**Nyatangi v Commissioner of Domestic Taxes (Miscellaneous Civil Application E121 of 2024) [2024] KEHC 8551 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8551 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**MISCELLANEOUS CIVIL APPLICATION E121 OF 2024**

**RN NYAKUNDI, J**

**JULY 16, 2024**

**BETWEEN**

**BENEDICT SIMEON ONDIEKI NYATANGI ..... APPLICANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

**RULING**

1. I am called to determine a Notice of Motion Application dated 9th April, 2024 in which the applicant seeks reliefs thus;

    1. Spent.

    2. That pending the inter-parties hearing and an order of *certiorari* do issue calling into this court and quashing the decision of the Respondent to charge the applicant in Eldoret Cm Cr. No. E4154 of 2021 (Republic v Benedict Simeon Nyatangi with 13 counts of fraud in relation to tax for the period 2018, 2019 and 2020 which is pending before the Chief Magistrates Court.

    3. That the honorable court be pleased to grant leave to apply for conservatory orders to the applicant to review and quash the decision of the Tax Appeals Tribunal rendered in Nairobi Misc. tax application Number E096 of 2023 on the 19th October, 2023 for being rendered unprocedurally and violating the applicants right to a fair administrative action.

    4. That pending inter partes hearing an order do issue of prohibition to prohibit the Respondent from commencing recovery proceedings of tax arrears assessed in error and gross violation of the Tax Procedure Act and the bill of rights that qualifies a tax payer to be treated in a certain manner commensurate to fair hearing and consideration of all factors including sickness.

    5. That at the Interparties hearing the court be pleased to invoke its supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function and call into this

court and quash the decision of the Respondent to change the applicant in the criminal court and irregularly dismissing his appeal before the Tax Appeals Tribunal made on 19th October, 2023.

2. The application is anchored on 8 substantive grounds and an affidavit in support sworn by Simeon Ondieki Nyatangi. The applicant avers that:

   i. The applicant has been subject to investigations over tax dispute for the years 2018, 2019 and 2020.

   ii. The applicant was dissatisfied with the tax assessment made by the commissioner of domestic taxes.

   iii. The applicant appealed to the tax appeals tribunal through Misc Tax Application No. E096 of 2023 on 25.07.2023.

   iv. The tax appeals tribunal dismissed the applicants appeal for being unpersuasive and relying on incomprehensible documents to support the reason of illness for his late approach to it.

   v. The applicant has been charged in the chief magistrates' court vide Eldoret CMCR No. E0415 of 2021 with 13 counts of tax fraud in a case that has not moved beyond the plea because of the procrastination of the respondent, the prosecuting authority.

   vi. That the decision to dismiss the applicants appeal before the Tax Appeals tribunal was made outside the statutory period of 60 days.

   vii. That in dismissing the applicants' objection and appeal, the Respondent acted *Ultra Vires*, in abuse of power and the whole process was tainted with unreasonableness and procedural impropriety.

   viii. That the process of investigating the applicant, processing his objection, dismissing his appeal, and charging him in criminal court went against the principles of natural justice, Criminal Jurisprudence and the constitutional tenets of fair hearing, fair administrative action and national values and principles of governance.

3. In response to the application, the Respondent filed replying affidavit in which one Abdub Matoye deponed on behalf of the Respondent as follows:

   1. That I am aware that the Respondent has over the years been experiencing challenges in effectively assessing, collecting and accounting for all tax revenues due to various acts, omissions or vices perpetrated by taxpayers which result in deliberate and/or incorrect lower tax declarations with resultant loss of substantial government revenue.

   2. That whilst a majority of the tax payers are compliant, there are a few taxpayers who are unwilling to meet their tax obligations hence the need for investigations and enforcement actions as provided for in the revenue statutes to deal with tax evasion.

   3. That the applicant was earmarked for investigations as a result of the intelligence gathered from the sector profiling of suspected tax non-compliant business owners at Eldoret Central Business District (CBD) which includes the applicant.

   4. That based on the intelligence gather the Respondent carried out in-depth investigations against the applicant which commenced on or about October 2020 to establish the nature and extent of the Applicant's non-compliance with the revenue laws.

5. That in carrying out the investigations, the Respondent mainly covered the applicant's tax declarations for income tax (Resident Individual) and Value Added Tax (VAT) for the period 2016 to December, 2020.

6. That in the course of the investigations, the Respondent interrogated the Applicant's tax returns and records held by the Respondent to establish whether the applicant has been correctly declaring income and paying the resultant taxes and requested for the bank accounts statements from the Applicant's bankers.

7. That upon conclusion of the Respondent's investigations, the Respondent established and made the following findings:

    a. The applicant derived its income from renting out residential houses and operating general hardware shops at Eldoret CBD and one along Eldoret Kapsabet road in Langas location;

    b. The applicant omitted from its returns income amounting to Kshs. 58,543,214 in the period between 2016 to 2020 as shown by the variances established from comparison between the income declared in the income tax returns and the trade deposits from the banking information;

    c. Based on these variances established, it became apparent that the applicant had made incorrect statements in its tax returns by declaring a lesser income thereby reducing its tax liability by Kshs. 17,562,964 in Income Tax, Kshs. 338,400 in rental income and Kshs. 8,691,621 in VAT and consequently paying less taxes;

    d. From the Applicant's tax records, the Respondent also noted that the applicant did not file his rental income returns for the years 2016, 2017 and 2020 thereby concealing its income and thus evading the taxes payable therefrom; and

    e. The Preliminary investigation findings indicated a possibility that the Appellant had committed several tax related offences.

8. That upon conclusion of the investigations, the Respondent prepared the preliminary tax investigation's findings which were shared with the Applicant on 26th August, 2021 and the applicant was given seven days to submit their responses and supporting documentation failure to which the Respondent would issue Amended Assessments.

9. That I am aware that the Respondent, on 10th November, 2021, wrote to the applicant informing them of the updated tax investigation findings and granted the applicant fourteen days to submit their response and supporting documentation failure to which the Respondent would issue Amended Assessments.

10. That I am aware that the Applicant failed to honor the Respondent's request or respond to the issues raised in the investigation report and based on the investigation findings, the Respondent suspected that the Applicant had committed several tax offences.

11. That consequently, the Respondent prepared an investigation file and forwarded it to the ODPP on 14th December 2021 with recommendation that the applicant be charged with the offences under Section 97 of the *Tax Procedures Act*, 2015.

12. That I am aware that the DPP independently reviewed the Investigation File and made a decision on 17th December, 2021 to charge the Applicant as per the Respondent's

recommendation and on 29th December, 2021, the applicant was arraigned in court and charged with several counts of tax offences.

13. That I am aware of my own knowledge that the Respondent has a duty in law to investigate tax related offences and/or complaints and that where any offences are established in the course of such investigations, the Respondent is legally bound to lodge a complaint and cause all the persons culpable to be tried in a court of law.

14. That I am also aware that any accused person, the applicant herein included will have and opportunity to defend himself/herself against any allegations against them made by the Respondent as provided under Article 49 and 50 of the *Constitution* of Kenya, 2010 which guarantees right to fair hearing.

15. That as a tax administrator, I am aware that from the Respondent's findings, there is a reasonable suspicion that the Applicant herein has committed several tax offences and thus should be held accountable for his actions and/or omissions through criminal/prosecution process.

16. That the Respondent is not the prosecuting authority and secondly, the Respondent is only a complainant and a witness in the case who is looking forward to have the matter concluded expeditiously and does not control how the case proceeds.

17. The civil proceedings seek to recover taxes which have become due and payable whereas the criminal proceedings seek to punish the criminal offences which have been committed. Therefore, there is no duplicity of actions/processes as alleged;

18. The mere fact that there are pending civil proceedings on the same subject matter does not ipso facto bar the Magistrate's court and/or the Director of Public prosecution from varying on with the criminal proceedings of similar subject against the Applicant or vice versa;

19. The existence of civil proceedings (collection of taxes) is not a bar to the continuance of the criminal proceedings since both proceedings can run concurrently pursuant to sections 105 and 108 of the *Tax Procedures Act*, 2015 as read with Sections 193A of the Criminal Procedures Code.

20. That considering civil proceedings and criminal proceedings can run concurrently, the allegation that the applicant will be subjected to double jeopardy is not only unfounded but also has no basis in law;

21. Therefore, both proceedings can run concurrently without infringing the applicant's rights to fair hearing.

22. That, if dissatisfied by the Ruling of the tribunal in Nairobi TAT Misc. Application No. E096 of 2023 Benedict Simeon Ondieki v Commissioner of Domestic, has the option of appealing against the same to this honorable court pursuant to section 32 of the *Tax Appeals Tribunal Act*, Cap. 369 A Laws of Kenya;

23. The issues raised by the Applicant against the manner in which the Tribunal exercised its discretion or the reasons for dismissing its application for leave to file an appeal out of time are grounds which ought to be canvassed by way of an appeal and not through an interlocutory application;

24. The orders of *certiorari* and prohibition can only be sought with the leave of this honorable court by way of Judicial Review application pursuant to Order 53 of the *Civil Procedure Rules,*

*2010* or a petition pursuant to Articles 22 and 23 of the *Constitution* of Kenya, 2010 and not as sought by the Applicant;

25. In the absence of leave of this honorable court or a proper application or suit before court, the orders of *certiorari* and prohibition are not available to the applicant and thus should not issue.

26. That the orders of *certiorari* and prohibition as sought at the preliminary stage (pending inter-parties hearing) cannot and should not issue as the orders are final in nature.

27. The applicant has not demonstrated how the Tribunal's ruling and the lawfully instituted criminal proceedings violated the applicant's rights;

28. As long as the applicant and the Tribunal Act in a reasonable manner, the High court should not intervene and/or interfere with their statutory and/or constitutional powers conferred by law.

29. That should the orders and reliefs sought by the applicant be granted and the criminal proceedings be quashed, it will amount to having the applicant exonerated and/or acquitted from the criminal charges without the benefit of standing a trial; and

30. Therefore, granting any of the orders sought by the Applicant will amount to this Honorable court unduly interfering with the constitutional and/or statutory duties and powers of the Respondent and other constitutional bodies herein.

31. In the circumstances, the orders sought in the notice of motion application should be declined as they are without any merit.

4. Notwithstanding, the necessity of filing affidavit evidence by the respective parties to the instant notice of motion to discharge the standard and burden of proof as provided for in Section 107 (1), 108 &109 of the *Evidence Act* both learned counsels took the liberty to advance their respective cases by way of written submissions. With regard to the Applicant, the substantive remedies are as coached in the Notice of Motion dated 9.4.2024. In this respect, learned counsel Mr. Ngigi Mbugua on behalf on behalf of the Applicant relying on the written submissions dated 9.7.2024 submitted that the respondent in discharging its statutory duty in dealing with tax assessment and subsequent collections from the Applicant as a tax payer has failed to be impartial, balanced and fair. Further in learned counsel's submissions, the respondent is in breach of procedural fairness in the assessment of the tax due from the Applicant culminating in trumped up charges as evidence in the charge sheet filed in the Chief Magistrate's Court at Eldoret in Cr. Case No 4154 of 2021. That in exercise of its jurisdiction, under the *Tax Procedure Act* Cap 469 (A) & (B) leaned counsel argued and submitted that the respondent acted in excess of jurisdiction in striking out evidence in support of ill health suffered by the Applicant during pendency of the proceedings and subsequently locking him out of the entire trial. This in essence according to learned counsel, deprived the Applicant the right to a fair hearing which indeed was a violation of the fundamental Rights and Freedoms founded in the Bill of Rights. In support of these submissions learned counsel placed reliance on Article 22(i) , 23, 159, 165, 258, & 259 of the *Constitution*. It is on this strength of the law, learned counsel invited this court to set aside the Tax Appeal Tribunal No. E096 of 2023 and half the process of investigation and assessment commence a fresh within the period under inquiry.

5. In response to the submissions by the Applicant the respondent in a re-joinder relied on the written submissions dated 7.6.2024 which touched on the competency of the application and whether it can be cured by Article 159 of the *Constitution* of Kenya 2010.

6. Learned counsel Mr. Ngetich Kipngeno for the Respondent advanced his arguments which in summary are captured herein under:

7. On the first issue, it is submitted by learned counsel for the Respondent that the instant application is incompetent as it seeks judicial review orders without leave of this Honorable Court. The application therefore offends Order 53 of the *Civil Procedure Rules, 2010*. In support of this position, the applicant cited the decision in *Republic v Head Teacher, Kenya High School & Another Ex-parte SMY* (2012) eKLR. In view of that, the respondent submitted that the orders of *certiorari* and prohibition cannot issue at a preliminary stage and without leave of this honorable court.

8. It was further submitted learned counsel that even though under the current dispensation it may not be necessary to seek leave before instituting an application for judicial review, the application before court is neither a claim pursuant to Article 47 of the *Constitution* of Kenya nor the *Fair Administrative Action Act*, 2015. That it therefore follows that the application is either way defective and incompetent.

9. On the second issue, learned counsel for the Respondent submitted that failure to adhere to statutory provisions is not a procedural technicality that can be excused by or wished away under Article 159(2)(d) of the *Constitution* of Kenya, 2010. That the application before court is neither an application for judicial review under Order 53 of the *Civil Procedure Rule, 2010* nor Article 47 of the *Constitution* of Kenya, 2010 and the *fair Administrative Action Act*, 2015. That therefore the application is foreign to the law as it does not confirm to the provisions of the law.

10. As to whether the applicant is entitled to the relief sought, learned counsel for the respondent submitted that when invited to grant constitutional orders, where statutory remedies are available, this court should decline the invitation especially in a case like this where appropriate statutory procedures are provided to meet the necessity of the reliefs applied for by the Applicant. It was his contention that the Application as framed is implicitly a non -starter and should therefore be dismissed by this court. Learned counsel urged this court to make a finding that the Applicant has misapprehended the general principles of Tax Law and this procedure as premised in the statute it was his submissions that the court should be guided by the various dicta as pronounced by the Superior court in the following authorities: *Matagei v Attorney General: Law Society of Kenya (Amicus Curiae)* (Petition 337 of 2018) (2021) KEHC 460 (KLR) ( Constitutional and Human rights) (13 May 2021 Judgement) , *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* (2013) eKLR, Nairobi Court of Appeal Civil Appeal (Application) No. 228 of 2013, *Charles Apundo Obare & Another v Clerk, County Assembly of Siaya & another* (2020) Eklr. *Leonard Otieno v Airtel Kenya Limited* (2018) Eklr Nairobi High Court Petition No 218 of 2017

**Analysis and Determination**

11. I have carefully considered the rival arguments made by the parties, the submissions and the authorities cited. The only issue I find for determination is whether the orders sought by the Applicant are available.

12. First and foremost, by dint of the Applicant inviting this court to construe and grant the remedies, under the Bill of Rights it means therefore one cannot escape the constitutional interpretation of the Articles so submitted and relied upon by learned counsel for the Applicant. Essentially in this context is much of what is being addressed by learned counsel in his submissions as to the competency of the application and its convergence with the remedies strictly being agitated by the Applicant. This is therefore about establishing the context or perhaps the picture within which this particular application is pleaded and have it viewed from the lens of the *Constitution*. In Kenya the *Constitution*

itself provides the framework on interpretation as expressly stated in Art, 259 in the following language: The constitutions shall be interpreted in a manner that:

a. Promotes its purpose, values and principles

b. Advances the rule of law, and the and the human right and fundamental freedoms in the Bill of Rights.

c. Permits the development of the law and

d. Contributes to good governance.

13. This court is clothed with jurisdiction under Article 165 2(b) and (d) of the *Constitution* to entertain and determine the question on constitutional issues as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. In sub section (d) expressly states as follow:

(d) Jurisdiction to hear any question respecting the interpretation of this constitution including the determination of:

i. The question of whether the law is inconsistent with or in contravention of this Constitution.

ii. The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution.

iii. Any matter relating to Constitutional powers of state organs in respect of county governments and any matter relating to the Constitutional Relationship between the levels of government.....

14. Purposive interpretation of the *Constitution* has postulated in Art 259 is aimed at teasing out the core values which underpin the Bill of Rights in an open and democratic society based on human dignity, equality, human rights, non-discrimination, equity and social justice. See Art 10 2(b) of the *Constitution*. Flowing from this provision, the principles set out by the Canadian Court in *R v Big M Drug Mart Ltd* (1985) 18DLR 321, at 398. The court had this to say in this respect:

> " The meaning of a right or freedom guaranteed by the charter was to be ascertained by an analysis of the purpose of such a guarantee, it was to be understood, in other words in the light of the interest it was meant to protect. In my view this analysis is to be undertaken and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the charter itself to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined and where applicable to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the charter. The interpretation should be a generous rather than a legalistic one aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the charter's protection."

15. The court upon considering the submissions of counsel for the appliant and the rejoinder submissions by the Respondent, it is singled out very clearly that the applicant's main grievance is based on the proceedings held before the Commissioner tasked with the responsibility of assessing a tax payer as to whether his/her income meets the criteria set out in the law. It is apparent that the case for the Applicant found its way to the jurisdiction exercised by the Tax Appeals Tribunal. The other challenge

mounted by the applicant implicit from his application is on the grounds of his leave to appeal to the Tax Appeals tribunal having collapsed for want of merit. The Applicant's arguments are that the decision by the Tax Appeals Tribunal does not conform to the constitutional text and spirit hence the reason he has fronted Art 24 of the *Constitution* as a first line of approach for this court to find that his fundamental rights have been violated. There was an attempt by the applicant that the limitation provided by Article 24 analysis test should be undertaken by this court with a view to making a finding that the impugned ruling was unreasonable and unjustifiable more so given the nature of limiting the right to a fair hearing under Article 50 of the *Constitution*. In making these observations, one has to look at the statutory provisions of the *Tax Appeals Tribunal Act* which regulates both procedural and substantive jurisdiction of both the Tax Appeal Tribunal and further access to the High court on rights of an appeal by an aggrieved applicant. It is certainly the case that the principles set out in the Act are to guide the litigants who find themselves within the regime of the tax administration for the various provisions do provide and are couched in a language on the statutory recognition of either the administrative organ, the Tax Appeals Tribunal and the High Court for that matter. Consequently, and with respect, in answer to the question raised by the applicant, the breadth or depth of the court's inquiry into the general principles must be dictated by the nature of the specific issue arising. The potentiality to determine whether that provision limits in so far as the *Constitution* acknowledges, the question to be asked and answered by this court is whether this application will pass the test of proportionality. Admittedly, learned author Huscroft, B Miller and G Webber (eds), Proportionality and the rule of Law: Rights, justification, reasoning (Cambridge University Pres 2014) delved into the guidelines of establishing the proportionality test by the court conducting this inquiry thus:

> " Does the Legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right? Are the means in service of the objective rationally connected (suitable) to the Objective?; Are the means in service of the objective necessary, that ism minimally impairing of the limited right, taking into account alternative means of achieving the same objective? Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the Limitation; in short, is there a fair balance between the public interest and the private right?"

16. It should be clear by now that applying the above criteria not all infringements of the fundamental rights are unconstitutional. Where an infringement or a violation can be justified in accordance with the criteria in Art 24 of the *Constitution*, it will be Constitutionally valid. In reaction to the instant application, one cannot avoid to address the issue of jurisdiction of this court as the same is underpinned in Section 32 of the operating Act

17. It is trite that the jurisdiction of this court is anchored and qualified in the *Constitution* and the ascertainment of the provisions of the applicable statutes. The approach on jurisdiction was formulated by the Court of Appeal in the cases of *Public Service Commission & 2 others versus Eric Cheruiyot & 16 other* Civil Appeal No. 119 of 2017 and the case of The County government of Embu & Another versus Erick Cheruiyot being consolidated appeals in which the court held:

> " By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. the Limits of this authority are imposed by the statute charter, or commission under which the court is constitute, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited, A limitation may be either as to kind and nature of the actions and matter of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these

characteristics. If the jurisdiction of an inferior court or court or tribunal (including and arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing jurisdiction must be acquired before judgment is given."

18. In addition, the Supreme Court in the matter of *Interim Independent Electoral Commission* (2011) eKLR, Constitutional Application No. 2 of 2011held that jurisdiction of courts in Kenya is regulated by the *Constitution*, statute, and principles laid out in judicial precedent. A court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity.

19. The applicant herein upon being aggrieved by the decision of the commissioner on the assessment of his taxes had a right of appeal to the Tax Appeals Tribunal he was to file a notice of appeal within time. From the reading of the decision of the Tribunal. There was no compliance as to the provisions on time, the result of it was for the applicant to seek leave before the Appeals Tribunal to be granted an extension of time to file an appeal against the decision of the Commissioner of Domestic taxes. The 1st principles in the administration justice, for the tribunal and courts to promote the expeditious delivery of justice in adjudication of cases, the prescribed time limits are not just targets but dictates of the law which must be met by any litigant. The plain reading of the said impugned order from the Tax Appeals Tribunal indicates that the position taken to dismiss the application for extension was for reason of indolence and inordinate delay on the part of the applicant. One such underlying principles as laid out in the case of *Salat v Independent Electoral & Boundaries Commission & 7 others* (2014) KLR-SCK

> " Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court."

20. What forms of facts and the law which qualify for the court or Tribunal to exercise discretion to extend time is a matter wholly within the purview of that independent constitutional organ to hear and determine to draw necessary conclusions from any given individualized circumstances of a case. Without discerning the merits of the appeal which is not before this court, presumably may be the tribunal had every reason in regard to the conduct of the applicant who failed to file his appeal in adherence with the provisions of the Act. This being an application for a *certiorari*, conservatory orders and prohibition by virtue of Section 32 of the *Tax Appeals Tribunal Act*. The court lacks jurisdiction. The recourse in the Act was the applicant to file an appeal to the court on the issues presented and determined.

21. The assimilation and interaction of the law and the *Constitution* is especially well illustrated by the Supreme Court in the case of *Communications Commission of Kenya & 5 others v Royal Media Services Limited & others* case:

> " Although Article 229(1) of the Constitutional gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threaten, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. The principle emerges clearly from the High Court decision in */Anarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention of infringement, such principle plays

a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement." (see also Leonard Otieno v Airtel Limited (2018) eKLR)

22. The seminal question which arises for consideration is this application is whether the applicant has met the constitutional threshold contemplated in its letter and spirit to pursue this claim as a constitutional remedy, not as an appeal on the contested issues from the impugned decision of the Tax Appeal Tribunal. The court is of the view, the legislature had such intention to frame such provisions whose aim and object of Section 32 is to ensure that a decision from the Tax Appeals Tribunal be processed as an appeal. However, there is no embargo in the large interests of justice for a party to file a constitutional petition which meets the settled procedural law under the Bill of Rights in Chapter 4 of the *Constitution*.

23. Essentially in this matter the applicant is advancing the argument that the case considered by the Tax Appeal Tribunal and has finally decided was an affront to the *Constitution* calling for invocation of this court for an order of Judicial Review. The meaning given to the passage by the Constitutional Court of South Africa in *Fredricks & others v Mec for education and training, Eastern Cape & others* (2002) 23 ILJ 81 is of significance if the court is to bear in mind the sufficiency of the provisions of the applicable statute and for it to endeavor to be a faithful servant as possible to the legislative scheme within the constraints of the *Constitution*. It is in this respect the court stated as follows:

> "the *Constitution* provides no definition of constitutional matter. What is constitutional matter must be gleaned from a reading of constitution itself: if regard is had to the provisions of .... Constitution, constitutional matters must include disputes as to whether any law of conduct is inconsistent with the *Constitution* as well as issues concerning the status, powers and functions of an organ of state ... the interpretation, application and upholding of the *Constitution* are also constitutional issues. So too .... Is the question of the interpretation of any legislative or the development of the common law promotes the spirit, purport and object of the Bill of rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Cosntitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction....."

24. I am once again called upon to evaluate the interplay among Article 22(i), 23, 159, 165, 258, & 259 of the *Constitution* and Section 32 of the *Tax Appeals Tribunal Act*. At issue in this application, are the principles to be applied when a tax decision is to be challenged on the basis of illegality, appropriateness, justness, or on errors of facts or law as conceived by the aggrieved tax payer. That is not the case here and applying the principles laid down in the aforesaid cases to the facts of the present application I find that by no stretch of imagination can the issues here be elevated into a constitutional petition.

25. The orders as crafted are those seeking judicial review orders by dint of Order 53 of the *Civil Procedure Rules*. The applicant in his application indicated that he was dissatisfied with the tax assessment made by the Commissioner of domestic taxes and appealed the same to the Tax Appeals Tribunal through Misc Tax Application No. E096 of 2023 but the same was dismissed.

26. The assessment in itself is a tax decision as defined under Section 3 (1) (a) and (b) of the *Tax Appeals Tribunal Act*. It is defined to mean

> "a self-assessment, default assessment, advance assessment, or amended assessment, and includes any other assessment made under a tax law."

27. The process under which the tax decision is challenged has been set out in Section 51 of the *Act*. It states as follows: -

51. Objection to tax decision:

(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.

(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

(4) 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.

(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.

(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.

(7) The Commissioner may allow an application for the extension of time to file a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) The Commissioner shall make the objection decision within sixty days from the date of receipt of—(a)the notice of objection; or(b)any further information the Commissioner may require from the taxpayer, failure to which the objection shall be deemed to be allowed.

28. Having laid that out, it is evident that the applicant made the said objection with the Commissioner and upon considering the objection, it was dismissed in its entirety. The subsequently did an appeal to the tax appeals tribunal as provided for under section 12 of the *Tax Appeals Tribunal Act*, cap. 469A which 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, upon giving notice in writing to the Commissioner, appeal to the Tribunal'. Section 13 of the Tax Appeals Act details the procedure for making of the appeal.

29. If still dissatisfied with the decision of the Tax Appeals Tribunal, the applicant would be entitled to move this Honourable Court by way of an appeal under Section 32 of the *Tax Appeals Tribunal Act* to impeach that decision. Under this provision of the law, a party to proceedings before the Tribunal may, within thirty days after being notified of the impugned decision or within such further period as the High Court may allow, appeal to this Honourable Court.

30. The applicant at this point did not move this court in a bid to impeach the decision of the tribunal. The question I then ask myself is this, was the applicant to file and application seeking judicial review orders or institute an appeal?

31. I find the answer to that in Section 32 of the *Tax Appeals Tribunal Act* which provides what, in my humble view, is sufficient to answer the question. For avoidance of doubt, the provision states as follows:

32. Appeals to the High Court on decisions of the Tribunal

(1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

(1A) A party that has appealed against the decision of the Tribunal in subsection (1) shall within two days of lodging a notice of appeal, serve a copy of the notice on the other party.

(2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice.

32. This provision of the law is explicit and leaves no doubt that it is an appeal rather than an application for judicial review that ought to be filed against decisions of the Tax Appeal Tribunal. Therefore, even assuming its shape and form and the fact that the Applicants did not properly draft it as averred by the Respondent, the orders sought therein could still not issue. I am of the view that the applicant should have lodged an appeal against the Impugned decision and not the present application. I agree with the Respondent that issuing the reliefs sought is akin to exonerating the applicant and/or acquit him of criminal charges and yet there is already an active cause in court for determination.

33. In the case of the *Speaker of the National Assembly versus James Njenga Karume* (19920 eKLR the Court of Appeal held that:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament the procedure should be strictly followed. We observed without expressing a concluded view that Order 53 of the Civil procedure Rules cannot oust clear constitutional and statutory provisions."

34. This is also the context in which the Court of Appeal ordained as follows in *R versus National Environment Management Authority Exparte sound equipment Ltd* (2011) eKLR thus:

> "where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the Court to look carefully at the stability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it..." (See also the principles in *Charles Apudo Obare & Another v County Assembly of Siaya* eKLR

35. The doctrine of exhaustion is created by the legislature in order to promote an efficient justice system and autonomy in the administration of justice. Consequently, a court seized of the cause of action has to interpret the statutory version applicable and therefore must first decide whether there is a jurisdictional rule or not. The law does not allow for courts to create exceptions to the jurisdictional rules or parties may not waive or forfeit the procedural rules on jurisdiction for they will loom over the proceedings from the start to finish. In a subject matter for adjudication before a court of law in the event it is faced with a jurisdictional exhaustion requirement court must choose between diluting the concept of jurisdiction and allowing injustice to apply which structure for purposes of exhaustion will be in breach of the law. In the application before this court, this court is being asked to ignore the mandatory exhaustion procedure in Section 32 of the *Tax Appeals Tribunal Act*. To do so, the court will be creating a legal conceptual mess and as a consequence of it occasioning prejudice and injustice to the parties. This dichotomy cannot be remedied by article 165(6) & (7) of the *Constitution* which provides as follows:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

36. Over the past decade, since the promulgation of the *Constitution* courts have their sue of clear statement rules when procedural pre-conditions like exhaustion are jurisdictional. Given the stakes in Tax law matters, parliament tried to unify questions of procedural rules which are jurisdictional to facilitate the development of the law and jurisprudence on matters around cause of action on tax litigation. The overall statutory scheme, past rulings and context provide particular guidelines on statutory requirements on jurisdiction. This categorization cannot be ousted by judicial fiat or by consent of the parties. When it comes to Tax Appeals tribunal, parties should not be confused by the statute exhaustion requirement that they ignore the legislative scheme and apply to approach the court directly

knowing its jurisdictionality. The courts are largely creatures of the statute and where regulations provide a particular procedure in administrative appeals that imposed issue of exhaustion requirement cannot be bypassed by any litigant because of desirability for the court to hear his or her claim. That is one question which remains unanswered by the applicant to this claim as against the defendant respondent. Surprisingly, the applicant moved this court with a mixed bag of remedies under the Judicial review jurisdiction without compliance with the uniformity of the constitutional Rules and Order 53 of the *Civil Procedure Rules*. Hence this was potentially insufficient to serve the purpose of ensuring judicial consideration of matters arising out of the decision of the Tax Tribunal dated 19th October, 2023. Before this court the applicant petitioned for *certiorari* assailing the ruling of the Tax Tribunal of 19th October, 2023. In support of the prayer is a notice of motion application without a corresponding petition. On the issues raised by the applicant, this court is tasked to determine whether the tax tribunal committed grave abuse of discretion when it denied the applicant's motion for extension of time to canvass the issues arising out of his tax compliance. The resolution of the issue in turn hinges on a determination of the propriety of that decision. The principle primary jurisdiction in Section 32 holds that for such a grievance the forum of conveniens clothed with jurisdiction is the appeals division of the High court. The High Court cannot or will not determine a controversy involving a question within the jurisdiction of the Tax Tribunal without first complying with the doctrine of primary jurisdiction under section 32 of the Act. Guided by such a precept this court cannot uphold the applicant's recourse to judicial review without proper framing of the pleadings by way of a petition and there is nothing in law which was a bar to the applicant to process his cause of action within the requirements of the statute. In any event, the circumstances of the case do not qualify as one of the exceptions to the specific rules on primary jurisdiction and the doctrine of exhaustion.

37. Another aspect that the court found peculiar was that of being asked to quash the criminal proceedings by issuing the writ of *certiorari*. I have already ruled that there is no constitutional petition before this court. Presumably if it was and competently filed, what would have been the key principles go guide the court in making its finding. The legal analysis is always on the interpretation of the text in the pleadings and the strength of the provisions relied upon by the Petitioner/Applicant. The central issue here is about the impugned decision by the tribunal. The hallmark of the writs of *certiorari* and prohibition was well discussed in the case of *Pastoli v Kabale District Local Government Council & others* (2008) 2 EA 300, where it was held as follows:

> "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...Illegality is when the decision-making authority commits an error of law in the process of taking 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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...Procedural Impropriety is when there is a 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."

38. It is also against the provisions of Section 7 of the *Fair Administrative Actions Act* that the applicant can move the court tor judicial review orders. As far as the question of abiding grounds are concerned, an applicant has to rely on the following to petition for the prerogative writs under judicial review for instance: a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c) the action or decision was procedurally unfair; (d) the action or decision was materially influenced by an error of law; (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; (f) the administrator failed to take into account relevant considerations; (g) the administrator acted on the direction of a person or body not authorized or empowered by any written law to give such directions; (h) the administrative action or decision was made in bad faith; (i) the administrative action or decision is not rationally connected to(i) the purpose for which it was taken; (ii) (iii) (iv) (j) the purpose of the empowering provision; the information before the administrator; or the reasons given for it by the administrator; there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law; (k) the administrative action or decision is unreasonable; (l) the administrative action or decision is not proportionate to the interests or rights affected; (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates; (n) the administrative action or decision is unfair; or (o) the administrative action or decision is taken or made in abuse of power. (3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that(a) the administrator is under duty to act in relation to the matter in issue; (b) the action is required to be undertaken within a period specified under such law; (c) the administrator has refused, failed or neglected to take action within the prescribed period.

39. Lord Diplock's classic *dictum* in Council of *Civil Service Union versus Minister for the civil Service* (1985) A.C. 37,410 provides a useful guide in what an unlawful decision entails; in that case he outlined three heads which he referred to as 'the grounds which administrative action is subject to control by judicial review." These grounds are illegality irrationality and procedural impropriety.

40. What is at stake in the present application as deduced from the affidavit of the applicant is the commencement and prosecution of the applicant in criminal Case No. E4154 of 2021. In brief, given the earlier observations made on lack of justiciability of the application under the realm of judicial review however for purposes of the writ of *certiorari* prayed for by the applicant, I rely on the principles in the cases of *Republic v Grace Wangari Bunyi (sued as the administrator of the estate of the late Obadiah Kuira Bunyi) & 7 others Exparte Moses Kirruti & 28 others* (2018) eKLR

> "It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions. The mere fact that their high chance of success as regards the intended or ongoing criminal proceedings does not count, it not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned merits of the case but to address defects in decision making process by a decision-making body. However, the court may only intervene were the said discretion is exercised unlawfully and in bad faith, for instance where it is being abused or being used for achievement of some collateral purpose which are not geared towards the vindication of the commission of a criminal

offence and the justice system such as with a view to forcing a party to submit to a concession of a civil dispute, the court will not hesitate to bring such proceedings to a court."

41. The more the greater the policy content of a decision the more hesitant the judicial review court must necessarily be in holding a decision to be in need of grant of the writs of prohibition, *certiorari* or *mandamus*.

42. For those reasons and as a consequence, the following orders shall abide the findings of this court.

    a. That the notice of motion application dated 9th April, 2024, and filed on 22nd April, 2024 is hereby struck out for want of merit and jurisdiction.

    b. The Applicant and the respondent to bear their own costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 16TH DAY OF JULY**

**2024**

**R. NYAKUNDI**

**JUDGE**