



**Republic v Clerk of the National Assembly & another; Cabinet Secretary,
Ministry of Industrialization, Trade and Enterprise Development & 5 others
(Interested Parties); Njiraini (Exparte Applicant) (Judicial Review E1102 of 2020)
[2023] KEHC 22723 (KLR) (Judicial Review) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW E1102 OF 2020
JM CHIGITI, J
SEPTEMBER 29, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

CLERK OF THE NATIONAL ASSEMBLY 1ST RESPONDENT

THE NATIONAL ASSEMBLY 2ND RESPONDENT

AND

**CABINET SECRETARY, MINISTRY OF INDUSTRIALIZATION, TRADE AND
ENTERPRISE DEVELOPMENT INTERESTED PARTY**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED
PARTY**

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

DIRECTORATE OF CRIMINAL PROSECUTION INTERESTED PARTY

**PUBLIC PROCUREMENT REGULATORY AUTHORITY INTERESTED
PARTY**

NIAVANA AGENCIES LTD INTERESTED PARTY

AND

BERNARD NJIINU NJIRAINI EXPARTE APPLICANT



RULING

1. The subject of this ruling is a Preliminary Objection dated 7th November, 2021 filed by the 6th Interested Party, on the grounds that:
 1. The Honourable court's time-bound jurisdiction to take cognizance of, hear and determine the Notice of Motion Application dated 21st October, 2020 has lapsed and expired following effluxion of the ninety day's statutory timelines under Section 8 of the [Fair Administrative Action Act](#).
 2. Any stay orders ostensibly subsisting, and proceedings purportedly continued herein following the effluxion of statutory timelines under section 8 of the [Fair Administrative Action Act](#) are therefore a nullity, bereft of any force or effect in law.
2. The Preliminary Objection, sought to challenge the Notice of Motion dated 21st October, 2020.
3. This court directed that the Preliminary Objection be disposed by way of written submissions. From the court's records, it's only the *Ex-parte* Applicant that filed their written submissions; that were dated 23rd June, 2023, opposing the Preliminary Objection.
4. It was the *ex-parte* Applicant's submissions that the subject Notice of Motion is dated 21st October, 2020 and it is brought under the auspices of Order 53, Rule 3 of the [Civil Procedure Rules](#), 2010 and the [Law Reform Act](#). Further, that a cursory glance at the Statutory Statement and Verifying Affidavit reveals that they are filed in furtherance of the Order 53 [Civil Procedure Rules](#), 2010 and the [Law Reform Act](#) requirements, and not the [Fair Administrative Actions Act](#).
5. Additionally, that Order 53, Rule 2 of the [Civil Procedure Rules](#), 2010 limits the filing of Judicial Review causes that seek *Certiorari* to 6 months, from the date of the decision complained of. That in this case, summons for leave were filed timeously. The impugned decision was made on 29th May, 2020; the summons for leave filed on 14th September 2020; and substantive Motion on 21st October, 2020.
6. It was posited that following the promulgation of [the Constitution](#), 2010; and the entrenchment of the right to fair administrative action (Article 47), the [Fair Administrative Actions Act](#) was enacted. That this legislation makes further provisions on administrative action, judicial review grounds, and subsequent action. Resultantly, that this led to the rise in two-track judicial review proceedings, being: those founded on the [Law Reform Act](#) and Order 53 and others founded on/instituted under the [Fair Administrative Actions Act](#).
7. As per the *ex-parte* Applicant, this has been the subject of several pronouncements by this High Court. Relied on *Republic v Kenya Revenue Authority, Commissioner Ex-parte Keycorp Real Advisory Limited* (2019) eKLR where the court considered whether it was still necessary to seek leave, the right to fair administrative action having been constitutionally bestowed to all persons.
8. It was contended that following the passage of the [Fair Administrative Actions Act](#), no legislative reforms have been undertaken to harmonize the provisions of the [Law Reform Act](#)/ Order 53 [Civil Procedure Rules](#) and the [Fair Administrative Actions Act](#). Further that coupled with the failure of the Hon, Chief Justice to make Practice Rules under section 10 (2) of the [Fair Administrative Actions Act](#), has largely left the institution of Judicial Review proceedings to the rigours of either of the two routes. Notice was taken of proposed/draft [Fair Administrative Action Act](#) Rules, 2022 that were proposed



- by the Hon. Chief Justice during the pendency of this Judicial Review proceedings; but instructively, long after the proceedings had been instituted.
9. That it is not in dispute the *Ex parte* Applicant has complied with the formalities for institution of these proceedings, as per Order 53 [Civil Procedure Rules](#), and the [Law Reform Act](#). Notably, that while the proceedings were not determined within the ninety (90) days period set out in the [Fair Administrative Actions Act](#), the present proceedings were not instituted under this statute, and as such section 8 of the [Fair Administrative Actions Act](#), is inoperable.
 10. It was submitted that this Court has had an opportunity to address similar claims to those made by the 6th Interested Party as in the case of [Republic v National Land Commission & 3 others; National Land Commission \(Interested Parties\) Ex parte James Finlay Kenya Limited & 10 others](#) [2020] eKLR (Nrb JR Misc 95 of 2019) where section 8 of the [Fair Administrative Actions Act](#) was held to be inapplicable, in light of the provisions of [the Constitution](#).
 11. The *ex-parte* Applicant averred that they hold the same position as in the aforementioned case, especially where the circumstances of the delay in the hearing and disposal of the instant suit is attributable to the Respondents, Interested Party, and the Court.
 12. That the record will reveal that on 6th November, 2020, the 6th Interested Party filed a Notice of Preliminary Objection to the *Ex parte* Applicant's Motion (1st Preliminary Objection) dated 14th October 2020 ('the Extension of Time/Stay Motion.') Directions on the disposal of the Preliminary Objection were severally issued by the Court [Hon. Lady Justice Pauline Nyamweya] (as she then was) on diverse dates with gracious extensions of time being accorded to the 6th Interested Party, and other parties of a similar position for them to comply. The failed to do so for many months, ultimately leading the Court to determine the Preliminary Objection notwithstanding the failure by its mover to urge it.
 13. To the *ex-parte* Applicant, the same circumstance presently plagues these proceedings. Despite filing the Preliminary Objection at Bar, the 6th Interested Party has taken no step towards its disposal. No submissions have been filed in support thereof despite the several accommodations made by the Court. Therefore, that the delay in this case is not attributable to the *Ex parte* Applicant but to opposing parties.
 14. Additionally, that despite the Ruling on the Extension of time/Stay Motion having been slated for early 2021, Ruling wasn't delivered then. It was deferred on Notice and later delivered on 19th October, 2021.
 15. It was submitted that owing to the institution of the Judicial Review proceedings through the [Law Reform Act](#) and Order 53 [Civil Procedure Rules](#), the provisions of section 8 of the [Fair Administrative Actions Act](#), are wholly inoperable. Also that, in view of Article 48 and 50 of [the Constitution](#), as read with Article 25 of [the Constitution](#), the limitation of a party's right of access to justice/fair hearing would be violated if a litigant was turned away from the Court's door on operation of section 8 of [Fair Administrative Actions Act](#), more so where the cause of delay is entirely attributable to his adversaries or delays/inefficiencies of the Court.
 16. In the end, the *ex-parte* Applicant prayed that the 6th Interested Party's Notice of Preliminary Objection dated 7th November, 2021 be dismissed with costs.
 17. The Issue for determination that arises is: Whether the instant Preliminary Objection is merited in law.



Analysis and Determination

18. On Preliminary Objection, it is trite law that point of law can be raised at any stage of proceedings. The courts have time and again restated this position of the law. In the case of *Republic v Chief Registrar of the Judiciary & 2 others Ex parte Riley Services Limited* [2015] eKLR (Nairobi Judicial Review Miscellaneous Application no 2 of 2015) the court found that: -

“...the question of the appropriate time to raise a preliminary objection has been addressed in various decisions in our courts. In the case of *Beatrice Cherotich Koskei and another v Olenguruone Land Dispute Tribunal and 2 Others Misc Civil Appl 861 of 2007*, the court observed as follows:

“If, as respondents’ counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody’s time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at the earliest possible opportunity. I, therefore, hold that respondents’ counsel is entitled to raise his preliminary objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon.”

These sentiments echoed the view of the court in the case of *Ali Oshan and Others v Mrs Catherine Kaswii Nyiba and Others Misc Civil Application 525 of 2002* where the court stated as follows:

“It is obvious that the Kenya National Football Federation Constitution does not allow parties whose disputes fall within the definition of Article XIX (1) to commence proceedings in a court of law but to refer them to Arbitration. ... It is trite law that a preliminary objection can be raised at any time when the action is still active. Hence Mr Gikandi is perfectly right to raise the preliminary point at this stage...”

19. The High Court, in discussion Preliminary Objection, in *Republic v Permanent Secretary, Ministry of Education & 2 others Ex parte Mesback Ochieng’* [2021] eKLR observed that,

“The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, are as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. A Preliminary Objection Cannot Therefore Be Raised If Any Fact Requires To Be Ascertained. In The Case Of *Oraro v Mbaja*, (2005) 1 KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The Court of Appeal also stated in *Mukisa Biscuit Company v West End Distributors Ltd (supra)* that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion. (Emphasis added).



20. Further, in the case of *Oraro v Mbaja* [2007] KLR 141 where Ojwang J. (as he then was) stated as follows: -

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point Anything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence” (Emphasis added)

21. On Jurisdiction, the case of *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR 1, Justice Nyarangi JA (as he then was) held:

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

22. The Court of Appeal proceeded to define jurisdiction and its source as follows:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of 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 constituted, 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 the kind and nature of the actions and matters of which the particular court has cognisance, 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 tribunal (including an 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 judgement is given”

23. A Court’s or tribunal’s jurisdiction therefore flows from either *the Constitution* or statute, or from principles laid out in judicial precedent. It is thus, a pure question of law. The judicial review jurisdiction of this Court is in this respect granted by Articles 47 and 165(6) of *the Constitution*, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged, or unfair action by an administrator is alleged. In addition, Article 165 (6) of *the Constitution* in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or *quasi*-judicial function in this regard.



24. Turning back to the instant matter, the 6th Interested Party's Preliminary Objection is primarily challenging the jurisdiction of this court based on Section 8 of the [Fair Administrative Actions Act, 2015](#) which provides that:

“ 8. Period for determination of applications and appeals

An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application.”

25. The issue of Section 8 of the [Fair Administrative Actions Act](#) impacting on the jurisdiction of high court to determine matter under the [Fair Administrative Actions Act, 2015](#) is not novel. The high court, in [Republic v National Land Commission & 3 others; National Land Commission \(Interested Parties\) Ex parte James Finlay Kenya Limited & 10 others](#) [2020] eKLR, under paragraph 39, Nyamweya J (as she then was) observed that:

“ 39. Before I conclude, I also need to comment on two additional arguments put forward by the 3rd and 4th Respondents on this Court's jurisdiction. The first was by the 3rd Respondent that this suit has abated by virtue of the provisions of section 8 of the [Fair Administrative Actions Act](#). It is my view that whereas statutory limits must be observed, they must also be constitutional. I subscribe to the holding in [Republic v Public Procurement Administrative Board and another](#), [2017] eKLR that statutory time limits which limit the constitutional right of a party to be heard by a court of law is unconstitutional, particularly in light of the provisions of Article 50(1) of [the Constitution](#) on the right to a fair hearing; Article 159(2) that requires substantive justice be dispensed without undue regard to procedural technicalities; and Article 160 on the independence of the Judiciary which insulate the Judiciary from any direction or control.”

26. Before closing, I have relooked at the record which reveals that on 6th November, 2020, the 6th Interested Party filed a Notice of Preliminary Objection. Directions on the disposal of the Preliminary Objection were severally issued by the Court on diverse dates with gracious extensions of time being accorded to the 6th Interested Party, and other parties of a similar position for them to comply. The failed to do so for many months, ultimately leading the Court to determine the Preliminary Objection notwithstanding the failure by its mover to urge it.

27. Despite filing the Preliminary Objection at Bar, the 6th Interested Party has taken no step towards its disposal. No submissions have been filed in support thereof despite the several accommodations made by the Court. Therefore, that the delay in this case is not attributable to the *Ex parte* Applicant but to opposing parties.

28. The Supreme Court recently in SC Application no E029 of 2023 [Okiya Omtatah Okiiti 3 Others v The Cabinet Secretary for the National Treasury and Planning 10 Others](#) Para 26 held that;

“ taking all the above matters into account, we must state that, this Court has on several instances underscored the importance of compliance with its Orders, Rules and Practice Directions. With regard to filing and service of documents within the requisite time, the Court has in a long line of decisions stressed that it will not countenance breaches of timelines set by the Rules or by the Court, and affirmed the general constitutional principle that justice shall not be delayed. See [Independent Electoral & Boundaries Commission v](#)



Jane Cheperenger & 2 Others, SC Petition no 5 of 2016; [2018] eKLR and *Kenya Railways Corporation & 2 Others v Okoiti & 3 Others*, SC Petition (Application) no 13 of 2020 & Petition 18 of 2020 (Consolidated); [2022] KESC 68 (KLR). It goes without saying that compliance with court orders goes to the root of the rule of law as well as the dignity of any court.”

29. Compliance with court directions cannot be overstated. None compliance with the timelines as assigned by the court has a negative impact on access to justice. A lot of precious courts time is lost in mention cases for purposes of reporting compliance with court orders. This is a costly blight in the justice chain which must come to an end sooner than later.

Order:

On that premise, the Notice of Preliminary Objection dated 7th November 2021 is unmerited and the same is dismissed with cost.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2023.

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J. CHIGITI (SC)

JUDGE

