



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 175 OF 2017

**IN THE MATTER OF ARTICLES 27,47,48,50 AND 169 OF THE CONSTITUTION OF KENYA,
2010**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26, LAWS OF
KENYA**

AND

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, ACT NO. 4 OF 2015, LAWS
OF KENYA.**

AND

IN THE MATTER OF THE COOPERATIVE SOCIETIES ACT, CAP 490, LAWS OF KENYA

AND

**IN THE MATTER OF CO-OPERATIVE TRIBUNAL (PRACTICE AND PROCEDURE) RULES,
2009**

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
PROCEEDINGS**

BETWEEN

JOSEPH MUISYO NZIOKAAPPLICANT

VERSUS

THE CHAIRMAN,

THE CO-OPERATIVE TRIBUNAL AT NAIROBI1ST RESPONDENT

NGOS COORDINATION BOARD.....2ND RESPONDENT

KANGUNDO MULTIPURPOSE

CO-OPERATIVE SOCIETY LIMITEDINTERESTED PARTY

RULING

1. By a chamber summons dated 10th April 2017 and filed in court on 11th April 2017, the exparte applicant Joseph Muisyo Nzioka seeks from this court:

a)spent

b) That leave be granted to the applicant herein to apply for an order of certiorari to remove and bring to this Honourable court for the purposes of quashing, the order issued by the respondent on 23rd November, 2016 in Co-operative Tribunal case No.95 of 2014, Kangundo Multipurpose Co-operative Society Ltd vs Joseph Muisyo Nzioka.

c) That leave be granted herein to apply for an order of mandamus compelling the Co-operative Tribunal at Nairobi, the respondent herein, to hear and determine the applicant's application dated 25th May 2015 on its merits in Co-operative Tribunal case No. 95 of 2014, Kangundo Multipurpose Co-operative Society vs Joseph Muisyo Nzioka.

d) That the leave granted herein do operate as stay and/or a suspension of the operation of the decree dated 4th February, 2015 extracted and issued by the respondent in Co-operative Tribunal case No. 95 of 2014, Kangundo Multipurpose Co-operative Society Ltd vs Joseph Muisyo Nzioka, pending the hearing and determination of the suit herein.

e) That costs of this application be provided for.

2. The chamber summons is predicated on the statutory statement, verifying affidavit sworn by the exparte applicant Joseph Muisyo Nzioka and the annexed exhibits.

3. The exparte applicant's case is that the interested party herein Kangundo Multipurpose Co-operative Society Ltd filed suit against the exparte applicant before the respondent co-operative tribunal vide a statement of claim dated 24th February 2014 alleging that the applicant had been involved in the mismanagement of the interested party society while serving as a member of its management committee, which allegation was predicated on an impugned inquiry report dated June, 2010.

4. An amended statement of claim was filed on 26th May 2014. That later the interested party filed an affidavit of service showing that it had served summons to enter appearance and all the pleadings and witness statements upon the applicant and which affidavit alleged that the applicant had not appended his signature to any of the served documents.

5. That based on the alleged service of pleadings and summons to enter appearance upon the applicant, the respondent tribunal entered judgment on 16th December 2014 in default of appearance and defence upon a request by the interested party made on 10th December 2014 and a decree was drawn to that effect.

6. The exparte applicant asserts that he never received any summons to enter appearance or pleadings and

that he was only made aware of the existence of the proceedings when he was faced with execution of decree based on *ex parte* judgment entered against him on 16th December 2014.

7. That *vide* an application dated 25th May 2015 the applicant sought for setting aside of the *ex parte* judgment and all the consequential orders.

8. That the interested party herein filed a preliminary objection on 5th June 2015 alleging that the tribunal was *functus officio*, could not grant the orders sought and that the applicant ought to have filed an appeal to the High Court within 30 days on matters of law only; which preliminary objection was upheld by the ruling made on 23rd November 2016 dismissing the applicant's application dated 25th May 2015.

9. The *ex parte* applicant claims that the respondent in its ruling alleged that it lacked jurisdiction to reopen its own cases, which was a clear violation of Rule 17 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009 which provides that a judgment, Order or award made *ex parte* under this Rules may, on application be set aside on such terms as may be just.

10. That therefore by upholding the preliminary objection, the respondent acted against the tenets of natural justice by infringing on the applicant's right to be heard which has exposed the applicant to imminent threat of execution by way of attachment of his property.

11. That the matters raised are for the public interest of members of co-operative societies. The amount which the applicant was ordered to pay was kshs 2,900,000 together with interest and costs of the claim.

12. In response to the chamber summons, the interested party Kangundo Multipurpose Co-operative Society Ltd filed a replying affidavit sworn by John Munyao Muindi on 16th May 2017 and a preliminary objection dated the same day as the replying affidavit contending that the chamber summons as filed seeks to oust the clear statutory provisions of Section 74(1) and (2) of the Cooperative Societies Act, Cap 74 Laws of Kenya which provides for redress for any grievance hence Order 53 of the Civil Procedure Rules cannot circumvent the above statutory provisions.

13. Secondly, that the applicant is guilty of non-disclosure of material facts in failing to disclose to the court that on 24th February 2017 when the matter before the tribunal came up for notice to show cause, an order was issued after the applicant offered to settle the decretal sum within 30 days which is an admission of liability.

14. Third, that the application seeks to challenge the order of surcharge by the Commissioner of Co-operative Development made on 30th September 2010 and adopted as judgment of the Co-operative Tribunal on 16th December 2014 and which final orders would be subject to a Judicial Review application for orders of *certiorari*, and not the order disallowing the setting aside of the judgment hence the chamber summons has been filed out of time of six months under Order 53 Rule (2) of the Civil Procedure Rules.

15. Fourth, that the orders sought to be questioned do not fall within the purview of the Judicial Review process in that the applicant must prove illegality, irrationality and procedural impropriety. That this was not the case here as the tribunal arrived at the decision after an *inter partes* hearing of the application for setting aside *ex parte* judgment and the preliminary objection.

16. The *ex parte* applicant filed a further affidavit sworn on 22nd September 2017 deposing that the application to set aside *ex parte* judgment was not heard *inter partes* because the respondent's ruling of 23rd November 2016 upheld the interested party's preliminary objection of 5th June 2015.

17. That the preliminary objection raised irrelevant issues to the application for setting aside of *ex parte* judgment. That the preliminary objection could only be canvassed after the setting aside of

the exparte judgment and that the preliminary objection was not a preliminary objection in law as far as the application for setting aside exparte judgment was concerned.

18. That by the time the applicant was made aware of the Tribunal case No. 95/2014, the 30 days for filing of the appeal had already lapsed.

19. The applicant's counsel also filed written submissions dated 15th May 2017 but all the parties relied on their pleadings, affidavit and the preliminary objection.

20. The exparte applicant's submissions sets out the parameters for grant of Judicial Review as stated in the **Republic vs Kenya National Examinations Council Exparte Gathenji & Others CA 266/1996; Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd CA 185/2001; Pastoli vs Kabale District Local Government Council and Others[2008] 2 EA 300; Council of Civil Unions vs Minister for the Civil Services[1985] AC 2; and an application by Bukoba Gymkhana Club [1963] EA 478.**

21. According to the applicant, the respondent's decision under challenge is tainted with illegality, irrationality and procedural impropriety as set out in the **Pastoli** (supra) case.

22. On illegality, it was submitted that the tribunal disregarded Rule 17 of the Co-operative Tribunal(Practice and Procedure) Rules, 2009 which allows the Tribunal to set aside, on application, a judgment or order or award made exparte.

23. That the decision was irrational because it failed to provide a forum for the applicant to be heard on the application to set aside the exparte judgment and consequential orders.

24. On procedural impropriety it was submitted that the respondent in making the impugned decision breached the Rules of Natural Justice as it condemned the applicant unheard. Reliance was placed on **Republic vs The Honourable The Chief Justice of Kenya & Others exparte Moyo Maiya Ole Keiwua Nairobi HC Miscellaneous Application No. 1298/2004** that the right to be heard has intrinsic and instrumental facets.

25. Further reliance was placed on Article 50(1) of the Constitution of Kenya on the right to a fair hearing. It was submitted that the decision was made by the respondent without hearing the exparte applicant hence the case is within the purview of Judicial Review. It was submitted, replying on Section 9(3) of the Law Reform Act and Order 53 Rule (2) of the Civil Procedure Rules, that the above provisions permit the bringing of Judicial Review applications where there is a right of appeal against the decision with a discretion to adjourn Judicial Review proceedings where an appeal has been filed, until the appeal is heard and determined or the time for filing of the appeal has expired.

26. It was therefore submitted that albeit the impugned decision is subject to appeal under Section 74(2) of the Co-operatives Societies Act, Cap 490 Laws of Kenya, the impugned decision was made on 23rd November 2016 and by the time these proceedings were instituted on 11th April 2017, the time for appealing had long expired.

27. It was therefore submitted that failure to file an appeal is not fatal and that as the application falls within the purview of Judicial Review, It is properly before this court.

28. Reliance was placed on **Eldoret ELC 5/2014 JR John Kotit vs Patrick K. Cheruiyot & 3 Others** where it was held that availability of other remedies is not a bar to the granting of Judicial Review.

29. The interested party and the respondent did not file any submissions but the interested party relied on the preliminary objection, replying affidavit and the supplementary affidavit filed on record and urged the court to adopt them as canvassing the application.

30. On 2nd October 2017 the court directed that the preliminary objection as filed be deemed to be a response to the chamber summons.

DETERMINATION

31. I have considered the foregoing and in my view, the main issues for determination in this matter are:

- 1) *Whether this court has jurisdiction to hear and determine the application for leave and stay.*
- 2) *Whether the application for leave and stay is merited.*
- 3) *What orders should this court make.*
- 4) *Who should bear costs of the application.*

32. On whether this court has jurisdiction to hear and determine the application for leave and stay as filed, the interested party raised a preliminary objection contending that the provisions of Section 74(2) of the Co-operatives Societies Act ousts the jurisdiction of the this court to hear and determine the application because the said provision makes it clear that any person aggrieved by the decision of the tribunal should file an appeal to the High Court within 30 days of the date of the decision.

33. On the part of the applicant, it is contended that the above provision does not oust the jurisdiction of this court because the provisions of Section 9(3) of the Law Reform Act and Order 53 Rule (2) of the Civil Procedure Rules are clear that an aggrieved party may bring Judicial Review proceedings where there is a right of appeal against the decision with a discretion to adjourn Judicial Review proceedings where an appeal has been filed, until the appeal is heard and determined or the time for filing of the appeal has expired.

34. It was submitted that in this case, the decision under challenge was made on 23rd November 2016 and by the time these proceedings were instituted on 11th April 2017, the time for appealing had long expired.

35. To determine the above issue of jurisdiction the court does appreciate that jurisdiction is everything, without which a court of law acts in vain hence the moment a court of law finds that it has no jurisdiction, it must down its tools and do no more. Jurisdiction is conferred by the Constitution or by statute. Where a court of law has no jurisdiction or where its jurisdiction is ousted by statute or the Constitution, the court cannot by craft, or by consent of parties arrogate itself or by the parties consent, jurisdiction to entertain a matter before it as the consequences would be that such proceedings undertaken and decision made without jurisdiction would be a nullity ab initio.

36. The locus classicus case in Kenya on jurisdiction is the owners of **Motor Vessel ‘Lilian S’ vs Caltex Oil (K) Ltd.**

37. The court notes that Section 74(2) of the Co-operative Societies Act (Cap 490) Laws of Kenya) provides for an avenue for an aggrieved party to challenge the decision of the Tribunal. It provides:

“ A party aggrieved by the decision of the Tribunal may within 30 days appeal to the High Court on matters of law.”

38. However, the applicant claims that he could not have appealed to the High Court because by the time he came to learn of the existence of the *exparte* judgment, the judgment and decree were already being executed to recover the surcharged amount.

39. Further, that he was not served with summons to enter appearance and pleadings as amended and filed before the tribunal hence the suit proceeded *exparte* to his detriment, and that is why he applied to set aside the *exparte* judgment and all the consequential orders which application was dismissed

following a preliminary objection raised by the interested party before the tribunal alleging inter alia that the tribunal is *factus officio* upon adopting the report of the Commissioner of Co-operative Development.

40. The court notes that there was a statement of claim filed before the tribunal by the interested party. It is dated 24th February 2014 seeking for payment of shs 2,900,000 being the surcharged amount by the Commissioner for Co-operative Development of Kenya plus interest and costs. The applicant never appealed to the tribunal challenging the decision of the Commissioner as stipulated by Section 74(1) of the Co-operatives Societies Act, within the 30 days stipulated in the Act.

41. Thereafter the interested party filed the statement of claim dated 24th February 2014 before the tribunal seeking for the payment of the surcharged amount, and it obtained *exparte* judgment in default of appearance and defence, which judgment was in the process of being executed when these proceedings were instituted.

42. It follows that the applicant could be expected to have filed an appeal to the High Court challenging proceedings which had proceeded *exparte*, as Rule 17 of the Co-operative Tribunal (Practice Rules), 2009 are clear that such judgment or order made *exparte* could, on application be set aside. It would therefore be expected that the applicant could appeal against a decision refusing to set aside the *exparte* judgment and all consequential orders since he did not participate in the hearing of the substantive claim before the respondent tribunal.

43. Instead, the applicant approached this court seeking for leave to institute Judicial Review proceedings challenging the decision of the respondent refusing to set aside the *exparte* judgment.

44. The question is whether this court has jurisdiction to hear and determine these proceedings for leave and stay. The applicant has relied on Section 9(2) of the Law Reform Act and Order 53 Rule (2) of the Civil Procedure Rules to assert that where the proceeding is subject to appeal and a time limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

45. With utmost respect to the *exparte* applicant, there is no allegation that he was not aware of the decision of 23rd November 2016 as the decision was the outcome of his application dated 25th May 2015 seeking to set aside the *exparte* judgment and decree of the respondent tribunal made on 16th December 2014 and issued on 4th February 2015 respectively in favour of the interested party. The applicant therefore having known the decision dismissing his application for setting aside *exparte* judgment as at 23rd December 2016, the question is why did he wait until 11th April 2017 when he approached this court by way of an application for leave to institute Judicial Review Proceedings?

46. If the time for filing an appeal had lapsed, the applicant had an opportunity to apply for extension of time to file an appeal as stipulate in Order 42 of the Civil Procedure Rules.

47. In addition the interested party has availed to court an order issued on 13th April 2017 but made on 24th February 2017 by the respondent tribunal showing that the applicant was participating in the execution proceedings and made a proposal to pay the full amount in 30 days and in default execution to issue by way of warrant, but never disclosed that fact to this court and neither did he explain the reason for non disclosure or delay in bringing these proceedings after the said order was made on 24th February 2017.

48. Further, the *exparte* applicant's application is not only brought under the provisions of Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, but also under the Fair Administrative Action Act, No. 4 of 2015 which latter Act implements Article 47 of the Constitution on the right to Fair Administrative Action, claiming that he was not heard by the respondent on his application to set aside the *exparte* judgment and its consequential orders; and that the tribunal only upheld the preliminary objections raised by the interested party on account that the tribunal has no

jurisdiction to reopen the case; the respondent was served with orders; and that the respondent should appeal.

49. Section 9 of the Fair Administrative Action Act, 2015 which Act came into force on 17th June 2015 stipulates:

1) Subject to Subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for Judicial Review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

2) The High Court or a subordinate court under Subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in Subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under Subsection (1).

4) Notwithstanding Subsection (3) The High Court or 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”

50. In the instant case, it is the view of this court that the applicant's application for setting aside the exparte judgment having been dismissed on a preliminary objection, it is not for this court to determine the merits of that dismissal. The applicant had an opportunity to seek leave to appeal to the High Court. The tribunal by definition under Article 169(1) (d) of the Constitution is a subordinate court and therefore even assuming that the decision based on the preliminary objection raised before the tribunal by the interested party was not appealable to the High Court as of right, as stipulated in Orders 43 & 75 of the Civil Procedure Rules, the applicant could still have sought leave to appeal to the High Court. Instead, the applicant by-passed the appeal process stipulated under Section 74 of the Co-operative Societies Act and approached this court seeking leave to institute Judicial Review proceedings.

51. Section 9 of the Fair Administrative Action Act is an Act of Parliament implementing Article 47 of the Constitution and for connected purposes. Although the applicant claims that he was not heard by the tribunal and that the tribunal only determined his application on the preliminary objection raised, Order 51 of the Civil Procedure Rules is clear that a party who wishes to oppose an application may file a replying affidavit, grounds of opposition or a preliminary objection.

52. A preliminary objection founded on a pure point of law can dispose of the entire application for setting aside an exparte judgment. Therefore, the fact that it is the preliminary objection which has considered in the process of hearing the application for setting aside the exparte judgment does not translate into denial of the applicant to have his application canvassed as it is the preliminary objection that disposed of the application for setting aside of exparte judgment. As stated earlier, whether or not the tribunal correctly arrived at the decision that it had no jurisdiction is a matter that could be competently determined by the Court on Appeal.

53. The provisions of Section 9 of the Fair Administrative Action Act, 2015 mandate this court in exercise of Judicial Review jurisdiction to be satisfied that the applicant has first exhausted the alternative remedies available under the internal mechanisms or under any other written law, before resorting to court.

54. However, in exceptional circumstances and on application, the court may exempt the party from resorting to alternative remedies. In the instant case, the applicant has not made any application for

exemption from resorting to or exhausting the available remedies through an appeal process to the High Court.

55. Further, he has not demonstrated through his application, a prayer seeking exemption on account of exceptional circumstances for the court's consideration. This court is prohibited by the Law Reform Act section 8 thereof from exercising civil or criminal jurisdiction in the exercise of judicial review jurisdiction. I find that the complaint by the applicant is akin to an appeal.

56. The Court of Appeal in **Republic vs National Environment MANAGEMENT Authority (NEMA) CA 84/2010 [2011] e KLR** stated:

“ Regarding the availability of an alternative remedy, such as an appeal, whereas there are occasions when the court will require exhaustion of other remedies of procedures such as execution procedures under the Civil Procedure Act, Cap 21 Laws of Kenya and the Civil Procedure Rules made there under, the availability of such alternative remedy is not a bar to proceedings by way of Judicial Review. They have no concern with the merits of either of the applicant's or respondent's case. This court concerns itself with the review of the decision making process, not whether NEMA had authority to issue a stop order or notice, or whether is an appeal mechanisms.”

57. The court in the above case however stated further:

“.....where there was an alternative remedy and especially where a Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and in determining whether an exceptional should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case. The Learned Judge, in our respectful view, considered these structures and came to the conclusion that the appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect, we agree with the judge.

58. The above Court of Appeal decision was rendered before the enactment of the Fair Administrative Action Act, 2015 but the Court of Appeal recognized the significance of alternative remedies being exhausted first, except in exceptional circumstances. Where parliament has provided or a clear procedure for statutory appeal, the court should not allow the Judicial Review process to be invoked.

59. Emukule J (as he then was) in **Rental Health Care [EPZ] Ltd & Another v Ministry of Health & 5 Others [2015] e KLR** citing with approval **Damian Belfonte vs The Attorney General of Trinidad & Tobago CA 84/2004** persuasively observed that:

“ where there is a parallel remedy, constitutional relief should not be made unless the circumstances of which the complaint is made include some feature which is appropriate to take that course.

As a general rule, there must be some feature, which, at least, arguably indicates redress otherwise available would not be adequate.

To seek constitutional relief in the absence of such feature would be misuse, an abuse of the court process.”

60. The same judge Emukule in **Republic vs PM Lamu Magistrate's Court & Another exparte Kenya Forest Service** citing with approval the Court of Appeal decision in **Eliud Wafula Mailo v Minister of Agriculture & 3 Others [2016] e KLR** was categorical, as extract from **Halbury's Laws of England, VOL 10, paragraph 319** that:

“ The subject’s rights to access the courts may be taken away or restricted by statute.....

“ where a tribunal with exclusive jurisdiction has been specified by a specific statute to deal with claims arising under a statute, the County Court’s jurisdiction to deal with these claims is ousted, for where an Act of Parliament creates an obligation for, and enforces the performance of it, it cannot be enforced in any manner.”

61. In this case, as I have stated above, the provisions of Section 74 of the Co-operative societies Act provides for an appeal process of the decision of the tribunal and that is to the High Court. judicial review jurisdiction is not an appeal jurisdiction.

62. Article 50(1) of the Constitution stipulates that:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

63. The appropriate court in the instant case, is the High Court exercising appellate jurisdiction not judicial review jurisdiction. That is the stipulation in Section 74 of the Co-operative Societies Act, and as there is no application before this court citing exceptional circumstances and seeking for exemption from resorting to the High Court by way of an appeal, this court is entitled to decline to entertain the application as intended by the applicant.

64. In **Mutanga Tea and Coffee Company Ltd Vs Shikara Ltd & Another [2015] e KLR**, the Court of Appeal Makhandia, Ouko & M’inoti JJA cited **Speaker of the National Assembly v Karume [2008] 1KLR 425** where it was held:

“.....where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be followed.

The Court of Appeal stated:

“.....This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribe for resolution of particular disputes (Speaker of the National Assembly v Karume) (supra)....see also Kones v Republic & Another Exparte Kimani Wanyoike & 4 others [2008] e KLR 296, it is apparent that in the above cited cases the court was speaking on issues of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first, that Article 159(2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution including, reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

The use of the word ‘including’ leaves no doubt that Article 159(2) (c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, rather undermining a clear Constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3) (a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms, normally have an advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and

that regard, the dispute is resolved in a much more cost effective manner. ...We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded appellant the right to access the High Court by way of an appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison de'tre of the mechanisms provided under the two acts..."

65. More recently the same Court of Appeal in **Samson Vuko v Nelson Kilimo & 2 Others**[2016] e KLR citing with approval its previous decisions including the **Speaker of the National Assembly vs Karume** (supra) maintained that:

“ where there is a clear procedure (forum for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure or forum must be followed.”

66. In the **Mutanga Tea** (supra) case, the Court of Appeal cited the High Court decision with approval in **Rich Productions Ltd v Kenya Pipeline Company Ltd & Another** **Petition No.173/2014** where the court explained why it must be slow to undermine the prescribed alternative dispute resolution mechanisms as follows:

“The reason why the Constitution and the law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with technical competence and the jurisdiction to deal with them.

While the court retains the inherent and wide jurisdiction under Article 165 of the Constitution to supervise bodies such as s the 2nd respondent, such supervision is limited in various respects, which in need not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issued in dispute into constitutional issues when it is not.”

67. In **Republic vs NEMA CA 84/10** (supra) the Court of Appeal upheld a decision of the High Court declining to entertain a Judicial Review Application by a party who had a remedy, which he had not utilized , under the EMCA Act. The Court of Appeal reiterated that *where Parliament has provided an alternative remedy in the form of statutory appeal procedure, it is only in exceptional circumstances that an order of Judicial Review will be granted.* (see also **Vania Investments Pool Ltd vs Capital Markets Authority & 8 Others CA 92/14**)”

68. Therefore, whereas this court has discretion to invoke its Judicial Review jurisdiction in matters where alternative remedies exist, that discretion is not absolute. It is fettered by judicial precedent and Section 9(3) and (4) of the Fair Administrative Action Act and Article 159(2) (c) of the Constitution.

69. There must be exceptional circumstances for this court to bypass the alternative procedure stipulated in law and even then, the applicant invoking exceptional circumstances must apply for such exemption from resorting to alternative procedures/remedies of appeal.

70. On the basis of the above analysis, I am inclined to find and hold that the preliminary objection predicated on jurisdiction of this court succeeds and the same is upheld, striking out the chamber summons dated 10TH April 2017.

71. But even assuming that I was wrong on the above finding and upholding of the preliminary objection raised by the interested party, I would still decline the prayers for leave and stay for reasons that the applicant has not explained to court why upon failing to get orders in his favour on

23rd December 2016 from the tribunal he did not lodge the application for leave or an appeal and waited until 11th April 2017 after he had even pleaded with the tribunal to allow him to settle the whole amount within 30 days from 24th February 2017 on a notice to show cause application by the interested party against the applicant. Delay ousts the discretion of this court in judicial review matters as judicial review remedies are discretionary in nature.

72. It would appear that it was after the applicant had defaulted to settle the decree and on realizing that the warrant of arrest would issue against him that he now invoked the Judicial Review jurisdiction of this court but even then, there is no explanation why he had to wait for all that time

73. Judicial Review is a discretionary remedy and even were the remedy is available, a party invoking the jurisdiction of the court must come to court with expedition and not to wait until the appeal period is over then seek audience before the court. In exercising discretion to grant or not to grant leave, the court must consider the bona fides of the applicant in that in this case he sought for time to settle the decreed amount, delay in bringing the matter in that albeit certiorari has a 6 months ceiling and mandamus has no statutory limit, the court will be reluctant to entertain applications for leave which in its opinion, are an afterthought and brought with the intention of abusing the court process or to defeat execution of decree of a court or tribunal of competent jurisdiction.

74. The applicant having waited from 23rd December 2016 until a notice to show cause was issued against him and on the notice to show cause hearing he asks for 30 days to comply and after that takes his time without explanation for nearly 2 months before seeking Judicial Review cannot benefit from the discretion of this court.

75. In the circumstances, I would still decline to exercise my discretion in the applicant's favour and find that he had no prima facie arguable case for in-depth investigation at the substantive stage and I therefore proceed to dismiss the application for leave and stay.

76. I order each party to bear their own costs of the chamber summons dated 10th April 2017 which is hereby dismissed.

Dated, signed and delivered in open court at Nairobi this 25th Day of January, 2018.

R.E. ABURILI

JUDGE

In the presence of:

Miss Njuguna h/b for Mr Owino for the exparte applicant

N/A for Respondent

N/A for interested party

CA: KOMBO