



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 97 OF 2019**

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE AMANI NATIONAL CONGRESS PARTY**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT (NO. 4 OF 2015)**

**BETWEEN**

**HON. GODFREY OSOTSI.....APPLICANT**

**VERSUS**

**THE AMANI NATIONAL CONGRESS PARTY....RESPONDENT**

**RULING**

**Introduction.**

1. This ruling disposes a Preliminary Objection filed by the Respondent's counsel on 9<sup>th</sup> April 2019 objecting to this court's jurisdiction to entertain this case on grounds that the application is untenable in law.

2. A Preliminary Objection was defined in the case of *Mukisa Biscuit Company – vs- Westend Distributors Limited*<sup>[1]</sup> thus:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop”.

3. A preliminary objection is a formal step by which a party to a court proceeding raises a question which it contends should be dealt with separately, before any other issue in the proceedings is examined. This is usually, perhaps indeed necessarily, on the basis that that question is preliminary in nature; and that as a result, its resolution (in the sense contended for by the party raising it) will make examination of the rest of the case unnecessary and inappropriate.

**4. The Parties.**

5. The applicant, Hon. Godfrey Osotsi states that he is a *bona fide* member and the Secretary General of the Amani National Congress Party, and a Nominated Member of the National Assembly.

6. The Respondent, Amani National Congress Party is a Political Party, within the meaning assigned to Political Parties in Article 260 of the

Constitution. It is registered under the Political Parties Act<sup>[2]</sup> (herein after referred to as the act).

### **The reliefs sought.**

7. By a Chamber Summons dated 1<sup>st</sup> April 2019 expressed under the provisions Order 53 Rule 1(2) (4) of the Civil Procedure Rules, 2010, the *ex parte* applicant seeks the following orders:-

a. Leave be granted to the applicant to apply for:-

i. An Order of Certiorari to quash the decisions of the Disciplinary Committee and the National Executive Committee of the Amani National Congress Party purporting to the expel the *ex parte* applicant from the Party.

ii. An order of Prohibition, prohibiting the Respondent whether by itself, or through any of its officers, organs or ad hoc committees from discussing, and/or, in any way deliberating on, and/or, disseminating the decisions of the Disciplinary Committee and the National Executive Committee of the Respondent purporting to expel the *ex parte* applicant from the Party.

b. Until the hearing and determination of the application for leave and the Notice of Motion application, the grant of leave do operate as stay of the decisions of the Disciplinary Committee and the National Executive Committee of the Respondent purporting to expel the *ex parte* applicant from the Party.

c. The costs of and occasioned by the application be provided for.

### **The Factual Matrix.**

8. The *ex parte* applicant contends that a Mr. Barack Mulika, by letters dated 19<sup>th</sup> March 2019, addressed to him, the media, the Registrar of Political Parties and the Speaker of the National Assembly stated that the Disciplinary Committee and the National Executive Committee of the Party had decided that he be “expelled from the ANC Party Membership forthwith.” He also contends that he was not afforded a hearing prior to making the decision, nor is he privy to the reasons for the decision, and that, despite his written request, he has not been furnished with the decision; hence, he has been unable to challenge the decision.

9. Further, he contends that by a letter dated 10<sup>th</sup> January 2019, the Party’s Disciplinary Committee notified him of complaints and commencement of disciplinary proceedings against him. He states he was accused of financial improprieties, yet, the Respondent’s treasurer was in charge of the Party’s finances. He asserted that the invitation to him to answer such allegations was unreasonable, mischievous and that the allegations were made in the backdrop of a court dispute between the parties to this case.

10. In addition, he contends that from October 2027 to date, he had no access to the Party’s records, and, that, the expulsion was actuated by ulterior motives. In addition, he states that the Disciplinary Committee was improperly constituted, and, that, it comprised of persons who had litigated with him, hence, they were not impartial.

### **Legal Foundation of the application.**

11. The application is anchored on alleged violation of sections 4 (2) (3) (g) and 5(1) of the Fair Administrative Action Act.<sup>[3]</sup> He also relied on the provisions of Article 19.1.5, 19.1.7 and 47.3(d) (ii) of the Respondent’s Constitution.

12. Further, he challenges the impugned decision on grounds of unlawfulness, unreasonableness, procedural impropriety and abuse of power. He contends that the decision violates the Constitution and the Fair Administrative Action Act.<sup>[4]</sup>

### **The arguments.**

13. **Dr. Alutalala Mukhwana**, the Respondent’s counsel mounted a spirited challenge to the *ex parte* applicant’s case by way of as a Preliminary Objection objecting to this court’s jurisdiction. He adopted his written submissions dated 12<sup>th</sup> April 2019. He also made oral highlights. He argued that the objection is anchored on the Constitution, the Political Parties Act,<sup>[5]</sup> the Fair Administration Action Act,<sup>[6]</sup> case law and the Respondent’s Constitution.

14. **Dr. Mukhwala** submitted that section 39 of the Act establishes the Political Parties Dispute Tribunal (PPDT) and vests it with jurisdiction to entertain disputes emanating from the Political Parties in Kenya. He argued that section 39 of the act as read with sections 40 and 41 of the act stipulate that the PPDT is the only statutorily established forum with the mandate to solve disputes between a Political Party and its members. He also argued that the PPDT only handles such disputes after it is demonstrated that the Party’s Internal Dispute Resolution Mechanism has been exhausted, and, that, appeals from the decisions of the PPDT lie in the High Court.

15. To buttress his arguments, **Dr. Mukhwana** cited *Republic v Political Parties Tribunal 2 Others ex parte Susan Kihika & 2 Others*<sup>[7]</sup> and *Eric Kyalo Mutua v Wiper Democratic Movement Kenya & Another*.<sup>[8]</sup> Both decisions held that the intention of enacting the Political Parties Act was to provide a mechanism with which disputes arising between members of Political Parties can be expeditiously resolved, hence, the PPDT is the right forum for such disputes.

16. To fortify his argument that this court lacks jurisdiction, he cited *Peter Gichuki Kihara v Independent Electoral and Boundaries Commission & 2 Others*,<sup>[9]</sup> and *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited*<sup>[10]</sup> for the proposition that without

jurisdiction, the court has no power. In addition, he argued that Article **159 (2) (c) (d)** of the Constitution makes it an imperative that Alternative Dispute Resolution be upheld.

17. The Preliminary Objection is opposed. **Mr. Awele**, counsel for the *ex parte* applicant in opposition to the objection correctly pointed out that the objection is premised on section **9(2) (3)** of the Fair Administrative Action Act.<sup>[11]</sup> He argued that section **9(4)** of the act grants the High Court power, in exceptional circumstances to exempt an applicant from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. He contended that the scope of the exceptional circumstances under which the court may exercise its power under section **9(4)** is unlimited, the only consideration being the interest of justice.

18. In his view, **Mr. Awele** argued that a proper construction of section **9(4)** of the Fair Administrative Action Act<sup>[12]</sup> is that the court must, as of necessity, conduct an extensive review of the facts, most of which are contested. He relied on *Republic v Kenya Revenue Authority & Another & 3 Others (Interested Parties) ex parte Nairobi City County Government*<sup>[13]</sup> which held that availability of alternative dispute resolution procedures is not a bar to judicial Review. It also held that in order to avoid the alternative dispute resolution mechanism clearly anchored in Article 159 of the Constitution, an applicant must show that there are exceptional circumstances that would allow the court to side step its constitutional imperative to promote alternative dispute resolution.

19. Counsel also cited *Mohamed Ali Baadi and Others v Attorney General & 11 others*<sup>[14]</sup> which defined what constitutes an effective remedy to warrant exemption for the exhaustion requirement. He also cited *R v Independent Electoral and Boundaries Commission (IEBC) & Others ex parte the National Super Alliance (NASA) Kenya*<sup>[15]</sup> where the court laid down the considerations to be taken into account in determining exceptional circumstances to qualify for an exemption.

20. Additionally, **Mr. Awele** cited *R v Kenya Revenue Authority ex parte Neolife International Limited*<sup>[16]</sup> for the proposition that the court may on its own motion, or, pursuant to an application by a party concerned; exempt a party from exhausting the alternative remedy. Also cited is *R v Secretary of the Firearms Licensing Board & 2 Others ex parte Senator Johnson Muthama*<sup>[17]</sup> where the court found that at the time of granting leave, the court had granted the applicant the exemption.

21. Conceding that Article **50.12.(i)** of the Respondent's Constitution grants the Respondent's National Executive Committee power to review a decision, the said forum, in his submission is inappropriate to justly and fairly determine the dispute, because it is biased. He cited issues of conflict of interest and contended that the *ex parte* applicant would not be afforded a fair trial.

22. **Mr. Awele** invoked this courts vast supervisory jurisdiction<sup>[18]</sup> and its powers to grant Judicial Review reliefs.<sup>[19]</sup> Contending that the Respondent's Dispute Resolution Mechanism is inadequate, he cited *Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 Others ex parte Alfred Kiptoo Keter & 3 Others*.<sup>[20]</sup> In the said case, the court held that where a remedy provided is made illusory with the result that it is practically a mirage; the court will not shirk from its constitutional mandate to ensure that the provisions of Article **50(1)** of the Constitution are attained.

#### **Determination.**

23. The *ex parte* applicant avers that he is a member of the Respondent, a Political Party, within the meaning assigned to Political Parties in Article **260** of the Constitution. He contends that he is the Party's *bona fide* Secretary General. Its common ground that he is aggrieved by the Respondent's decision to expel him from the Party. He now seeks the leave of this court to commence judicial review proceedings to apply for orders of *certiorari* and *prohibition* to quash the said decision, prohibit the expulsion, and prohibit the Respondent's officers from discussing the impugned decision. That is the substance of the dispute disclosed in this case. Differently put, it is simply a dispute between a Political Party and a Member.

24. **Mr. Awele**, conceded that Article **50.12. (i)** of the Respondent's Constitution grants the Respondent's National Executive Committee (NEC) power to review a decision. However, he contended that the said forum is inappropriate to justly, and, fairly determine the dispute. He asserted that the NEC biased. In my view, this case stands or falls on the proper construction of the provisions of sections **39** and **40** of the Political Parties Act<sup>[21]</sup> and section **9(2) (4)** of the Fair Administrative Action Act.<sup>[22]</sup>

25. The short title to the Act provides that it is "An Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes." Section **39** of the act establishes the Political Parties Disputes Tribunal. Section **40** of the act provides for the jurisdiction of the Tribunal in the following words:-

#### **40. Jurisdiction of the Tribunal**

(1) The Tribunal shall determine-

- (a) Disputes between the members of a political party;
- (b) Disputes between a member of a political party and a political Party;
- (c) Disputes between coalition partners; and
- (d) Disputes between an independent candidate and a political Party;
- (e) Disputes between coalition partners; and
- (f) Appeals from decisions of the Registrar under this Act;

(g) Disputes arising out of party primaries.

26. Despite the above vast jurisdiction, the claw back clause is to be found in sub-section (2) of the above section which provides that “Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”

27. The above provisions being the crux of this Preliminary Objection, the question that falls for determination is whether this court has the jurisdiction to entertain this dispute in view of the provisions of sections 39 and 40 of the Political Parties Act<sup>[23]</sup>. Differently stated, the phrase that best describes the Preliminary objection under consideration is whether **this suit is bad in law under the doctrine of exhaustion of statutory provided dispute resolution mechanism.**

28. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. I have severally stated that this doctrine is now of esteemed juridical lineage in Kenya<sup>[24]</sup> and was felicitously stated by the Court of Appeal<sup>[25]</sup> in *Speaker of National Assembly vs Karume*<sup>[26]</sup> in the following words:-

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

29. The above case was decided before the promulgation of Constitution of Kenya. However, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.<sup>[27]</sup> The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*,<sup>[28]</sup> where it stated that:-

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

30. In the *Matter of the Mui Coal Basin Local Community*,<sup>[29]</sup> the High Court stated the rationale thus:-

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

31. This court has severally observed that from the above jurisprudence, at least two principles are discernible. *First*, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.<sup>[30]</sup>

32. The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This is the reasoning **Mr. Awele** emphasized in his submissions basing his arguments on *Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others*.<sup>[31]</sup> However, **Mr. Awele** overlooked the reasoning of the court in the said case, which emphasized the ability of the statutory forum to balance the issues in the dispute. There is no argument before me nor was it proved that the Respondent's Internal Dispute Resolution Mechanism cannot resolve the dispute between the *ex parte* applicant and the Respondent.

33. Secondly, the crux of the dispute in *Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others*<sup>[32]</sup> involved procurement of ballot papers for the 2017 general elections. There were numerous issues citing violations of various provisions of the Constitution among them Article 227. The court properly addressing itself to the issues under consideration was clear in its mind that the Public Procurement Review Board could not resolve such issues. That is the context within which the said decision was made, hence, the facts are totally distinguishable from the facts presented in this case which is a dispute between a member and a political party, a dispute within the meaning of section 39 of the act.

34. **Mr. Awele** also relied on *Mohamed Ali Baadi and Others v Attorney General & 11 others*<sup>[33]</sup> where the court considered and determined several jurisdictional issues among them the jurisdiction of the National Environment Tribunal *vis a vis* the jurisdiction of the high court and the scope and mandate of the said tribunal. The court also considered the jurisdiction of the Environment and Land Court *vis a vis* the jurisdiction of the high court, the issues touching on national and county governments among others. The court found that the case presented a mixture of issues and concluded that in hybrid cases, the application of the predominant test applies. The predominant issues in the said case fell within the ambit of the jurisdiction of the High Court. Simply stated, the court appreciated a mixture of issues in the said case but was clear that it was not possible to adopt a separationist approach, that is, isolate issues falling within its jurisdiction, which were predominant, and leave the others which arose because of the constitutional violations. Such is not the situation in this case whose dispute is narrow in the sense that it falls under section 39 of the Political Parties Act.<sup>[34]</sup>

35. It is clear that the above cases are distinguishable from the present case. With respect, the same is true about majority of the other cases relied upon by **Mr. Awele**. For example, **Mr. Awele** cited *R v Secretary of the Firearms Licensing Board & 2 Others ex parte Senator Johnson Muthama*.<sup>[35]</sup> A reading of the said case reveals that the court found that at the time of granting leave, the court had already granted the applicant the exemption. The applicant has not been granted an exemption in this case nor did he apply for it, hence, the decision has no relevancy to the circumstances of this case.

36. I am compelled to repeat that my often-stated statement that a case is only an authority for what it decides. This was correctly captured in the following passage:-<sup>[36]</sup>

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)

37. The ratio of any decision must be understood in the background of the facts of the particular case.<sup>[37]</sup> A case is only an authority for what it actually decides, and not what logically follows from it.<sup>[38]</sup> It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.<sup>[39]</sup>

38. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.<sup>[40]</sup> In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.<sup>[41]</sup> To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.<sup>[42]</sup>

39. As **Mr. Awele** correctly pointed out, the substance of this objection stands on the provisions of section **9(2)** and **(4)** of the Fair Administrative Action Act<sup>[43]</sup> which provides that a court may in exceptional circumstances entertain a case notwithstanding the requirement for exhaustion, subject to the applicant applying for exemption from the court. However, **Mr. Awele** argued that his reading of the provision is that the court may on its own motion and in the interests of justice grant an exemption.

40. Section **9(2)** of the Fair Administrative Action Act,<sup>[44]</sup> provides that the High Court or a subordinate court under subsection **(1)** **shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.** Also relevant is sub-section **(3)** which provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1)**."

41. It is instructive to note the use of the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.<sup>[45]</sup> There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.<sup>[46]</sup> The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

42. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

43. The word "*shall*" when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.<sup>[47]</sup> The Longman Dictionary of the English Language states that "*shall*" is used to express a command or exhortation or what is **legally mandatory**.<sup>[48]</sup> Ordinarily the words '*shall*' and '*must*' are mandatory and the word '*may*' is directory.

44. A proper construction of section **9(2) & (3)** above leads to the conclusion that it is couched in mandatory terms. The only way out is the exception provided by section **9(4)**, which provides that: - "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. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

45. In my view, what constitutes exceptional circumstances depends on the facts of each case<sup>[49]</sup> and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. In addition, the Fair Administrative Action Act<sup>[50]</sup> is also heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance. Flowing from this observation, I find that the following points from a leading South African decision rendered by **Thring J** relevant:-<sup>[51]</sup>"

i. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . ."

ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

iv. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

46. Additionally, in another South Africa decision[52] the court said the following about what constitutes exceptional circumstances:-

"What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

47. I should perhaps add that there is no definition of ‘exceptional circumstances’ in the Fair Administrative Action Act, [53] but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided. [54]

48. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

49. As stated above, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case. There was no attempt to demonstrate that the internal remedy would not be effective and/or that its pursuit would be futile for this court may permit the applicant to approach the court directly. There was no argument that the appellate tribunal has developed a rigid policy which renders the requirement for exhaustion futile.

50. It has not been established that applying the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of this case suggests otherwise. The provisions are very clear on the jurisdiction of the Tribunal. It has not been shown that the mechanism is not effective nor has it been demonstrated that the *ex parte* applicant cannot obtain an effective remedy from the Tribunal. The allegations that the tribunal is likely to be biased are mere apprehensions that do not fall within the ambit of the tests developed by the courts over the time. In my view, the applicant ought to appear before the forum and raise his objections, so that his opponent can respond and leave to the forum to render a ruling. Such a ruling will be appealable as the law permits.

51. The second requirement is that on application by the applicant, the court may exempt the person from the obligation. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the Fair Administrative Action Act.[55] The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[56] Section 9(4) of the Fair Administrative Action Act[57] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. No such application for exemption was made to this court prior to filing this application. In my view **Mr. Awele’s** arguments suggests that a party can by-pass the requirement to apply for an exemption and get the exemption from the court under the court’s inherent powers. Unfortunately, this argument does not present the correct construction of section 9(4). My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.

52. As stated above, the law is that Section 9(4) of the Fair Administrative Action Act[58] postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. Suggesting that an applicant can simply wait for the court to invoke its inherent powers without any application, is in my view, a dangerous step not contemplated by section 9(4). The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine.

53. No competent application was presented before this court to determination the question whether or not the *ex parte* applicant demonstrated exceptional circumstances; nor do I see any exceptional circumstances in the circumstances of this case even if I were to invoke this court’s jurisdiction as counsel suggested.

54. Perhaps, I should add that it is uncontested that the impugned decision constitutes an administrative action as defined in section 2 of the Fair Administrative Action Act.[59] Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional circumstances to exempt him from this requirement.[60] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the

Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.<sup>[61]</sup> An internal remedy is adequate if it is capable of redressing the complaint.<sup>[62]</sup>

55. There was no argument before me that the internal remedy is not effective. There was no suggestion that the remedy under the act does not offer a prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. Lastly, there was no suggestion, even in the slightest manner that the internal remedy is inadequate and incapable of redressing the complaint.

56. The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it. No argument was advanced that the mechanism under the act is not adequate nor do I find any reason to find or hold so.

57. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This argument that the Tribunal is likely to be biased is farfetched and as stated above, the applicant had the option of raising an objection at the forum.

58. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. No argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute.

59. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the *ex parte* applicant ought to have exhausted the available mechanism before approaching this court. I find that this case offends section 9 (2) of the Fair Administrative Action Act.<sup>[63]</sup> The *ex parte* applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the Fair Administrative Action Act.<sup>[64]</sup>

60. In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail. Consequently, I dismiss the application dated 1<sup>st</sup> April 2019 with no orders costs and direct that the *ex parte* applicant must first exhaust the statutory dispute resolution mechanism before approaching this court.

Orders accordingly.

Signed, dated and delivered at Nairobi this 30<sup>th</sup> day of April 2019

**John M. Mativo**

**Judge**

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<sup>[1]</sup> {1969} EA 696 at page 701.

<sup>[2]</sup> Act No. 11 of 2011.

<sup>[3]</sup> Act No. 4 of 2015.

<sup>[4]</sup> Ibid.

<sup>[5]</sup> Act No. 11 of 2011.

<sup>[6]</sup> Act No. 4 of 2015.

<sup>[7]</sup> {2015}e KLR

<sup>[8]</sup> {2017} e KLR.

<sup>[9]</sup> Civil Appeal No. 23 of 2013.

<sup>[10]</sup> Civil Appeal No. 50 of 1989.

<sup>[11]</sup> Act No. 4 of 2015.

[12] Ibid.

[13] {2019} e KLR.

[14] {2018} e KLR.

[15] {2017} eKLR.

[16] {2018} eKLR.

[17] {2018} eKLR.

[18] Citing *R v Disciplinary Tribunal of the Law Society of Kenya ex parte John Wacira Wambugu & 2 Others* {2016} e KLR

[19] Citing *Jaset Enterprises Limited v District General National Transport and Safety Authority* {2017}eKLR

[20] {2018}e KLR

[21] Act No. 11 of 2011.

[22] Act No. 4 of 2015.

[23] Act No. 11 of 2011.

[24] *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR

[25] Ibid.

[26] {1992} KLR 21.

[27] Ibid.

[28] {2015} eKLR.

[29] {2015} eKLR

[30] Ibid.

[31] Supra.

[32] Supra

[33] {2018} e KLR.

[34] Act No. 11 of 2011.

[35] {2018} eKLR.

[36] As observed in *State of Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967

[37] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986

[38] Ibid

[39] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

[40] In the High Court of Delhi at New Delhi February 26, 2007 W.P. (C).No.6254/2006, *Prashant Vats v University of Delhi & Anr.* (Citing Lord Denning).

[41] Ibid.

[42] Ibid.

[43] Act No. 4 of 2015.

[44] Act No. 4 of 2015.

[45] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions*. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2 ).

[46] *Ibid*.

[47] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[48] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[49] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[50] Act No. 4 of 2015.

[51] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

[52] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 39, Mokgoro J

[53] Act No. 4 of 2015.

[54] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[55] Act No. 4 of 2015.

[56] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[57] Act No. 4 of 2015.

[58] Act No. 4 of 2015.

[59] Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

[60] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[61] *Ibid* para 44.

[62] *Ibid* paras 42, 43 and 45.

[63] Act No. 4 of 2015.

[64] *Ibid*.