Makori v Kenya National Highways Authority (Judicial Review Miscellaneous Application E005 of 2022) [2023] KEHC 23149 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23149 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E005 OF 2022

MW MUIGAI, J

SEPTEMBER 26, 2023

IN THE MATER OF: AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI & MANDAMUS BY

JORAME OTWORI MAKORI

AND

IN THE MATTER OF: ARTICLES 47,48,50 & 159 OF THE

CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 17,20 & 22(2) OF THE EAST

AFRICAN COMMUNITY VEHICLE LOAD

CONTROL ACT 2016

IN THE MATTER OF: SECTIONS 8 & 9 OF THE LAW REFORM

ACT, CAP 26 LAWS OF KENYA

BETWEEN

JORAME OTWORI MAKORI .... APPLICANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY .... RESPONDENT

RULING

Background

1. By Chamber summons dated 9th December,2022, the ex parte Applicant sought leave for an order of certiorari for the purposes of quashing the decision of the Respondent through its agents and/

or employees for unlawfully impounding and detaining the Applicant's motor vehicle registration number KCN 094G and sand contents condemning the Applicant to pay Kshs 4,679,199/= being fees for alleged overloading without affording the Applicant the right to be heard through a judicial and just process.

2. Consequently, the Applicant sought leave to apply for an order of Declaration that the decision to impound and subsequently detain the Applicant's motor vehicle and sand contents was procedural, illegal and therefore null and void

3. Additionally, the Applicant sought leave to institute Judicial Review proceedings for an order of Mandamus compelling the Respondent and/ or its agents to release forthwith the Applicant's motor vehicle together with its contents pending hearing and determination of the substantive Application.

4. Further, the Applicant sought that the grant of leave herein does not operate as a stay of any intended disposal, sale through auction by the Respondent or its agents.

5. Lastly, the Applicant sought for the costs of this Application.

Grounds of ex parte Application

6. The application is premised on the grounds that Section 17 of the *East African Community Vehicle Load Control Act* 2016 provides for procedure to be utilized by the Respondents, its agents and/ or employees in impounding an overloaded vehicle and that the provisions of the Section herein are conditional in that they require the Respondent to issue weighing report to the affected person, not to allow the concerned motor vehicle to continue with its journey unless the load is redistributed or offloaded and re-weighed.

7. The ex parte Applicant states that Section 22 (2) of the *East African Community Vehicle Load Control Act* provides that the Respondent ought to have obtained the Applicant's consent and that the Respondent shall not exercise its powers to of condemning an individual to pay a fine if no written consent is obtained. Stating that no such admission notice was ever obtained hence the Respondent breached the rules of natural justice by failing to accord the Ex parte Applicant an opportunity to be heard before impounding and unilaterally detaining his motor vehicle and its sand contents.

8. The ex parte Applicant averred that the decision of the Respondent to unilaterally impound and detain the Applicant's motor vehicle and prescribe payment fee of Kshs 4,679,199/= was contrary to procedure provided for under Section 22 (2) of the *East African Community Vehicle Load Control Act* that requires an Applicant's written consent in the form of admission. The ex parte applicant stated that he be accorded a fair hearing pursuant to statutory provisions as well as constitutional provisions regarding protection of property under Article 40 and right to be accorded a fair hearing under Article 50 of the *Constitution* of Kenya 2010.

Respondent's Replying Affidavit

9. In opposing the application, the Respondent in its Replying Affidavit dated 30th January,2023 and filed in court on 8th February,2023 sworn by ENG. Kennedy Ndugire Respondent's Senior Engineer. He deposed that the Respondent is discharging its responsibility as set out in Section 4 (2) of the *Kenya Roads Act*, 2007 wherein it is obligated to construct, upgrade, rehabilitate and maintain National Roads under its control; to control national roads and road reserves and access to roadside developments; to implement road policies in relation to National Roads; to ensure adherence to the rules and guidelines on Axle Load Control as set out in the *Kenya Roads Act*,2007 and the *East African Community Vehicle Load Control Act* 2016.

10. Deposing that the applicable law in this case is the *East African Community Vehicle Load Control Act* 2016 as the Applicant's vehicle detained at Mombasa Nairobi (A8) Road a few kilometers from Machakos Junction turnoff on 25th November,2022 which is along the Regional Trunk Road Network as defined under the First Schedule to the *East African Community Vehicle Load Control Act* 2016; it was the Respondent's case he is aware of the *East African Community Vehicle Load Control Act* 2016, which provides for the detailed procedure and requires that in the instances where an overload has been detected, the overload vehicle is detained pending payment of overload fees and correction of the overload and that such detained vehicle can only be released upon payment of the overload fees or issuance of a guarantee in the prescribed form to the Respondent. He deposed further that the said vehicle was carrying 44,740 kgs on the gross vehicle weight instead of the maximum permissible 26,000 Kgs and was after it was weighed, it was found to be overloaded by 18,740 Kgs on gross vehicle weight and the 1st and 2nd Axle groupings. It was lamented by the Respondent that in line with the provisions of Section 17 of the *East African Community Vehicle Load Control Act* 2016 and Third Schedule of the *East African Community Vehicle Load Control (Enforcement Measures) Regulations*, 2018 overload fees were tabulated, a weight ticket was duly issued to the Applicant; the said ticket showed the extent of overload as well as overload fees of USD. 38,266.45 converted to Kshs 4,679,199.00/= payable to the authority (annexed marked copy of the ticket); it was deposed by the Respondent that the Applicant's Application has failed in totality to demonstrate standards set for grant of leave being sought.

11. The matter was canvassed by written submissions.

Submissions

Applicants Written Submissions

12. Applicant vide his written submissions dated and filed on 20th February,2023 raised the following salient issue for determination:

    i. Whether the Application by the Applicant has met the requisite threshold for the grant of leave for judicial review.

13. On the above issue Mr. Omondi for the Applicant relied on Article 47 (1) of the *Constitution* which provides every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. And Article 47 (2) which provides that "If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

14. Mr. Omondi further relied on Section 4 (3) of the *Fair Administrative Action Act* No. 4 of 2015 which provides that:

> Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
>
> a. prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> (b) an opportunity to be heard and to make representations in that regard;
>
> (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
>
> (d) a statement of reasons pursuant to section 6;

15. Counsel submitted that upon impounding and subsequent detention of the Applicant's vehicle and its contents, the Applicant proceeded to Athi River be given reasons for the action in anticipation of being heard instead the Respondent blatantly ignored him and instructed the Applicant to pay the fees Kshs 4,679,199/= without any question hence offended the Constitutional and Statutory principles that underpin the concept of an administrative action.

16. It is the Applicant's case that the Respondent's Actions amounted to a breach of rules of natural justice, right to a fair hearing and fair administrative action. Reliance was made on Section 17 and 22 (2) of the *East African Community Vehicle Load Control Act* which he said provides for the procedure to be followed by the Respondents, its agent and/ or employees in impounding overloaded vehicle.

17. It submitted that though the Respondent through its agents and/ or employees followed procedure enumerated under Section 17, the decision by the Respondent to impose a fine without written admission of liability by the Applicant was not only illegal but offended the guidelines laid down by the enabling statute.

18. Urging that grant of leave to apply for judicial review is well settled. Reliance was placed on cases of *Republic v Kenya Revenue Authority Commissioner Ex Parte Keycorp Reals Advisory Limited* (2019) eKLR, *Republic v National Transport & Safety Authority & 10 Others* (2014) eKLR.

19. The counsel submitted that the Applicant has established his case by demonstrating on a balance of probabilities that the decision to impound his motor vehicle and its contents by the respondent was illegal, unfair and irrational.

Notice of Preliminary Objection.

20. Respondent by its Notice of Preliminary Objection dated on 20th February,2023 and filed in Court on 12th May,2023 raised a preliminary objection on the grounds that:

    i. The suit is barred by dint of Section 9 (2) of the *Fair Administrative Actions Act* No. 4 of 2015.

    ii. The Application is barred by dint of Section 17 of the *East African Community Vehicle Load Control Act*, 2016.

Respondent's Written Submissions In Opposition To The Application Dated 9Th December,2022 And In Support Of The Preliminary Objection Dated 20Th February,2023.

21. Respondent vide its written submissions dated 10th May,2023 and filed in court on 12th May, 2023 in which Mr. Ian Counsel for the Respondent while submitting on the arguable case averred that there is no arguable case on account that this court lacks jurisdiction to entertain the present application for non-compliance to the mandatory provisions of *ECVLCA* as shall be enumerated in detail hereinafter.

22. It is contended that the application is dead on arrival, frivolous and waste of valuable judicial time. Reliance was made on the case of *Uwe Meixner & Another v Attorney General* [2005] eKLR, to buttress his case. Urging that the court must be satisfied any leave granted, is granted to the right Applicant who is entitled to the relief sought upon the conclusions of the Judicial Review and therefore the legal ownership of the suit motor vehicle must be satisfied before leave is granted as it touches onto the core of whether the Applicant has locus to even lodge an arguable case of the judicial review.

Submission In Support Of The Preliminary Objection.

23. As to the Preliminary Objection Mr. Ian submitted that Judicial Review proceedings were initiated prematurely and in violation of the Provisions of Section 17 of the *East African Community Vehicle*

Load Control Act, 2016 and Section 9 of the *Fair Administrative Action Act*. counsel relied on Section 17 (4) of the *East African Community Vehicle Load Control Act*, 2016 which stipulates that:

(4) Where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may—

a. pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or

b. appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.

24. It is contended that the Applicant failed to indicate the dispute in the weighing report as provided in the Act and also failed to pay the overloading fees to secure the release of the vehicle. Urging that the Applicant did not exhaust all avenues of appeal provided in the Act before approaching the Court.

25. Mr. Ian further submits that it is only after the exhaustion of the procedures provided under the Act that the Courts power can be invoked, urging that the Applicant did not seek any exemption as provided under Section 9 (4) of the *Fair Administrative Action Act*. reliance made on the case of *Sanlam Kenya Plc & Another v National Environment Management Authority & 2 Others* [2018] eKLR and Section 25 of the *EACVLCA* to buttress the case.

26. Counsel for the Respondent further quoted the case of *Office of the Director of Public Prosecutions v Juma Chemomenyu Batuli* (2020) eKLR, which case gave precedence of *EACVLCA* over other Kenyan Laws. Counsel also relied on the cases of *Martin Nyongesa Barasa v Traffic Commandant & 2 Others* (2021) eKLR, Busia JR Application No. E001 of 2023 *Republic v Director General. Kenya National Highways Authority & 2 Others Ex-parte Daniel Ochieng Ofula* (unreported).

27. Lastly Counsel submits that the Applicant has approached the Court without exhausting the dispute resolution mechanisms provided in law and the court's jurisdiction has been invoked prematurely.

Applicant's Written Submissions On The Respondent's Preliminary Objection.

28. The Applicant vide his submissions dated and filed in court on 17th May, 2023, in which the Mr. Omondi Counsel for the Applicant raised an issue of whether the Preliminary objection is merited. Counsel relied on the case of *Mukisa Biscuits Manufacturing Limited v West End Distributors Ltd* (1969) EA 696, to buttress his case.

29. Counsel submits that the Preliminary Objection must be based on express and pure points of law and that whoever raises a Preliminary Objection must show with specificity the point of law that is relied upon. Urging that the quoted Sections are merely prescriptive and do not in any way witness the presence of an appellate body within the Respondent that the Applicant could have approached.

30. Counsel quoted Section 9 (2) of the *Fair Administrative Action Act* which provides that an individual aggrieved with the decision of an administrative body is required to exhaust all the available appellate mechanisms before approaching court and averred that in the absence of any such appellate mechanism, the direct available recourse in such circumstances is approaching the court in Judicial Review proceedings.

31. Counsel argues that the Sections as framed do not point to the existence of a body within the Respondent mandated with the responsibility of handling disputes arising from disputed overloading

allegations. Reliance made to the case of *Anarita Karimi Njeru v Republic* (1979) eKLR, to buttress his case.

32. Lastly Counsel submits that merely citing provisions of the law as has been done in this case is not only frowned upon but also points to a fishing expedition meant to delay delivery of justice to aggrieved parties and that the Respondent wrongly faults the Applicant for failure to comply with a non-existent internal administrative appellate process hence Preliminary Objection as constituted cannot stand and should be dismissed with costs to the Applicant.

Determination

33. I have considered the notice of preliminary objection, the submissions of the parties and the authorities relied on by the parties.

34. The main issue for determination is whether the Preliminary Objections and instant Application for the grant of judicial review are merited.

35. I will start by considering the Preliminary Objection which was raised by the Respondent way after the Applicant had filed his submissions on the application for the grant of leave to institute judicial review.

36. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696. At page 700 where Law JA stated:

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

At page 701 Sir Charles Newbold, P added:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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..."

37. Further, In *Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR, the Supreme Court stated that;

> " .... a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit".

38. More still, In the case of *Kalpana Rawal & 2 Others v Judicial Service Commission & 6 Others* [2016] eKLR, Supreme Court stated that:

> " the examples of jurisdiction and limitation given by law J.A in the Mukisa Biscuits 'case were but only examples of two grounds worthy of preliminary hearing and that a checklist approach to the test as to whether a matter merited and fell under the Mukisa Biscuits case

was not in consonant with the spirit and letter of the *Constitution*. The court then proceeded to state that where the Preliminary Objection raised a "fundamental issue" (per Mutunga CJ) then as a matter of good order it was appropriate to have the issue settled first even if there were apparent factual conflicts."

39. It is therefore apparent that for a preliminary objection to succeed the following tests ought to be satisfied:

a. It should raise a pure point of law;

b. It is argued on the assumption that all the facts pleaded by the other side are correct; and

c. finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

40. In the present case, the face of the preliminary is that the suit is barred by dint of Section 9 (2) of the *Fair Administrative Actions Act* (FAA) and that the application is barred by dint of Section 17 of the *East African Community Vehicle Load Control Act*, 2016 (the Act).

41. According to Section 9 (2) of *FAA*, it is provided that:

> "(2) the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
>
> (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

42. Section 17 of the *East African Community Vehicle Load Control Act* provides that:

> (1) When an authorized officer determines that a vehicle is carrying a load in excess of the legal load limit under this Act, he or she shall issue a weighing report setting out the overload particulars and the amount of overload fees payable.
>
> (2) Where an authorized officer, while a journey is being undertaken, determines that a vehicle is carrying a load in excess of the legal load limit, the authorized officer shall in consultation with relevant implementing agencies, not allow the vehicle in question to continue its journey, unless the load is redistributed and the vehicle is, upon being reweighed, found to be within the legal load limit, or the vehicle is offloaded to lower its weight to the legal load limit and—
>
> > (a) any amounts due under subsection (1) have been paid to the national roads authority or its duly appointed agent; or
> >
> > (b) a guarantee in the prescribed format is provided by the transporter that such amounts shall be paid.

(4) Where the fact of overloading is disputed by the transporter, the authorized officer weighing the vehicle shall indicate such dispute in the weighing report, and a copy of the disputed report shall be issued to the transporter who may—

a. pay the requisite overloading fees on a without prejudice basis to secure the release of the vehicle, make such necessary adjustment on the load as may be directed by the authorized officer and lodge an appeal against the fees as provided for by regulations made under this Act; or

b. appeal against the fees, using regulations made under this Act, during which period the vehicle will remain detained at such designated place at the cost of the transporter.

43. In the case of *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, it was observed that:

> "The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks to review the action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya"

44. Further, in the case of *Speaker of National Assembly v Karume* {1992} KLR 21. It was observed thus:

> "Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

45. Similarly, the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* {2015} eKLR, the court expressed itself as follows:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

46. In the present case Counsel for the Respondent submitted that the Applicant failed to indicate the dispute in the weighing report as provided in the Act and has also failed to pay the overloading fees to secure the release of the vehicle submitting further that weight ticket issued to the Applicant remains undisputed and the Applicant did not exhaust all avenues of Appeal provided in the Act before approaching Court.

47. Counsel for the Applicant on the other hand submitted that the quoted Sections are merely prescriptive and do not in any way witness the presence of an appellate body within the Respondent

that the Applicant could have approached submitting that in the absence of any such appellate mechanism, the direct available recourse in such circumstances is approach the court in judicial review proceedings.

I associate myself with the decision in the Matter of the *Mui Coal Basin Local Community* {2015} eKLR,the High Court stated that:

> " At least two principles are discernible from decisional law. First, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.

33 Second, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it."

48. The question that needs to be asked in this instant case is that was there any internal mechanism that was in place which the parties could first exhaust before approaching this court? if the answer is to the affirmative was the procedure followed by the parties? In the verifying affidavit and in the Submissions of the Applicant, it is averred that the Applicant tried all he could to have the Respondent hear him regarding the impounded vehicle and its contents having disputed the overloading claims, it is submitted that the Applicant expected to be directed to an appellate mechanism effectively seized with powers to adjudicate his claims. No such step was taken by the Respondent.

49. In the upshot of the foregoing and having read the *East African Community Vehicle Load Control (enforcement measures) Regulations* 2018, and *East African Community Vehicle Load Control Act* 2016, I have not come across any procedure and or inference of any internal mechanism that the parties could first exhaust before approaching this court. Respondent has not outlined which internal mechanism they could approach to address their grievances.

50. It is true that Section 17 (4) (a) and (b) of the *East African Community Vehicle Load Control Act* recognizes the aspect of lodging an appeal against the fee. It is not clear the forum under which that Appeal is to be lodged making the said provision a mere prescription.

51. In the case of *Mombasa Water Products Limited v Kenya National Highways Authority* (Petition E037 of 2021) [2021] KEHC 238 (KLR) (9 November 2021), Mativo J observed that:

> " The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively…" (emphasis added)

52. In my view the application for grant of leave before this court is exceptional having due regard to the fact that no internal mechanism was in place that the Applicant could turn to except to approach the court.

53. Having considered the circumstance of the Preliminary objection, I find that the Preliminary Objection lacks merit and is hereby dismissed.

54. I shall now determine the Applicant's Ex parte Chamber Summons date and filed in Court on 9th December,2022. In which the Applicant sought leave to institute Judicial Review proceedings.

55. Section 9 (b) of the *law Reform Act* Cap 26 provides that:

> (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—
>
> > (b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;

56. In the case of *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 Waki J (as he then was) held as follows:

> "The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

57. In HCJR Case No. E087 of 2021, *AAR Insurance v Public Procurement Administrative Review Board, Secretary IEBC anad Zamara Risk and Insurance brokers Limited Interested Parties* (unreported), Ngaah J aptly summed up the rationale for the requirement for leave where he stated;

> "I must reiterate that that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review court will weigh between 'the legitimate requirement of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.' If upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of

grant of leave to institute a substantive motion for judicial review reliefs. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this Honourable court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard."

58. It is trite that judicial review is more concerned with the manner in which a decision is made than the merits of the decision. The court is concerned with the lawfulness of the process by which the decision is made. The grounds upon which an order of judicial review can issue include where the decision complained of is tainted with illegality, irrationality and procedural impropriety (where there is failure to act fairly on the part of the decision-making authority in the process of taking a decision) or where the rules of natural justice are not complied with. It may also be issued where the decision is made without or in excess of jurisdiction. [See *Republic v National Land Commission & another Ex-parte Farmers Choice Limited* (2020) eKLR].

59. In *Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya* [2019] eKLR, it was observed that:

> " 72. The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or nemo judex in causa sua – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or audi alteram partem – "hear the other side"). The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to procedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken."

60. Article 47 (2) of the *Constitution* is to the effect that:

> " (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action"

61. Section 2 of the *FAAA* defines an "administrative action" to mean

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

62. Section 4 (3) of *FAAA* provides that:

> Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
>
> (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> (b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

63. In the instant case, the Applicant, counsel for the Applicant submitted that the decision to impound and subsequently detain the Applicant's motor vehicle was marred with illegalities, procedural improprieties, offended the Applicant's legitimate expectations, breached the Respondent's duty to act fairly and was unreasonable, irrational and malicious. Counsel submitted further that the imposition of Kshs 4,679,199/- was not only irrational but unreasonable as it is excessive in nature. Counsel for the Respondent on the other hand averred that the question of the legal/ or beneficial ownership of the suit motor vehicle must be satisfied before leave is granted as it touches on to the core of whether the Applicant has locus to even lodge an Arguable case at the Judicial Review. Counsel further termed the Application frivolous and waste of the valuable judicial time.

64. In my view, I find that the Applicant has dispensed the burden of demonstrating that the decision by the Respondent was not only illegal but also irrational and unreasonable. I am guided byLord Diplock in the case of Council for *Civil Service Unions v. Minister for Civil Service* [1985] A.C. 374, at 401D when he stated that: -

> "Judicial review has I think developed to a stage today when…one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'…By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it…By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'…it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision." (emphasis added)

65. I therefore find that the decision imposed by the Respondent by impounding and detaining the said motor vehicle without affording the Applicant the prior and adequate notice of the nature and reasons for its proposed administrative action was illegal, irrational, and to say the least unreasonable. it was an offence to the rules of natural justice.

66. In De Smiths *Judicial Review of Administrative Action*, 4th Edition at page 196,

> "the learned author states that in a large majority of reported cases where a breach of audi alteram partem rule has been alleged, no notice whatsoever of the action taken, or proposed to be taken has been given to the person claiming to be aggrieved and failure to give such a person prior notice was tantamount to a denial of an opportunity to be heard on that matter."

67. In my considered opinion the Applicant has persuaded the court that he has an arguable issue that can be resolved by the full hearing of the Judicial Review application

68. In the premises aforesaid, I find that the Ex parte application has merits and I do allow prayers (a), (b), (c) (d) and (e).

69. The substantive application be prosecuted within 90 days from the date of this ruling, failing to which prayers granted shall lapse.

70. It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2023 (PHYSICAL/VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE