit of judicial

review. As we pointed out earlier, judicial review is like a strait jacket, we cannot expand it however noble our intentions are. We must therefore restrain ourselves to its settled parameters namely, illegality, impropriety of procedure, irrationality, Wednesbury unreasonableness, bias, bad faith malice, excess of jurisdiction (*ultra vires*), retrospective laws and abuse of power.

From the above it is clear that the appellant's grievances fell squarely within the ambit of Judicial Review and the learned Judge had jurisdiction to entertain them and arrive at her findings. After hearing the parties and considering the pleadings and evidence before the court, the learned Judge summarised the issues for determination and proceeded to make findings on them.

It is important for us to bring those issues out clearly to enable us make a determination as to whether or not they were issues that could be determined within the Judicial Review proceedings.

1. **Whether the applicant has an alternative remedy;**
2. **Whether the demand for withholding tax is illegal and in contravention with the laws of Kenya.**
3. **Whether Section 35 (1) as read with Section 2 is ambiguous;**
4. **Whether the demand for withholding tax on consultancy agency or contractual fees is retroactive;**
5. **Whether the respondent has acted capriciously;**
6. **Whether the orders sought can issue.**

On the first issue, we have discussed this earlier and shown that the applicant (appellant) had an alternative remedy other than Judicial review and had actually pursued the same. The fact that it could have pursued another remedy could not bar it from pursuing Judicial Review remedies. As we stated earlier however, the appellant should not have pursued both matters contemporaneously before two different avenues.

The second issue was also squarely within the Judicial Review ambit and the learned Judge was in order to entertain it. This is so because as we said earlier on, Judicial Review also questions lawfulness or legality of the actions of judicial or quasi-judicial or administrative organs like the respondent. The Respondent under **Section 120** of the Income Tax Act has authority to inquire into the accounts of a company, assess tax it finds owing and demand payment of the same. The fact of inquiring into and assessing tax and demanding payment of the same, *per se*, was not unlawful.

The fourth issue was also properly before the court because if the respondent was imposing taxes retrospectively, then that would be in violation of tax law, as clearly enunciated by this Court in several decisions, and such a decision would have been made in excess of jurisdiction and would be amenable to judicial review. (See **The Kenya Revenue Authority & 6 Others vs. Keroche Industries**).

The learned Judge upheld the respondent's submission that the withholding tax sought for the years 1998 and 1999 was not retroactive, and it was covered by the Income Tax Act 1995. In making the withholding tax demand for those years, the respondent was not applying the 2000 amendment to the Income Tax but was relying on the law as it was in 1995. We are in agreement with the learned Judge on this point and find that the amendment made to the Act in 2000 added the words "agency and contractual" which did not affect the payments demanded in the years 1998 to 1999. See also our decision in **Stanbic Kenya Limited VS. Kenya Revenue Authority (2009) eKLR** which dealt with a similar issue.

Issue No.5 was also within the Judicial Review ambit as it questioned the conduct and rationality of the respondent's decision. We shall nonetheless advert to this issue later and analyse it in greater detail.

On the question as to whether the learned Judge could interpret the meaning of **Section 35 (1)** as read with **Section 2** of the **Cap 470**, our view is that as long as the learned Judge could do so without delving into the facts or merits of the case, then it was in order. We say so because if the Judge were to find that the interpretation adopted by the respondent was the wrong one, then the logical conclusion would have been that the respondent had no basis to demand the tax in question, and it would therefore have overstepped its jurisdiction.

The learned Judge appreciated the principle that it was not her place to delve into the facts surrounding a live dispute and to make findings on the same as that would mean going into the merits of the matter. The learned Judge had this to say on that point:

**“on the question of whether or not payments were made to the parent company, it is my view that this court is not in a position to verify those allegations because that would go to the merits of whether or not any income or interest were earned and it also goes to the issue of assessment and that would best be determined by the Tribunal set up under Section 83 of the Income Tax Act. Judicial Review is concerned not with the merits of the decision made by the respondent, but the fairness of the process by which the decision was arrived at.”**

We are in total agreement with the learned Judge on the above finding. The learned Judge should have stopped there. What she did however was to depart from that principle and do a complete turnaround by descending into the realm of disputed facts and making a determination that the monies had been paid, only basing that finding on what she said was the fact that **“Cimbria has not disputed what the respondent says were entries in the profit and loss account of the Applicant.”**

In our view the question as to whether payment had been made or not was not for the Judge sitting on Judicial Review proceedings to determine. Interestingly, further down in her judgment, the learned Judge observed that if the appellant disputed the findings of fact advanced by the respondent, and in our view whether payment had been made or not was a question of fact, such dispute could only be determined by the tribunal set up under **Section 83** of the Income Tax Act. There is no doubt whatsoever as can be seen from the exchange of correspondence between the appellant’s auditors and the respondent’s officers that they could not agree on whether the monies in question had been credited to the appellant’s balance sheets as claimed by the respondent. This was an issue that could only be determined by calling evidence, and this would inevitably have meant delving into the merits of the case.

The learned Judge therefore fell into error when she went into the issues of merit and made a finding that payment had not been disputed by the appellant.

The other issues arising from the impugned judgment are carried by the ground on interpretation of **Section 35(1)** of the Income Tax Act, and more particularly the meaning of the words **“upon payment”**. These words may appear simple and straight forward, but not so in tax law. Indeed they have been subject of interpretation in many decisions both within and outside our jurisdiction. We start the interpretation with the simple English dictionary meaning attached to these words. In normal English parlance, the word **“on”** and **“upon”** are used interchangeably and are taken to have similar meaning. The word **“upon”** is defined in ***Ballentine’s Law Dictionary*** by **Jack G. Handler** as “on... Upon sight, same as at sight; upon trial, at trial, at the time of trial, when the court is tried, when the case was tried.” It follows that “upon payment” would similarly refer to ‘upon payment, when payment was made, at the time of payment.’

**P Ramanatha Aiyar** in his **Major Law Lexicon**, 4<sup>th</sup> edition 2010 equates the word “on” to “upon” and defines the word “on” as “Upon, as soon as, near to, along, alongside of, adjacent to, contiguous to, at the time of, following upon, in, during...”

From these renowned scholars of Law, it is clear that the words “upon payment” would mean ‘on payment’, and in this case, it would also mean “paid”. We agree with the learned Judge’s interpretation of the said phrase in the case of **Republic v. Kenya Revenue Authority & Another Ex parte Kenya Nut Company Limited** [2014] eKLR, where the court held that the word ‘upon payment’ literally means ‘paid’.

Both learned counsel in this matter are also in agreement 'that upon payment' means 'paid'. Their point of departure is that the appellant says the monies had not been paid yet and so no withholding tax could attach, while on the other hand the respondent argues that the moment the appellant debited its books and credited the Parent company's books, the payment crystallised, and withholding tax became payable.

According to the appellant there was no proof that any payments had been made, and indeed its position was that no payment had been made to warrant the assessment and demand for payment. The learned Judge agreed with the respondent, on the basis that the appellant had not disputed the entries in its profit and loss account.

We pause here and ask, did the learned Judge have the jurisdiction to dig into the accounts and make her conclusion that the monies had actually been credited? We hold the view that the learned Judge overstretched her jurisdiction on this one. In fact after making this finding she went ahead and made the following statement which we find reflects the correct position; *"If Cimbria disputes the findings of fact, by the respondent, it should have challenged them at the Tribunal but not by way of Judicial Review"*.

Having considered the entire record of appeal, submissions of counsel both here and before the High Court, the oral highlighting and the legal authorities cited, along with the grounds of appeal, we come to the following conclusions; That the words "upon payment" mean "paid" and not "payable". Secondly, that there was a dispute as to whether the monies in question had been paid or not. It was the respondent's contention that the appellant's accounts showed that the monies in question had been credited to the accounts and the accounts balanced, and in view of the definition of the word 'paid' in **Section 2** of the Income tax Act to include 'credited', then withholding tax was payable. The issue here in our view was not the purported ambiguity of **Section 35(1) A** of the Income Tax Act, but whether the said monies had been credited into the appellant's account or not. We nonetheless find that neither the court sitting on Judicial Review nor this Court can resolve the issue of facts as to whether the monies said to have been credited into the appellant's accounts had been paid and if so how much. That dispute could only have been determined in the appeal before the Local committee, after hearing the parties. That is why we faulted the learned Judge elsewhere in this judgment for venturing into contested matters of fact and concluding that the appellant had not disputed the figures in question.

We now revert to issue No. 5 as listed by the learned Judge. This was the issue on the conduct of the respondent when dealing with this matter. The appellant claimed that the respondent had behaved in a capricious manner, and or unreasonably in demanding payment of the tax in question without considering the appellant's side first. As stated elsewhere in this judgment, judicial review is also called into play in cases of what we referred to earlier as Wednesbury unreasonableness. The term "wednesbury unreasonableness" is derived from the locus classicus case of **Associated Provincial Picture Houses Ltd Vs. Wednesbury [1914] 1KB 222**, where Lord Green expressed himself as follows:-

**It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonableness" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting "unreasonably". Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority....."**

According to the learned Judge, the appellant had failed to demonstrate that the respondent had acted in bad faith or had been capricious. Whereas we would have been inclined to say more on this issue, given that after the assessment no notice was given or time to appeal and immediate payment of the assessed tax was demanded, the appellant did not raise these issues. We shall therefore say no more on that issue.

All in all, we find that the learned Judge veered off course and delved into and determined the merits of

the case which as we have stated earlier was outside the purview of Judicial Review. As stated earlier, our view of the matter is that the issues as to whether the money had been credited to the appellant's account or not are issues for determination by this Court.

We reiterate that the answer and recourse sought by the appellant lies with the Local committee where the appellant had already filed its appeal. We appreciate the appellant's concern that pursuing the appeal before the committee will require it to deposit the entire amount claimed by the respondent. In our view, such a requirement stands in the way of equality before the law as guaranteed by the Constitution of Kenya 2010, as it gives the respondent an undue advantage over the party that dares to appeal against its decision. It is also a hindrance or obstacle to the guaranteed right of access to justice. It is definitely one of the laws that requires adjustment to align it to the dictates of our very progressive constitution.

In view of the above, we conclude that this appeal partially succeeds in that the orders of the High Court which we have concluded were arrived at in excess of jurisdiction cannot be allowed to stand. Consequently, the impugned judgment dated 4<sup>th</sup> of October, 2010, is hereby set aside. The application dated 3<sup>rd</sup> December, 2002 is hereby allowed in terms of prayers (a), (b), (c) and (d) thereof, which are as follows:-

*a) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the letters dated 24<sup>th</sup> October 2002 and 6<sup>th</sup> November 2002 written by Mrs. T. W. Kibinge for the Senior Assistant Commissioner Investigations Branch of the Income Tax Department of the Kenya Revenue Authority and addressed to the applicant.*

*b) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the letter dated 18<sup>th</sup> November 2002 written by S.O. Aboge the Senior Assistant Commissioner Investigations Branch of the Income Tax Department of the Kenya Revenue Authority and addressed to the applicant.*

*c) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the Agency Notice dated 22<sup>nd</sup> November 2002 written by S.O. Aboge, the Senior Assistant Commissioner Investigations Branch of the Income Tax Department of the Kenya Revenue Authority and addressed to The Manager, Citibank, P.O. Box 30711-00200 Nairobi.*

*d) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the Agency Notice dated 22<sup>nd</sup> November 2002 written by S.O. Aboge, the Senior Assistant Commissioner Investigations Branch of the Income Tax Department of the Kenya Revenue Authority and addressed to the Manager, Barclays Bank of Kenya Ltd, Karen Branch, P.O. Box 24189 Nairobi.*

The documents referred to in the above orders are removed into this Court and are hereby quashed.

However, as far as prayers (e) and (f) are concerned, as observed earlier, one of the core functions of the respondent is to collect and demand payment of taxes rightly and legally owed by all eligible taxpayers, the appellant included. The Court cannot therefore prohibit the respondent from demanding any tax lawfully owed to the Government by the respondent, upon fair assessment and after hearing the respondent on the issue as to whether the money in question was actually paid or credited to the appellant's account, or not. Prayers (e) and (f) are therefore disallowed. In view of these orders we order that each party bears its own costs both here and in the High Court.

***Dated and delivered at Nairobi this 22<sup>nd</sup> day of September, 2017.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**