



Republic v Juma Ali Abdalla, Senior Principal Kadhi, Mombasa & another; Shafi & 2 others (Interested Parties); Mohamed & another (Exparte) (Judicial Review Application E002 of 2022) [2022] KEHC 12953 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEHC 12953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
JUDICIAL REVIEW APPLICATION E002 OF 2022
JM MATIVO, J
SEPTEMBER 21, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**JUMA ALI ABDALLA, SENIOR PRINCIPAL KADHI, MOMBASA 1ST
RESPONDENT**

**KHADIJA ABDULRAHMAN MWINZAGU AKA KHADIJA KHAMI
SHAFI 2ND RESPONDENT**

AND

KALTHUM KHAMIS SHAFI INTERESTED PARTY

SHEFFA KHAMIS SHAFI INTERESTED PARTY

FADHILA ZAHRAN MOHAMED INTERESTED PARTY

AND

KHADIYJAH AHMED MOHAMED EXPARTE

ZAINAB AHMED MOHAMED EXPARTE

RULING

1. By an application dated 14th February 2022 expressed under Article 170 (5) of *the Constitution*, sections 2,4(2) (3), 5(1), 7 (2) (a) (ii) (iv),7 (2) (c) (d) (o),11 (ii) (b)(i), 11(2) (c) of the *Fair Administrative*



Action Act¹(the FAA Act) and Order 24 Rule 4 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law, the applicants pray for: --

- a. Certiorari to quash the 1st Respondent's judgment dated 6th October 2021 together with the consequential orders issued on 7th October 2021 for want of jurisdiction.
 - b. That all the beneficiaries of the three Wakfs, namely (I) Mwana Mishi Binti Aziz dated 6th October 1926 for plot number 264, now known as Title No. Mombasa/ Block XXXIV/97; (ii) Mwana Mishi Binti Aziz dated 19th August 1938 for plot 1926 for Plot 165, now known as Title No. Mombasa/ Block XXXIV/96; and (iii) Mwana Mishi Binti Aziz dated 19th October 1938 for Plot 12 (Original 251 & 259/1), now known as Title No. Mombasa/ Block XXXIV/12 be ordered to revert to the management of the immovable properties belonging respectively to the said Wakfs i.e Title Nos. Mombasa/ Block XXXIV/12, 96, 97 that was in place prior to 8th September 2020.
 - c. That Khadija Khamia Shafi a.k.a Khadija Abdulrehman Mwinzangu be declared to be an unfit person and she be enjoined from managing or being a trustee over any of the properties registered in the name of three Wakfs of Mwana Mishi Binti Aziz, namely, the Wakfs of Mwana Mishi Binti Aziz dated:-
 - i. 6th October 1926 for Plot 264, [now known as Title No. Mombasa/Block XXXIV/97];
 - ii. 6th October 1926 for Plot 265. [now known as Title No. Mombasa/Block XXXIV/96]; and
 - iii. 19th August 1938 for Plot 12 (Original 251 & 259/1), [now known as Titl No. Mombasa/Block XXXIV/12].
 - d. The costs of this application be provided for.
2. The grounds in support of the application are that their mother who was a Respondent in the case before the Kadhi died during the pendency of the case; that the three Wakfs prohibit alienation of the Wakf properties, that the parties requested that the Wakf properties be rented out. They contend that neither their mother (deceased) nor themselves could have agreed to the alienation. They state that the 3rd Interested Party who is their auntie and her advocates have issued a Notice to their 90-year-old widowed father to vacate from a premises he has occupied for 57 years.
 3. They contend that the impugned judgment was issued in excess of jurisdiction because the Kadhi's jurisdiction is limited by Article 170 (5) of the Constitution to matters affecting Muslims personal status, marriage, divorce and inheritance, and, that the 3 wakfs provide that no one can inherit personally any part of the three properties. Also, they state that the properties ceased to be part of the immovable properties of the donor, so upon her death, the properties could not form part of her estate. Further, the applicants state that the reversionary deed dedicated the reversion of the three properties to the poor and beggars and that the Wakf Act applies to the properties, hence, the 1st Respondent breached section 7 (2) (a) (ii) of the FAA Act.
 4. Also, the applicants contend that the judgment is tainted with bias in favour of the Plaintiff; that despite the death of the 1st Respondent, the beneficiaries were not notified; that the Kadhi failed to

¹ Act No. 4 of 2015.



ensure all the beneficiaries consented to the proceedings before him, so he violated section 7 (2) (a) (iv) of the FAA Act; that the Kadhi refused to force the Respondent substitute the deceased Respondent in breach of section 4(3) of the FAA Act; that they were not accorded an opportunity to be heard in breach of section 7 (2) (d) of the FAA Act; and the proceedings were undertaken in a procedurally unfair manner contrary to section 7 (2) (c) of the FAA Act.

5. Additionally, the applicants contend that the decision is tainted by an error of law and it was undertaken in an abuse of power in breach of section 7 (2) (d) (o) of the FAA Act because Order 24 Rule 4 of the Civil Procedure Code, 2010 make it mandatory for the Plaintiff to appoint another defendant. Lastly the applicants accuse Khadija Mwazingu, for obtaining a search using the signature of Khadija S. Bin Rashid who died in 1964 contrary to the Wakfs which require fidelity and integrity.
6. In his grounds of opposition dated 11th March 2022, the Hon. Attorney General stated that the application is frivolous, scandalous, vexatious and an abuse of court process, that the decision is neither improper, irregular, illegal or unreasonable, that the Khadhi had jurisdiction to entertain the dispute and that the applicant failed to adhere to the requirements of Order 24 Rule 4 of the Civil Procedure Rules, 2010 by failing to apply for substitution of the deceased.
7. The 2nd Respondent filed the Replying affidavit of Khadija Khamis Shafi dated 28th February 2022. The salient points are that: (a) the eviction letter was sent on 15th November 2021 and the applicant sought leave to institute these proceedings on 24th January 2022 and no explanation has been offered for the delay; (b) the application is frivolous; (c) the suit before the Kadhis court and the orders issued therein were made in accordance with the law; (d) paragraph 3 and 5 of the applicants' affidavit are contradictory because the applicants' proposal is in line with paragraph 5 of the Kadhi's order dated 7th October 2021; (e) the eviction order was made pursuant to a consent; (f) that there are surviving beneficiaries, so the clause on the poor and beggars cannot take effect; (g) that the suit against Ali Zahran Mohamed abated, hence, there was no need to substitute; (h) that the donor of the properties Mwana Mishi Binti Aziz irrevocably transferred the ownership of the properties as Wakf to her three daughters in her life time; (i) the intention of donor in the Wakf is for the beneficiaries to benefit in perpetuity, but considering the relationship between the beneficiaries, it's prudent to have the properties divided as per the arrangement adopted by the Kadhis court which will realize the full potential of the Wakf; (j) the signature on the search was in good faith; (k) the prayers sought are unmerited.
8. In his submissions, the applicants' counsel cited Article 170 (5) of the Constitution and submitted that the judgment was issued in excess of jurisdiction. He argued that no one can benefit from the three properties governed by the respective Wakfs. He cited Phoenix of E.A Assurance Company Ltd v S M Thiga t/a Newspaper Service² which followed Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Ltd³ which held that jurisdiction is everything and without jurisdiction, a court has no power. Also, counsel submitted that each Wakf contains the words "irrevocable transfer" signifying the intention of the donor to part with legal ownership of the three properties. He argued that under section 4 (1) & (2) of the Wakf Commissioners Act⁴ the three Wakfs are valid because the reversionary clause dedicated the reversion of the said properties to the poor and beggars. He argued that the estate properties are not covered under the estate of the donor.

² [2019] e KLR.

³ [2019] e KLR.

⁴ Cap 109, Laws of Kenya.



9. Counsel also cited Halsbury's Laws of England⁵ which explains the nature of quashing orders and the circumstances under which a quashing order can issue and insisted that the Kadhi had no jurisdiction, so the impugned judgment and ensuing order ought to be quashed. He submitted that the 2nd Respondent is not a fit and proper person to be appointed a trustee premising this argument on the alleged forged search. He also argued that the judgment is tainted with bias and it was issued in violation of sections 4 (3), 5 (1), 7 (2) (c), (o) of the *FAA* Act. Lastly, he argued that Order 24 Rule (4) of the *Civil Procedure Rules*, 2010, makes it mandatory for the Plaintiff to appoint another defendant.
10. The 1st Respondent's counsel submitted that the parties submitted to the jurisdiction of the Kadhi's court; that the death of a party was not brought to the Kadhi's attention; and that material facts were not brought to the court's attention.
11. Counsel for the 2nd Respondent and the 1st and 2nd Interested Parties argued that the application is frivolous, vexatious and an abuse of court process. He submitted that the matter before the Kadhi was filed in accordance with Article 170 (5) of *the Constitution* and the Kadhis Court Act,⁶ and that the doctrine of estoppel applies since the Petitioners mother was the 2nd *Petitioner in Ali Mohamed Ali Darani & another v Khadija Shaffi & 3 others*.⁷ He submitted that the properties in question are Wakf properties within the meaning of section 2 of the *Wakf Commissioners Act*. He faulted the applicants for not moving the court as provided by Order 24 Rule 4 of the *Civil Procedure Rules*, 2010. He cited *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others*⁸ which held that courts look at facts but not apprehensive causes and speculations. He argued that the donor absolutely and irrevocably transferred ownership of the properties to her three daughters in her life time to benefit in perpetuity.
12. Additionally, counsel submitted that the application offends the doctrine of exhaustion under section 9 (2) of the *FAA* Act; that the applicant has not discharged the burden of prove under section 107 and 109 of the *Evidence Act*;⁹ that the applicant is raising merits grounds in a judicial review application which is impermissible and relied on *Republic v Public Procurement Administrative Review Board & 2 others ex parte Rongo University*.¹⁰
13. The 3rd Interested Party's counsel cited Article 170(5) of *the Constitution* and submitted that the Kadhi's court is vested with jurisdiction to entertain the matter. He relied on *Genevieve Bertrand v Mohamed Athman*.¹¹ He faulted the applicants for failing to invoke the provisions of Order 24 Rule 4(1) of the *Civil Procedure Rules*, 2010. He submitted that in absence of an application by a moving party for substitution, the Kadhi had no discretion to move himself. He argued that the property in question is Wakf property and subject Muslim law, and that the matter before the Kadhi met all the attributes of Article 170 (5) of *the Constitution*. Additionally, counsel submitted that all the parties before the Kadhi were afforded a hearing. Lastly, he cited *R v Senior Principal Magistrate* and

⁵ 5th Edition, Vol. 61A 92018)/6, para 106 & 111.

⁶ Cap 11, Laws of Kenya.

⁷ KC Miscellaneous application No. 51 of 2014, [2015] e KLR.

⁸ {2014} e KLR.

⁹ Cap 80, Laws of Kenya.

¹⁰ [2018] e KLR.

¹¹ Malindi Civil Application No. 24 of 2013 [2014] e KLR.



another¹² in support of the holding that judicial review orders are discretionary and the court has to consider whether they are most efficacious in the circumstances.

14. In his submissions in reply, the applicants' counsel submitted that the property in question being Wakf property cannot form part of the deceased's estate, that all the persons represented by the applicants herein are beneficiaries and that they were not consulted nor did they consent to the appointment of the trustee by the Kadhi. Counsel introduced new submissions which ordinarily do not form party of submissions in reply.
15. Upon carefully analyzing the pleadings and the party's respective positions, I find that the following issues distil themselves for determination; namely: -
 - a. Whether the suit against the first Respondent is sustainable in law.
 - b. Whether the impugned decision is amenable to judicial review jurisdiction.
 - c. Whether the applicants are citing grounds of appeal as opposed to judicial review grounds.
16. Regarding the first issue, the applicants have sued Juma Ali Abdalla, Senior Principal Kadhi, Mombasa in person as the 1st Respondent. None of the parties deemed it fit to address the competence or otherwise of suing a judicial officer in his name in civil proceedings arising from the performance of his judicial functions. The practice of litigants naming judicial officers in civil suits arising from their exercise of judicial functions is gaining root in this country despite the existence of clear provisions of the law granting judicial officers' immunity from being sued in civil proceedings arising from the exercise of their duties. Such practice is not only unlawful, but if unchecked, it has the potential of eroding the administration of justice, a key component of the Rule of Law, one of the founding values in Article 10 of *the Constitution*.
17. Granted, judicial authority is derived from the people and vests in, and is to be exercised by the courts and tribunals established by or under *the Constitution*. This is the language of Article 159 of *the Constitution*. In exercising judicial authority the Courts and Tribunals are, inter alia, to be guided by the principle that the purpose and principles of *the Constitution* shall be protected and promoted. *The Constitution* is the supreme law of the land and binds all persons and all State organs at both levels of government.¹³ Article 160 (1) of *the Constitution* entrenches the independence of *the Constitution*. Article 160 (5) of *the Constitution* clothes judicial officers with immunity while performing their judicial functions. It reads: -

A member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

18. The above constitutional prescription is buttressed by section 6 of the *Judicature Act*¹⁴ which provides: -

No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or

¹² Misc. Application No. 321 of 2006.

¹³ Article 2 (1) of *the Constitution*.

¹⁴ Cap 8, Laws of Kenya.



process which he would have been bound to execute if within the jurisdiction of the person issuing it.

19. Justice Field used the following language in *Bradley v Fisher*¹⁵: - “For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. The test in article 160 (5) is that the judicial officer must have done the thing complained of or omitted to do it in good faith in the lawful performance of a judicial function. Lawful in this context means “conforming to, permitted by, or recognized by law or rules.”¹⁶ The adjective of the word lawful is (a) allowed or permitted by law; not contrary to law: a lawful enterprise. (b) recognized or sanctioned by law; legitimate, (c) appointed or recognized by law; legally qualified, (d) acting or living according with the law; law-abiding. Allowable or permissible by being in conformity with laws, principles, regulations, statutes, etc., meant to govern or regulate a particular activity or conduct. It also means legal and legitimate.
20. The above section shields judicial officers from civil proceedings arising from the conduct of their judicial functions and not criminal proceedings. In *Cooley on Torts*,¹⁷ the author says: -

“Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor and he may exercise it without fear; that the duties concern individuals but they concern more especially the welfare of the State and the peace and happiness of society; that if he shall fail in the faithful discharge of them, he shall be called to account as a criminal, but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer. The rule thus laid down applies to large classes of offices, embracing some, the powers attached to which are very extensive and others whose authority is exceedingly limited.”
21. In *Griffith v Slinkard*,¹⁸ the court held that “Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which the said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.” The primary purpose of immunity is to protect the judicial process by maintaining the judiciary’s independent decision making. In 1978, the U S Supreme Court, in *Stump v Sparkman*¹⁹ enunciated the most recent test to determine whether a judge’s conduct is protected by absolute immunity. Under Stump’s two-part test, absolute immunity is limited first to those acts normally performed by a judge, provided, second, that they are performed in his “judicial” capacity.

¹⁵ 13 Wall. (80 U. S.) 335, 337, 347, 20 L. Ed. 646, 647.

¹⁶ <https://www.google.com/search?q=meaning+of+lawful&ie=utf-8&oe=utf-8&client=firefox-b>.

¹⁷ 3rd Ed. vol. 2, p. 795.

¹⁸ 146 Ind. 117, 44 N. E. 1001, 1002.

¹⁹ 435 U.S. 349 (1978).



22. Unqualified immunity is intended to protect the judicial function from suits against judges brought by individual parties.²⁰ The most frequently offered justification for absolute immunity is preservation of independent judicial decision making. According to this rationale, immunity for judicial acts is necessary so that judges can make the sometimes-controversial decisions that are their legal obligation to make, independent of personal considerations, including fear of personal liability.²¹
23. However, I should clarify that judicial immunity is not applicable where the judiciary intends to use it as a shield from public scrutiny. Judicial independence and immunity do not shield a judicial officer from accountability. In a democratic polity, it is inconceivable, that any person, whether an individual or an authority, exercises power without being answerable for the exercise. Judicial accountability like judicial independence has thus come to be recognized as a bulwark of the Rule of Law. What constitutes abuse of judicial authority is improper/ inappropriate use of the power of a judicial office. This must be differentiated from a judicial officer's error in law which can only be the subject of appeal.
24. I have considered the grounds cited in support of the application against the principles of law discernible from the above jurisprudence. The grounds cited by the applicant clearly show a litigant dissatisfied by a court decision. The grounds cited are grounds of appeal but no grounds to sue a judicial officer in his personal capacity. This suit is an affront to the judicial immunity granted to judicial officers by the above cited provisions of the law. The suit against the 1st Respondent offends the provisions of section 8 of the *Judicature Act*²² and Article 160 (5) of *the Constitution*. It follows that the suit against the 1st Respondent is unsustainable in law. On this ground alone, I strike out the suit against the 1st Respondent.
25. I now turn to the 2nd question, which is whether the impugned decision/judgment is amenable to judicial review jurisdiction. Unfortunately, none of the parties ventured into this pertinent question of law. Elementary points of law come to mind. One, is the impugned decision a judicial decision as opposed to an administrative decision? If so, is it a matter to be only be challenged by way of appeal or is it a matter for review.
26. It is critical to identify whether the decision of the learned Kadhi is an 'administrative action' within the meaning of the definition at section 2 of the *FAA Act*, thereby rendering it amenable to Judicial Review under section 7 of the *FAA Act*. I say so because the applicants' counsel heavily relied of several provisions of the *FAA Act*.
27. The *FAA Act* defines "administrative action" to include "powers, functions and duties exercised by authorities or quasi-judicial tribunals" or "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." The decisive question is therefore whether the judgment, ruling or orders made by a court of competent jurisdiction such as the decision under challenge in this case can be classified as an administrative action or decision falling within the above definition. The implication of the above definition is that the

²⁰ See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872) ("Liability to answer to everyone who might feel aggrieved by the action of the judge, would be inconsistent with ... that independence without which no judiciary can be either respectable or useful."); *Gregoire v. Biddle*, 177 F.2d 579, 580-81 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950); Nagel, *Judicial Immunity and Sovereignty*, 6 *Hastings Const. L.Q.* 237, 245-46 (1978) (judicial function protects itself through the doctrine of judicial immunity).

²¹ See *Butz v. Economou*, 438 U.S. 478, 512 (1978) ("Absolute immunity is necessary to assure that judges..., can perform their..., functions without harassment or intimidation."); *Stump v. Sparkman*, 435 U.S. 349, 363 (1978) ("a judicial officer... [should] be free to act upon his own convictions, without apprehension of personal consequences to himself" (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872))).

²² Cap 8, Laws of Kenya.



decision of a public authority or quasi-judicial tribunal is outrightly amenable to judicial review while the decision of any other person or body is amenable to judicial review if it affects the legal rights or interests of the concerned party.

28. Judicial bodies are the ordinary courts of law - such as the Supreme Court, High Courts and the Magistrates Courts/Kadhis courts. A quasi-judicial body is a non-judicial body which can interpret law. It is an entity such as an arbitrator or tribunal board, generally of a public administrative agency, which has powers and procedures resembling those of a court of law or judge, and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action.
29. Article 165(6) of *the Constitution* provides that the High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or a quasi-judicial function but not a superior court. The applicant did not invoke the supervisory jurisdiction of the High Court under the above provision nor do I find any basis for invoking the said provision. The applicant invoked judicial review jurisdiction under the provisions of the *FAA* Act.
30. There is a clear distinction between supervisory jurisdiction and judicial review jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs.²³
31. This power of superintendence conferred by Article 165 (6), as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee*²⁴ is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with an unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere.²⁵
32. The power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where an order of the Tribunal, etc. has resulted in grave injustice.
33. Judicial review on the other hand is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the

²³ *Gallagher v. Gallagher*, 212 So. 2d 281, 283 (La. Ct. App. 1968).

²⁴ AIR 1951 Cal. 193.

²⁵ *See D. N. Banerji v. P. R. Mukherjee* 1953 SC 58.



forbidden appellate approach. Judicial Review is about the decision-making process, not the decision itself. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

34. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. In fact, the reasons cited by the applicants are grounds for appeal as opposed to grounds for judicial review. This leads me to the next issue, which is whether the applicants ought to have preferred an appeal as opposed to a review. The applicants' grounds in my view are grounds of appeal disguised as judicial review grounds. On this ground alone, the entire application collapses.
35. Even if I were to spare sometime, paper and ink to address the application on merits, I still find that the application collapses not on one but on several fronts. One, the applicants seek to impugn the decision for want of jurisdiction. Any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions.²⁶ When the legislature grants authority to a decision-maker, the authority will perforce be limited; the decision-maker must act within the jurisdiction it has been granted. That is true of judicial authority.
36. As Lord Pearce put it, decision-makers must "confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament."²⁷ When courts intervene to keep a decision-maker within boundaries established by legislation, this represents "simply an enforcement of Parliament's mandate to the tribunal."²⁸ That the "very effectiveness" of statute should be ensured by judicial review²⁹ is underpinned by rule-of-law concerns: "By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law."³⁰ A statute might, however, grant significant decisional authority to an administrative decision-maker, which a court paying due respect to the scope of the authority would be obliged to take into account: -

"The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more.... [In such a case] it is an erroneous application of the [jurisdictional error] formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends..."³¹

²⁶ *Union des employés de service, local 298 v Bibeault* [1988] 2 SCR 1048 at 1086, *per* Beetz.

²⁷ {1969} 2 A.C. 147, at p. 194.

²⁸ {1969} 2 A.C. 147, at p. 196. See similarly *R. v Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 K.B. 338, at p. 346.

²⁹ *R. (Cart) v Upper Tribunal*, [2009] EWHC 3052, [2010] 1 All E.R. 908, at para. 38, *per* Laws L.J.

³⁰ *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 29.

³¹ *R v Income Tax Special Commissioners, ex parte Cape Copper Mining Company* (1888) 21 QBD 313, at pp. 319-320, *per* Lord Esher MR. See *e.g. Tithe Redemption Commission v Wynne* {1943} KB 756.



37. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the body, consciously or unconsciously, are acting perversely.³² Hayne J defined jurisdictional error in the following terms: -

“...There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorized to decide is an error within jurisdiction.”³³

38. A more specific definition of Jurisdictional error is defined as follows: -

“Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers.”³⁴

39. Guidance can be obtained from *Craig v South Australia* (1995) HCA 58 which held that: -

“A jurisdictional error occurs when the extent of that authority is misconceived. Decisions affected by jurisdictional error can be quashed by judicial review. ...

Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers.”

40. In *Judicial Review of Administrative Action*³⁵ the learned author Mark Aronson identified 8 categories or types of jurisdictional error namely: a mistaken assertion or denial of the very existence of jurisdiction; a misapprehension or disregard of the nature or limits of the decision-maker's functions or powers; acting wholly or partly outside the general area of the decision-maker's jurisdiction, by entertaining issues or making the types of decisions or order which are forbidden under any circumstances; mistakes as to the existence of a jurisdictional fact or other requirement when the relevant Act treats that fact or requirement as something which must exist objectively as a condition precedent to the validity of the challenged decision; disregarding relevant considerations or paying regard to irrelevant considerations, if the proper construction of the relevant Act is that such errors result in invalidity; errors of law, although where the decision-maker is an inferior court or other legally qualified adjudicative body, the error will probably have to be such that it amounts to a misconception of the nature of the function being performed or of the body's powers; acting in bad faith and breaching the hearing or bias rules of natural justice.

³² See *R v Hillingdon London Borough Council, ex parte Puhlhofer*, {1986} AC 484, at p. 518, per Lord Brightman.

³³ *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57.

³⁴ *Craig v South Australia* [1995] HCA 58.

³⁵ 4th Ed, 2009, [1.90].



41. A reading of the jurisdiction of the Kadhi's court as conferred by the enabling statute and Article 170 (5) of *the Constitution* and the facts before the Kadhi leave no doubt that the subject matter of the case fell within his jurisdiction and there is no feature in the case which prevented the Kadhi from exercising his jurisdiction. Further, the case came before the kadhi's court initiated by due process of law and upon fulfilment of any condition's precedent to the exercise of his jurisdiction. Even if the Kadhi were to err in misinterpreting the facts or the law, then he would have erred within his jurisdiction. Such an error, if any, is a perfect ground for appeal as opposed to a ground for review.
42. The other ground mounted is that the Kadhi was biased. Bad faith has been defined rarely, but an Australian case defined it as "a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker."³⁶ Justice Southin in *MacMillan Bloedel Ltd. v Galiano Island Trust Committee*³⁷ articulated the concept of bad faith as follows: -
- “The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.”(Emphasis added)
43. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that “justice should not only be done, but be seen to be done.”³⁸ On this view, appearances are important. Justice should not only be fair, it should appear to be fair. Lord Hewart's statement signaled the rise of the modern concern with the possible apprehension that courts or quasi-judicial bodies might not appear to be impartial, rather than the narrower problem that they might in fact not be impartial. The importance of the appearance of impartiality has become increasingly linked to public confidence in the courts and the other forms of decision-making to which the bias rule applies.³⁹ This rationale of the bias rule also aligns with the objective test by which it is now governed because the mythical fair minded and informed observer, whose opinion governs the bias rule, is clearly a member of the public.
44. The High Court of Australia explained, “Bias, whether actual or apparent, connotes the absence of impartiality.” Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues

³⁶ *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19]. Recklessness was held not to involve bad faith (*NAFK v Minister of Immigration* (2003) 130 F.C. 210, [24]).

³⁷ {1995} B.C.J. 1763.

³⁸ *R v Sussex Justices Ex p McCarthy* [1924] 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that “[N]ext to the tribunal being in fact impartial is the importance of its appearing so”: *Shrager v Basil Dighton Ltd* [1924] 1 KB 274 at 284.

³⁹ See, eg, *Ebner v Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 363 (Gaudron J) (HCA); *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [83] (Eng CA); *Lawal v Northern Spirit Ltd* [2003] UKHL 35; [2004] 1 All ER 187 at [14], [21] (HL); *Forge v Australian Securities Commission* [2006] HCA 44; (2006) 229 ALR 223 at [66] (Gummow, Hayne and Crennan JJ) (HCA). See also *Belilos v Switzerland* [1988] ECHR 4; (1998) 10 EHRR 466 at [67] where the European Court of Human Rights explained that the bias rule, as it arose from Art 6 of the European Convention of Human Rights, was based upon the importance of “the confidence which must be inspired by the courts in a democratic society”.



with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.⁴⁰ A claim of apprehended bias requires a finding that a fair-minded and reasonably well-informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as “apparent,” “imputed,” “suspected” or “presumptive” bias.⁴¹

45. These differences between actual and apprehended bias have several important consequences. Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the actual views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the possible views and behavior of the decision-maker.⁴² Each form of bias also requires differing standards of evidence.⁴³ A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. In the absence of an admission of guilt from the decision-maker, or, more likely, a clear and public statement of bias, this requirement is difficult to satisfy.⁴⁴ A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer might conclude there was a real possibility that the decision-maker was not impartial.⁴⁵
46. The Supreme Court of Kenya expressed the same view in *Hon. Lady Justice Kalpana Rawal v Judicial Service Commission & Another*⁴⁶ citing Professor Groves M. in “The Rule Against Bias”⁴⁷ where it stated that- “... claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand.”
47. In formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man.”⁴⁸ The Lords also made clear that the

⁴⁰ *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

⁴¹ *Anderton v Auckland City Council* [1978] 1 NZLR 657 at 680 (SC NZ); *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414 (NSW CA); *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

⁴² **Groves, M. “The Rule Against Bias” [2009] UMonashLRS 10**

⁴³ *Ibid*

⁴⁴ *See, eg, Sun v Minister for Immigration and Ethnic Affairs* [1997] FCA 1488; (1997) 151 ALR 505 at 551-552 (Fed Ct, Aust); *Gamaethige v Minister for Immigration and Multicultural Affairs* [2001] FCA 565; (2001) 109 FCR 424 at 443 (Fed Ct, Aust). *See also Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at 489 where Lord Hope accepted that proof of actual bias was “likely to be very difficult”.

⁴⁵ This expression of the bias test was suggested by the English Court of Appeal in *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at 711 and adopted by the House of Lords in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The Australian test, which is explained below, also adopts an objective assessment and will be satisfied if there is a “possibility” that the decision-maker might not be impartial: *Ebner v Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 345.

⁴⁶ Supreme Court No. 11 of 2016.

⁴⁷ {2009} U Monash LRS 10.

⁴⁸ [1993] UKHL 1; [1993] AC 646 at 670.



standard was one of a “real danger” as opposed to a “real likelihood” or “real suspicion.” In a subsequent decision, the House of Lords also affirmed that the fair-minded observer would take account of the circumstances of the case at hand.⁴⁹

48. Whether the allegation relates to actual or apprehended bias, it is a serious matter, which strikes to the validity and acceptability of a decision. Actual bias has been applied in the following two fact-situations: (a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.⁵⁰
49. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias,⁵¹ apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.⁵²
50. The current double reasonableness test, which commenced its journey in the Supreme Court of Canada⁵³ and then travelled through the High Court of Australia,⁵⁴ is so called because it translates into a two-stage requirement of reasonableness. It is a refinement of sorts of the formulation by the late Professor De Smith in his rationalisation of the real likelihood test as “based on the reasonable apprehensions of a reasonable man.”⁵⁵ There must be an apprehension of bias that must be reasonably entertained. That is the first stage. In the second stage, the apprehension must be one held by a reasonable person, someone who need not have interest in the outcome of the matter other than the general interest shared by the public in the fair administration of justice. The fulfilment of this general

⁴⁹ Porter v Magill [2001] UKHL 67; [2002] 2 AC 357.

⁵⁰ See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v LABSORI/W Local No 97* 2008 CanLII 39763 (BCLRB) para 1.

⁵¹ On the contrary, Burns and Beukes *Administrative Law* 303-304 think it is the other way round. For them, it is generally “a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised.” In their view, “a reasonable suspicion of bias or perceived bias is rather more complex”

⁵² Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant’s medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him

⁵³ In *Committee for Justice and Liberty v National Energy Board* 1978 68 DLR (3d) 716 735 de Granpré J laid down what has become the trademark of public adjudication in modern Canada when he stated that: “the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... That test is ‘what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.’ Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?”

⁵⁴ In *Livesey v NSW Bar Association* 1983 151 CLR 288 293-294, the previous “high probability” test was supplanted by the reasonable apprehension test.

⁵⁵ De Smith *Judicial Review* 230



interest is mainly a pre-occupation with a fair administration of justice; a concern that justice is not only done but is manifestly and undoubtedly seen to be done.

51. In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.⁵⁶ As formulated, the test is: "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel. Acting in good faith presumes exercising a judgment which is either made in good faith or in bad faith. If it is made in good faith, the statutory immunity applies. If it is made in bad faith, the statutory immunity does not apply. I find nothing in the material before me to suggest bad faith or bias on the part of the Kadhi.
52. The above accusation is legally frail and outrightly misguided. Order 24 Rule 4 (1) is explicit that '... the court on an application made on that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.' The applicants never invoked the said provision. They cannot now turn round and purport to blame the Kadhi for their omission.
53. The applicants claim that the proceedings were undertaken in a procedurally unfair manner. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness.⁵⁷ Lord Diplock noted that "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," is a form of procedural impropriety.⁵⁸ To the extent the alleged procedural impropriety is premised on alleged non-observance of Order 24 Rule 4(1), then the said argument collapses on account of the reasons discussed above.
54. In any event, in recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.⁵⁹ That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.
55. A decision contrary to natural justice is where the presiding Judge or Magistrate or Tribunal denies a litigant some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings, as for instance refusing to allow a litigant to address the court, or where he refuses to

⁵⁶ *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire*; In *Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (Re Sapire).

⁵⁷ *Peter Leyland; Gordon Anthony* (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", *Textbook on Administrative Law* (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2.

⁵⁸ *Supra*, note 18.

⁵⁹ David J. Mullan, *Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?* <http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf>.



allow a witness to be cross-examined, or cases of that kind.⁶⁰ Section 4 of the *FAA* Act re-echoes Article 47 of *the Constitution* and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. There is nothing to suggest that the Kadhi conducted the case before him in breach of section 4 of the *FAA* Act or Article 47.

56. Whether or not a person was given a fair hearing depends on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."⁶¹
57. It was alleged that the search relied upon before the Kadhi was forged. Again, this court is being invited to find that one of the trustees is not fit to be a trustee. These are attractive grounds. However, these are merit grounds which requires evidence to prove. Judicial review does not deal with contested issues of fact. These are grounds of appeal not review. Lastly, the attempt to recite provisions of the *FAA* Act is of no help. The grounds cite must be proved to the required standard.
58. In view of my analysis and the determination of the issues discussed above, the conclusion becomes irresistible that the applicants' application dated 14th February 2022 is fit for dismissal. Accordingly, I dismiss the said application with costs to the Respondents and the Interested Parties.

Orders accordingly.

SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2022

JOHN M. MATIVO

JUDGE

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2022

OLGA SEWE

JUDGE

⁶⁰ (1897) 18 N.S.W.R. 282, 288 (S.C.).

⁶¹ See S. De Smith, *Judicial Review of Administrative Action*, 4th ed. J. Evans (1980), 352- 4.

