

# CASES DIGEST

ISSUE 7 | March 2022



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**Decisions on  
KRA cases**



**KENYA REVENUE  
AUTHORITY**

*Tulipe Ushuru, Tujitegemee!*



**A publication of the  
Kenya Revenue Authority**

**Vision**

A Globally Trusted Revenue Agency Facilitating Tax and Customs Compliance

**Mission**

Building Trust through Facilitation so as to foster Compliance with Tax and Customs Legislation

**Values**

Trustworthy, Ethical, Competent, Helpful

## **Forward**

Kenya Revenue Authority is the Government Agency established through the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya with the role of collecting revenue and enforcing tax laws. We are pleased to publish the 7<sup>th</sup> edition of the Kenya Revenue Authority (KRA) Cases Digest.

A number of decisions on various issues have been delivered by courts and Tribunals since the establishment of the Kenya Revenue Authority in the year 1995. This Cases Digest focuses on decisions by the courts on the use of agency notices by the Commissioner to collect tax and customs revenue.

The Digest is relevant to legal practitioners as reference point, scholars as a tool for training and reading, KRA staff and all persons interested in the Authority's operations.

I wish to thank the editorial and design teams for the concerted efforts made towards the publication of this 6<sup>th</sup> edition of the Kenya Revenue Authority cases digest.

**C.S. Paul M. Matuku, EBS**

**Commissioner, Legal Services and Board Coordination**

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# Executive Summary

This volume features cases on agency notices under tax and customs laws. It highlights the interpretation of the law by the courts on the provisions relating to issuance of agency notices by the Courts.

*In Malindi Civil Appeal No. 153 consolidated with Civil Appeal No. 155 of 2007: Harshavadan P. Shah T/a Vipees Through the Republic & another v Kenya Revenue Authority [2012] eKLR*, the Court held that the respondent had jurisdiction under section 131 of the EACCMA 2004 to issue agency notice for collection of revenue. The learned Judge came to the conclusion that the respondent had not acted capriciously and arbitrarily in the determination of the liability of the appellant to pay tax and by section 135 of the Act the respondent had power to recover any duty which had been short levied.

*In High Court Judicial Review Application No. 445 of 2012: Republic V Commissioner General, Kenya Revenue Authority Ex-Parte Martin M. Mugi [2018] eKLR* the court held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal in that case in addition observed that it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case, and ask itself what the real issue to be determined is and whether the statutory appeal procedure was suitable to determine it.

*In Nairobi Judicial Review Application 447 of 2018 : Republic V Kenya Revenue Authority, Commissioner For Investigation And Enforcement Department Ex Parte Centrica Investments [2019]*, the Court held 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. A taxpayer cannot approach the Court prematurely before exhausting the available statutory remedies for resolution of disputes. In relation to tax laws, a taxpayer is to seek a remedy.

*In Judicial Review Miscellaneous Civil Application No. E009 of 2021 SBI International Holdings AG Kenya V Commissioner, Customs and Border Control, of Kenya Revenue Authority* the Court held that an applicant who seeks assistance of the Court must first exhaust the administrative mechanisms for resolution of disputes before filing a case in Court. If an applicant skips an administrative process, the application is incompetent and the Court will not entertain it.

*In Nairobi Petition 4 of 2017 - Gibb Africa Limited V Kenya Revenue Authority [2017] eKLR*, the Court held that a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Article 23 (1) grants the court authority to uphold and enforce the Bill of Rights. It follows that this court has powers to grant Judicial Review orders or fashion such reliefs as may be appropriate to meet the ends of justice. Such orders can be granted in a Constitutional Petition

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## A.Digest of Cases on Agency Notices

### 1. Malindi Civil Appeal No. 153 consolidated with Civil Appeal No. 155 of 2007: Harshavadan P. Shah T/a Vipees Through the Republic & another v Kenya Revenue Authority [2012] eKLR

**Coram:** D.K. Maraga, E.M. Githinji, M.K. Koome JJA.

**Date of judgment:** 16<sup>th</sup> March 2012

**Keywords:** tariff classification, agency notice, collection of duty, wrong tariff index, reclassified. Medicaments, review application.

**Sections of the law:** Section 131, 135, 229 of the East African Community Customs Management Act

#### Implications

In a case where an importer of goods misclassifies goods, the Commissioner (*Respondent herein*) is empowered to correctly classify the goods. If the reclassification of the goods leads to the goods attracting import duty, then it must be paid. The Commissioner did not act capriciously and arbitrarily in the determination of the liability of the Appellant to pay tax.

By section 135 of the Act, the Commissioner had power to recover any duty which had been short levied. Further by section 131 of the Act, the Commissioner had power to issue agency notices to recover tax. The computation of the duty payable was based on the result of laboratory analysis of the appellant's products resulting in a re-classification of the goods. The Commissioner acted within the law.

#### Background

The appellant is the sole proprietor of a firm known as Vipees which has been importing Herbal and Ayurvedic medicines which are drugs under the Pharmacy and Poisons Act. In about September 2005, the appellant imported a consignment of Herbal/Ayurvedic medicines which it declared under import entry No. 67114 of 14th September, 2005 under Tariff HS Code 3004:90.00 as medicament and paid the relevant duty.

In December 2005, an officer of the respondent in Post Clearance Audit Unit while carrying the duties of post clearance audit discovered that the tariff classification on the appellant's goods was incorrect and raised a demand query dated 22nd December, 2005 for taxes amounting to Kshs.1,453,806/= to be paid within 30 days.

The two consolidated appeals arise from two separate judicial review applications both dated 17<sup>th</sup> November, 2006 and filed in the High Court by the appellant against the respondent. In the first application i.e. Miscellaneous Application No. 1030 of 2006, the applicant sought four orders namely; an order of certiorari to quash the decision of the respondent classifying the appellant's Herbal/Ayurvedic medicines under tariff HS Code 2106.90.90 and demanding Kshs.8,446,995/= as taxes; an order of certiorari to quash the decision of the respondent demanding payment and appointing Investments and Mortgage Bank as the respondent's agent for the collection of the tax, an order of prohibition, prohibiting the respondent from classifying the appellant's goods under the tariff code applied, and, lastly, an order of mandamus directing the respondent to refund to the appellant all monies recovered from its account

A sample of the goods were extracted and taken to the Respondents laboratory for analysis and classification. A chemist working at the Custom's Laboratory prepared a report classifying most of the appellant's products under HS code 2106.90.90. Based on the laboratory analysis report an officer of the respondent working at Post Clearance Audit Unit, computed duty under the correct classification and demanded duty amounting to Kshs.8,446,995/=.

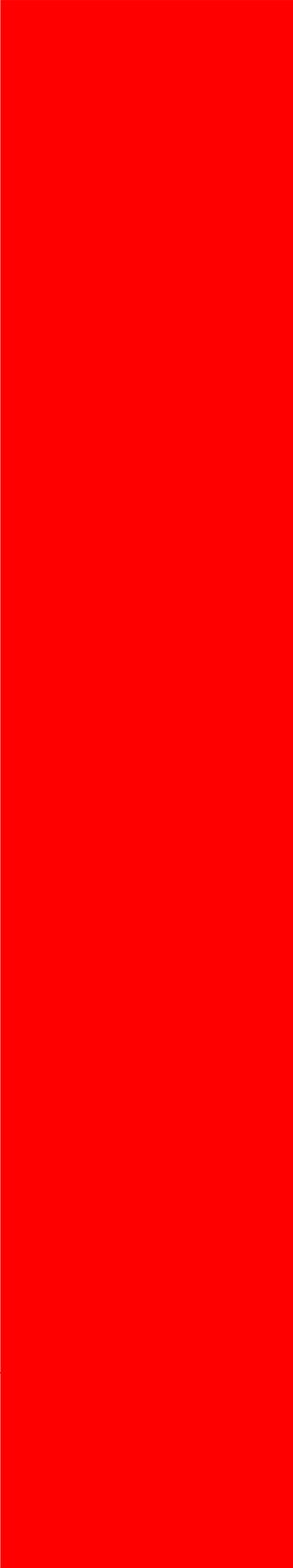
The respondent in exercise of powers conferred by section 131 of the East African Community Customs Management Act (Act) appointed the Manager, Investments and Mortgage Bank the agents of the appellant, to recover Kshs.9,227,867/=. It is the Agency Notice which precipitated the application for Court orders.

In the second application, that is, Misc. Appl. No. 1031 of 2006, the appellant sought three orders namely, an order of certiorari to quash the decision of the respondent appointing Investments and Mortgage Bank as agent for the appellant for collection of duty amounting to Kshs.1,740,841/=; an order of prohibition prohibiting the respondent from classifying the appellant's goods in various entry numbers of 11th January, 2003 under any other code other than HS code 3004.90.00, and, an order of mandamus directing the respondent to refund all the monies recovered by the bank.

The circumstances under which the Agency notice was issued in the second application are similar to the circumstances in the first application. The two applications relate to the same Herbal/Ayurvedic medicine. The appellant declared the medicines under tariff HS code 3004.90.00 and paid the duty. On 21st June, 2006 the respondent raised an audit query demanding Kshs.1,593,563/= on the basis that the appellant declared the goods under the wrong tariff index

### Issues for determination

- a) Whether the Respondent (Commissioner) acted without jurisdiction.
- b) Whether or not the respondent acted arbitrarily or capriciously and in breach of the rules of natural justice.



## Decision of the Court

On the first issue the learned Judge considered the fact that the respondent carried out laboratory analysis on the samples of the appellant's products and that the analysis revealed that the appellant had used the wrong tariff index. The learned Judge concluded that the respondent acted within the provision of the Act and was entitled to demand payment of the under collected import duty under section 135 of the Act.

There was no evidence that the appellant made a review application to the Commissioner in respect of the letter dated 21st June, 2006 demanding Kshs.8,446,995/= or the demand letter dated 11<sup>th</sup> August, 2006 demanding Kshs.1,740,841/=. The learned Judge was not addressed on those issues. We cannot speculate what his decision would have been had the appellant raised those issues. On our analysis of the material placed before the learned Judge and the submissions made before him we are satisfied that the learned Judge did not misapprehend the appellants' case. It is clear, as the learned Judge correctly found, that in the application and by the judicial review orders sought, the appellant was contesting the merit of the basis of decision that is not the province of the judicial review jurisdiction.

On the second issue, the trial judge came to the conclusion that the respondent had jurisdiction under section 131 of the EACCMA 2004 to issue agency notice. The learned Judge considered the second issue and came to the conclusion that the respondent had not acted capriciously and arbitrarily in the determination of the liability of the appellant to pay tax. By section 135 of the Act the respondent had power to recover any duty which had been short levied. Further by section 131 of the Act, the respondent had power to issue agency notices to recover tax. The computation of the duty payable was based on the result of laboratory analysis of the appellant's products resulting in a re-classification of the goods. The respondent acted within the law. For the foregoing reasons, the judges were satisfied that the High Court reached the correct decision and dismissed the Appeal.

[\*Read the full judgment here\*](#)

## 2. HIGH COURT JUDICIAL REVIEW APPLICATION NO. 445 OF 2012: REPUBLIC V COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY EX-PARTE MARTIN M. MUGI [2018] EKLK

**Coram:** P. Nyamweya

**Date of judgement:** 18<sup>th</sup> July 2018

**Court:** High Court sitting in Nairobi

**Key words and Phrases:** agency notice, certiorari, mandamus, natural justice, prohibition

**Sections of the Law:** section 19, 30, 32, 33 of the Value Added Tax Act (Cap 476) (since repealed) and section 56(1), 82, 84, 85, 90, 96 of the Income Tax Act (Cap 470), section 42, 52, 58 and 113 of the Tax Procedures Act, Act No 29 of 2015, section 5 of the Kenya Revenue Authority Act

### 🔍 Implications of the judgment

Where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal in that case in addition observed that it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case, and ask itself what the real issue to be determined is and whether the statutory appeal procedure was suitable to determine it.

Where the Respondent is found to have acted unreasonably, in breach of the Applicant's legitimate expectations and in breach of the rules of natural justice, the Applicant is entitled to the order of certiorari to quash the Agency Notices placed by the Respondent with the Applicant's bankers.

The court cannot issue prohibition orders prohibiting the Respondent from undertaking its statutory duties of assessing the tax due and enforcing payment of the same as provided for in the law. It is not for the Court to determine the amount of tax due from the Applicant and whether it has been paid, and it cannot therefore direct the Respondent to issue the Applicant with a tax compliance certificate.

## Background

The Applicant, an advocate of the High Court of Kenya was aggrieved with the assessment of taxes due from him by the Respondent and applied to the court for an order of Certiorari to quash the decision or order of the Kenya Revenue Authority to place an agency notice with the Applicant's accounts with their bankers; an order of Mandamus directed to the Commissioner, Kenya Revenue Authority directing him to issue the Respondent herein with a Tax Compliance Certificate and an order of Prohibition directed towards the Commissioner, Kenya Revenue Authority prohibiting him from ever placing an agency notice or in any way interfering with the Applicant's bank accounts over the alleged tax arrears

The Applicant's stated that the genesis of the application was a request he lodged through his auditors, for a tax compliance certificate, whereupon he was issued with a demand for tax arrears. He averred that he then presented his annual reports, and his financial statements together with his book of accounts, which showed that he had paid all taxes and what was remaining were penalties for late payment.

The Applicant states that the Respondent instead thereupon placed an Agency Notice with his bankers, meaning that he could not transact business with regard to funds held in the account; and that he requested his auditors to carry out discussions with the Respondent. Further, that the Agency Notice still persisted, even after the Applicant and his auditors sent letters to the Respondent requesting the lifting of the same terming the Respondent's actions are not only illegal but in breach of its statutory and common law duties, prejudicial to himself and his trade as an advocate; and that he has all along been paying taxes as required albeit sometimes late, which had attracted penalties which he offered all along to pay.

The Respondent contends that these claims are not justified, as the Applicant has failed to avail the withholding tax certificates pertaining to the alleged withholding tax purportedly remitted by the alleged third party; and that adjustments cannot be made without the submission of the original withholding tax certificate and the original tax payment receipts. Further, that the tax compliant certificate cannot be issued to the Applicant unless the tax arrears owed are paid in full; and pointed to the admission by the Applicant of his failure to remit taxes within timelines.

*"I agree with the holding by Odunga J. in Republic vs Kenya Revenue Authority Exparte Jaffer Mujtab*

*Mohamed [2015] eKLR where the learned Judge rendered himself thus:*

*"46. Therefore whereas this Court is not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court in intervening."*

**Justice P. Nyamweya**

It was further asserted by the Respondent that the Agency Notices were valid, for reasons that they were issued in accordance with section 96 of the Income Tax Act and section 19 of the Value Added Tax Act; they were issued to the appointed agent and copied to the Applicant in enforcement of the demand notices issued to the Applicant, and in enforcement of taxes properly assessed in accordance with the Income Tax Act and Value Added Tax. It was also contended that the agency notices did not contravene any provisions of the law and the rules of natural justice.

## Issue

- a) whether the Respondent acted reasonably and was in breach of the Applicant's legitimate expectations in issuing the Agency Notices with respect to the Applicant's bank account;
- b) Whether the Respondent breached the rules of natural justice when issuing the said Agency Notices; and lastly,
- c) Whether the Applicant is entitled to the relief he seeks.

## Decision of the Court

On the first issue as to whether the Respondent acted reasonably and was in breach of the Applicant's legitimate expectations, the Court notes that the Respondent explained in considerable detail why there were different amounts of tax due that were stated in its letters dated 6th August 2003, 30th September 2004, 11th July 2012 and 13th July 2015.

It is notable that three different amounts of tax due namely Kshs 1,604,460/= , Kshs 915,675/= and Kshs 3,331,278/= had been indicated in the said letters before the impugned Agency Notices were issued, and it is my finding that the process used to arrive at the issuance of the agency notice was unreasonable, as it was based on contradictory information given to the Applicant, which raises an inference that the amount of taxes demanded from him were arbitrary. This is more so in light of the onerous effect the decision to issue an agency notice would have on the Applicant's rights, and a reasonable process would have clarified the differences in the figures of tax demanded, before issue of the agency notices.

In addition, issuing an agency notice after making differing demands on the amount of tax due goes against the legitimate expectation of a tax payer that the Respondent will state the amount of tax due to it with clarity and unambiguity, as it is mandated to do under the applicable provisions of the law, and that by its various representations to the Applicant it had thereby has not reached a decision on the amount of tax due and payable.

## **Decision of the Court**

*“The Applicant is entitled to the order sought of certiorari to quash the Agency Notices placed by the Respondent with the Applicant’s bankers.*

*The Respondent cannot be prohibited from undertaking its statutory duties of assessing the tax due and enforcing payment of the same from the Applicant, which tax is yet to be ascertained.*

*Similarly, with respect to mandamus it is not for the Court to determine the amount of tax due from the Applicant and whether it has been paid, and it cannot therefor direct the Respondent to issue the Applicant with a tax compliance certificate”*

**Justice P. Nyamweya**

As to whether the Respondent breached the rules of natural justice when issuing the impugned agency notices, the Court found in the affirmative, as while it did provide evidence of a demand notice issued to the Applicant dated 11th July 2012, and a reminder dated 23rd August 2012 for payment of the tax of Kshs 3,331,278/= , it also annexed a response to the demand notices by the Applicant’s Accountant dated 3rd September 2012 wherein the Applicant denied owing the tax demanded and seeking amendment of its record to reflect payments he had made.

There was evidence of communication by the Applicant with the Respondent before 3rd October 2012, seeking clarification as regards the amount of tax that was demanded. While it is indicated that the Respondent received the letter dated 3rd September 2012 on 9th October 2012, it still proceeded with the agency notices with respect to the demanded amount of tax while knowing that the amount was disputed, and not giving the Applicant the opportunity to prove the payments he alleged to have made.

On the last issue, the Applicant sought orders of certiorari, prohibition and mandamus. As the Respondent has been found to have acted unreasonably, in breach of the Applicant’s legitimate expectations and in breach of the rules of natural justice, the Court found that the Applicant is entitled to the order sought of certiorari to quash the Agency Notices placed by the Respondent with the Applicant’s bankers.

As the said agency notices were quashed, there is no longer any reason to grant the prohibition sought, as the Respondent if it still intends to proceed with its claim will have to start the process afresh in accordance with the law, and there is no longer any threat present of an illegal action. In addition the Respondent cannot be prohibited from undertaking its statutory duties of assessing the tax due and enforcing payment of the same from the Applicant, which tax is yet to be ascertained.

Similarly, with respect to mandamus, it is not for the Court to determine the amount of tax due from the Applicant and whether it has been paid, and it cannot therefor direct the Respondent to issue the Applicant with a tax compliance certificate. In the premises, the Applicant’s Notice of Motion dated 14th December 2012 only succeeded to the extent of the orders granted by this Court.

[\*\*Read the full judgment here\*\*](#)

3. **NAIROBI JUDICIAL REVIEW APPLICATION 447 OF 2018 - REPUBLIC V KENYA REVENUE AUTHORITY, COMMISSIONER FOR INVESTIGATION AND ENFORCEMENT DEPARTMENT EX PARTE CENTRICA INVESTMENTS [2019]**

**Coram:** John N. Mativo

**Date of Ruling:** 25<sup>th</sup> February 2019

**Court:** High Court sitting in Nairobi

**Key words and Phrases:** Agency Notice, exhaustion of statutory remedies.

**Sections of the Law:** Article 47 of the constitution of Kenya, Section 51, 52 of the Tax Procedures Act, Section 9 of the Fair Administrative Actions Act.

## 🔗 Implications of the judgment

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. A taxpayer cannot approach the Court prematurely before exhausting the available statutory remedies for resolution of disputes. In relation to tax laws, a taxpayer is to seek a remedy.

## Background

The Applicant made an application to Court seeking leave of the Court 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. 40,307,397.40 and Ksh. 5,548,246.00 from SPIRE Bank Limited and Commercial Bank of Africa Limited respectively.

Further, the Applicant sought leave of the Court to apply for an order of Prohibition to prohibit the Commissioner for Investigation and Enforcement Department from issuing any further Agency Notices for the sum of Ksh. 40,307,397.40. The Applicant prayed that the leave if granted to operate as a stay of the Agency Notice and Orders until the determination of the substantive application or until further orders of the court.

The basis of the application was that the Respondent has never issued a demand notice to recover any amount relating to taxes, penalty or interest from the applicant; Additionally, the ex parte applicant states that it disputes the said sum, that the Respondent has never assessed it to ascertain any tax liability. The Applicant further contended that the Respondents actions are ultra vires, illegal, unfair, unreasonable, abuse of power, actuated by malice and in breach of its legitimate expectation, and, its business operations have been adversely affected and it stands to suffer irreparable loses.

The Respondent through one of its investigation officers deposed that the Respondent investigated the ex parte Applicant's affairs 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 the investigations established that the company had received sums totalling Ksh. 117,833,600/= from Oxygen 8 EA Limited and Bachman being payment of taxes to the Respondent but it did not remit the said taxes.

The Respondent's officer averred that the Agency Notices were issued pursuant to the provisions of sections 42 of the Tax Procedures Act to the ex parte applicant as well as Keycorp Advisory Limited's Bankers requiring them to remit the monies to the Respondent. Additionally, he averred that as a consequent of the foregoing, the instant application is not made in good faith and that it is an effort by both companies to circumvent the law and delay the payment of taxes. He averred that the ex parte applicant was being dishonest and is not ready to pay taxes, and, that, the Respondent exercised its powers under section 42 of the Tax Procedures Act,[3]hence, its action is valid and enforceable. Also, he averred that the application is without merit and is an abuse of court process.

### 🕒 Issues

- 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.

### 🕒 Decision of the Court on the issues

On the first issue as to whether the ex parte applicant has established grounds for the court to grant the leave sought, the Court also considered 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.

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*" 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.

## **Doctrine of Exhaustion of remedies**

*"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."*

**Court of Appeal in the case of Speaker of National Assembly vs Karume**

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. 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.

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*. 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. Judicial Review is now entrenched in the Constitution.

Time has come for Parliament to consider the relevancy and constitutionality of the provisions of the Law Reform Act and the Civil Procedure Rules, 2010 which prescribe a litigant must seek the 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. In my view, the constitutional guarantee to the right to access courts fundamentally shifted the ground and rendered the provisions of the Civil Procure Rules, 2010 and the Law Reform Act that require a party to seek courts leave to approach the court obsolete.

On the second issue, the 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.

The doctrine of exhaustion is now of esteemed juridical lineage in Kenya. 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. In this case, no convincing argument was advanced nor can I discern any virgin argument touching on constitutional interpretation. 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.

[\*\*Read the full judgement here\*\*](#)

#### 4. JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION E009 OF 2021 SBI INTERNATIONAL HOLDINGS AG KENYA V COMMISSIONER, CUSTOMS AND BORDER CONTROL, OF KENYA REVENUE AUTHORITY

**Coram:** JUSTICE G. V. ODUNGA

**Date of Judgement:** 30<sup>th</sup> November 2021

**Key Sections of the law:** Sections 131, 229, 230, 231 of the East African Community Customs Management Act 2004, 51 of the Tax Procedures Act No. 29 of 2015

**Key words and Phrases:**

### Implications of the judgment

An applicant who seeks assistance of the Court must first exhaust the administrative mechanisms for resolution of disputes before filing a case in Court. If an applicant skips an administrative process, the application is incompetent and the Court will not entertain it.

### Background

The Applicant sought orders of *Certiorari* to quash the Agency Notices issued by the Commissioner, Customs and Border Control of the Kenya Revenue Authority, dated 3rd August 2021 against the Applicant's two bankers. The Respondent issued Agency Notices against the Applicant's bank accounts under section 131 of the East African Community Customs Management Act, 2004. As a consequence, the Applicant's bankers, NCBA, issued notification to the Applicant that the said accounts were immediately attached.

The Applicant contended that the said Agency Notices were grossly illegal, premature, unprecedented abuse of power, grossly irrational and issued in extremely bad faith, warranting immediate invocation of this Court's jurisdiction to urgently intervene, to forestall the otherwise devastating prejudice to the Applicant, violating the fundamental right to a fair administrative action. The Applicant further stated that under section 131 of the said Act, the Respondent has jurisdiction to issue Agency Notice only where a tax is due, not before duty due is calculated, ascertained and or communicated.

In response, it was averred that the Respondent's Bonds Management Unit within its Trade Facilitation Division commenced an intensive Bonds audit in the financial year 2019/2020. The exercise involved retrieval of outstanding bonds in the Simba system and issuance of demands to the bond holders for accounting or payment of taxes and subsequent bond cancellation or retirement. Out of the audit, it was established that the Applicant was among the taxpayers with outstanding bonds for the period 2006-2014. As a result, the said security bonds issued by the Applicant were computed and the payable taxes and Compound interest amounted to Kshs. 1,908,485,367.00.

The Respondent also established that a bulk of the security bonds have been outstanding in the Simba system for a long period of time, prompting the Respondent to seek to have them settled by the Applicant. It was contended by the Applicant that the Application is an abuse of the Court Process and one intended to cause delays and frustrate the collection of the taxes meant for the Respondent from the Applicants. It was therefore contended that the Application before this Court lacks merit, is calculated to curtail the Respondent's ability to collect due taxes and should therefore be dismissed with costs to the Respondent.

According to the Respondent, the EACCMA provides for both the substantive and procedural law hence ousting any necessity of applying the Tax Procedures Act to matters customs and that Sections 229 and 230 of the East Africa Community Customs Management Act is instructive in regards to the applicable procedure in this instance. It was submitted that since the Applicant failed to exercise his right to seek review of the Commissioner's decision within the prescribed thirty days, the taxes became due and payable as demanded by the Respondent.

## Issue for Determination

Whether the Applicant is entitled to the Orders sought from Court.

### Determination by the High Court

Further the issuance of agency notices was clearly a decision and a decision may be right or wrong. Where a decision is wrong the remedy is provided for under section 229 of the East African Community Customs Management Act 2004. In that event, the Applicant was required to lodge an application to the Commissioner in writing within thirty days of the date of issuance of the agency notices seeking review of that decision after which the Commissioner would then be obligated to, issue a decision on the application for review as provided for under Section 229 (4) of the East African Community Customs Management Act 2004.

If dissatisfied by a decision of the Commissioner issued under Section 229, the Applicant would then have had the liberty to Appeal the said decision to the Tax Appeals Tribunal, which is vested with the jurisdiction to hear Appeals from the review decision of the Commissioner.

The Objection to the Commission regarding the omission to make a decision on the duty due, which is the gravamen of the Applicant's case, the issue of the Respondent issuing the tax decision and allowing for the appeal review period of thirty days to lapse, before making the decision having regarded the appeal, before enforcement could be undertaken through the Agency Notices, does not therefore arise.

The issue of a decision on the merits would then have to be dealt with under section 230 of the East African Community Customs Management Act 2004. The applicant's grievances could have been properly dealt with under the aforesaid provisions. No convincing reasons have been given to me why the applicant opted to bypass the aforesaid mechanisms which in my view are not any less appropriate, convenient, effective and/or beneficial. In the premises the Court found the Notice of Motion as misconceived and incompetent and struck out but with no order as to costs.

[\*\*Read the full judgment here\*\*](#)

**Author:** John N. Mativo

**Date of delivery of Judgment:** 9<sup>th</sup> November 2017

**Key Articles/Sections of the law:** Articles 19, 20, 21, 22, 23, 47, 258 and 260 of the Constitution.

**Key Words and Phrases:** Agency Notice, demand, Constitution.

## 🔍 Implications

A court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Article 23 (1) grants the court authority to uphold and enforce the Bill of Rights. It follows that this court has powers to grant Judicial Review orders or fashion such reliefs as may be appropriate to meet the ends of justice. Such orders can be granted in a Constitutional Petition.

## 🔍 Background

On 6th June 2016, the Respondent audited its business and raised a tax demand of Ksh. 112,981, 522/=. The Petitioner through its tax consultant responded to the said letter on 20th July 2016 stating that:- (i) it is a key player in the construction industry mainly employed by the Government of Kenya; (ii) that the Government of Kenya owed it Ksh. 393 Million as at June 2016, a colossal sum which had affected its operations including payment of taxes; (iii) that the Petitioner was willing to pay the outstanding debt.

The Petitioner and Respondent held meetings to decide on how the tax was to be paid. The petitioner however felt that the Respondent had violated the legitimate expectation by sending Agency notices to the debtors, including those whose debts weren't due. The petitioner felt that its right to property had been infringed because by issuing the notices the Respondent was going to collect an amount higher than the tax that was to be paid. The Respondents argued that the matter brought before the court should have been best resolved in Tax Appeals Tribunals or Judicial Review Court. The Respondent stated that the issuance of the Agency notices was in accordance to Tax Law.

The Petitioner challenged the Agency Notices on grounds that it violates its rights and fundamental freedoms in the Bill of Rights under the Constitution and International Convention on Social Economic Rights. The Petitioner cites violation of articles 40 (1) & 47 (1) of the Constitution and Section 4 of the Fair Administrative Action Act



### 🔍 Issues for determination

- a. Whether the court had jurisdiction to hear or determine the case?
- b. Whether the petitioner's legitimate expectation was violated by the agency notices?
- c. Whether the petitioner's right to own property was violated by the agency notices?

### 🔍 Determination by the court

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. Article 23 (1) grants the court authority to uphold and enforce the Bill of Rights. It follows that this court has powers to grant Judicial Review orders or fashion such reliefs as may be appropriate to meet the ends of justice. Such orders can be granted in a Constitutional Petition such as this Petition if warranted.

On the 2<sup>nd</sup> issue, it is settled law that Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned legal notice to be allowed to stand, it must be demonstrated that the same is grounded on law. As such, the Agency Notices must conform to the doctrine of legality. Put differently, if the Agency Notice has no foundation in law, then, it would amount to undermining the legality principle which, is inextricably linked to the Rule of Law.

The Petitioner admits its legal obligation to pay taxes. It admits some amounts are due but states that the decision to issue Agency Notices is unreasonable because the Respondent disregarded an existing agreement and also issued notices for "amounts that were not legally due. The existence of the agreement is contested.

The agency notices were issued in conformity with Section 42 of the Tax Procedures Act, 2015. If at all the Respondent issued a notice for an incorrect tax amount, then this is a tax dispute and can be resolved through the statutory mechanisms discussed earlier but not by way of a constitutional Petition.

In light of the provisions of Section 42 of the Tax Procedures Act, the principle of legality discussed above which requires the first Respondents' actions to conform with the law, I find that the notices did not in any manner offend the relevant provisions of the tax laws or the Fair Administrative Action Act. It should be emphasized that the Respondent is statutorily mandated to collect taxes as provided under the law and provided its action fall within the law, this court will not intervene.

Section 42 confirms the mandate of the Respondent to issue Agency Notices. The other crucial question which must be answered is what is the standard by which the validity of Agency Notice and conformity with the Fair Administrative Action Act and Article 47 of the constitution should be judged. such a question should be answered with reference to the standards of review laid down by courts when the validity of a statute is challenged which include two main standards. The first is the "rationality" test and second is *that of "reasonableness" or "proportionality"*. The court held that Agency Notice has not been shown to be unreasonable and or violating the Petitioners Right to fair Administrative Action as alleged.

***As to whether the Agency Notice violates the Petitioners' right to property,*** Courts will be *'required to balance the interests of society with those of individuals and groups'*.<sup>[33]</sup>It is my view that it is in public interest that taxes must be paid. I find and hold that the Agency Notices do not infringe on the Petitioners Rights to property. I also note that the Petitioner is not challenging its tax obligations. In view of the above, the Court declined to grant the reliefs sought in this petition and dismissed the Petition with no orders as to costs

[Read the full judgment here](#)



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***Tuliye Ushuru Tujitegemee!***