Republic v Insurance Regulatory Agency; Xplico Insurance Company Limited & 2 others (Exparte) (Application E009 of 2023) [2023] KEHC 27161 (KLR) (Judicial Review) (28 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27161 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E009 OF 2023

J NGAAH, J

DECEMBER 28, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

INSURANCE REGULATORY AGENCY ..... RESPONDENT

AND

XPLICO INSURANCE COMPANY LIMITED ..... EXPARTE

ARBAAZ QURESHI ..... EXPARTE

HEMAN RANMAL HARIA ..... EXPARTE

JUDGMENT

Applicants' application

1. Before court is the applicants' motion dated 10 February 2023 in which they seek the following orders:

> " 1. That the Honourable Court do and hereby directs that pending the hearing and final determination of this motion, the leave granted on the 27th of January, 2023 do operate as allowing the 2nd and 3rd Ex parte Applicants as Board Members of 1st Ex-parte Applicant.
>
> 2. That an Order of Mandamus be and is hereby issued against the Respondent compelling it to approve the Appointment of Mr. Arbaaz Qureshi and Mr. Heman Ranamal Haria as Board Members of the 1st Ex-parte Applicant, Xplico Insurance Company Limited with immediate effect.

3. That an Order of Certiorari do issue to remove into this Honourable Court and quash the Respondents' decision refusing to appoint the 2nd and 3rd Ex-parte Applicants as Board Members of the 1st Ex parte Applicant.

4. That this Honourable Court be pleased to make such other or further orders as are necessary for the ends of justice to meet.

5. That costs of this application be provided."

2. The application is expressed to be brought under Article 47 of *the Constitution*, Sections 7, 8, 9 and 11 of the *Fair Administrative Action Act*, 2015 and Order 53 Rule 3 of the Civil Procedure Rules, 2010.

3. It is based on a statutory statement dated 26 January 2023 and an affidavit sworn on even date by Aarbaz Qureshi, verifying the facts relied upon. Mr. Qureshi is named in these proceedings as the 2nd applicant and he has sworn that he is the operations manager of the 1st applicant which is a company duly registered in Kenya to conduct insurance business in accordance with the *Insurance Act* cap. 487.

4. On diverse dates between the months of November 2022 and January, 2023, various board members of the 1st applicant company tendered their resignation as a result of which the company could not conduct its business. The company then appointed Mr. Heman Ranmal Haria and Mr. Arbaaz Qureshi as board members to replace those who had resigned. It forwarded their names to the respondent for approval as required under the law.

5. However, the respondent is said to have deliberately refused, neglected or failed to approve the appointment of Mr. Heman Ranmal Haria and Mr. Arbaaz Quereshi as the 1st applicant's board members without any justifiable reason or any colour of right. Consequently, the 1st applicant's business has been brought to a standstill and subjected the 1st applicant to hardship.

6. It is the applicants' position that that the respondent should be compelled to approve the appointment of Heman Ranmal and Mr. Arbaaz Qureshi to the board of the 1st applicant as members to enable it continue with its business operations and avert loss to itself and its insured.

Respondent's response

7. The respondent opposed the application and a replying affidavit to this effect was sworn by Mr. Godfrey Kiptum in his capacity as the commissioner of insurance and the executive officer of the respondent.

8. According to Mr. Kiptum, the respondent is a statutory regulatory body established under the *Insurance Act* to, among other things, supervise, regulate and promote the development of the insurance industry in Kenya. The objects and functions of the respondent are stipulated in section 3A of the *Insurance Act* and they include ensuring the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya and also formulation and enforcement of standards for the conduct of insurance and reinsurance business in Kenya.

9. In exercise of its statutory mandate, the respondent assesses the suitability of persons managing, controlling or having a significant ownership or significant beneficial interest in companies licensed under section 68A of the *Insurance Act* to undertake insurance business in Kenya.

10. Under section 27 A of the Act, for instance, qualifications of the board members of an insurance company have been spelt out. That section says:

> A person shall not be registered under section 31 unless-

(a) the board of directors or managing board of such person comprises at least five members; and

(b) the Commissioner is satisfied that all members of such board have knowledge and experience in matters relating to insurance, actuarial studies, accounting, finance or banking.

(c) All the members of such Board have in writing addressed to the Commissioner signifying their acceptance to serve on the Board.

11. In addition to the statutory requirements, the respondent has issued what has been described as "Guidelines on Suitability of Key Persons Involved in the Ownership, Stewardship and Management of Insurers, 2013 (IRA/PG/15)". These guidelines require that key persons in control functions of regulated entities possess competence and integrity to fulfil their roles.

12. The respondent can only confirm the suitability of key persons involved in the ownership, stewardship and management of insurers if the applicants fill the requisite details on the respondent's online portal with supporting documents.

13. As far as the applicants' application is concerned, on diverse dates in October 2022, the respondent received applications by the 1st applicant for appointment of as members of its board. Among the persons proposed for appointment were the 2nd and 3rd applicants.

14. Upon reviewing the applications, the respondent noted that the information with respect to the 2nd and 3rd applicants was not sufficient enough to prove that they were qualified to be directors under Sections 27A and 31 of the *Insurance Act*. The respondent, therefore, asked further particulars to facilitate the processing of the applications. In particular, the respondent sought for the excerpt of the minutes of the meeting in which the 2nd applicant was proposed as the director and copies of his professional and academic certificates.

15. As far as the 3rd applicant is concerned, the respondent wanted a more detailed curriculum vitae showing his level of experience in insurance, actuarial science and accounting. The respondent was also interested in his experience in finance and banking. The 1st applicant did not respond to the respondent's request. Neither did the 2nd nor the 3rd respondent. It is the respondent's position that it is ready and willing to consider the 2nd and 3rd applicants' respective applications for approval once they provide the required information.

16. In the circumstances, Mr. Kiptum has sworn, the applicants' contention that the respondent has deliberately refused, neglected or failed to approve the appointments of the 2nd and 3rd applicants to the board without any justifiable reason or any colour of right is unfounded, a gross misrepresentation of the facts and is only intended to mislead this Honourable Court.

17. In any event, the applicants' suit offends the doctrine of exhaustion of alternative dispute resolution mechanisms as provided for under Section 173 and Section 204A (3) of the *Insurance Act* and Section 9(2)(3) of the *Fair Administrative Action Act*.

Applicants' submissions

18. In their submissions, the applicants acknowledged the respondent as a statutory body under the *Insurance Act* with the mandate to regulate insurers such as the 1st applicant in the insurance business. They also acknowledged that, amongst its functions, is the function to approve people nominated by the insurers to act as board members. To that end, the respondent is obligated to appoint the 2nd and

3rd applicants to the 1st applicant's board. The applicant's cited the case of Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [2022] eKLR, for the submission that this court would intervene to correct a public law wrong which they believe the respondent has committed. In that case a public law wrong was held to be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, *ultra vires,* bad faith, unfairness, or a decision made or arrived at capriciously.

19. On the applicants' compliance with sections 3A, 27A and 68A of the *Insurance Act*, it was submitted on behalf of the applicants that the court cannot be called to determine the question whether the 2nd and 3rd applicants qualified to be appointed as members of the 1st applicant's board because that would amount to interrogating the respondent's decision on merit yet judicial review is about process and not merit. In any event, sections 68 and 68A refer to a principal officer of a registered person and not members of the board of an insurer.

20. In the same breath, the applicants have urged that the court cannot inquire into the question whether the applicants complied with the Guidelines on Suitability of Key Persons Involved in the Ownership, Stewardship and Management of Insurers, 2013 (IRA/PG/15 which, in any event, the respondent has not exhibited to the replying affidavit.

21. As far as section 3A of the *Insurance Act* is concerned, it has been submitted that the powers of the respondent under this provision is for the purpose of promoting growth and stability of the insurance industry and not for micro-managing the administrative affairs of insurers who include 1st applicant. Those powers, according to the applicants, cannot be manipulated to make irrational and unreasonable decisions on the pretext of enforcing the statutory powers.

22. On section 27A, it has been submitted on behalf of the applicants that this section applies to registration of the entities carrying out insurance business in Kenya such as registration of an insurance company itself. According to the applicants, it does not apply to appointment of directors of an already registered and existing entity such as the 1st applicant. This is what the applicants understand section 27A as read together with sections 30 & 30 A of the *Insurance Act* to mean.

23. The applicants submit thatallowing the respondent to assess suitability of individuals who can sit as board members on the 1st applicant's board or on the board of any other insurer is tantamount to allowing the respondent to micro manage the administrative affairs of the 1st applicant or any other insurer. According to the applicants, this is contrary to the spirit of the *Insurance Act*.

24. As to the viability of an order for mandamus, the applicants submitted that since the respondent's decision was unreasonable and irrational and without any legal backing, it is only proper that an order of mandamus be issued to compel the respondent to approve the appointment of the 2nd and 3rd applicants as board members of the 1st applicant. They relied on Republic v County Secretary, Narok County Government & another Ex parte SEC & M Company Limited (2022) eKLR in which the Court of Appeal decision of Republic v Kenya National Examinations Council Ex Parte Gathenji & 8 Others Civil Appeal No 234 of 1996 was followed. In this latter decision the court, quoted a passage in Halsbury's Law of England, 4th Edition. Vol. 7 p. 111 para 89 on what the order of mandamus entails. The passage was in the following terms:

> " The order of mandamus is of most extensive remedial nature and is in form, of a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all

cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

25. It is the applicants' case that since the respondent has failed in its statutory duty it should be compelled by the order of mandamus to perform it.

26. On the question of whether the applicants ought to have exhausted other available mechanisms for resolution of their dispute, it was urged that it has been held in Cortec Mining Kenya Ltd -versus- Cabinet Secretary Ministry of Mining & 9 Others (2017) eKLR, that the availability of an alternative remedy or internal dispute resolution mechanisms is not a bar, in itself, to judicial review proceedings and that each case depends on its peculiar circumstances.

27. Further, it has been urged that, section 173 of the Act is about appeals to the Tribunal from the decisions of the commissioner with regards to his functions as provided for under section 5 of the *Insurance Act*. This Honourable Court's jurisdiction is not thereby ousted.

Respondent's submissions

28. In the submissions on behalf of the respondent, it has been urged that the applicants ought to have appealed to the Tribunal first before moving this Honourable Court. In this submission, the respondent relied on section 173(1) of the *Insurance Act* which provides that any person aggrieved by a decision of the Commissioner may appeal to the Tribunal. Since the applicants have not lodged an appeal as contemplated in the Act, it is urged that the application is contrary to section 9(2) and (3) of the Fair Administration Act, 2015. These provisions state as follows:

    (2) The High Court or a subordinate court under subsection (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).

29. The respondent's learned counsel relied on the decision in Republic versus Kenyatta University, ex parte Ochieng Orwa Dominick & 7 Others (2018) eKLR where Mativo, J (as he then was) held that the word "shall" in subsections (2) and (3) is employed in the mandatory sense and not directory. On exhaustion of administrative remedies, the learned counsel relied on Republic v Firearms Licensing Board & another Ex Parte Stephen Vincent Jobling (2019) eKLR where again, Mativo, J (as he then was) defined exhaustion of administrative remedies as a situation when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. In that case, 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.

30. On the question whether the respondent complied with the law in rejecting the appointment of the 2nd and 3rd applicants, the respondent submitted that it has the mandate and duty under section 3A and 27A of the *Insurance Act* to ensure effective administration, supervision, regulation and also to enforce standards for the conduct of insurance and reinsurance business in Kenya. In that regard, the Commissioner must be satisfied that all members of the board of directors have adequate knowledge and experience in matters relating to insurance, actuarial studies, accounting, finance or banking.

31. The 2nd and 3rd applicants were found wanting in this respect and therefore the respondent acted within its powers to reject the applicant's application.

Analysis and determination

32. The question whether the applicants ought to have appealed the respondent's decision rejecting their application to the tribunal rather than filing the instant application takes center stage and calls for immediate attention as a preliminary point. Section 173 of the *Insurance Act* makes for provision for appeals against the decisions of the Commissioner. Subsection (1) is more pertinent to the question at hand and it reads as follows:

> 173. Appeals from Commissioner's decisions
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> (1) A person aggrieved by a decision of the Commissioner under this Act may, within one month from the date on which the decision is intimated to him, appeal to the Tribunal which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary that decision.

33. Subsection (2) is to the effect that an appeal made to the Tribunal under subsection (1) shall be final and conclusive. However, subsection (3) provides a window to appeal to this Honourable Court against the decision of the Tribunal on a question of law. Subsection (4) clarifies what the question of law entails and subsection (5) authorises the Chief Justice to make rules for regulating the practice and procedure in connection with an appeal under subsection (3) and for the better carrying into effect the provisions of the subsection.

34. The Tribunal to which reference has been made is established under section 169(1) of the Act which reads as follows:

> 169(1) The Cabinet Secretary may, by notice in the Gazette, establish a tribunal for the purpose of hearing appeals under this Act.

35. The applicants have disputed the application of section 173(1) to their case on what I understand to be two prongs. On the first prong, it is their argument that this section only applies to the decisions of the Commissioner with respect to his functions under section 5 of the Act. To quote the learned counsel for the applicants on this point, he submitted as follows:

> "section 173 is about Appeals to the Tribunal about decisions of the commissioner with regards to his or her functions as provided for under section 5 of the *Insurance Act*. We submit the said functions and decisions therein do not hinder this court or oust its' jurisdiction from articulating on the orders of Judicial review sought before this court in the first instance."

36. This argument is obviously contrary to the express provision of section 173(1) which states in clear and unambiguous terms that it is the any decision by the Commissioner under the *Act* and not just under section 5 or any particular part of the Act. In other words, any appealable action or omission, conduct or decision by the Commissioner may be appealed to the Tribunal regardless of whether that action or omission, conduct or decision arises from the Commissioner's functions under section 5 of the Act or under any other provision in the Act.

37. If it was the intention of the legislature that appeals against actions or omissions of the Commissioner, his conduct or decision would only lie with respect to specific provisions in the Act, it would have expressly stated so.

38. Secondly, the applicants' argument is untenable because, under section 27A of the Act, it is the duty of the Commissioner to ensure that the board of directors of a registered person, such as the 1st applicant, satisfies the statutory requirements under that provision of the law; that section reads as follows:

> 27A Qualification of Board members
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> A person shall not be registered under section 31 unless-
>
> (a) the board of directors or managing board of such person comprises at least five members; and
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> (b) the Commissioner is satisfied that all members of such board have knowledge and experience in matters relating to insurance, actuarial studies, accounting, finance or banking.
>
> (c) All the members of such Board have in writing addressed to the Commissioner signifying their acceptance to serve on the Board

39. There is evidence exhibited to the applicants' own affidavit that the 2nd and 3rd applicants were not only appointed to the board of directors of the 1st applicant but that they also wrote to the Commissioner signaling their acceptance of the appointments. Proof of this fact are copies of letters dated 23 November 2022 exhibited to the affidavit of 2nd applicant. The letters have been authored by the 2nd and 3rd applicants respectively accepting their appointments. Exhibited to the same affidavit is also a copy of a letter dated 28 November 2022 by the 2nd applicant directed to the Commissioner of Insurance confirming his acceptance of the appointment.

40. There is no doubt that in writing these letters, the applicants were out to comply with provisions of section 27A of the Act, in particular section 27A(a) and (b) of the Act. At the very least, there is no evidence to the contrary.

41. That being the case, the Commissioner's decision to either seek for further information from the applicants or reject their application could only have been informed by section 27A (c). He either sought to be satisfied or, in rejecting the applicants' application he was not satisfied that the 2nd and 3rd applicants have knowledge and experience in matters relating to insurance, actuarial studies, accounting, finance or banking.

42. It follows that whichever decision the Commissioner takes under section 27A, it would be such a decision that is subject to appeal to the Tribunal under section 173 (1) of the Act because, for all intents and purposes, it is "a decision of the Commissioner under this Act". And being dissatisfied with the decision, it was always incumbent upon the applicants to appeal to the Tribunal within one month from the date when they became aware of the decision.

43. The applicants cannot, therefore, urge that the decision the Commissioner took is not subject to appeal to the Tribunal yet their application to the Commissioner was made under or subject to the very provisions of the law according to which the Commissioner would make a decision that can only be appealed against to the Tribunal.

44. The suggestion by applicants that once registered, the statutory requirements under section 27A would be inapplicable to a registered person is illogical and to a great degree absurd. It is also a self-defeatist argument because, assuming the applicants are right, it would not have been necessary for them to make the application they made for approval of the names of persons who had been appointed to replace those that had resigned from the board of directors.

45. More importantly, section 31 (g) of the Act is to the effect that a person will remain registered as an insurance company only if it complies with the provisions of the Act which, no doubt, include registration requirements, not only at the time of registration but during the entire period the company is so registered and remains in the insurance business. The section reads as follows:

> 31. Registration
>
> (1) Where the Board is satisfied that-
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> (g) the applicant is, and is likely to continue to be, able to comply with such of the provisions of this Act and regulations and directions made or issued under this Act as are applicable to the applicant;
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> the Board shall, subject to such terms and conditions as it may consider necessary, approve the registration of the applicant in respect of such class or classes of insurance as it may direct.

46. It is also worth noting that according to section 196(2) (a) and (e) of the Act, non-compliance with the provisions of the Act, which include registration criteria under sections 27 A and 31 of the Act, would lead to cancellation of a licence of a registered person. Sections 196 (2) (a) and (e) read as follows:

> 196(2) The Commissioner, after giving a registered person a reasonable opportunity of making
> (a) representations may by notice in writing cancel the registration of that person, either totally or in respect of any particular part of his business
>
> (a) if the person fails to comply with or acts in contravention of this Act, or any regulation or direction made or issued under this Act;
>
> (e) where, having regard to the nature and quality of the staff of the registered person, including the professional qualifications, knowledge and experience of the staff, the Commissioner is satisfied that the person cannot carry on the business, or a part of the business, for which he is registered, as the case may be, in a satisfactory and efficient manner;

47. All these provisions point to the conclusion that section 27A and 31 apply to registered persons as much as they apply applicants for registration as insurance companies.

48. The second prong of the applicants' argument against exhaustion of the appeal mechanism in the Act is that even if the applicants were bound to appeal to the Tribunal, that in itself does not oust the jurisdiction of this Honourable Court to entertain this suit and issue the judicial review orders sought.

49. It is true that under Article 165(3)(a) of *the Constitution*, this Honourable court has unlimited original jurisdiction in both civil and criminal matters except for those matters reserved for the Supreme Court and special courts of environment and land, employment and labour relations. However, where a statute prescribes a particular procedure for determination of any particular grievance, that procedure ought to be followed.

50. It is trite that a judicial review court will not, in exercise of its discretion, make the remedy of judicial review available where some other body has exclusive jurisdiction in respect of the dispute. In the English decision of R versus Peterkin, ex p Soni (1972) Imm AR 253 Lord Widgery CJ had this to say on the need to exhaust appellate avenues before moving to court:

> " Where Parliament has provided a form of appeal which is equally convenient in the sense that the appellate tribunal can deal with the injustice of which the applicant complains this court should in my judgement as a rule allow the appellate machinery to take its course.

> The prerogative orders form the general residual jurisdiction of this court whereby the court supervises the work of inferior tribunals and seeks to correct injustice were no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when other and adequate jurisdiction exists elsewhere."

51. Our very own Court of Appeal has held in the Speaker of the National Assembly v. Karume, Civil Application No. NAI 92 of 1992 that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

52. And section 9 (2) of the *Fair Administrative Action Act* No. 4 of 2015 is also clear that this court should not entertain disputes whose resolution has been provided for elsewhere by an Act of Parliament. It states as follows:

> 9. (2) Procedure for judicial review.
>
> > The High Court or a subordinate court under subsection (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.

53. But I am minded that judicial review may be granted where the alternative statutory remedy is 'nowhere near so convenient, beneficial and effectual' (see R v Paddington Valuation Officer, ex p Peachey Property Corpn Ltd [1966] 1 QB 380 at 400). The court will, of course, take into account such factors as whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review.

54. It is not the applicants' case, and neither have they even suggested, that they opted for judicial review because the appellate mechanism provided under the *Insurance Act* for redress of what they believe are their grievances against the decision of the Commissioner are inadequate in the sense that the appellate process is not as convenient, beneficial and effectual. And even if this was their case, the first step for them would have been to invoke section 9(4) of the *Fair Administrative Action Act* and seek exemption from exhausting the option of appeal to the Tribunal. The subsection is properly understood in the context of the entire section 9 which reads as follows:

> 9. Procedure for judicial review.
>
> > (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
> >
> > (2) The High Court or a subordinate court under subsection (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) 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.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal. (Emphasis added).

55. To emphasise the point that a judicial review court's jurisdiction cannot be employed as an alternative to the appellate mechanism, David Foulkes in his book Foulkes Administrative Law, 7th Edition has stated that it is the statute that is the determining factor. Citing the case of Customs and Excise Commissioners versus J.H. Corbitt (Numismatists) Ltd (1981) AC 22, (1980) 2 2ALL ER 72, the learned author noted as follows:

> "It is to be noted that an appeal lies from, whether to an appellate tribunal or to a court of law, only when and to the extent that statute so provides, and the powers of the appeal body to review, reconsider etc. the decision of the tribunal likewise depend on the statute.
>
> To be contrasted with appeal is judicial review. The decision of tribunals, as bodies exercising judicial functions, have always been subject to review by the courts (that is, to judicial review) by means of the order of certiorari. This enables the court to quash a decision on certain grounds. Whereas appeal lies only when and to the extent that statute provides, the court's common law power of judicial review exists unless it is take away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by way of judicial review..." (at p.150-151).

56. And no doubt this was the principle applied by Lord Wright in General Medical Council versus Spackman (1943) AC627, at 640 where he stated as follows:

> "I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power."

57. It follows that judicial review would not be applicable where the statute has provided, as in the applicants' case, an appellate avenue as the means of redressing a particular grievance. The applicants ought to have appealed to the Tribunal and, to the extent that they have filed a judicial review application instead, their application is misconceived and an abuse of the due process of this Honourable Court.

58. The last point I need to make on the applicants' application is that even if the judicial review option was open to the applicants, their application would still have failed because what they have presented in the statutory statement as the grounds upon which they seek judicial review reliefs are merely facts upon which they have relied. These are facts that mirror the depositions they have made in the affidavit in support of their application. The purported grounds have been stated as follows:

> "C. Grounds Upon Which The Reliefs Are (sic)
>
> 1. On diverse dates between the months of November 2022 and January, 2023, various Board Members of the Applicant tendered their resignation letters and left the Applicant's Board

of Directors. As a result of their resignation, the Applicant could not conduct its' business as usual.

2. The Applicant appointed Mr. Arbaaz Qureshi and Mr. Heman Ranmal Haria as Board Members to replace the ones who resigned and forwarded their names to the Respondent for Approval as required under the law.

3. The Appointment of Mr. Arbaaz Qureshi and Mr. Heman Ranmal Haria is necessary for the effective functioning of the Applicant to conduct its' business and the Respondent's continuous failure to approve them is only subjecting it to untold irreparable losses.

4. The Respondent has deliberately refused, neglected and/ or failed to approve the Appointment of Mr. Arbaaz Qureshi and Mr. Heman Ranmal Haria as Board Members of the Applicant without any justifiable reason or any colour of right.

5. The Applicant's business has been brought to a standstill by the conduct of the Respondent for refusing to approve the Appointments of Mr. Arbaaz Qureshi and Mr. Heman Ranmal Haria as Board Members of the Applicant. This has subjected the Applicant's Insured and other prospective Insureds to uncertainty and therefore the whole business has come to a standstill as their capacity to transact is severely hampered.

6. In the Circumstances, it is only fair and just that the Respondent be compelled to approve the appointment of Mr. Arbaaz Qureshi and Mr. Heman Ranmal Haria to the Board of the Applicant as members to enable it conduct its' business as usual and avert the looming loses to itself and its' insureds.

7. No prejudice will be occasioned to the Respondent if the Application filed herein is certified urgent and orders sought therein be granted. In any case, damages are a sufficient remedy.

8. It is in the interest of justice that leave be granted to enable the ex-parte Applicants to lodge substantive proceedings for Judicial Review Proceedings."

59. As I have stated before in applications similar to the instant one, the point of entry for a judicial review court to intervene and check the powers of subordinate courts or tribunals or such other bodies whose powers are amenable to judicial review is the grounds upon which the application is made and, by extension, upon which judicial review reliefs are sought.

60. Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

61. And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

62. The grounds to which reference has been made in these provision of the law have not been left to speculation. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, 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." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> 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. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). 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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> 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. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

63. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. In exercise of its discretion, a judicial review court will intervene and grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed. According to the Court of Appeal in Suchan Investment Limited versus Ministry of National Heritage & Culture & 3 Others (2016) Eklr, this principle was first adopted in R versus Home Secretary; ex parte, Daly (2001) 2 AC 532.

64. Since they form the foundation upon which the application for judicial review is based and for which reliefs are sought, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

65. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook (supra), at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

66. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in *pari materia* with our own Order 53 of the Civil Procedure Rules, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity.

67. In the application before court, the applicants have left it to court to speculate which of the grounds of the judicial review upon which they are seeking relief. But it is not up to the court to make out these grounds from the facts which the applicants rely upon; that is the burden of the applicants. For the reasons I have given, they have not discharged this burden to my satisfaction.

68. In the final analysis, I am not satisfied the applicant's application merits the exercise of discretion by this Honourable Court in favour of the applicants. It is hereby dismissed with costs. Orders accordingly.

DATED, SIGNED AND POSTED ON THE CASE TRACKING SYSTEM PORTAL ON 28 DECEMBER 2023

NGAAH JAIRUS

JUDGE