



Republic v Commissioner of Domestic Taxes, Kenya Revenue Authority; Karanja (Exparte Applicant) (Judicial Review E003 of 2021) [2022] KEHC 16216 (KLR) (5 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW E003 OF 2021
RE ABURILI, J
DECEMBER 5, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES, KENYA REVENUE AUTHORITY RESPONDENT

AND

PETER MUHORO KARANJA EX PARTE APPLICANT

JUDGMENT

1. By a Notice of Motion application dated July 28, 2021, the *ex-parte* applicant herein Peter Muhoro Karanja sought the following orders against the Commissioner of Domestic Taxes, an office established under section 13 of the [Kenya Revenue Authority Act](#):
 - a. The Honourable Court does issue a declaration that because of the Commissioner’s failure to make decisions on the Applicant’s Objections dated May 7, 2021 (against assessment orders Numbers KRA2021xxxx; KRA2021xxxx; KRA2021xxxx and KRA2021xxxx) within the statutory period of 60 days, the said Notices of Objection be ordered or be deemed as having been allowed in terms of Section 51 (11) of the [Tax Procedure Act 2015](#).
 - b. An order of certiorari does issue to bring to the Honourable Court and quash the Commissioner of Domestic Taxes objection decision against the Applicant dated July 8, 2021.
 - c. An order of prohibition prohibiting the Commissioner of Domestic Taxes whether by himself, his authorized officers or agents from demanding payment of, and or taking any enforcement



action of whichever nature against the Applicant in respect of the Assessment Orders Numbers KRA2021xxxx; KRA2021xxxx; KRA2021xxxx and KRA2021xxxx.

- d. The costs of this application be paid to the Applicant by the Respondent.
2. It is the *ex-parte* applicant's case that he was served with the assessment orders Numbers KRA2021xxxx; KRA2021xxxx; KRA2021xxxx and KRA2021xxxx, by the Respondent upon which he objected to the same on May 7, 2021, which objection the respondent received on the May 8, 2021.
3. The *ex-parte* applicant avers that Section 51 of the *Tax Procedures Act* provides that the respondent had 60 days from May 8, 2021 to decide on the said objections which days lapsed on the July 7, 2021 but that the Respondent failed to do make any decision.
4. It is the *ex-parte* applicant's averment and deposition that the respondent purported to dismiss the objections by an objection decision made on the July 8, 2021, outside the statutory 60 days. He asserts that by operation of Section 51 (11) of the *Tax Procedures Act*, the applicant's objections were deemed allowed by the law.
5. It is averred that the respondent intends to institute recovery action against the applicant, pursuant to the assessment orders to the detriment of the *ex-parte* applicant. He further avers that the respondent has acted contrary to the *ex-parte* applicant's right to a fair administrative action guaranteed under Article 47 of the *Constitution* and Section 7 of the *Fair Administrative Action Act*.
6. The *ex-parte* applicant avers that there is no valid objection decision made by the Respondent capable of being appealed against at the Tax Appeals Tribunal and thus he is entitled to seek the declarations and orders of certiorari, mandamus and prohibition.
7. In his further affidavit sworn on the August 23, 2022, the *ex-parte* applicant deposed that through his e-mail on May 8, 2021, he sent 4 objections dated the May 7, 2021 and that the respondent conceded that objections were received on the May 8, 2021.
8. The *ex-parte* applicant denied making any objections on the May 10, 2021 as alleged by the respondent and contended that the letter of May 18, 2021 did not in any way affect the requirement by the Commissioner to determine the objections within the statutory prescribed timelines.
9. The *ex-parte* applicant reiterated in his depositions that the objection decision by the respondent was not proper as it was issued out of time and thus amounted to a non-decision incapable of being appealed against at the Tax Appeals Tribunal but that the decision ought to be quashed for being null and void.

The Respondent's Replying Affidavit

10. The respondent opposed the *ex-parte* applicant's Notice of Motion. It filed an affidavit sworn by Sarah Misuko on the July 15, 2022 wherein she deposes in contention that the Respondent issued additional tax assessment to the *ex-parte* applicant for VAT assessments for the period of December 2016, December 2017 and February 2021 which the *ex-parte* applicant alleges that he objected to on the May 7, 2021 without a stamp denoting received. The respondent contended that the *ex-parte* applicant made an online objection on May 10, 2021 against the December 2018 VAT assessment by the respondent.
11. It is the respondent's contention that on the May 18, 2021, the respondent wrote to the *ex-parte* applicant communicating and advising him to file an online objection and upload any supporting documents with regard to the tax period of December 2016, December 2017 and February 2021, on or



before May 25, 2021 so as to enable the office of the Respondent to process and examine the objections in compliance with Section 51(3) of the [Tax Procedures Act 2015](#).

12. The respondent further averred that by failing to either comply or issue a reply to the Respondent with regard to the letter dated May 18, 2021, the *ex-parte* applicant was equable as to any eventualities and tax obligations arising from all VAT assessments issued by the Respondent.
13. It is further contended that on July 8, 2021, the Respondent issued an Objection Decision for all the assessments issued to the Applicant based on variances between the self-assessed income tax and VAT returns and unsupported purchase invoices and that the *ex-parte* applicant was issued with a proper Objection Decision for the VAT assessments in totality.
14. The respondent further deposed that the *ex-parte* applicant's objection was not proper in law as he failed to provide evidence to explain the inconsistencies as per the provisions of Section 51(3) of the [Tax Procedures Act](#).
15. It is contended further that the *ex-parte* applicant has failed to discharge his burden of proof in proving that the Respondent's Tax decision is incorrect as per the provisions of Section 56(1) of the [Tax Procedures Act](#) whereas the Respondent issued an Objection Decision within the time frame set in the Tax Procedures Act.
16. The Respondent contended further that the decision by the *ex-parte* applicant to file a Judicial Review application to contest an Objection Decision by the Respondent amounted to forum shopping since he did not approach the Tax Appeals Tribunal, which is seized with jurisdiction of such a matter as stipulated in the Tax Procedures Act and that the *ex-parte* applicant did not qualify the criteria depicting it being in the interest of justice to file a Judicial Review application.
17. The respondent maintains that the *ex-parte* applicant has not demonstrated any prima facie case with a high probability of success to warrant a grant of the orders sought in the application and thus it is just and equitable for the Honorable Court to refer the matter back to the Tax Appeals Tribunal.

The Ex-Parte Applicant's Submissions

18. It was submitted by the *ex-parte* applicant that there is no procedure set out in the Tax Procedures Act to appeal against a decision made out of time and which decision was thus ultra vires. The *ex-parte* applicant maintained that the only remedy open to the *ex-parte* applicant was judicial review.
19. The *ex-parte* applicant submitted that the court is entitled to intervene where it is alleged that the discretion of the respondent is not being exercised judicially as was held in the case of [Fleur Investments Limited v Commissioner of Domestic Taxes](#) [2018] eKLR. Reliance was further placed on the case of [Republic v Commissioner of Custom Services Exparte Tetra Pak Limited](#) [2012] eKLR where the court held *inter alia* that:

“Non-compliance with the statutory procedures set out in the Act taints what would have been an otherwise lawful decision with illegality and procedural impropriety that automatically invites this courts intervention by way of Judicial Review.”
20. The *ex-parte* applicant submitted that his application was not caught up by the rule of exhaustion of remedies and that it was not an abuse of the court process as there was no effective remedy available to the him. It was further submitted that the doctrine of exhaustion ought not to be used to lock out a party who has no viable remedy as was held in the case of [Republic v Commissioner of Domestic Tax Ex parte Fleur Investments Limited](#) [2020] eKLR.



21. It was further submitted by the ex parte applicant that the availability of an alternative remedy was not a bar to judicial review proceedings as provided in Section 9 (4) of the *Fair Administrative Action Act* and as held by the Court of Appeal in the case in the case of *Kenya Revenue Authority & 2 Others v Darasa Investments Limited* [2018] eKLR.
22. The *ex-parte* applicant submitted that the court had jurisdiction to deal with such a case where the statutory appeal remedy was clearly not available or without impediment as was held in the case of *Republic v Kenya Revenue Authority Ex parte Majid Al Futtaim Hypermarkets Limited* [2020] eKLR.
23. It was further submitted that where a party challenges the manner in which a decision was reached, from a constitutional perspective, the Court had jurisdiction to deal with the matter as was held in the case of *Deepak Lalchand Nichani v Kenya Revenue Authority & Another* [2021] eKLR. The ex-parte applicant further relied on the Court of Appeal case of *United Millers Limited v Kenya Bureau of Standards & 5 Others* [2021] eKLR where it was held that even where a party did not resort to internal dispute resolution mechanisms provided in statute, and even failed to apply for exemption under the *Fair Administrative Action Act*, the Court can still proceed to hear and determine the case on its merits.
24. The ex-parte applicant submitted that where the decision was not made within 60 days in accordance with section 51 (11) of the *Tax Procedures Act*, the person who had objected has no decision that he can take to the Tax Appeals Tribunal, and can only seek judicial review. Reliance was placed on the cases of *Equity Group Holdings Limited v Commissioner of Domestic Taxes* [2021] eKLR, *Republic v Kenya Revenue Authority Ex parte M-Kopa Kenya Limited* [2018] eKLR, *Vivo Energy Kenya Limited v Commissioner of Customs & Border Control & 2 Others* [2020] eKLR, *Total Kenya Limited v Kenya Revenue Authority, Barclays Bank of Kenya Limited & 2 Others(Interested Parties)* [2020] eKLR, *Louis Dreyfus Company (K) Limited v Kenya Revenue Authority* [2021] eKLR and that of *Republic v Commissioner of Customs Services Ex parte Unilever Kenya Limited* [2012] eKLR.

The Respondent's Submissions

25. It was submitted that the ex-parte applicant failed to lodge a valid objection for consideration under section 51(8) of the *Tax Procedures Act* and cannot therefore purport to hide under section 51(11) of the *Tax Procedures Act*. The respondent submitted that the ex-parte applicant came to court with unclean hands and cannot demand an enforcement of his right under section 51(11) of the *Tax Procedures Act* without first performing his own obligations under section 51(2) and (3) of the *Tax Procedures Act*. Reliance on approaching court with clean hands was placed on the case of *Kyangavo v Kenya Commercial Bank Ltd & another* [2004] eKLR.
26. The Respondent submitted that no valid objection as claimed by the ex-parte applicant exists and that being mandated to inform taxpayers of an objection that has been invalidly lodged, it informed the Applicant vide a letter dated May 18, 2021 that his objection was invalidly lodged and even extended time for him to lodge the same but the ex-parte applicant did not.
27. It was submitted that the ex-parte applicant having committed an illegality sought to have the illegality validated by this court which was against the conscious of the rule of law and thus the ex-parte applicant cannot invoke the doctrine of equity in furtherance of this illegality. It was submitted that equity cannot override the provisions of the law. Reliance was placed on the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR.
28. The respondent submitted that the ex-parte applicant's objection failed to meet the requirements set out under Section 51(3) of the *Tax Procedures Act, 2015* and therefore the Court should not allow itself to be drawn into determining whether the Respondent's decision was issued outside of the statutory



- 60 days without first applying section 51(3) of the [Tax Procedures Act](#) on the Objection itself. It was submitted that section 51(11) of the [Tax Procedures Act](#) is not a shield against section 51(3) of the [Tax Procedures Act](#). Reliance was placed on the case of *Ngurumani Traders Ltd V Commissioner of Investigations and Enforcement* (TAT 125 of 2017).
29. It was submitted that the case of *Fleur Investments Limited supra* relied on by the ex-parte applicant was substantially different from the present case as the Appellant in the *Fleur* case had complied with all that was required of him and approached the court with clean hands hence had both the moral and the legal standing to approach the court and seek the remedies sought.
30. Further reliance was placed on the case of [Esther Nugari Gachomo v Equity Bank Limited](#) (2019) eKLR where the court held that:
- “...He who comes to equity must come with clean hands. The application for injunction being an application seeking equitable relief must fail the moment the Court finds the applicant’s hands are tainted...”
31. It was submitted that the ex-parte applicant of his own will chose to lodge an online objection on the 10th of May 2021 and an Objection Acknowledgment Receipt was automatically generated. The respondent further submitted that no evidence had been adduced to counter the existence of this receipt and as the *ex-parte* applicant only refers to documents acknowledging the letter dated May 7, 2021, the claim that no objection dated May 10, 2021 exists is mere allegation without proof and this court should dismiss it as such.
32. The respondent submitted that the document dated July 8, 2021 was a confirmation of the assessment and was validly issued. It was further submitted that section 51(11) of the [Tax Procedures Act](#) (TPA) cannot be read in isolation as it is qualified by section 51(8) of the [TPA](#) that defines what an objection decision is.
33. It was further submitted on behalf of the Respondent that for a document to qualify to be issued under section 51(11) then there is a prerequisite requirement that there must be a validly lodged notice of objection and that in the matter before court, no valid objection had been lodged therefore by operation of the law, there was no objection for the Respondent to consider under section 51(8) of the [Tax Procedures Act](#) hence the time under section 51(11) did not apply.
34. The respondent submitted that it’s letter dated May 18, 2021 was communicated to the *ex-parte* applicant pursuant to section 51(4) of the [Tax Procedures Act](#) informing him to lodge a valid objection in compliance with section 51(3) of the [Tax Procedures Act](#) and extended the time required to the 25th of May 2021 but the ex-parte applicant chose to decline the opportunity to validate the objection.
35. On the issue of whether the letter dated 8th July was issued outside of the 60-day timeline, it was submitted that notwithstanding the fact that section 51(11) of the [TPA](#) did not apply to an invalid objection, the time could not have started at the point the invalid objection was lodged but rather the time would begin running at the point the Objection was validated. Reliance was placed on the case of [Sony Holdings Company Limited versus Commissioner of Domestic Taxes](#) (Tax Appeals Tribunal No 717 of 2021).
36. The respondent submitted that the decision dated July 8, 2021 was the final decision of the Commissioner in reference to the assessment and therefore, an appealable decision thus the Tax Appeals Tribunal has the requisite jurisdiction to hear and determine the matter on merits.



37. It was submitted that the ex-parte applicant had not exhausted all internal remedies available to him before approaching this Court. Reliance was placed on the case of *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR. The respondent further submitted that the Judicial Review Proceedings go against the doctrine of exhaustion thereby working against the interest of justice.
38. It was submitted that the proceedings herein offend the Respondent's right to appeal to the High Court had a decision gone against it at the Tribunal and further also seeks to punish the Respondent for lawfully performing a statutory duty. Reliance was placed on the case of *Republic v Ministry of Interior and Coordination of National Government Ex-parte ZTE Corporation & another* [2014] eKLR where Ojwang J citing the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR stated 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. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures....”

Analysis & Determination

39. I have considered the Judicial Review application, the grounds, statement of facts and supporting as well as further affidavit. I have also considered the replying affidavit filed by the respondent and the rival submissions filed by both parties.
40. At the heart of the legal contest herein lies the construction of section 51 (8) & (11) of the *Tax Procedures Act* and the consequences of the 1st respondent's alleged failure to render an objection decision under the said provision. However, before I delve into the merits of this judicial review application, I observe that the respondent has consistently raised a preliminary point of law to the judicial review application to the effect that this application is premature as the ex parte Applicant has failed to comply with the mandatory provisions of section 51(3) of the *Tax Procedure Act, 2015* and that this being a tax dispute, the proper forum should be the Tax Appeals Tribunal established under the *Tax Procedures Act, 2015*.
41. To determine whether the exparte applicant should first have approached the Tax Appeals Tribunal or this court in ventilating is grievances challenging the legality of the decision by the respondent, it is necessary to restate the parameters for judicial review jurisdiction, as was stated in the Ugandan case of *Pastoli v Kabale District Local Government Council & Others*, (2008) 2 EA 300 that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have



made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

42. Judicial review is now entrenched as a constitutional remedy pursuant to the provisions of Article 47 of the *Constitution*, which guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This Article of the *Constitution of Kenya 2010* was successfully implemented by the enactment of the *Fair Administrative Action Act* whose rules are now being developed by the Rules Committee. Under section 7 of the Act, any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others*, (2016) KLR stated that:

“Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator. Lastly, Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person’s rights.”

43. With respect to tax disputes, section 51(1) & (2) of the *Tax Procedures Act* provide as follows as regards the dispute resolution process:

- “(1) 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.
- (2) 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.”

44. Section 52 of the *Tax Procedures Act* in addition provides as follows as regards appealable decisions to the Tax Appeals Tribunal:

- “(1) 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, 2013 (No 40 of 2013).
- (2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice.”



45. An appealable decision is defined under section 3 of the Tax Procedures Act to mean “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.”
46. A “tax decision” is defined to mean: (a) an assessment; (b) a determination 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; (d) a decision on an application by a self-assessment taxpayer; (e) a refund decision; (f) a decision requiring repayment of a refund; or (g) a demand for a penalty.
47. Lastly, section 12 of the [Tax Appeals Act](#) also provides that:
- “ 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, and upon giving notice in writing to the Commissioner, appeal to the Tribunal.”
48. On the other hand, Section 9(2) and (3) of the [Fair Administrative Action Act](#) requires the exhaustion of statutory and other internal review or appeals mechanisms before a party can seek judicial review. Under section 9 (4) of the Act, the 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, by exempting resort to the alternative remedy mechanism. While the exceptions to the exhaustion requirement are not clearly delineated, the Court of Appeal has given some guidelines when the exceptions would apply in as follows in the case of [Republic v National Environment Management Authority](#), Civil Appeal No 84 of 2010:
- “...where there was an alternative remedy and especially where Parliament had 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 was 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, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge.”
49. The High Court in [In the Matter of the Mui Coal Basin Local Community](#) (2013) e KLR, [R vs Independent Electoral and Boundaries Commission \(IEBC\) & Others Ex Parte The National Super Alliance \(NASA\) Kenya and Mohamed Ali Baadi and others v Attorney General & 11 others](#) [2018] eKLR held that in reaching a decision as to whether an exception applies, courts will undertake an analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issues and the ability of a statutory forum to determine them.
50. In the instant case, it is also important to have clarity about the effect of the mechanisms of the proceedings under Part VIII of the [Tax Procedures Act](#), namely, tax decisions, objections and appeals. For precision purposes, the proceedings referred to herein are defined in section 50 (4) of the [Tax Procedures Act](#) to mean: (a) an objection made under section 51; (b) an appeal made to the Tribunal under section 52 in relation to an appealable decision; (c) an appeal made to the High Court under



- section 53 in relation to a decision of the Tribunal; or (d) an appeal made to the Court of Appeal under section 53 in relation to a decision of the High Court.
51. Nonetheless, Section 50 (4) of the TPA must be construed in the light of the injunction contained in Article 50 (1) of the Constitution which guarantees every person the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal and the right to a fair administrative action as guaranteed under Article 47 of the Constitution.
52. The first opportunity for a hearing under the above provisions is the objection to the assessment. Thus, an objection to assessment and the obligation to render an objection decision is not a mere formality nor has it been included in the statute for cosmetic purposes. While it is appreciated that the hearing at this stage is limited, it is a form of audi alteram partem, the principles of which have frequently been recognized as being flexible and capable of being tailored according to the exigencies of the situation.
53. Section 51 (8) of the TPA obligates the Commissioner where a notice of objection has been validly lodged within time, to consider the objection and decide either to allow the objection in whole or in part, or disallow it. This decision is referred to as an "objection decision." This section mandatorily requires the Commissioner to make an objection decision. The only qualification is prescribed in section 51 (3) in the following words:
- (3) 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;
- (b) 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 or has applied for an extension of time to pay the tax not in dispute under section 33(1); and
- (c) all the relevant documents relating to the objection have been submitted.”
54. Therefore, were it not for the above special appeal procedure, the avenues for substantive redress available to persons aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common law judicial review as is now buttressed by the right to a fair administrative action under Article 47 of the Constitution, and as fleshed out in the Fair Administrative Action Act.
55. Here, however, the Tax Procedures Act provides its own special procedure for review of appealable decisions. It is however important to highlight that the Act nowhere excludes judicial review in the ordinary course. In other words, if the Commissioner fails to render an objection decision within the time prescribed under the Act, then there is no appealable decision to be challenged before the Tribunal. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner’s decisions, but it leaves intact all other avenues of relief including judicial review if the Commissioner fails to comply with the law.
56. In the present case, it is not controverted that a tax assessment and demand was made by the 1st Respondent to the ex-parte applicant, and that the ex-parte applicant made an online objection on May 10, 2021. It is contended by the respondent that the ex-parte applicant failed to lodge a valid objection for consideration under section 51(8) of the Tax Procedures Act and that subsequently vide a letter dated May 18, 2021, the respondent informed the ex-parte applicant that his objection was invalidly lodged and even extended time for him to lodge the same but the ex-parte applicant did not.



57. The respondent further contended that the ex-parte applicant's objection was not proper in law as he failed to provide evidence to explain the inconsistencies as per the provisions of Section 51(3) of the [Tax Procedures Act](#).
58. I have considered the respondent's letter dated May 18, 2021 and note that indeed the letter informed the ex-parte applicant that his objection was invalidly lodged and that he needed to lodge all the relevant documents. The letter further extended time to the ex-parte applicant to lodge his valid objection. This was in keeping with the provisions of section 51 (4) of the [TPA](#) that provides:
- “Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.”
59. There is however, a dispute as to whether the Respondent's decision was made within the stipulated statutory timelines or not and therefore the applicant alleges that there was no decision capable of being challenged at the Tax Appeals Tribunal.
60. The other dispute is whether the ex-parte applicant allegedly failed to lodge a valid objection as envisaged under section 51 (3) of the [Tax Procedures Act](#) and subsequently, whether the respondent was well within the law to proceed and make his decision which is impugned herein.
61. The other question that arises is what is the effect of the decision by the respondent dated July 8, 2021 and whether this was the final decision of the Commissioner with regard to the assessment and therefore, whether it is an appealable decision.
62. The Court of Appeal in the case of *Geoffrey Muthinja Kabiro (supra)* held 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”
63. Again the Court of Appeal in the case of [Bethwel Allan Omondi Okal v Telkom \(K\) Limited \(founder\) & 9 Others](#) (2017) eKLR, further held that:
- “The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.”
64. It is now settled law that where the [Constitution](#) or any law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure



provided by law. That, in essence, is the effect of Articles 50(1) and 159(2) of the Constitution which provides that:

“50 Every person has the right to have any dispute that can be resolved by the applicant of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.”

65. Under Article 159(2) of the Constitution, the courts and tribunals in exercising judicial authority which is derived from the people of Kenya, shall be guided by the following principles:
- a. Justice shall be done to all, irrespective of status;
 - b. Justice shall not be delayed;
 - c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause
 - d. Justice shall be administered without undue regard to procedure technicalities and
 - e. The purpose and principles of this Constitution shall be protected and promoted.
66. In Samson Chembe Vuko V Nelson Kilumo & 2 others & 2 others [2016] eKLR the Court of Appeal, citing other decisions with approval, among them: Speaker of the National Assembly v Karume [2008] 1 KLR 425 where the Court of Appeal held, *inter alia*:

“...where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed.” Mutanga Tea & Coffee Company Ltd vs Shikara Limited & Another [2015] e KLR the Court of Appeal reiterated the foregoing as follows:

“...where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be followed.... And further held as follows.....

“...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 :“ where 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.(See also Kones v Republic & Another exparte Kimani Wanyoike & 4 Others[2008] e KLR (ER) 296. It is readily apparent that in the above cited cases the court was speaking on 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.

The basis for that view is first, that Article 159 (2) (e) of the Constitution has expressly recognized alternative forms of alternatives 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 reaching 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. Secondly, such alternative dispute resolution mechanisms normally have an 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.....

...We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of an appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison d'être of the mechanisms provided under the two Acts.....”

67. In addition, under Section 9(2) of the *Fair Administrative Action Act* No 4 of 2015, 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. (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 Subsection (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 exemption to be in the interest of justice....” [emphasis added].
68. From the above provisions of the law it is clear that even the *Fair Administrative Action Act* mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court. However, the onus is on the applicant to demonstrate to the court that he ought to be exempted from resorting to the available remedies; and on application for such exemption.
69. Odunga J (as he then was) had an opportunity to determine a similar question of whether the applicant had failed to exhaust the remedies under the Tax Procedures Act, where the Respondent herein had allegedly made a decision outside the statutory timelines. This was in the case of *Republic v Commissioner of Domestic Taxes Ex-Parte I & M Bank Limited* [2017] eKLR. The learned Judge had this to say, and I quote him quite extensively because I find no reason to depart from his findings:

“94. Similarly in Peter Oduor Ngoge vs. Hon Francis Ole Kaparo, SC Petition 2 of 2012, [para 29-30] it was held:

“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted. In the interpretation of any law touching on the Supreme Court's appellate



jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with 'general' original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework”.

95. In my view what the Court ought to consider in such circumstances is the efficacy of the alternative remedy and whether it is less appropriate, convenient, effective and/or beneficial. Otherwise as was held in *International Centre for Policy and Conflict and 5 others-vs- The Hon. Attorney-General & 4 others* [2013] eKLR the Court recognizes the need to let relevant statutory bodies deal with matter within their mandate fully before interfering in manner sought in these proceedings by holding that a Court of law:

“...must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act...Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”

96. In *Thuku Kirori & 4 Others –vs- County Government of Murang’a* [2014] eKLR the Court similarly held that:

“Moreover, where a statute or constitution, for that matter, has expressly delegated specific functions, duties or responsibilities to a particular organs, state or otherwise , this court will be hesitant to intervene and curtail these organs’ efforts to execute their statutory or constitutional mandates”

97. That judicial review is a remedy of last resort and a party ought to endeavour to exhaust the alternative remedies available and reliance was emphasised in *Republic –vs- Chief Magistrate Nanyuki Law Courts Ex Parte Purity Gathoni Macheru* [2016] eKLR where the Court held that:

“The Learned authors Beatson, Mathews and Elliot in the book *Administrative Law on availability of alternative remedy* had this to say.’ It is generally accepted that, at least in principle, judicial review is a remedy of last resort, to be invoked only when other avenues , such as rights of appeal...have been explored; if not then permission may be defined.”

98. See also *NasiekuTarayia G vs Board of Directors Agriculture Finance Corporation & Another* [2012] eKLR.

99. It was this realisation, in my view that guided the Court in *Diana Kethi Kilonzo & another vs Independent Electoral & Boundaries Commission & 10 others* [2013] eKLR when it expressed itself as follows:



‘We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities. As was stated in *International Centre for Policy and Conflict and 5 others -vs- The Hon Attorney General & 4 Others* [2013] eKLR:

109. “An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrary to the institutional independence of IEBC guaranteed by Article 249 of the Constitution.
110. Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted...”
100. The court went ahead to hold as follows:
“Equally, and as we have already stated, it was the exclusive constitutional mandate of the IEBC under Article 88(4)(e) to settle all pre-election disputes, including those relating to registration and nomination. Accordingly, Ms Kilonzo’s legitimate expectations must be circumscribed within this legal environment, and we hold that to be the case.”
101. I agree with the decision in *Nasieku Tarayia G vs Board of Directors Agriculture Finance Corporation & Another* [2012] eKLR that judicial review is a remedy of last resort and where an alternative remedy exists, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available.
102. Section 12 of the Tax Appeals Tribunal Act provides as follows:
“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.”
103. The wording of the above section is clearly wide to encompass any matter arising under the provisions of any tax law. In this case what provoked these proceedings according to the applicant was the failure by the Commissioner to comply with section 51(9) of the Tax Procedures Act. No one doubts that



such a failure clearly falls within a matter arising under the provisions of any tax law in this case the Tax Procedures Act. Section 52(1) of the Tax Appeals Tribunal Act on its part 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, 2013 (No. 40 of 2013).

104. In this case, it is clear that the applicant did exercise the optional available to it under the Tax Procedures Act and the Tax Appeals Tribunal Act and filed Nairobi Tax Appeals Tribunal Number 72 of 2017: I & M Bank Limited v Commissioner of Domestic Taxes which is yet to be determined. I have perused the Memorandum of Appeal to the Tax Appeals Tribunal exhibited and it is clear that the issue of the objection having been deemed to have been allowed by the failure on the part of the Respondent to comply with section 51(9) of the Tax Procedures Act is not explicitly taken up. It has however not been contended that the applicant is barred from amending its pleadings before the Tribunal to incorporate that issue. Nevertheless it is my view that the failure by a party to bring an issue within the jurisdiction of the Tax Appeals Tribunal, where the same could have been properly taken up thereat, does not warrant the commencement of judicial review proceedings based on the omitted ground.
105. In this case as I have stated hereinabove, the law gives the Tribunal very wide powers with respect to matters arising from the provisions of any tax law. Whereas the applicant contends that the appeal filed before the Tribunal challenges the merits while these proceedings challenge the legality of the Respondent’s action in issuing its Objection Decision outside the time period prescribed by the Tax Procedures Act, nowhere in the submissions is it contended that the Tribunal does not have the power to make a decision regarding the failure by the Respondent to make a determination on a valid objection within the prescribed time.
106. To my mind, the sole reason why the applicant has invoked the two jurisdictions is as it contends “to preserve its right of appeal on the merits of the Objection Decision and out of abundant caution.” That statement in my view speaks volumes about the applicant’s real intentions. What I understand the applicant to be saying is that it is taking precautionary measures so that if it does not succeed in these proceedings, it would still be at liberty to pursue its appeal before the Tribunal without being locked out. In other words the applicant appreciates that if this application is successful, it would not be necessary to proceed with the appeal. With due respect to the applicant, this is a gross abuse of the due process.
107. In my view section 9(2) of the Fair Administrative Action Act is clear that this Court is barred from reviewing an administrative action or decision until the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The Legislature must be taken to have been aware that these proceedings only challenge the process while an appeal challenges the merits of the case yet they still, in their wisdom, provided that parallel proceedings are not permissible



as long as they challenge the same decision and, in my view, provided that the issues in dispute can be resolved through that alternative dispute resolution mechanism without the necessity of having to split the matter and have the issues in dispute resolved before separate forums. As was held by this Court in Nairobi High Court Petition No 613 of 2014 – Patrick Musimba vs The National Land Commission and Others:

“...it would be ridiculous and fundamentally wrong, in our view, for any court to adopt a separationistic view or approach and insist on splitting issues between the Courts where a court is properly seized with a matter but a constitutional issue not within its obvious exclusive jurisdiction is raised.”

108. However, if what is sought to be achieved by judicial review proceedings is substantially the same as what is sought in the appeal, a party ought not to be allowed to have a double-pronged attack on the same decision with a view to availing to itself an opportunity of challenging the same decision twice over. In my view even without the provisions barring such a course, to proceed in that manner would amount to playing lottery with the Court and render legal proceedings a circus. That clearly is an abuse of the Court process.
109. Whereas, this Court may in exceptional cases excuse the failure to invoke the alternative dispute resolution mechanisms provided under the law, where such mechanisms have in fact been invoked, to abandon the same midstream without terminating the same and proceed to commence judicial review proceedings or vice versa amounts to abuse of the process of the Court.
112. Having considered the issues raised before me in these proceedings, I am not satisfied that this is a matter in which an exemption ought to be considered. As was held in Republic vs National Environment Management Authority Civil Appeal No 84 of 2010 in which the Court of Appeal expressed itself as follows:
“...where there was an alternative remedy and especially where Parliament had 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 was 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, in the context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge.”
113. The substance of my findings hereinabove is that the issues raised herein would have been better dealt with by the Tax Appeals Tribunal in the exercise of its appellate jurisdiction under section 12 of the Tax Appeals Tribunal Act as read with section 51(9) of the Tax Procedures Act.
114. In the premises I find that the Notice of Motion dated April 4, 2017 is misconceived and incompetent.



115. However section 11 of the section 11 of the Fair Administrative Action Act, 2015 provides as follows:

- (1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order
 - (a) declaring the rights of the parties in respect of any matter to which the administrative action relates;
 - (b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;
 - (c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;
 - (d) prohibiting the administrator from acting in a particular manner;
 - (e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;
 - (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;
 - (g) prohibiting the administrator from acting in a particular manner;
 - (h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;
 - (i) granting a temporary interdict or other temporary relief; or
 - (j) for the award of costs or other pecuniary compensation in appropriate cases.

116. The operating word is including which means that the Court is not restricted to the reliefs enumerated thereunder. In my view, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be promoted or enhanced. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision."

70. This Court in the [*Ndiara Enterprises Limited V Nairobi City County Government*](#) vide Nairobi HC Misc Civil Application No 91 of 2016) which decision was upheld by the Court of Appeal vide CoA [*Ndiara Enterprises Ltd v Nairobi City County Government*](#) [2018] eKLR had made a similar decision on resorting to alternative remedies before approaching the High Court. The Court of Appeal in agreeing with this Court had this to state:

"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.

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;

"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.

(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 subsection (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."

71. In the circumstances, I find that the ex-parte applicant violated the doctrine of exhaustion. The question is what remedy should this court make. In my view, just like in the decision in *Republic v Commissioner of Domestic Taxes Ex-Parte I & M Bank Limited*, cited above quite extensively, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the *Constitution* cannot properly be promoted or enhanced. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision.
72. In the result, the Notice of Motion dated July 28, 2021 is hereby struck out as the court has not delved into the merits of the impugned decision of the respondent. However, in the exercise of the powers conferred upon this Court by section 11 of the *Fair Administrative Action Act*, I direct the applicant, if so minded to follow the procedure for filing of an appeal before the Tax Appeals Tribunal, on the issue of the legality of the Respondent's decision which is alleged to have been rendered out of the statutory stipulated timelines, so that all the issues in controversy can be dealt with by the Tribunal. The applicant herein shall off course have to seek leave to enlarge time for filing of the said appeal as stipulated in the law.
73. As the merits of the issues raised remain unresolved, I order that each party shall bear their own costs of this judicial review application.
74. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF DECEMBER, 2022

R.E. ABURILI

JUDGE

