



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 171 OF 2018

IN THE MATTER OF APPLICATION FOR AN ORDER OF *CERTIORARI*.

AND

IN THE MATTER OF APPLICATION FOR AN ORDER OF *MANDAMUS*

AND

IN THE MATTER OF LAW REFORM ACT SECTION 8 & 9 (CHAPTER 26, LAWS OF KENYA)

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTION 8 OF THE NATIONAL EMPLOYMENT AUTHORITY ACT NO. 3 OF 2016, LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 10, 22, 23, 47 AND 48 OF THE CONSTITUTION OF KENYA.

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL EMPLOYMENT AUTHORITY.....1ST RESPONDENT

THE PRINCIPLE SECRETARY, STATE MINISTRY

OF EAST AFRICA COMMUNITY (EAC), LABOUR

AND SOCIAL SERVICES.....2ND RESPONDENT

CABINET SECRETARY, STATE MINISTRY FOR

EAST AFRICA COMMUNITY (EAC) SERVICES.....3RD RESPONDENT

DIRECTOR GENERAL, NATIONAL

EMPLOYMENT AUTHORITY.....4TH RESPONDENT

AND

MIDDLE EAST CONSULTANCY SERVICES LIMITED.....EX PARTE APPLICANT

JUDGMENT

The parties.

1. The *ex parte* applicant is a limited liability company incorporated in Kenya under the Companies Act.^[1] Its main object is to look, identify employment opportunities and undertake recruitment work.
2. The first Respondent is the National Employment Authority (NEA), a statutory body with powers to sue and be sued on its own name established pursuant to the provisions of the National Employment Authority Act.^[2]
3. The second Respondent is the Principal Secretary, State Ministry for East Africa Community (EAC), Labour and Social Services, and is the Chief Administrator of the first Respondent's parent Ministry.
4. The third Respondent is the Cabinet Secretary, State Ministry for East Africa Community (EAC), Labour and Social Services in charge of the first Respondent's parent Ministry.
5. The fourth Respondent is the Director General of the first Respondent tasked with delivering and coordinating the functions of the first Respondent.

The application.

6. By way of a Notice of Motion dated 8th May 2018, the *ex parte* applicant seeks (a) An order of *Certiorari* to quash the first and fourth Respondent's decision dated 9th March 2018; (b) An order of *Mandamus* compelling the first and fourth Respondents to consider the *ex parte* applicant's documents for registration and register the *ex parte* applicant as recruitment agency; and; (c) Costs of this application to abide the final outcome of the substantive motion.
7. The core grounds relied upon as far as I can discern them from the application and the *ex parte* applicant's verifying Affidavit sworn by **Valentine Mugo**, a Director of the *ex parte* applicant dated 25th April 2018 are that the *ex parte* applicant is a recruitment agency in Kenya with immense network transcending Middle East Countries and works to secure employment opportunities for thousands of Kenyans. The *ex parte* applicant states that in 2017, it applied to be registered as a recruitment agency, but vide a letter dated 9th March 2018, the Respondent "communicated its refusal" stating that the *ex parte* applicant was engaging in illegal recruitment and that the company was bonded to attend Court.
8. The *ex parte* applicant's case is that having complied with all the registration requirements to be registered as a recruitment agent, it had a legitimate expectation that its documents will be considered, processed and ultimately registered. Accordingly, the *ex parte* applicant states that the first and fourth Respondent's letter dated 9th March 2018 requiring it "...to provide a status report of the matter before application is processed" had the effect of denying the *ex parte* applicant its legitimate expectation, which decision was capricious.
9. Further, it states that *ex parte* applicant was not given a hearing; that the decision is unreasonable, illogical, groundless, baseless, unfounded, unjustified and unsound manner, and, that, the purported criminal matter communicated in the above letter was non-existence, and violates Articles 10 and 47 of the Constitution, the Fair Administrative Action Act,^[3] the Public Officers Ethics Act^[4] and Leadership and the Integrity Act.^[5]

Respondent's Response.

10. The Respondent's case as far as I can distil it from the Replying Affidavit of **Joseph Njue**, the first Respondent's Chief Employment Officer is that pursuant to the Security (Amendment) Act, 2014, the institution responsible for the vetting of the applications made by employment bureaus is an inter-ministerial committee consisting of officers from the Ministry responsible for Labour, Immigration, Security, Foreign Affairs and the Attorney General. He averred that the *ex parte* applicant applied for an employment accreditation certificate to operate as a private recruitment agency on 16th June 2016, and, as the procedure requires, the applicant's were inspected on 8th August 2016. The Respondent further states that on 18th November 2016, the *ex parte* applicant was issued with a notification of approval by the chair of the inter-ministerial committee advising it to pay the registration fees within 14 days from the date of the notification, but, the *ex parte* applicant failed to pay the required fee, and therefore could not be issued with a certificate.
11. **Mr. Njue** further states that the *ex parte* applicant was inspected on 21st July 2017 for further consideration by the committee, and on 3rd August 2017, the *ex parte* applicant's file was submitted to the vetting committee for consideration but the approval was deferred because it had failed to provide police clearance certificate, tax compliance certificate and county government operating license. He also states that the *ex parte* applicant later provided the documents and the file was re-submitted to the vetting committee for consideration on 15th February 2018. He averred that in the committee meeting of 15th February 2018, the secretariat to the vetting committee presented a summary report dated 2nd February 2018 on all recruitments agencies under review, and, the report indicated that the *ex parte* applicant had a pending complaint that was reported at Shauri Moyo Police Station relating to an alleged illegal recruitment. He averred that the committee decided to put on hold the issuance of a certificate until it received a status report on the matter, which decision was reasonable and within its legal mandate and was aimed at helping the committee to arrive at an informed decision.

12. He further averred that on 9th March 2018, the Director General, National Employment Authority wrote a letter to the *ex parte* applicant informing it of the committee's decision and requesting it to provide a status report on the matter to facilitate further processing of the application. Further, he averred that on 16th March 2018, the *ex parte* applicant replied to the above letter disputing the complaint, however, on 2nd March 2018, the Director General received a letter from the OCS Shauri Moyo Police Station confirming the existence of the complaint, and that the case was to be submitted to the DPP for directions upon gathering more information. Also, he averred that the Director General received a letter from the Commission on Administration of Justice (Office of the Ombudsman) regarding allegations of exploitation of Kenyans by the *ex-parte* applicant.

13. He averred that it is not in the interests of the public to compel the first Respondent to issue a certificate of registration to the *ex parte* applicant in blatant disregard of the above issues, but, it is in public interest to allow the first Respondent and the vetting committee the opportunity to investigate the allegations to satisfy themselves that the *ex parte* applicant should indeed be registered. Further, he averred that this Court lacks jurisdiction to hear this case by dint of section 56 (8) of the Labour Institutions Act.^[6]

Issues for determination.

14. Upon carefully considering the parties' opposing positions and the submissions by their respective advocates, I find that the following issues distil themselves for determination:-

a. Whether this Court lacks jurisdiction to entertain this case.

b. Whether the *ex parte* applicant's right to legitimate expectation was violated.

c. Whether the doctrine of ripeness applies to this case.

d. Whether the *ex parte* applicant has established any grounds to warrant the Court to grant the Judicial Review orders sought.

a. Whether this Court lacks jurisdiction to entertain this case.

15. The Respondent in his Replying Affidavit cited section 56 (8) of Labour Institutions Act^[7] and averred that this Court has no jurisdiction to entertain this matter.

16. Interestingly, the *ex parte* applicant's advocate did not address this highly dispositive and pertinent issue in his submissions.

17. Jurisdiction is the very basis on which any Tribunal or Court tries a case; it is the lifeline of all trials. In other words, a trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to the Court; *a fortiori* the Court *can suo motu* raise it.

18. By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.

19. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or Tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or Tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or Tribunal has been given power to determine conclusively whether the fact exist.

20. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.^[8] A Court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent.^[9]

21. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*^[10] where the late Justice Nyarangi of the Court of Appeal held as follows:-

"... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

22. In general, a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court*^[11] had this to say:-

"Jurisdiction is determined on the basis of the pleadings,^[12]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the

applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

23. It is trite that a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws. [13] Section 56 (8) of the Labour Institutions Act [14] provides that "Any person aggrieved by a decision of the Director made in the exercise of his functions under this section may appeal against such decision to the Industrial Court."

24. It is the duty of Courts of justice to try to get at the real intention of the legislation by carefully attending to the whole scope of the statute to be considered. 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.

25. Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. *Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.*

26. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

27. All that the Court has to see at the very outset is, what does the provision say? The Courts are bound by the mandate of the Legislature and once it has expressed its intention in words which have a clear significance and meaning, the Court is precluded from speculating. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. The Courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

28. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question. The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others* [15] observed that:-

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

29. My reading of Section 56 (8) cited above leaves me with no doubt that that Parliament was very clear that disputes arising from the exercise of the fourth Respondent's functions under the above section are to be appealed against at the Industrial Court. Consequently, I find and hold that this Court has no jurisdiction to entertain this matter by dint of the above section. On this ground alone, the *ex parte* applicants application must fail.

b. Whether the *ex parte* applicant's right to legitimate expectation was violated.

30. Counsel for the *ex parte* applicant argued that having submitted all the required documents, and, having duly complied with all the legal requirements, the *ex parte* applicant had a legitimate expectation that its application would be successful. He cited *Communication Commission of Kenya & 5 Others vs Royal Media Services & 5 Others* [16] where the Court stated that legitimate expectation would arise when a body, by representation or by past practice has aroused an expectation that is within its power to fulfil, and, for an expectation to be legitimate, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation. [17]

31. The Respondent's counsel submitted that the *ex parte* applicant has not proved the essentials of legitimate expectation. [18] He also argued that an applicant must satisfy the requirements laid down in section 56 of the Labour Institutions act [19] which include satisfying vetting requirements and that legitimate promise must be within the confines of the law. [20]

32. Whereas the authorities cited by the *ex parte* applicants counsel represent the correct interpretation of the law, the facts disclosed in this case warrant a close scrutiny to establish whether they truly disclose violation of the right to legitimate expectation as alleged, and, whether, the facts of this case satisfy the principles enunciated in the said cases. Differently said, are the said authorities relevant to the facts of this case. I am reminded of the wise saying that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:- [21]

*"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. On this topic this is what Earl of Halsbury, LC said in *Quinn vs. Leatham*, [22] that "Now before discussing the case of *Allen vs. Flood* [23] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that 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. The other is that a case is only an authority for what it actually decides...." (Emphasis added)*

33. The ratio of any decision must be understood in the background of the facts of that case. [24] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. [25] 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. [26]

34. 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. [27] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. [28] 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. [29]

35. Its common ground that the fourth respondent's mandate stems from section 56 of the act. Section 56(2) provides that the application shall be vetted by the Inter- Ministerial Committee established under section 54A of the Act. It is a requirement that the applicant satisfies the vetting process under section 54A. The section also provides that the director may have regard to any other relevant considerations in deciding whether the application should be granted. The section also provides that the director may refuse to grant an application made under the act and give reasons for refusal.

36. A proper construction and architecture of section 56 leaves no doubt that upon submitting all the required documents, the application must be subjected to the laid down process including vetting. The applicant cannot assert right to legitimate expectation just because it submitted the required documents. It is a legal requirement that the application must be subjected to the laid down legal process and be vetted and approved as the law demands. A strict adherence to the statutory process cannot amount to a violation of the right to legitimate expectation.

37. The section clearly provides for the registration process. The Director is bound to adhere to the clear provisions of the law. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our Constitution. It follows that for the registration the *ex parte* applicant is seeking to be valid, it must be processed in strict conformity with the law. It is not sufficient for the applicant to state that it has assembled all the required documents and hide behind the principle of legitimate expectation. The applicant must as a legal requirement allow the process to undergo the requisite legal processes.

38. Differently put, the registration must be undertaken in conformity with the law in a process that must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised Public power . . . can be validly exercised only if it is clearly sourced in law" [30]

39. The fourth Respondent has not only a statutory duty but also a moral duty to uphold the law and ensure due compliance with the law and Regulations governing the registration in question. It would in general be wrong to whittle away the obligation of the fourth Respondent to uphold the law. A lenient approach could be an open invitation to the fourth Respondent to act against its legal mandate.

40. When the constitutionality of an act or omission of a statutory or public body is challenged, the Court's duty is first to determine whether, through "the application of all legitimate interpretive aids, [31] the impugned decision, or act or omission is capable of being read in a manner that is constitutionally or legally compliant. Differently put, whether an act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution [32] and the relevant statutory provisions.

41. Addressing the subject of legitimate expectation, *H. W. R. Wade & C. F. Forsyth* [33] at pages 449 to 450, thus:-

"It is not enough that an expectation should exist; it must in addition be legitimate. ... First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation. Second, clear statutory words, of course, override an expectation howsoever founded. Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy."

"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice." (Emphasis added)

42. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. The relevant provisions of the law cited earlier clearly show that the first and fourth Respondent's decision is grounded on the provisions Section 56 discussed above. In the circumstances, the plea for violation of the right to legitimate expectation has no basis and must fail.

c. Whether the doctrine of ripeness applies to this case.

43. The uncontested facts of this case are that the fourth Respondent in the exercise of its statutory mandate which includes vetting applications obtained information from the police that the *ex parte* applicant had a pending complaint against it. The fourth respondent wrote to the *ex parte* applicant on 9th March 2018 requesting the *ex parte* applicant "to provide a status report of the matter before the

application is processed." This letter clearly requested the applicant to respond to the allegations. The *ex parte* applicant wrote through his advocates disputing the allegations. The *ex parte* applicant never bothered to secure information from the police clearing them or explaining the status of the complaint. On the contrary, the police wrote to confirm the existence of the complaint. Instead of making efforts to explain the matter further, the *ex parte* applicant moved to this Court citing violation of the right to be heard and right to a Fair Administrative Action.

44. In my view, these proceedings are unmerited, misconceived, and, pre-mature. *First*, the final decision had not been made. The application was still under consideration. The letter asking for a status report is not a decision. It is part of the vetting process. There is no decision capable of being quashed. The *ex parte* applicant ought to have subjected itself to the legally laid down vetting process and respond to the complaints against it instead of rushing to Court.

45. This brings into focus the principle of ripeness which prevents a party from approaching a Court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of conduct alleged to be unlawful. None of the parties deemed it fit to address this pertinent legal point. The principle of ripeness was aptly captured by **Kriegler J**[34] in the following words:-*"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. ...The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."*

46. **Lord Bridge** of Harwich put it more succinctly when he stated:- *"It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."*[35] It is perfectly true that usually the Court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed.[36] The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function.[37] On the other hand, *mootness* involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being.

47. **Ripeness** refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." [38] The final decision was yet to be made, hence, there is no decision to be quashed. The goal of ripeness is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.

48. The U.S. Supreme Court fashioned a two-part test for assessing ripeness challenges in Abbott Laboratories vs. Gardner[39] as follows:-

"Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[40]

49. A justiciable controversy refers to an existing case or controversy that is appropriate or ripe for judicial determination, not one that is conjectural or merely anticipatory.[41] In the present case the *ex parte* applicant was asked to provide a status report. The report was necessary in deciding vetting the application. Instead of providing the report, the *ex parte* applicant moved to this Court. Sadly, the *ex parte* applicant filed this case before the decision was made whether or not to allow the registration. *First*, the anticipated decision had not been made. The effect is that this case was filed pre-maturely and ripe for adjudication. I find and hold that the facts presented in this case do not disclose a ripe dispute for judicial adjudication. On this ground alone this case is a non-starter and must fail.

C. Whether the *ex parte* applicant has established any grounds to warrant the Court to grant the Judicial Review orders sought.

50. The *ex parte* applicant's counsel argued that the applicant was denied the opportunity to be heard.[42] He also submitted that the first and fourth respondent acted irrationally/illogically/unreasonably[43] and that the decision is illegal in that it violates Article 47, Section 8 of the act.

51. The Respondents' Advocate argued that the impugned decision is legal and that in any event, no substantive decision has been made.

52. *This case presents an opportunity to this Court to restate the function, scope and nature of Judicial Review remedies and the test for granting such remedies.* In Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. The role of the Court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'.

53. Judicial Review is about the decision making process, not the decision itself. The role of the Court in Judicial Review is supervisory. 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.

54. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a Court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[44]:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”

55. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:-

a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or

b. a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

56. An administrative or quasi-judicial decision can only be challenged for **illegality, irrationality and procedural impropriety**. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.**

57. *First*, it is not in disputed that the fourth Respondent had power to process the application. The law provides for vetting and in exercise of its mandate, the fourth Respondent sought and obtained adverse complaints filed at the police station. The fourth Respondent in exercise of its mandate wrote to the *ex parte* applicant and sought a status report on the complaints. *Second*, there is nothing to show that it exceeded its statutory powers in requesting for the report from the *ex parte* applicant. The request has not been shown to be illegal or *ultra vires* or outside its functions. I reiterate that no decision had been made so far, but even if we are to treat the letter as a "decision," it can only be quashed if the body acted without jurisdiction or in excess of its powers or if the "decision" is so perverse or unreasonable that it would be against the sense of justice to allow it to stand.

58. Perhaps I should add that the fourth Respondent is vested with powers to process the application. The powers include vetting the application to satisfy itself on the suitability of an applicant. No abuse of such powers has been alleged or proved. It has not been shown that the power was not exercised as provided for under the law. It has not been proved or even alleged that the fourth Respondent acted outside its powers. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the Courts unless the decision under challenge is illegal, irrational, or un-procedural.

59. The *ex parte* applicant seeks an order of *Mandamus* to compel the first and fourth Respondents to consider the *ex parte* applicant's documents for registration and register the *ex parte* applicant as recruitment agency. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.^[45] The *ex parte* applicant has no legal right to have his application processed without being subjected to the processes laid down in the law. *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. The first and fourth Respondents have not refused to act. In fact it is the *ex parte* applicant who seeks to circumvent the legal process by purporting to seek registration without being subjected to the legal processes which includes vetting.

60. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**^[46]

61. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.

62. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*,^[47] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[48] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

63. Clearly, there is no evidence that the first and fourth Respondents have refused to act. On the contrary, it was in the process of acting. The *ex parte* Applicant has not satisfied all conditions precedent. He must comply with the registration requirements which include passing the vetting process. The *ex parte* applicant cannot use this Court to avoid the vetting, which is a legal process.

64. The other test is "an express refusal, or an implied refusal through unreasonable delay." First, as I have concluded above, "no delay whether unreasonable or otherwise" has not been established in the present case. In fact, the fourth Respondent acted promptly, diligently commenced the vetting process which unearthed the police complaints and drew the attention of the adverse reports to the *ex parte* applicant. Instead of the *ex parte* applicant exonerating itself from the said reports, it now seeks an order of *Mandamus* to be registered notwithstanding the adverse reports. *Mandamus* cannot issue in such circumstances. Secondly, an express refusal or even implied refusal has not been established. *Mandamus* can only issue where it is clear that there is *wilful* refusal or *implied* and or *unreasonable* delay.

65. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the *ex parte* applicant ought to have subjected itself to the vetting process and at least exonerate itself from the adverse police reports instead of invoking the Judicial Review jurisdiction of this Court.

66. The grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, whether or not the *ex parte* applicant is using Court processes to avoid the statutory laid down process. Applying the above tests to the facts and circumstances of this case, I find and hold that the applicant has not satisfied the above conditions. It follows that there is no basis at all for the Court to grant the Judicial Review orders of *Certiorari* and *Mandamus*.

67. In view of my analysis herein above, I find and hold that the applicant has not established any grounds for this Court to grant the Judicial Review Orders of *Certiorari* and *Prohibition*. The upshot is that the *ex parte* applicants application dated 8th May 2018 is hereby dismissed with costs to the Respondents.

Orders accordingly

Signed, Dated and Delivered at Nairobi this 24th day of September 2018.

John M. Mativo

Judge.

[1] Act No. 17 of 2017.

[2] Act No. 3 OF 2016.

[3] Act No. 4 of 2015.

[4] Act No. 4 of 2003.

[5] Act No. 19 of 2012.

[6] Act No. 12 of 2007.

[7] Ibid.

[8] John Beecroft, *Words and Phrases Legally Defined*, Volume 3:1-N, at Page 113.

- [9] The Supreme Court in *the matter of the Interim Independent Electoral Commission*, Constitutional Application No. 2 of 2011 (unreported).
- [10] {1989} KLR 1.
- [11] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.
- [12] *Fraser vs ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.
- [13] *Samuel Kamau Macharia vs. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.
- [14] Act No. 12 of 2008.
- [15] {1987} 1 SCC 424.
- [16] SC Pet Nos 14, 14A, 14B & 14C of 2014.
- [17] *Justice Kaplan H. Rawal vs Judicial Service Commission & 3 Others* {2016}eKLR.
- [18] As laid down in *R (Bibi) vs Newham London Borough Council* {2002}1 WLR 237 at page 19, and *R vs Jockey Club e parte RAM Racecourses*{1993}2ALL 225, at 236H-237 B.
- [19] Act No. 12 of 2007.
- [20] Citing *R vs Kenya Revenue Authority ex parte Distributors Limited*, HC Misc App. No. 359 of 2012.
- [21] MANU/SC/0047/1967.
- [22] {1901} AC 495.
- [23] {1898} AC 1.
- [24] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986.
- [25] *Ibid.*
- [26] *Bhavnagar University vs. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59).
- [27] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats vs. University of Delhi & Anr.* (Citing Lord Denning).
- [28] *Ibid.*
- [29] *Ibid.*
- [30] *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).
- [31] *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.
- [32] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.
- [33] **Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000.**
- [34] In *Ferreira vs Levin NO & others; Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) at paragraph [199].
- [35] In the case of *Ainsbury vs Millington* {1987} 1 All ER 929 (HL), which concluded at 930g: 13.
- [36] See *Transvaal Coal Owners Association vs Board o Control* 1921 TPD 447 at 452
- [37] *Nuclear Tests (Australia vs. France)*, Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 476, para. 58).

[38] [Texas vs United States](#), 523, US 296 (1998).

[39] [387 U.S. 136](#) (1967).

[40] *Abbott Laboratories vs. Gardner*, [387 U.S. 136](#) (1967), pp. 148-49.

[41] [Board of Optometry vs. Colet](#), 260 SCRA 88, July 30, 1996; *Gozun vs. Liangco*; citing *Galarosa vs. Valencia*, 227 SCRA 728, 737, November 11, 1993; [Office of the Ombudsman vs. Judge Ibay](#), 364 SCRA 281, September 3, 2001.

[42] Citing *Pashito Holdings & Another vs Ndungu & 2 Others* KLR

[43] Citing *Susan Mungai vs The Council of Legal Education & 2 Others & Municipal Council of Mombasa vs Republic & Umoja Consultants*.

[44] {2014} eKLR.

[45] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[46] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[47] [1993 Can LII 3004 \(F.C.A.\)](#), [1994] 1 F.C. 742 (C.A.), aff'd [1994 CanLII 47 \(S.C.C.\)](#), [1994] 3 S.C.R. 1100.

[48] [2003 FCT 211 \(CanLII\)](#), [2003] 4 F.C. 189 (T.D.), aff'd [2003 FCA 233 \(CanLII\)](#), 2003 FCA 233).