REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 448 OF 2018

In the matter of an application by Keycorp Real Advisory Limited for leave to apply for orders of *Certiorari* and *Prohibition*

and

In the matter of Agency Notices and orders dated 9th November 2018 by the Commissioner for Investigation and Enforcement Department

Between

Republic.....Applicant

versus

Kenya Revenue Authority, Commissioner.....Respondent

and

Keycorp Real advisory Limited.....*Ex parte* applicant

RULING

*1. By a Chamber Summons dated **13th** November 2018, the ex parte applicant seeks leave to apply for an order of Certiorari for the purposes of quashing Agency Notices/ orders of the Commissioner for Investigations and Enforcement Department dated **9th** November 2018 demanding payment of **Ksh. 4,011,865/=** and **Ksh. 23,410,962.70** from SPIRE Bank Limited and Commercial Bank of Africa Limited respectively.*

2. *Additionally, the ex parte seeks leave to apply for an order of Prohibition to prohibit the Commissioner for Investigation and Enforcement Department from issuing any further Agency Notices to the said Banks. It also sought an order that the leave if granted* operates as a stay of the Agency Notice/Orders in question until the determination of the substantive application or until further orders of the court. Also, the *ex parte* applicant prays for the court to grant all the necessary and consequential orders/directions and costs of the application.

*3. The application is founded on the ground that the ex parte applicant only leant about the Agency Notices from its Bank on **12th***

*November 2018, and, that, the Respondent has never issued a demand notice to recover any amount relating to taxes, penalty or interest from the applicant. Also, the ex parte applicant states that on **24th** October 2018 the Respondent invited the applicant for a meeting scheduled for **1st** November 2018 to discuss its business operations and tax matters. That the ex parte applicant attended the said meeting but the meeting did not discuss any tax liability, penalty, interests whatsoever. Further, it states that the Respondent did not communicate to the ex parte applicant following the said meeting. The ex parte applicant also states that it was subsequently invited for a further meeting on **2nd** November 2018 where the ex parte applicant's director, a **Mr. Peter Kiguta Weru** was arrested and charged in court in Criminal case number **2092** of 2018 on allegations of failing to apply for VAT registration among others.*

4. The ex parte applicant states that it disputes the amount claimed and that it has never been assessed nor has it ever been issued with a demand notice relating to tax liability. It also contends that the Respondents actions are ultra vires, illegal, unfair, unreasonable, abuse of power, and, are actuated by malice and violate its legitimate expectation and, that, its business operations have been adversely affected and it stands to suffer irreparable harm.

Respondent's Relying Affidavit.

*5. In opposition to the application is the Replying Affidavit filed **29th** November sworn by **Dominic Keng'ara**, an officer at the Respondents Investigations and Enforcement Department, appointed under section **13** of Kenya Revenue Authority Act.[1]He deposed that the Respondent investigated the affairs of the ex parte applicant for the period February 2018 to October 2018 to establish claims that it had been conducting business since its incorporation in February 2018 but it neither filed returns nor paid taxes due. He averred that upon analyzing the ex parte applicant's Bank statements, they revealed that it had received monies from various sources amounting to **Ksh. 131,563,844/=** but it did not declare the same nor pay taxes as required in law, which conduct can only be construed as calculated to evade payment of taxes. H averred that out of the monies received in the ex parte applicant's bank accounts at the Commercial Bank of Africa, **Ksh. 117,833,600/=** was from **Oxygen 8 EA Limited,** Pesalink Transfers of **Ksh. 10,138,430**/=and cheque deposits of **Ksh. 3,591,814.** He deposed that the ex parte applicant received the sum of **Ksh. 117,833,600/=** acting as their tax agents which amounts were to be applied to pay taxes.*

*6. **Mr. Kengara** further averred that upon establishing that the monies remitted by **Oxygen 8 EA Limited** to the ex parte applicant for payment of taxes were deposited in its bank accounts, the Respondent issued the Agency Notices pursuant to the provisions of sections **42** of the Tax Procedures Act[2] to the ex parte applicant as well to its Bankers requiring them to remit the monies to the Respondent. He averred that as a consequent of the foregoing, the instant application is not made in good faith and but is an effort to circumvent the law and delay the payment of taxes, hence, the ex parte applicant was being dishonest. He also averred that the Respondent exercised its powers under section **42** of the Tax Procedures Act,[3]hence, its action is valid and enforceable, and, that, the application is without merit and is an abuse of court process.*

*7. Lastly, he averred that the ex parte applicants director was arrested and charged in criminal case number **2092** of 2018. Also, he averred that its directors had registered another company being Centrica Investments which is the applicant in JR No. **447** of 2017 which raises similar issues as the present case.*

Ex parte applicant's further Affidavit.

*8. **Mr. Peter Kiguta Weru,** the ex parte applicant's Managing Director swore the further Affidavit dated **5th** December 2018. He averred that the ex parte applicant is not a tax agent, and, that, no taxes were due at the time of filing the return.*

Litigation history.

*9. On **13th** November 2018, the court declined to grant the above orders ex parte but directed the application to be served for mention inter partes on **21st** November 2018. Barely three days later, that is, on **16th** November 2018, the ex parte applicant filed a Certificate of Urgency and a supporting affidavit pleading that the Agency Notices be stopped. Upon due consideration, the court maintained the above date and declined to grant the orders. On **21st** November 2018, in the presence of both parties, the court gave further directions on filing pleadings and a mention date to confirm compliance on **10th** December 2018.*

*10. However, on **27th** November 2018, barely five days after the above directions, the ex parte applicant filed yet another*

*application seeking to stop/freeze/suspend/halt the implementation of the Agency Notices pending the hearing and determination of the application. The court declined to grant the orders ex parte, but directed that the same be served for hearing on **3rd** December 2018. On the said date, the court directed that the said application, will, if entertained disrupt the already scheduled hearing date for **10th** December 2018. Ultimately, hearing of the application now under consideration proceeded on **10th** December 2018.*

The arguments.

*11. **Mr. Mwala**, counsel for the ex parte applicant essentially relied on the grounds on the face of the application, the verifying Affidavit and the Statutory Statement and urged the court to grant he th December 2018. The crux of his submissions were that the ex parte applicant had established grounds to warrant the court to grant the leave sought. He relied on Republic v Land Disputes Tribunal Court Central Division And Another ex parte Nzioka,[4] Republic v County Council of Kwale & Another ex parte Kondo & 57 Others[5] and Agutu Wycliffe Nelly v Office of the Registrar Academic Affairs Dedan Kimathi University of Technology.[6] Additionally, he argued that the impugned decision is illegal, unfair and irrational.[7]*

*12. **Mr. Omtueka,** counsel for the Respondent contended that this court has no jurisdiction to entertain this matter. Additionally, he stated that the ex parte applicant has sworn an Affidavit in Judicial Review No. **447** of 2018, hence, this case is an abuse of court process. He urged the court not usurp the Respondents powers especially where the tax recovery process has began. He contended that the proper forum was the Tax Appeals Tribunal. Alternatively, he opined that the ex parte applicant ought to face the Respondent. He stated that the Respondent was invited for a meeting with the Respondent but he refused to attend. It was his argument that the amount sought is disclosed in the Notices, hence, the ex parte applicant ought to face the Respondent and demonstrate that the amount is not payable.*

Issues for determination

13. Upon analyzing the facts presented by the parties and the advocates submissions, I find that the following issues fall for determination, namely:-

a. Whether the ex parte applicant has established grounds for the court to grant the leave sought. In the alternative, whether under the 2010 Constitution, leave is still a prerequisite to commence Judicial Review proceedings.

b. Whether this suit is bad in law under the doctrine of exhaustion.

a. Whether the ex parte applicant has established grounds for the court to grant the leave sought. In the alternative, whether under the 2010 Constitution, leave is still a prerequisite to commence Judicial Review proceedings.

*14. The facts and arguments presented in this case are identical to those presented in JR No. **447** of 2018 which raises similar facts. In fact, one of the issues cited by the Respondents is that the two companies share the same directors, one of whom swore the Affidavits in support of both suits. This argument was not contested. Inevitably, the issues raised in both cases are strikingly similar, including the respective advocates submissions. Inevitably this determination will resemble the decision in the said case in many respects.*

15. *I deem it fit to address the question whether* under the 2010 Constitution, leave to commence Judicial Review proceedings is still a prerequisite. Differently put, is the requirement for leave to commence Judicial Review proceedings consistent with the dictates of the 2010 Constitution.

16. *First, I will address the question whether, the ex parte applicant has established grounds to warrant the leave sought.* The importance of obtaining leave in a Judicial Review application was eloquently stated by **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others***[8]** cited by the Respondent's Counsel where the learned Judge said:-

" is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and

secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived..”(Emphasis added)

17. In *Meixner & Another vs A.G,*[9] it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory **"leave stage."** At this stage an application for leave to bring Judicial Review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*.

18. At the leave stage an applicant must show that:- **(i) 'sufficient interest'** in[10]the matter otherwise known as *locus standi*; **(ii)** that he/she is affected in some way by the decision being challenged; **(iii)** that he/she has an arguable case and that the case has a reasonable chance of success; **(iv)** the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; **(iv)** the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.

19. At the leave stage, the applicant has the burden of demonstrating that the decision is *illegal, unfair* and *irrational*. The applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the Judicial Review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.

20. The above decisions and the jurisprudence on the question of grant of leave represents the correct legal position. However, the cases cited were determined before the promulgation of the 2010 Constitution. Order **53** of the Civil Procedure Rules, 2010, is borrowed from Sections **8** and **9** of the Law Reform Act.[11]The said provisions are premised on the common law Jurisdiction governing Judicial Review remedies and procedure for applying for Judicial Review orders.

21. The question is, whether under the 2010 Constitution, a person requires leave to approach the court. The entrenchment of the right to access the court in the Constitution opened the doors to access justice. This is captured by the phrase *"Justice is open to all, like the Ritz Hotel"*[12]attributed to a 19th Century jurist. Indeed Article **22** of the Constitution guarantees the right to institute court proceedings to enforce the Bill of Rights. Article **23** grants the court the authority to uphold and enforce the Bill of Rights.

22. Article **48** guarantees the right to access court while Article **258** provides that every person has a right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. I need not mention the supremacy of the Constitution over all other laws and its binding nature decreed in Article **2.**

23. Additionally, Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the Fair Administrative Action Act.[13] Section **2** of the act defines an **“administrative action”** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Article **23 (3)** provides the remedies the Court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article **22,** the court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and *an order of Judicial Review*.

24. Considering the above constitutional provisions and in particular the right to access justice, the question that arises is whether a citizen citing violation of constitutional rights or challenging an administrative action or a decision of a tribunal requires the leave of the court to apply for Judicial Review Orders. Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that:-

(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."

25. All law must conform to the Constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act[14] and Order **53** of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed[15] *"All statutes must be interpreted through the prism of the Bill of Rights."*This statement is true of decisions made by statutory bodies. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution.

26. Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where it held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[16]*** that "the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

27. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second*, the right to access the Court is now constitutionally guaranteed. This makes the requirement for leave unnecessary. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3)(f).** *Fourth,* section **7** of the Fair Administrative Action Act[17] provides that "any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Section **7 (2)** of the act provides for grounds for applying for Judicial Review.

28. Court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.[18] Time has come for our courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the Courts to control the exercise of public power are now regulated by the Constitution.

29. It is my conclusion that time has come for Parliament to consider the relevancy and constitutionality of the provisions of the Law Reform Act[19] and the Civil Procedure Act, 2010 which prescribe a litigant must seek courts leave before approaching the court. This is because our 2010 Constitution guarantees access to justice. The right to approach the court received a seal of constitutional approval, courtesy of Article **48** of the Constitution. This in my view rendered provisions of the law that require a litigant to seeks courts leave to commence Judicial Review proceedings obsolete.

b. Whether this suit is bad in law under the doctrine of exhaustion.

30. **Mr. *Mwala***, *counsel for the ex parte applicant conceded that the ex parte applicant did not approach the Tax Appeal Tribunal. He argued that the Tribunal was not properly constituted, hence, the complaint could not have been filed there. He also argued that the ex parte applicant is not a "Tax Agent."*

31. ***Mr. Omtueka***, *counsel for the Respondent was of a different opinion. He argued that the ex parte applicant ought to have approached the Tax Appeals Tribunal. In his view, this court has no jurisdiction to entertain this case.*

32. *It is convenient to start by stating that t*he question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya.[20]It was perhaps most felicitously stated by the Court of Appeal[21] in *Speaker of National Assembly vs Karume***[22]** in the

following words:-

"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

33. Admittedly, the above case was decided before the Constitution of Kenya, 2010 was promulgated. However, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.[23] The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*,[24] where it stated that:-

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that 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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

34. In the *Matter of the Mui Coal Basin Local Community*,**[25]** the High Court stated the rationale thus:-

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

35. Two principles can be discerned from the above jurisprudence:- *First*, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[26] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

36. Section **9 (2)** of the Fair Administrative action Act[27](an act of Parliament that was enacted to bring into operation Article **47** of the Constitution), provides that the High Court or a subordinate court under subsection **(1) shall not** review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section **(3)** which provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

37. The use of the word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[28]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[29] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

38. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from

construing it in one way or the other.

39. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[30] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[31] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

40. A proper construction of section **9(2) & (3)** above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by **9(4)** which provides that:- "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. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

41. What constitutes exceptional circumstances depends on the facts of each case.[32] Article **47** of the Constitution and the Fair Administrative Action Act[33] are heavily borrowed the South African Constitution and their equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions may offer useful guidance. The following points from the judgment of **Thring J** are relevant:-[34]"

i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . ."

ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional." In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

42. Perhaps, I should hasten to state that there is no definition of 'exceptional circumstances' in the Fair Administrative Action Act,[35] but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[36]

43. In yet another South Africa decision***[37]*** the court said the following about what constitutes exceptional circumstances:-

"What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

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

45. *Second*, on application by the applicant, the court may exempt the person from the obligation. It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the Fair Administrative Action Act.[38] The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[39] Section **9(4)** of the Fair Administrative Action Act[40] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

46. It is uncontested that the impugned decision constitutes administrative action as defined in section **2** of the Fair Administrative Action Act.[41] Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the *ex parte* applicant can show exceptional circumstances to exempt it from this requirement.[42] Additionally, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue.[43] Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[44] An internal remedy is adequate if it is capable of redressing the complaint.[45]

47. The exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in this case, no convincing argument was advanced nor can I discern any virgin argument touching on constitutional interpretation.

48. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it. In the case before me, no argument was advanced that the mechanism under the above act was not adequate nor do I find any reason to find or hold so.

49. The *second* principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This argument was not advanced before me nor do I discern it from the facts of this case.

50. On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court held in the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others*[46]had this to say:-

*"Jurisdiction is determined on the basis of the pleadings,***[47]***… and not the substantive merits of the case… In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim …, one that is to be determined exclusively by…..{another court}, the High Court would lack jurisdiction…"*

51. A casual look at the *ex parte* applicant's case shows that it is aggrieved by a tax decision. To be specific, it falls within the ambit of the Tax Procedures Act.[48] That is the nature of the dispute before the court. No amount of coloring can change the pith, substance and character of the case. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The answer to this question lies in the relevant provisions of the Tax Procedures Act.[49] Section **51** of the Tax Appeals Act[50] provides for objection to tax decisions. Sub-section **(1)** thereof provides

that a taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law. Sub-section **(2)** provides that a taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision. Additionally, sub-section **(3)** provides that a notice of objection shall be treated as validly lodged by a taxpayer under subsection **(2)** if—(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.

52. Additionally, section **52(1)** of the act provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act.[51] Further, section **53** of the act provides for appeal to the High Court in the following words, that is, a party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the Tax Appeals Tribunal Act.[52]

53. In view of my analysis and the determination of the issue under consideration herein above, it is my conclusion that the *ex parte* applicant ought to have exhausted the available mechanism before approaching this court. *First,* I find that this case offends section **9 (2)** of the Fair Administrative Action Act.[53] *Second*, the *ex parte* applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the Fair Administrative Action Act.[54] *Third*, the *ex parte* applicant did not apply to this court as provided under section **9(4)** cited above. Consequently, I find and hold that this suit offends the doctrine of exhaustion of statutory available remedies. It must fail. I dismiss it on this ground.

Final orders.

54. Applying the principles laid down in the authorities discussed above, and guided by my determination of the issues and analysis of the law as enumerated above, the conclusion becomes irresistible that the *ex parte* applicant has not established any basis for the Court to grant any of the orders sought.

55. *Accordingly, the ex parte applicants application dated **13th** November 2018 must fail. The upshot is that the ex parte applicant's application dated **13th** November 2018 is hereby dismissed with costs to the Respondent.*

Orders accordingly.

Dated at Nairobi this **25th** day of **February** 2019

John M. Mativo

Judge

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[1] Cap 469, Laws of Kenya.

[2] Act No. 29 of 2015.

[3] Ibid.

[4] {2006} 1EA 321.

[5] HCMCA No. 384 of 1996.

[6] {2016} eKLR.

[7] *Keroche Industries Limited v Kenya Revenue Authority & 5 Others* NBI HCMA No 743 of 2006 {2007}2KLR 240.

[8] Mombasa HCMISC APP No 384 of 1996.

[9]{2005} 1 KLR 189

[10] See *R vs Panl for Takeovers and Mergers ex p Datafin* {1987}I Q B 815.

[11] Cap 26, Laws of Kenya.

[12] Sir James Matthew, 19th Century jurist.

[13] Act No. 4 of 2015.

[14] Cap 26, Laws of Kenya.

[15]Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and [2000]

[16] *2000 (2) SA 674 (CC) at 33.*

[17]Act No 4 of 2015.

[18] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[19] Cap 26, Laws of Kenya.

[20] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[21] Ibid.

[22] {1992} KLR 21.

[23] Ibid.

[24] {2015} eKLR.

[25] {2015} eKLR

[26] Ibid.

[27] Act No. 4 of 2015.

[28]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[29] Ibid.

[30] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[31] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[32] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[33] Act No. 4 of 2015.

[34] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

[35] Act No. 4 of 2015.

[36] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[37] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)*2010 (4) SA 327 (CC) para 39, Mokgoro J

[38] Act No. 4 of 2015.

[39] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[40] Act No. 4 of 2015.

[41]Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

[42] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[43] Koyabe supra para 39.

[44] Ibid para 44.

[45] Ibid paras 42, 43 and 45.

[46] Case CCT 64/08 [2009] ZACC 26

[47] *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[48] Act No. 29 of 2015.

[49] Ibid.

[50] Act No. 29 of 2015.

[51] Act No. 40 of 2013.

[52] Ibid.

[53] Act No. 4 of 2015.

[54] Ibid.