



**Owiti v Director of Pensions; Commission on Administrative Justice
(Interested Party) (Judicial Review Miscellaneous Application E110 of 2021)
[2023] KEHC 259 (KLR) (Judicial Review) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E110 OF 2021
AK NDUNG'U, J
JANUARY 26, 2023**

BETWEEN

VICTOR JUMA OWITI APPLICANT

AND

DIRECTOR OF PENSIONS RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE INTERESTED PARTY

RULING

1. This ruling resolves the Preliminary objection (PO) dated July 7, 2022. The applicant earlier moved this court vide Chamber Summons dated July 19, 2021 seeking the following orders:
 1. That the instant Application be certified as urgent and heard ex parte in the first instance and on priority basis.
 2. That the Honourable Court be pleased to grant the Applicants Leave to apply for the Judicial Review Order of Mandamus directing the Respondent to pay the Applicant and or any of the other three (3) children of the late Amos Owiti Juma, the remainder of the pension payable to the widow and or, after her death, the children in respect of the period from July 2009 to August 2019 (both months inclusive) for which they were entitled to the said payments, together with the interest accrued thereon at the prevailing bank rates until payment is made in full.
 3. That the costs herein be paid by the Respondent.
- Leave was granted in terms of prayer 2.



2. Pursuant to that leave, the Applicant moved the court vide the Notice of Motion dated October 8, 2021, seeking the following orders:
 1. A declaration that the twelve (12) years' delay by the Respondent in remitting payments in respect of the Widows and Children's Pension Scheme in respect of the Late Amos Owiti Juma [BPN/PC35328] is manifestly inordinate, unreasonable and unjustifiable.
 2. A declaration that the Respondent has violated the Applicant's constitutional rights to a fair administrative action under Article 47, and to a fair hearing under Article 50 of the [Constitution of Kenya](#) as a result of the manifestly inordinate, unreasonable and unjustifiable delay.
 3. An order of mandamus directed to and compelling the Respondent to expeditiously and in any case within a period of not more than sixty (60) days from the date of the judgment to process and pay out in accordance with the law, the remainder of the pension payable to the widow and, after her death, the Applicant and or any of the other three (3) children of the late Amos Owiti Juma, in respect of the period from July 2009 to August 2019 (both months inclusive) for which they were entitled to the said payments, with the interest accrued thereon at the prevailing court rates until payment is made in full.
 4. Specific damages amounting to Kshs 350,292.50 being the unpaid monthly arrears for 122 months from July 2009 being the first month after the last month of remittance (June to August 2019 the last month before Joseph Ombete Owiti, the deceased pensionable officer's last born turned 21 years old, together with the interest accrued thereon at the prevailing court rates until payment is made in full.
 5. General damages amounting to Kshs 3,000,000 being compensation for the Respondent's infringement of the Applicant's constitutional right to Fair Administrative Action exposing the Applicant and or his siblings to several years of turmoil and suffering, together with the interest accrued thereon at the prevailing court rates until payment is made in full.
 6. Any other relief that this Honourable court may find appropriate in the circumstances of this case.
 7. Costs herein be paid by the Respondent.
3. The Respondent raised a notice of Preliminary Objection dated July 7, 2022 on the following grounds:
 1. That the *ex parte* applicant had filed chamber summons dated July 19, 2021 praying for leave to apply for the Judicial Review Order of *Mandamus* listed as prayer No 2.
 2. That the court vide a ruling dated 9th June. 2022 granted leave to file substantive motion in terms of prayer two whose subject was an Order of Mandamus..
 3. That the *ex parte* applicant, in his substantive motion dated October 8, 2021. included additional prayers that were not initially in the Chamber Summons contrary to Order 53 of the [Civil Procedure Act](#).
 4. That the notice of motion application herein is contrary to order 53(1) I of the [Civil Procedure Act](#). which states that "no application for an order of *Mandamus* prohibition and certiorari shall be made unless leave therefore has been granted ... "
 5. That therefore the Notice of Motion dated October 8, 2021 is out of order and fatal defective and the same should be dismissed with cost to the Respondent.



4. The PO was canvassed through written submissions. The respondent filed submissions dated October 7, 2022. It is their case that the applicant vide an application dated July 19, 2021 sought leave to apply for orders of mandamus directing the respondent to pay the applicant the remainder of the pension payable to the widow. Leave was granted in a ruling dated June 9, 2022 in terms of prayer 2 whose subject was mandamus. It is noted that in the substantive Motion filed pursuant to the leave, the applicant included prayers that were not initially in the Chamber Summons. It is urged that the reliefs sought are contrary to the provision of Order 53 Rule 1 and Rule 4(1) of the Civil Procedure Rules. Reliance was placed on the cases of Commissioner General Kenya Revenue Authority v Silvano Anema Owai T/A Marenga Filling Station, Civil Appeal No 45 of 2000 and Republic v Public Procurement Administrative Review Board ex parte Syner-Chemie.
5. The applicant's submissions are dated October 11, 2022. It is the applicant's position that the promulgation of the Constitution of Kenya 2010 elevated the need for fair administrative action and the implementation thereof by way of judicial review from a merely traditional common law principle to a constitutional edict under Article 47. It is urged that Article 159(2)(d) of the constitution obligates the court to administer justice without undue regard to technicalities. Reliance was placed on the case of Republic v KRA ex parte Stanley Mombo Amuti.
6. It is further submitted that even if the court was to interpret Order 53 in the manner contemplated by the respondent, the applicant still complied with that provision of the law. The court is invited to adopt the interpretation that the provision only seeks leave in respect of any of the 3 orders of judicial review of mandamus, prohibition and certiorari and that such leave is not required in respect of any other relief that the applicant could seek separately or in addition to the prerogative orders. It is submitted that no leave is required for applications premised on Article 23(3) as read with Article 165 of the constitution.
7. I have had occasion to consider the preliminary objection, the submissions by the parties and the applicable law. The issues that emerge for determination are;
 1. Whether the application dated October 8, 2021 is fatally defective for including addition prayers over and above the prayer for which leave was granted.
 2. what orders should issue.
3. Costs
8. Central to the determination of the main issue for determination (issue 1) is how a party ought to approach the court in a judicial review application. In my view, a lot of confusion has arisen from what is an apparent misapprehension of the expanded nature of judicial review post 2010 constitution and the procedure to adopt when enforcing rights under judicial review. For starters, it is worthy of note that the entrenchment of judicial review as in enforcement of the Bill of Rights under Article 23(3)(f) and the embodiment of the right to fair administrative action in Article 47 of the Constitution and the enactment of the Fair Administrative Actions Act pursuant to Article 47(3), left the legal procedure under Order 53 of the Civil Procedure Rules intact. The said provision was not repealed and remained part of our laws. Where a party chooses to approach the court under Order 53 for orders of judicial review, I am of the persuasion that such a party must comply with the procedure set in law. Where a party seeks the enforcement of the Bill of Rights seeking the relief of judicial review under Article 23(3) (f) of the constitution such a party ought to file a constitutional petition whose procedure is governed by The constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013.
9. Court procedures are made for a purpose, that is, to ensure orderly, effective, consistent and predictable management of cases. Orderly and effective procedures enable smooth internal operations of court



including allocation of cases to the suitable Divisions of the court. Predictability and consistency enables respondents to be aware of what confronts them in the particular case. A fusion of jurisdictions in a matter might end up sowing uncertainty in the defence to be mounted. Where the facts of a case cut across different Divisions of the court, the predominant jurisdiction ought to determine where the matter shall be filed. The rules of procedure cannot be wished away even with the application of Article 159 (2)(d) of the constitution. In the case of Moses Mwigigi & 14 Others v Independent Electoral And Boundaries Commission & 5 Others [2016] eKLR the Supreme Court stated thus: -

‘This Court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.’

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”

10. Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR states:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

11. In Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR the Supreme court had this to say;

“The Applicant in this case has not invoked this Court’s Review jurisdiction. His application for certification is still pending in the Court of Appeal. In the Sum Model case and the Hermanus case, referred to above, this Court has set out the criteria for seeking leave to appeal to the Supreme Court. Further, it is an established principle that the law should be certain, consistent and predictable. The Court’s Rules of Procedure and Directions should also apply indiscriminately to all persons.”



12. In affirming the mandatory nature of the need for compliance with Order 53 Rule 1 of the *Civil Procedure Rules*, in judicial review proceedings/Applications, the Court of Appeal at Kisumu, in *Isaac Aluoch Polo Aluochier vs Independent Electoral and Boundaries Commission & 17 others*, Civil Appeal No El 76 of 2022 (unreported), observed that,

“ 18. The appellant's case is that his application was competent; that it was anchored on, inter alia, Article 47 of the Constitution and on sections 7(2) and 11(2) of the Fair Administrative Action Act, 2015; and that the procedure contemplated in the Law Reform Act and in Order 53 Rule 1 of the Civil Procedure Rules were not applicable to his application. The respondents were of a different view, and hence their preliminary objection citing incompetence of the appellant's Motion on account of incurable procedural defects.

19. Addressing herself on the competence of the appellant's application for Judicial Review, the learned judge made reference to Article 47 of the Constitution, which provides that every person has a right to fair administrative action. She observed that, pursuant to Article 47(3), Parliament enacted the Fair Administrative Action Act to give effect to Article 47. Citing the case of *Municipal Council of Mombasa v Republic & Another*, and *Umoja Consultants (Interested party) [2002] eKLR*, she correctly observed that, in judicial review, the Court would only be concerned with the process leading to the making of the decision; and that acting as an appellate court over the decision maker would involve going into the merits of the decision itself and that that was not in the province of judicial review.

20. With regard to the mandatory procedure for bringing judicial review applications, the learned judge held, again correctly in our view, that judicial review is a special jurisdiction; and that, in so far as no rules have been made under Article 47 of the Constitution, there can be no vacuum in law; that a party approaching the court for judicial review orders of certiorari, mandamus, or prohibition must comply with the procedure set out in Order 53 Rule 1(2) of the Civil Procedure Rules. Accordingly, such a party must seek the court's leave by way of a Chamber Summons Application supported by a Statement of Facts and a Verifying Affidavit together with relevant annexures in support of the prayers sought.

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22. It is noteworthy that, whereas Article 47 of the Constitution and sections 7(1) and 11(1) of the Fair Administrative Action Act affirm one's right to assert fair administrative action as enforceable by, inter alia, judicial review orders, subsection (2) Of both sections empower courts and tribunals to review administrative actions or decisions, but do not provide the procedure independent of the Civil Procedure Rules for the institution of appropriate proceedings in the enforcement of one's right to fair administrative action.

It therefore goes without saying that, in the absence of specific rules tailored to suit applications [or]judicial review orders, Order 53 of the Civil Procedure Rules necessarily applies. In view of the fact that the prescriptive provisions of Order 53 Rule I are mandatory, failure to comply therewith renders a Motion for judicial review incompetent, fatally defective and deserving of



nothing short of dismissal. Accordingly, we find nothing to fault the learned Judge for dismissing the appellant's application for failure to comply with the mandatory provisions of Order 53 Rule 1 of the Civil Procedure Rules.

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25. In view of the foregoing, we reach the inescapable conclusion that Order 53 Rule I applies in mandatory terms. It is the procedure therein prescribed that the appellant ought to have complied with before approaching the High Court without first seeking leave, as though his Motion were an appeal to the High Court.
 26. The above-mentioned procedural defects rendered the application before the Court fatally defective. In addition, however, the learned Judge observed that the applicant had also failed to annex the decision sought to be reviewed. Failure on the appellant's part to annex the impugned decision to the affidavit in support of his application meant that he submitted nothing to be reviewed. The learned Judge so concluded in view of the fact that the appellant's affidavit in support did not contain any annexures relating to the decision which the applicant sought to rely upon. In the absence of marked and sealed annexures, there was nothing for the court to consider on review. In effect, the application alone stood bare and devoid of substance for review. Even had the appellant followed the correct procedure, that glaring omission would have rendered his motion defective and fatally incompetent."
13. The jurisprudence taking prominence in our courts post the 2010 Constitution is that the entrenchment of judicial review in the constitution expanded the scope and application of the remedy beyond the traditional law principles to include the underpinning of judicial review in the constitution and merit review in appropriate circumstances. Odunga, J for example, in *Republic v Commissioner of Customs Services ex-parte Imperial Bank Limited* [2015] eKLR recognized that;
- “Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision” and the “need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front”. (See also *Joshua Sembei Mutua v Attorney General & 2 others* [2019] eKLR, *Super Nova Properties Limited & Another v The District Land Registrar Mombasa & 5 others* Civil Appeal No 98 of 2016 (ur), *Josephat Kiplagat v Michael Bartenge* [2016] eKLR, *Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium v The Public Procurement Administrative Review Board & Another*, Civil Appeal No 24 of 2017 and *Republic v Attorney General & 3 others Ex Parte James Muchemi t/a Jampur Agencies* [2018] EKLRL).
14. In our instant case we have an applicant who approached the court under order 53 of the *Civil Procedure Rules* seeking leave to institute judicial review proceedings for the specific order of mandamus. The prayer was acceded to by the court and leave granted, again, specifically to institute proceedings for an order of mandamus. In the substantive Motion dated October 8, 2021, the prayers are listed as follows;
1. A declaration that the twelve (12) years' delay by the Respondent in remitting payments in respect of the Widows and Children's Pension Scheme in respect of the Late Amos Owiti Juma [BPN/PC35328] is manifestly inordinate, unreasonable and unjustifiable.



2. A declaration that the Respondent has violated the Applicant's constitutional rights to a fair administrative action under Article 47, and to a fair hearing under Article 50 of the *Constitution of Kenya* as a result of the manifestly inordinate, unreasonable and unjustifiable delay.
 3. An order of mandamus directed to and compelling the Respondent to expeditiously and in any case within a period of not more than sixty (60) days from the date of the judgment to process and pay out in accordance with the law, the remainder of the pension payable to the widow and, after her death, the Applicant and or any of the other three (3) children of the late Amos Owiti Juma, in respect of the period from July 2009 to August 2019 (both months inclusive) for which they were entitled to the said payments, with the interest accrued thereon at the prevailing court rates until payment is made in full.
 4. Specific damages amounting to Kshs 350,292.50 being the unpaid monthly arrears for 122 months from July 2009 being the first month after the last month of remittance (June to August 2019 the last month before Joseph Ombete owiti, the deceased pensionable officer's last born turned 21 years old, together with the interest accrued thereon at the prevailing court rates until payment is made in full.
 5. General damages amounting to Kshs 3,000,000 being compensation for the Respondent's infringement of the Applicant's constitutional right to Fair Administrative Action exposing the Applicant and or his siblings to several years of turmoil and suffering, together with the interest accrued thereon at the prevailing court rates until payment is made in full.
 6. Any other relief that this Honourable court may find appropriate in the circumstances of this case.
 7. Costs herein be paid by the Respondent.
15. Once the applicant sought and was granted leave to institute judicial review proceedings specific to an order of mandamus, the applicant was bound by the orders of the court without wriggle room. The reliefs sought are contrary to order 53 Rule (1) and Rule 4(1) of the *Civil Procedure Rules*. Rule 4(1) is categorical that copies of the statement accompanying the application for leave shall be served with the Notice of Motion, and copies of any affidavit accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement. (emphasis added).
16. The applicant has introduced grounds and reliefs that are alien to the statement accompanying his application for leave. The Notice of Motion dated October 8, 2021 is fatally defective. Not even Article 159 of the *constitution* can salvage it. The same is hereby struck out. Each party is to bear its own costs. In the wider interests of justice, the applicant be at liberty to take out a fresh motion within the confines of the leave granted.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2023

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A. K. NDUNG'U

JUDGE

