Mubea Group Limited v Kenya Revenue Authority (Judicial Review Originating Motion Application E115 of 2025) [2025] KEHC 12003 (KLR) (Judicial Review) (14 August 2025) (Judgment)

Neutral citation: [2025] KEHC 12003 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW ORIGINATING MOTION APPLICATION E115 OF 2025

RE ABURILI, J

AUGUST 14, 2025

BETWEEN

MUBEA GROUP LIMITED ..... EX PARTE APPLICANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

JUDGMENT

1. The application before this court is the Originating Motion dated 6th May 2025. The Motion is brought pursuant to Article 47 of *the Constitution*,2010 and Section 8,13,14 and 15 of the *Fair Administrative Action Act*.

2. The application seeks the following orders:

    1. This application be certified as urgent, service of the same be dispense with in the first instance and interim orders granted ex-parte.

    2. That there be a stay of execution and lifting of the agency notice issued on 15th April, 2025 pending the hearing and determination of this application.

    3. That a temporary injunction be issued restraining the Respondents from enforcing the agency notice dated 15th April, 2025 served upon Cooperative Bank of Kenya for the sum of Kenya Shillings Ten Million, One Hundred Thousand, Seven Hundred and Seventy Four Only (Kes10,100,774/=) pending the hearing and determination of this application.

    4. That an order of Certiorari be issued to remove into this court for purposes of quashing the decision of the Kenya Revenue Authority to demand and collect Kes. 10,100,774/= in respect

of the Notice dated 15th April, 2025 addressed to the applicant's bankers, Cooperative Bank Limited.

5. That an order of Prohibition be issued to prohibit the Kenya Revenue Authority from continuing to wrongfully demand from the applicant and its bankers, Cooperative Bank of Kenya Limited, the sum of Kes. 10,100,774/= on account of the custom duties allegedly payable by the applicant for non-cancellation of transit bonds.

6. That the costs of and occasioned by this Motion be taxed and paid by the respondent to the applicant.

7. That the Honorable Court be pleased to give all necessary and consequential directions.

3. The application is supported by the affidavit of David Maina sworn on 6th May 2025.

4. The Ex parte Applicant's case is that on 15th April 2025, the Respondent issued the Applicant's bank, Cooperative Bank of Kenya with a demand letter and agency notice dated the same day.

5. It is contended that the alleged tax amount was not as a result of any tax assessment, decision, or determination made under the relevant tax laws, but was instead imputed during the migration of the Respondent's systems from the Integrated Tax Management System (ITMS) to the current iTax platform.

6. The Applicant contends that despite numerous inquiries and follow-ups, officers from the Kenya Revenue Authority have been unable to provide a substantive explanation or justification for the origin or computation of the said figure.

7. Further, that a thorough examination of the Applicant's audited financial statements and supporting documentation for the period in question does not reflect the existence of the alleged figure in any form, whether as income, liability, receivable, or contingent item. The Applicant also contends that audit reports, prepared and certified, do not make any reference to such an amount, nor do they raise any queries, qualifications, or notes that would support or explain the origin or computation of the said figure.

8. The Applicant claims that the return filing form generated from the Kenya Revenue Authority's online system for the relevant period equally fails to reflect the alleged amount, and that the form, which captures data as submitted and acknowledged by the Authority at the time of filing, contains no entry or reference to the said figure, thereby strongly suggesting that the inclusion of the amount is erroneous and inconsistent with the Applicant's actual filings and declared tax obligations.

9. According to the Ex parte Applicant, there being no objectable tax decision, the respondent has curtailed its right to object to the action, and decision in terms of section 51 of the *Tax Procedures Act* No 29 of 2015. This, it is averred, is an exceptional circumstance entitling the Applicant the orders sought before this Honorable Court.

10. The Applicant states further that if the Respondent is allowed to execute the agency notice dated 15th April 2025 as prayed, the applicant will suffer irreparable damage occasioned by the impending loss of substantial amounts of money to the Respondent.

11. It is the Applicant's further position that the application has met the three traditional grounds for judicial review being illegality, irrationality and procedural impropriety as was explained by the court in the case of Council of Civil Service Unions vs. Minister for the Civil Service (1985) AC 374,410. The Applicant states that it has demonstrated a prima facie case with a high probability of success.

Response

12. In response the Respondent filed a Notice of Preliminary Objection dated 22nd May 2025 raising 4 grounds.

13. In the Objection, the Respondent contends that this Court lacks the requisite jurisdiction to hear and determine the suit in its entirety by virtue of section 52(1) of the *Tax Procedures Act* which designates the Tax Appeals Tribunal as the appropriate forum. Further, that the instant suit therefore offends the doctrine of exhaustion as provided for under section 9(2) of the *Fair Administrative Action Act*.

14. The Respondent also states that the instant suit offends the precedent set in the Court of Appeal decision in The Speaker of National Assembly -vs- James Njenga Karume [1992] eKLR to the effect 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. According to the Respondent, the instant suit is an outright abuse of the court process and ought to be dismissed with costs to it.

Submissions

15. The Originating Motion application was canvassed by way of written submissions. The Applicant filed written submissions dated 9th June 2025 in which it argues that the court had already satisfied itself on the issue of exhaustion of remedies and that filing of the Preliminary Objection appears to have been unnecessary. The Applicant also submits that the statutory mechanisms under the *Tax Procedures Act* and the *Tax Appeals Tribunal Act* are only triggered upon the making of a valid decision.

16. That without such a decision, the Applicant had no basis upon which to object under Section 51 of the *Tax Procedures Act*, nor could it invoke the appellate jurisdiction of the Tax Appeals Tribunal under Section 12 of the *Tax Appeals Tribunal Act*. Consequently, that the only available and effective remedy lay in invoking the High Court's jurisdiction under judicial review, pursuant to Articles 47 and 165 (6) and (7) of *the Constitution*, the *Fair Administrative Action Act* and Fair Administrative Action Rules,2024.

17. The Applicant relies on the case of Republic vs. National Environment Management Authority Ex parte Sound Equipment Ltd [2011]eKLR where the court is said to have held that judicial review is concerned with the decision making process and not the merits of the decision itself, and that it ensures public bodies do not act beyond their mandate in a manner that violates rights.

18. On the Preliminary Objection raised by the Respondent, the applicant argues that the same does not meet the threshold set out in Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. It is also submitted that whether or not a tax decision was made within the meaning of the relevant provisions of the *Tax Procedures Act* is not a matter ascertainable solely from the face of the pleadings. The Applicant submits that it is a question of fact that demands evidentiary inquiry.

19. The Applicant further submits that the Respondent's action of resorting to enforcement devoid of any appealable tax decision is capricious, arbitrary, irrational and unreasonable as was held by the court in the case of Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2023 & 2 Others [2012] eKLR.

20. Further, that the Respondent breached the rules of natural justice as was held by the court in the case of Republic vs. Commissioner General, Kenya Revenue Authority and Martin M Mugi; Ex Parte Applicant [2018] eKLR.

21. The Applicant additionally submits that an order of certiorari should issue to quash the agency notice which was issued unprocedurally, and an order of prohibition to restrain the Respondent from taking any further unlawful steps based on the defective process and to restrain any further enforcement.

22. On the issue of costs, it is submitted that it is trite that they follow the event. Further that the Respondent is liable for costs of the application given that its actions necessitated the judicial intervention.

23. The Respondent filed written submissions dated 10th June 2025. It relies on the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696 for what constitutes a preliminary objection. It also relies on section 52(1) of the *Tax Procedures Act* which provides that any person aggrieved by an appealable decision may appeal the same to the Tribunal in accordance with the *Tax Appeals Tribunal Act*.

24. The Respondent also cites section 2 of the *Tax Procedures Act* on the definition of an appealable decision. It submits that the decision to issue an agency notice is an appealable decision issued under a tax law pursuant to the provisions of section 42 of the *Tax Procedures Act*, and that the proper forum to challenge its propriety is the Tax Appeals Tribunal.

25. The Respondent relies on the case of Saleh Mohammed Trust vs. The Commissioner for Domestic Taxes HCCOMMITA/E221/2023 where the court is said to have held that it should be noted that the Tax Appeals Tribunal is the primary forum for seeking redress of the Respondent's decision before the matter is escalated to a judicial review court.

26. The Respondent submits that the Applicant has not demonstrated any exceptional circumstances to warrant the court's intervention. The Respondent relies on the case of Geoffrey Muthinja Kabiru & Others vs. Samuel Muguna Henry & 1756 Others [2015] eKLR where the court is said to have emphasised the need to exhaust dispute resolution mechanisms that exist before invoking the jurisdiction of the court.

Analysis and Determination

27. I have considered the originating Motion, the supporting affidavit and annexures thereto, the Notice of Preliminary Objection and the rival submissions by the parties. In my view, the following issues arise for determination:

    i. Whether the Preliminary Objection meets the threshold in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696;

    ii. Whether an agency notice issued under Section 42 of the *Tax Procedures Act* constitutes an "appealable decision" within the meaning of Section 2 of the *Tax Procedures Act* and therefore whether there is an alternative appeals mechanism which the applicant should have resorted to;

    iii. Whether the doctrine of exhaustion applies and, if so, whether the Applicant has demonstrated exceptional circumstances to warrant exemption; and

    iv. What orders should the Court make?

Whether the Preliminary Objection meets the threshold in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696;

28. It is now trite law that a preliminary objection must raise a pure point of law which, if upheld, may dispose of the matter without the necessity of ascertaining contested facts. This is the position espoused

in the locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, where Law JA held that:

> " A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
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> Sir Charles Newbold P added that:
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> "The first matter that a court has to consider is whether what is before it is a preliminary objection as understood in law. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

29. The Respondent's preliminary objection is anchored on Section 52(1) of the *Tax Procedures Act* and Section 9(2) of the *Fair Administrative Action Act*, contending that this Court lacks jurisdiction in view of the available statutory dispute resolution framework. According to the respondent, the agency notice given is a decision which is appealable under the *Tax procedures Act* ti the Tax Appeals Tribunal and not available for judicial review to this Court. The applicant argues that the decision is not appealable.

30. The question whether an agency notice issued under section 42 of the *Tax Procedures Act* constitutes an "appealable decision" within the meaning of section 2 of the *Tax Appeals Tribunal Act* is, in my view, a pure point of law within the Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 parameters. The question turns entirely on the interpretation of statutory provisions namely, whether such a notice falls within the catch-all category of "any other decision made by the Commissioner under any tax law" and does not require the court to ascertain any disputed facts.

31. For purposes of the preliminary objection, the existence and issuance of the agency notice are not in contention from the record. The determination calls only for application of the law to those assumed facts, and if upheld, the finding would dispose of the matter at the threshold on jurisdictional grounds without delving into the merits.

32. On whether the agency notice issued by the Commissioner is a decision which is appealable to the Tax Appeals Tribunal, section 2 of the *Tax Appeals Tribunal Act*, 2013 defines an appeal as: "appeal" means an appeal to the Tribunal against a decision of the Commissioner under any of the tax laws."

33. On the other hand, tax laws is interpreted to mean: "tax law" means—

    (a) the *Income Tax Act* (Cap. 470);

    b) the *Excise Duty Act* (Cap. 472); or

    c. the Value Added Tax (Cap. 476);

    d. the East African Community Customs Management Act, 2004;

    e. any other tax legislation administered by the Commissioner;

34. As to what an appealable decision is, Section 3 of the *Tax Procedures Act* defines "appealable decision" as follows:

> " Appealable decision" means an objection decision and any other decision made under a tax law other than—
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> (a) a tax decision; or
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> (b) a decision made in the course of making a tax decision."

35. Section 52(1) of the *Tax Procedures Act*, 2015 provides that:

> " A person who disputes a tax decision may appeal the decision to the Tax Appeals Tribunal in accordance with the *Tax Appeals Tribunal Act*."

36. The *Tax Procedures Act* in section 3 defines a "tax decision" as"tax decision" means—

a. an assessment;

b. a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;

c. a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under sections 15, 17, and 18;

d. a decision on an application by a self-assessment taxpayer under section 31(2);

e. a refund decision;

f. a decision under section 48 requiring repayment of a refund; or

g. a demand for a penalty.

37. In Krystalline Salt Limited v Kenya Revenue Authority [2019] KEHC 6939 (KLR) faced with question of whether or not an agency notice is an appealable decision within the meaning of section 3 of the *Tax Procedures Act* held as follows:

> " 38. . Second, whether the decision is an appealable decision within the above provision. As stated above, the act defines an appealable decision" as an objection decision and any other decision made under a tax law other than—
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> (a) a tax decision; or
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> (b) a decision made in the course of making a tax decision. The words "any other decision under the tax laws" is significant. The impugned notice falls under the above definition. To hold otherwise would amount to intellectual dishonesty given the clarity of the provision."

38. Similarly, in Commissioner of Domestic Taxes v Pevans East Africa Limited & 6 others [2022] KEHC 10392 (KLR) the Court observed that:

> " Further, I have little doubt that the commissioner's decision of demanding and issuing agency notices to the respondents' bankers was an appealable decision to the Tribunal within the meaning and definition of an 'appealable decision' under section 3(1) of the TPA

which provides that it is, "an objection decision and any other decision made under a tax law other than— (a) a tax decision; or (b) a decision made in the course of making a tax decision."

16. In Krystalline Salt Limited v Kenya Revenue Authority NRB HC JR No. 359 of 2018 [2019] eKLR, Mativo J., upheld the argument that a decision made under any other tax law including the exercise of powers under section 42 of the TPA is an appealable decision and observed that, "The impugned notice (under section 42 of the TPA) falls under the above definition. To hold otherwise would amount to intellectual dishonesty given the clarity of the provision." I agree.

17. I therefore find and hold that the respondents were entitled to appeal against the decision leading to issuing of agency notices in accordance with section 52(1) of the TPA which provides that, "A person dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the *Tax Appeals Tribunal Act*, 2013.". This provision is to be read with section 3(3) of the *Tax Appeals Tribunal Act*, 2013 ("the TATA") which states that, "There is established a Tribunal known as the Tax Appeal Tribunal to hear appeals filed against any tax decision made by the Commissioner". This ground of appeal that the Respondents lacked locus standi to file their respective appeals at the Tribunal lacks merit."

39. In this case, it is not in dispute that the Commissioner assessed tax payable by the applicant and sent agency notice to the applicant's bankers. As to whether that tax was correctly or procedurally assessed or whether it is due or at all, it is an assessment which can be challenged, being a tax decision.

40. Guided by the above judicial pronouncements and statutory provisions, which I have no reason to depart from, I am satisfied that an agency notice issued under Section 42 is indeed an appealable tax decision within the meaning of Section 2 of the *Tax Appeals Tribunal Act* and section 3 of the *Tax Procedures Act*, and consequently, the decision falls within the appellate jurisdiction of the Tax Appeals Tribunal pursuant to Section 52(1) of the *Tax Procedures Act*.

41. The question is whether the applicant ought to have appealed against the decision to the Tax Appeals Tribunal or whether this court has jurisdiction to hear and determine the complaint placed before it.

42. Before turning to the substantive analysis of this issue, I must first deal with the Applicant's contention that this court has already made a finding on the question of exhaustion of remedies.

43. This court in its ruling of 12th May 2025 observed as follows"

> "I have heard the Applicant's counsel on the question of exhaustion of remedies and I am satisfied that at this stage, in the absence of any other evidence to the contrary, there is no decision on assessment of the tax payable by the applicant which was demanded and or disputed by the applicant to the Commissioner and which the applicant could escalate by way of an appeal to the Tax Appeals Tribunal."

44. In its ruling, which followed exparte arguments for stay of enforcement of the agency notice, this Court did not make a final and binding determination on the question of exhaustion of remedies but merely stated that, on the material then before it, it could not see how the Applicant could escalate the matter to the Tribunal. That position was provisional and it is for that reason that the Court stated that at "that stage, in the absence of any evidence to the contrary." The contrary has established that indeed,

the decision was appealable and therefore this Court cannot be said to have made a final decision on whether or not the decision to issue agency notice was appealable under the *Tax Procedures Act*.

45. Thus, with the subsequent filing of the Preliminary Objection, which squarely raises the point that an agency notice falls within the definition of an "appeal" under section 2 of the *Tax Appeals Tribunal Act*, and "an appealable decision" under section 3 of the *Tax Procedures Act*, the legal position is clarified and the facts placed before this court by the application for interim orders that there was no appeal mechanism, collapses. On that premise, the doctrine of exhaustion is properly invoked, and therefore the Applicant was required to first pursue the statutory appeal process before approaching the High Court in the manner provided for under section 53 of the *Tax Procedures Act* which is by way of an appeal.

46. Still on exhaustion of remedies, in Republic v Kenya Revenue Authority & another; Equity Bank Limited & 3 others (Interested Parties) Ex Parte Nairobi City County Government [2019] KEHC 11091 (KLR) the court observed as hereunder:

> " 34. Before I conclude this decision let me touch on the submissions by KRA and the Attorney General regarding the use and availability of alternative dispute resolution procedures. The availability of an alternative remedy is not a bar to judicial review proceedings but in order to avoid the alternative dispute resolution mechanism clearly anchored in Article 159 of *the Constitution*, an applicant must show that there are exceptional circumstances that would allow the court sidestep its constitutional imperative to promote alternative dispute resolution. That is why section 9(4) of the FAA provides that:
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> > 9(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. [Emphasis added]
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> "35. In this case the alternative remedy for challenging Agency Notices is clearly provided by section 2 of the TATA which has created the Tax Appeals Tribunal."

47. Section 9(2) of the *Fair Administrative Action Act* and the decision in Speaker of the National Assembly v James Njenga Karume [1992] eKLR underscore the principle that where the law provides a specific dispute resolution mechanism, that mechanism must be strictly followed. The High Court may, under Section 9(4) of the Act, exempt a party from the requirement upon demonstration of exceptional circumstances.

48. The rationale of the doctrine of exhaustion was further explained in the case of Geoffrey Muthiga Kabiru & 2 others vs. Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that 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 the Courts..."

49. In the case of Mutanga Tea & Coffee Company Ltd vs Shikara Limited &Another [2015] eKLR the Court stated thus:

> " This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume (supra) was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by *the Constitution*. In granting the order, the Court made the often-quoted statement that:
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> "[W]here there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."
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> See also Kones v Republic & Another exparte Kimani Wanyoike & 4 Others[2008] 3 KLR (ER) 296.
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> It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.
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> The basis for that view is first that Article 159 (2) (c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of *the Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of *the Constitution* in a way that will accommodate the alternative dispute resolution mechanisms.
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> Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In Rich Productions Ltd. V. Kenya Pipeline Company & Another, Petition No. 173 OF 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:
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> "The reason why *the Constitution* and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."
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> On the same reasoning, this Court, in Republic V. The National Environmental Management Authority, Ca No 84 OF 2010 upheld a decision of the High Court, which

declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted. More recently in Vania Investment Pool Ltd. V. Capital Markets Authority & 8 Others, Ca No 92 OF 2014 this Court also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the Capital Markets Appeals Tribunal established by the *Capital Markets Act*."

50. As was observed by Nyamu, J in Republic v Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728:

> " In the long run in the interest of the overriding objectives of case management, no group of litigants no matter how privileged are entitled to more judicial time than any other. Judicial time is an expensive resource which must be apportioned fairly to the entire spectrum of the work in the Court. Every file is important. For Courts to continually inspire confidence of the Court users and litigants, they must have a very sharp sense of proportionality, fairness and equity in the allocation of judicial time."

51. In Ndiara Enterprises Ltd v Nairobi City County Government [2018] KECA 825 (KLR) the Court of Appeal had this to say on exhaustion of alternative dispute resolution mechanisms, upholding the decision by this Court (R.E.Aburili J to decline jurisdiction:

> " Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of The speaker of The National Assembly v Njenga Karume (2008) 1 KLR 425, Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor (2015) eKLR for that proposition.
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> The appellant also alleged that the respondent's refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section 9 (2) of the Act from reviewing "an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. "The Act however gives the High Court power to exempt a person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows;
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> "In addition, under Section 9(2) of the *Fair Administrative Action Act* No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "shall not" review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
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> (3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under suction (1) (4) Notwithstanding Subsection (3) the High Court or

subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice ...

64. From the above provisions of the law and decided cases, it is clear that even the *Fair Administrative Action Act* which the exparte applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.

65. In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary."

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent's refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It's clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of *the Constitution* was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue."

52. The Applicant contends that there was no prior assessment or objectionable decision, and that the impugned demand emanated from a system migration anomaly, thereby depriving it of the statutory right of objection under Section 51 of the Act. While these allegations raise concerns of fairness, they do not demonstrate that the Tribunal is incapable of granting an effective relief after hearing the appeal, which appeal would also be appealable to the High Court under section 53 of the Act as stated above. The Tribunal is vested with jurisdiction to interrogate both the legality and procedural propriety of

enforcement actions, including agency notices. No evidence has been presented to justify bypassing that forum.

53. Section 12 of the *Tax Appeals Tribunal Act* provides for Appeals to the Tribunal in the following terms:

> A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal, Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.

54. The *Tax Appeals Tribunal Act* provides an elaborate procedure for filing of appeals and hearing of parties and at section 18, the Tribunal has jurisdiction to order to stay or affect the implementation of the decision under review. The section provides:

> Where an appeal against a tax decision has been filed under this Act, Tribunal may make an order staying or otherwise affecting the operation or implementation of the decision under review as it considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the appeal.

55. The Applicant also asserts that the Respondent acted without notice, without furnishing the computation or legal basis of the alleged liability, and without affording a hearing prior to enforcement. Article 47 of *the Constitution* and Sections 4 and 6 of the *Fair Administrative Action Act* demand transparency, fairness and reasoned decision-making by public bodies. These are weighty matters however; they fall squarely within the remit of the Tax Appeals Tribunal and ought to be raised there in the first instance. This court must not usurp powers or jurisdiction conferred on independent Tribunals whose members are specialized in Tax matters. To do so would undermine the integrity of the statutory dispute resolution framework established under Kenyan tax law and which is fully supported by the constitutional framework at Article 159(2) (c). The Tax Appeals Tribunal is a specialized body established by Parliament to handle complex and technical matters relating to taxation. It is equipped with the necessary expertise and statutory mandate to resolve such disputes efficiently.

56. The Applicant has not demonstrated that it attempted to appeal the Commissioner's decision to the Tribunal, nor that the matter falls within any of the recognized exceptions to the exhaustion doctrine, such as lack of jurisdiction, unreasonable delay, or violation of fundamental rights in a manner that cannot be addressed by the Tribunal.

57. In light of the foregoing, I find that the Respondent's Preliminary Objection is merited. It is upheld. The applicant still has the opportunity to apply for extension of time for objecting to the impugned decision.

58. In the end, this Court declines jurisdiction and strikes out the Originating Motion dated 6th May 2025 with an order that each party bear their own costs of the originating motion.

59. It is so ordered.

60. This file is closed.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 14TH DAY OF AUGUST, 2025

R.E. ABURILI

JUDGE