



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIAMBU**  
**JUDICIAL REVIEW APPLICATION NO. 2 OF 2017**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS**

**ACT NO. 4 OF 2015**

**BETWEEN**

**JAMES GACHERU KARIUKI & 22 OTHERS.....APPLICANTS**

**AND**

**THE KIAMBU COUNTY ASSEMBLY.....1ST RESPONDENT**

**THE KIAMBU COUNTY EXECUTIVE .....2ND RESPONDENT**

**THE COMMISSION ON REVENUE ALLOCATION.....3RD RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL .....4TH RESPONDENT**

**RULING ON A PRELIMINARY OBJECTION**

**A. INTRODUCTION**

1. The Applicants in this case are tenants of the Kiambu County Government. They originated this suit by way of Notice of Motion under the Fair Administrative Actions Act (FAAA). In their Notice of Motion dated 16/01/2017, the Applicants seek four interim orders and four permanent substantive orders. The prayers for interim and permanent orders are interspersed within their Notice of Motion. It may be necessary to reproduce their prayers in their entirety here. They seek for orders:

a. That the Application herein be certified urgent and the same be heard *ex parte* in the first instance.

b. That a temporally prohibitory injunction do issue, prohibiting the 1st and/or the 2nd Respondent(s) herein from purporting to demand and/or receive the rents that were repealed by the provisions of Acts No. 8 of 2013 and for clarity purposes, prohibiting the 1st and/or 2nd Respondent(s) herein from purporting to impose, demand and or receive rents from the dwelling houses and or business premises where the County Government of Kiambu is the landlord/landlady at any time before they have made a money bill in accordance with the provisions of section 21 of the County Government Act no. 17 of 2012, caused the publication of the money bill in the Kenya gazette and the Kiambu County gazette in accordance with the provisions of section 23 of the County Government Act no. 17 of 2012, introduced/table the money bill in the Kiambu county assembly in accordance with the provisions of the Kiambu county assembly standing orders,

debated and passed the money bill in accordance with the Kiambu county assembly standing orders, the speaker of the Kiambu county assembly has forwarded the passed money bill to the governor to be dealt with by the governor and/or the county assembly of Kiambu under the provisions of section 24 of the Kiambu County Executive Committee has caused the passed money bill in respect of the aforesaid rent(s) to be published in the Kiambu county gazette and the Kenya gazette.

c. That a temporary prohibitory injunction do issue, prohibiting the 1st and /or 2nd respondents herein from interfering in whatsoever manner with the quiet occupation/possession of any of the tenants in the dwelling houses and/or business premises where the county government of Kiambu is the landlord or landlady until the full hearing and determination of these proceedings and/or until further orders of the honourable court.

d. A declaration do issue that rents of the dwelling houses and business premises in the defunct local authorities the predecessors of the Kiambu county government as revenue raising measures were re-enacted by the provisions of section 22 of the county government public finance management transition Act no. 8 of 2013(REPEALED) and repealed on 30th September 2013 by the provisions of section 31 of county government public finance management transition Act no. 8 of 2013(REPEALED) and are therefore not to be deemed to have been made under the County Government Act no. 17 of 2012 for the purposes of section 24 of the interpretations and general provisions Act Cap 2 Laws of Kenya.

e. A declaration do issue that rent payers in respect of the dwelling houses and business premises where the count government of Kiambu is the landlord/landlady shall only have their rents become lawfully due after the repealed rents of the defunct Municipal Council of Thika a predecessor of the Kiambu county government vide gazette notice no. 1256 dated 21st May 1982, Kshs 270/= in respect of the dwelling houses and business premises of the defunct Municipal Council of Kiambu a predecessor of the County Government of Kiambu and the inaugural rents of the dwelling houses and business premises in the defunct Town Council of Kikuyu, the defunct Municipal Council of Ruiru and the defunct County Council of Thika all of which defunct councils are the predecessors of the Kiambu county government and which rents were re-enacted and repealed by the provisions of section 22 and 31 of the county government public finance management transition Act no. 8 of 2013 are:

i. Prepared into a money bill in accordance with the provisions of section 21 of the County Government Act no. 17 of 2012,

ii Published as a money bill of the Kiambu county assembly in the Kiambu county gazette and Kenya gazette in accordance with the provisions of section 23 of the County Government Act no. 17 of 2012,

iii. Debated in accordance with the standing orders of the Kiambu county assembly,

iv. Passed in accordance with the standing orders of the Kiambu county assembly,

v. Dealt with by the governor of the Kiambu County Executive Committee and/or the Kiambu County Assembly in accordance with the provisions of section 24 of the County Government Act no. 17 of 2012, and:

vi. Published in the Kiambu county gazette and the Kenya gazette in accordance with the provisions of section 25(1) of the county government Act no. 17 or 2012 and:

vii. In the event any pay hike of the rents aforesaid is deemed necessary, the Kiambu County executive shall comply with the provisions of the Rent restriction Act cap 296 laws of Kenya and/or the provisions landlords and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301 laws of Kenya.

f. That a prohibitory injunction do issue, prohibiting the 1st and/or the 2nd respondents herein from imposing, demanding and/or receiving rents from the dwelling houses and or business premises where the county government of Kiambu is the landlord/landlady until the processes in prayer (e) is complied with.

g. A temporary prohibitory injunction do issue, prohibiting the 1st and 2nd respondents herein from interfering in whatsoever manner with the quiet occupation/possession of any of the tenants in the dwelling houses and business premises where the county government of Kiambu is the and landlord or landlady otherwise than is provided by the Rent Restriction Act Cap 296 an/or the provisions 301 laws of Kenya.

h. h. Cost of this judicial review application as shall be assessed by the honourable court.

i. Any other order or further order(s) and/or writ(s) and/or direction(s) the honourable court may deem fit to grant.

j. That pending the hearing of this application interpartes there be an interim order in terms of prayer (b) & (c) hereinabove.

k. That the cost of this application be provided for:

2. The Applicants filed the Notice of Motion under Certificate of Urgency. I certified the matter urgent on 17/02/2017 and directed that the Applicants serve the Respondents and return for *inter partes* hearing on 14/02/2017. On that day, the 1st and 2nd Respondents' lawyers turned up and sought more time to file their replies. They eventually filed Replying Affidavits and Grounds of Opposition. They also each filed a Notice of Preliminary Objection. I directed that the Preliminary Objection be heard and disposed off first since it had the potential to dispose off the entire suit if it was successful. The parties agreed to file Written Submissions to canvass the Preliminary Objection and appeared before me to highlight on 08/05/2017.

3. The Commission on Revenue Allocation and the Honourable Attorney General neither filed any appearances nor filed any documents in the case.

## **B. THE PRELIMINARY OBJECTION: 1<sup>ST</sup> AND 2<sup>ND</sup>**

### **RESPONDENTS' ARGUMENTS**

4. The thrust of the Preliminary Objection can be easily stated. The 1st and 2nd Respondents argue that this is a Judicial Review Application and it has been brought without leave to do so as mandatorily required under Section 9 of the Law Reform Act and Order 53 Rule 1 and 2 of the Civil Procedure Rules. As such, the 1st and 2nd Respondents argue, the suit is fatally and incurably defective since the Applicants have not properly invoked the Court's jurisdiction. The 1st and 2nd Respondents, therefore, want the suit struck out as fatally defective, premature, frivolous and an abuse of the process of the Court.

5. The 1st and 2nd Respondents begin their argument by citing section 9 of the Law Reform Act. That Section stipulates as follows:

Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court – (a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought; (b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order; (c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

6. Next, the Respondents cite Order 53 Rule 1(1) of the Civil Procedure Rules which provides that:

No application for an order of Mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

6. The Respondents argue that it is evident from a reading of these provisions that seeking leave is a prerequisite to seeking the courts intervention in issuance of Judicial Review remedies.

7. The Respondents argue that while the Fair Administrative Action Act, which is the most recent legislation that has been passed to give effect to Article 47 of the Constitution, under Section 10 provides that “*An application for judicial review shall be heard and determined without undue regard to procedural technicalities*”, the Act goes further in Section 12 provide that: *This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.*”

8. The Respondents argue that while Section 10(1) of the Fair Administrative Actions Act is couched in a similar manner as Article 159(2)(d) of the Constitution of Kenya. Both the Constitution under Article 159(2)(d), and the Fair Administrative Actions Act, provide that the Court should not pay undue regard to procedural technicalities. Under Section 10(2) it’s noted that the Chief Justice may make rules as regards the procedure for approaching the Court to obtain Judicial Review Orders.

9. The Respondents ask the Court to take judicial notice of the fact that no rules of practice, as envisaged in Section 10(2), have been made by the justice with regards to the procedure of approaching the Court. They argue, therefore, that recourse should then be to the existing procedures namely what is provided for in the Civil Procedure Rules under Order 53 and the Law Reform Act at Section 9.

10. The Respondents argue that this is the precise reason the drafters of the FAAA included Section 12. This Section, according to the Respondents, is alive to the fact that there existed common law principles that guided the Courts in issuing orders of Judicial Review. These principles, the Respondents urge, are what is espoused under Order 53 of the Civil Procedure Rules and Law Reform Act.

11. If this be the case, the Respondents then proceed to argue that the requirement for leave provided for under Section 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules is a statutory requirement with a substantive purpose and not a procedural technicality. Relying on the definition of a technicality bequeathed to us by the Learned Honourable Justice Richard Mwongo, in ***Kenya Ports Authority V Kenya Power & Lighting Co. Limited (2012) eKLR*** and another one supplied by the Learned Hon. Justice C.W Githua in ***James Muriithi Ngotho & 4 Others V Judicial Service Commission (2012) eKLR***, the Respondents argue that procedural technicality is a lapse in form that does not go to the root of the suit. If a procedural requirement goes to the substance of the entire suit, then it is ***not*** a mere technicality that can be done away with.

12. The Respondents argue that the requirement for leave cannot be said, in any reasonable manner, to be a procedural technicality. They also relied on the Supreme Court decision in ***Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others (2014) eKLR***.

13. The 1st Respondent cited Hon. Justice Odunga in ***Wilson Njuguna Gakuru & another V National Transport & Safety Authority, & 2 others (2016) eKLR***, who, while making a determination on whether the Respondents were entitled to costs, after a consent was entered compromising the suit prior to hearing the chamber summons seeking leave, stated that:

- Order 53, rule 1(1) of the Civil Procedure Rules provides that an application for judicial review is to be made upon leave being granted. The word “leave” is defined by Black’s Law Dictionary, 9thEdn. At page 974 as “Judicial permission to take a particular judicial procedure and in this case it is permission to commence judicial review proceedings. It is therefore clear that an application for leave or permission to commence judicial review proceedings and whereas on the filing of the Notice of Motion the Chamber Summons is subsumed or submerged in the Motion, it is the

Motion that originates the Judicial Review application proper. I can do no better than quote the Court of Appeal in ***R vs. Communications Commission of Kenya & 2 others Ex Parte East Africa Televisions Network Ltd. Civil Appeal No. 175 of 2000 (2001) KLR 82; (2001) 1 EA 199*** where it expressed itself inter alia as follows: "The proceedings under Order 53 can only start after leave has been obtained and the proceedings are then originated by the notice of motion filed pursuant to the leave granted. It would be somewhat ridiculous to bring the application for leave by way of an originating summons and once the leave is granted, the originating summons is then swallowed up or submerged in the notice of motion....."

Therefore both on the letter of the law and on authorities, judicial review proceedings are commenced after leave therefore is sought and granted.....

14. The 1st Respondent quoted Waki J. (as he then was) when he, in ***Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996*** expounded on the function of leave in Judicial Review proceedings. The judge said:

The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review of it were actually pending even though misconceived.... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but always it has to be exercised judicially.

15. The point that the Respondents sought to make was that seeking leave in Judicial Review proceedings is not merely a mundane routine place for litigants and the Courts to merely go through the motions of a suit, but a major pre-requisite that goes to the very substance of the suit. This is so because, first, it is only after leave is sought and granted that the court's judicial review robe is worn, as was held in the ***Wilson Njuguna Gakuru case (Supra)***.

16. Secondly, the Respondents urge, it is at the leave stage when the Court will have to establish whether there exists a *prima facie* suit to allow the parties to move to the hearing of the substantive motion. In order to establish the existence of the *prima facie* suit, it would require that the court examine the substance of the applicants cause. Differently put, the requirement for leave serves important substantive function and is not a procedural technicality. Failure to seek leave, therefore, is a fatal to any Judicial Review proceedings. On the basis of this, the Respondents urge the Court to find that the Preliminary objection has merit and dismiss the Applicants' suit.

### **C. APPLICANTS' SUBMISSIONS**

17. The Applicants' position is that theirs is a proper suit brought under the FAAA. They contend that it is a suit commenced in a manner prescribed by the FAAA and that there are proper pleadings in the Court file for the case to go to determination on its merits.

18. The Applicants argue that while the FAAA provides that the Chief Justice may make rules of procedure under the Act, none have been made. However, the fact that no rules have been made does not mean that parties cannot bring suits under FAAA. The Applicants cite Article 22(4) of the Constitution for the proposition that lack of rules does not limit the rights of any person to commence proceedings under Article 22 of the Constitution.

19. The Applicants argue that their suit is brought under FAAA not Order 53 of the Civil Procedure Rules. They further argue that FAAA judicial review suits are much wider than those in Order 53 of the Civil Procedure Rules as they contemplate that a Court can grant all the reliefs set out in Section 11 of FAAA. Differently put, the Applicants argue that they self-consciously decided to bring the suit under the FAAA both because it is a separate avenue for suits provided for under a statute which was enacted pursuant to the provisions of Article 47 of the Constitution, and because the suit provided under FAAA is more suited to the reliefs they seek.

20. In other words, the Applicants believe that what they have filed in the suit – a Notice of Motion – in the absence of specific rules promulgated by the Honourable Chief Justice – is a proper pleading for purposes of bring a suit under FAAA. No leave of the Court is required before bringing such a suit.

#### **D. ANALYSIS AND DETERMINATION**

21. I begin by noting that nowhere in their pleadings do the Applicants express their suit as having been brought under Order 53 of the Civil Procedure Rules or the Kenya Law Reform Act. As it turned out, this was a conscious decision. The Applicants are clear that they believe that the suit is brought under the FAAA. The question then turns on the question whether a suit brought under the FAAA seeking review of administrative actions by a public body must be commenced only after leave of the Court has been granted.

22. The 1st and 2nd Respondents are categorical that Applicants seeking review of administrative actions by public bodies must first seek the leave of the Court to bring the substantive suit as provided under Order 53 Rule 1 of the Civil Procedure Rules.

23. I should point out that I have carefully read all the cases cited by the 1st and 2nd Respondents. None of them are directly on point. They can be categorized into two sets. The first set are on the point that despite the Constitutional commandment in Article 159 of the Constitution that justice shall be dispensed without any undue regard to technicalities, the Constitution did not aim to torpedo all established rules of procedure. The strident remarks by Kiage J.A. in *Nicholas Kiptoo Arap Korir Salat v IEBC and Others [2013] Eklr* is representative of this view. Needless to say, I am bound by this view coming as it does from the Court of Appeal. I do also think it represents a common sensical approach to the issue. Unfortunately for the 1st and 2nd Respondents, however, this does not aid them here at all. The aim of the 1st and 2nd Respondents is to use this doctrinal approach to argue that the Plaintiffs here did not follow all the procedural requirements as set out in Order 53 of the Civil Procedure Rules. However, as I determine below, this was not a suit founded under Order 53 but one brought under the FAAA.

24. The second set of authorities cited by the 1st and 2nd Respondents are cases which explicitly found that a case of Judicial Review simpliciter brought under Order 53 without first seeking leave of the Court is fatally defective. Numerous cases have so held many of them before passage of Constitution of Kenya, 2010. Suffice to say that, again, this is not the issue presented in this case for the reasons I explain below.

25. As I understand the arguments of the 1st and 2nd Respondents, the only avenue for bringing a suit to review administrative actions of public bodies even in the post-2010 period is Judicial Review Proceedings as comprehended under Order 53 of the Civil Procedure Rules. By this rendering, FAAA can never be a sufficient basis for a suit. Hence, by this account, parties seeking relief under FAAA must bring Judicial Review Proceedings under Order 53 Rule 1 of the Civil Procedure Rules.

26. The 1st and 2nd Respondents find much comfort to their interpretation of the FAAA in Section 12 of FAAA. That section provides that:

This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.

27. They take this to mean that parties are still required to follow common law principles as concretized in our jurisprudence and practice of Judicial Review simpliciter.

28. In an earlier case, to wit, *R v Kiambu County Executive & 3 Others ex parte James Gacheru Kariuki (Kiambu Judicial Review No. 4 of 2016)*, I had the following to say about the relationship between suits expressed to be brought under Order 53 of the Civil Procedure Rules and those expressed to be brought under Article 47 of the Constitution as read together with FAAA:

I wish to begin my analysis here. Our Constitution of 2010 took a decidedly anti-formalist turn. Whereas our previous jurisprudence might have been enamoured of arcane formalist logic on process before one could be permitted to perfect a substantive claim, our 2010 Constitution self-consciously rejects such an approach to adjudicating substantive claims especially those involving public interest. In the case of judicial review, the Constitution of 2010 introduced two new important provisions.

First, in Article 47, the Constitution expressly constitutionalizes administrative justice as a right and removes it from the clutches of Common Law. Indeed, the FAAA is the legislation required to implement Article 47 of the Constitution.

Second, in Article 23, the Constitution, in spelling out the authority of the High Court to uphold and enforce the Bill of Rights, expressly permits the Court to grant any appropriate relief including an order for judicial review (Article 23(3)(f)).

My reading of these two provisions is that they have the functional effect of blitzing the bifurcation between challenges to the exercise of public power using the traditional mechanism of judicial review rooted in the common law (and, in Kenya, the Kenya Law Reform Act) and those based expressly on the Constitution. In a straightforward petition to enforce the Bill of Rights under Article 23 of the Constitution, the High Court can issue an order for Judicial Review. Conversely, one can found a substantive suit challenging the exercise of administrative power under Article 47 of the Constitution or the FAAA which is the statute enacted to perfect that Article.

If that is the case, what, pray, is the utility of insisting on strict procedural timelines for one form of action and not the other? The County Executive says predictability and certainty are the operative functions. However, that predictability in the formalist traditional common-law based judicial review is precisely what the Constitution of Kenya 2010 hoped to overturn and install in its place a jurisprudence and process more in keeping with Article 47. In this regard, it is important to point out that the FAAA does not have any set time limits on when an aggrieved party can bring an action. Tellingly, at section 10(1) it provides that "an application for judicial review shall be heard and determined without undue regard to procedural technicalities.

29. As my analysis in the above case shows, I am not persuaded that it was the Constitutional intention to retain Judicial Review proceedings simpliciter as they existed in the Pre-2010 Constitution. I am even less persuaded that it was the intention of the drafters of the Constitution that all suits seeking the review of administrative actions of public bodies would, in the Post-2010 period, take the form of Judicial Review proceedings simpliciter as strictly provided for in Order 53 of the Civil Procedure Rules.

30. Section 9 of the Kenya Law Reform Act and Order 53 of the Civil Procedure Rules were introduced into our law to give the High Court special jurisdiction to issue the writs of certiorari, mandamus and prohibition. Prior to that, the High Court did not have any such jurisdiction. However, in the Constitution of Kenya, 2010, the jurisdiction of the High Court to review the administrative actions of public (and private) bodies is now expressly provided for in Article 47 of the Constitution as read together with Article 23 of the Constitution. Parliament has, further, enacted the FAAA to give effect to Article 47 of the Constitution. In other words, it is no longer necessary to rely on the Law Reform Act as the law that clothes the High Court with jurisdiction to review administrative decisions and actions by public bodies: the Constitution bequeaths that jurisdiction to the High Court directly by constitutionalizing the right to Fair Administrative Action.

31. It is important to recall that the right to fair administrative action is a fundamental right included in the Bill of Rights of the Constitution. The Article provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

32. It follows, then, that when a person is aggrieved by an administrative decision, that person's fundamental right as defined in Article 47 of the Constitution is potentially violated and that such a person may choose to bring a suit for enforcement of her fundamental rights under Article 23 of the Constitution. Parliament, in giving effect to Article 47 of the Constitution has now enacted the FAAA which provides an avenue for bringing such a suit by an aggrieved party. That avenue is provided for in Section 9 of FAAA.

Notably, the avenue provided by Parliament does not compel parties to use the straitjacket of Order 53 of the Civil Procedure Rules to access the High Court.

33. In my view, therefore, the procedure provided for challenging administrative actions in the FAAA is, at the very least, an alternative means of instituting proceedings un-encumbered by the rigid procedural requirements of Order 53. Thus, Section 9(1) of the FAAA is explicit that:

(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.

34. This Section self-consciously creates an avenue for an aggrieved party to directly approach the High Court for relief. The Section does not require the party to mould her application for relief within the confines of the existing Order 53 of the Civil Procedure Rules. Instead Section 9(1) of FAAA simply allows a party aggrieved by an administrative decision or action of a public body to make an appropriate application to the High Court.

35. What form, then, should such an Application take? The 1st and 2nd Respondents argue that an application for relief under FAAA must take the form of Judicial Review Simpliciter. I have rejected this view above. I wish to state two things about this aspect of the case. First, as both expressly provided for under Article 159 of the Constitution as well as the FAAA at Section 10(1), the form of action that a Plaintiff chooses to access justice from the Court takes should no longer form a basis for determining the merits of the suit before the Court. The Constitution expressly provides that disputes shall be determined without undue regard to technicalities. FAAA pays obeisance to this Constitutional commandment at Section 10(1).

36. Second, it was contemplated under FAAA that the Honourable Chief Justice may make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action. (FAAA Section 10(2)). The Honourable Chief Justice is yet to make the rules of procedure. That does not, however, mean, as the 1st and 2nd Respondents suggest that parties must, then, follow the rules of procedure under Order 53 of the Civil Procedure Rules (which is earlier in time than the Constitution and the FAAA). As I pointed out above, Order 53 of the Civil Procedure Rules was enacted pursuant to the provisions of the Kenya Law Reform Act which sought to give the High Court special jurisdiction that it did not previously have. The Constitution of Kenya, 2010, however, has now explicitly

constitutionalized Fair Administrative Action Act and provided a constitutional jurisdiction to the High Court under Article 22 and 23 of the Constitution. It is no longer, therefore, necessary to rely on the Kenya Law Reform Act for such jurisdiction. Indeed, there are serious questions whether the Kenya Law Reform Act, and its progeny, Order 53 of the Civil Procedure Rules are any more good law in view of the Constitutional developments.

37. Hence, Prof. Migai Akech of the University of Nairobi School of Law, in his *magna opus*, **Administrative Law**, rhetorically asks: "Given that the Constitution is the superior law, wouldn't it be sensible to either amend Order 53, or interpret it in a manner that makes it compatible with the 2010 Constitution?" Prof. Akech, then expounds thus:

In these circumstances, it is evident that the constitutional petition promises better access to judicial review, and a need arises to abandon the so-called applications for judicial review simpliciter. The Constitution envisages a simple but clear petition that is un-encumbered by technicalities (such as the need to obtain the leave of the Court before filing an application, or restrictive time limits within which the substantive application can be made or judicial orders sought. For example, the need to obtain the leave of the Court arguably serves to prolong administrative injustices and prevents applicants from seeking timely remedies. In any case, the doctrines of justiciability and standing can always assist the Courts to sift deserving cases from non-deserving ones, meaning that they are not likely to be inundated with judicial review applications.<sup>1</sup>

38. Similarly, Prof. James Gathii, the Wing-Tat Lee Chair of International Law at Loyola University Chicago School of Law, in his book, **The Contested Empowerment of Migai Akech, Administrative Law**, Strathmore University Press, 435 (2017).

**Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis**, states as follows:

This dual system of Judicial Review – Constitutional and common law – is perhaps a function of the divisions of the High Court. It could also be that the Judicial Review Division's docket is largely comprised of cases challenging subordinate agencies and further that its remedial remit has been whether to issue the prerogative orders of certiorari, mandamus and prohibition rather than test the constitutionality of laws or of government conduct. If this is the case, then perhaps the Judicial Review Division is exercising administrative review rather than Constitutional review. Even if this is the case, one must take into account Article 47 of the Constitution which guarantees a right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action. By constitutionalizing administrative justice as a right and removing it from the Common Law, the 2010 Constitution has created a large new swath of judicial decision-making authority that is within the four corners of the power of the Judicial Review Division. Article 47 of the 2010 Constitution explicitly requires that all public agencies to safeguard the administrative rights of citizens, and to ensure that they are within the terms of their legal authority.

In my view, Article 47 of the 2010 Constitution makes Judicial Review based on the common law outdated.<sup>2</sup>

39. I agree with the scholarly views of Prof. Akech and Prof. Gathii. It is therefore my view that FAAA provides an

2. James Gathii, *The Contested Empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis*, Sheria Publishing House, 58 (2016 independent avenue for exercising the Constitutional right to fair administrative action. In the absence of any rules of practice under the FAAA it is unclear what form the originating document for such a suit should be. It would, however, be absurdly formalist and reification of procedural technicalities to strike out such a suit founded by way of Notice of Motion without leave of the Court because such suits founded under Order 53 of the Civil Procedure Rules require leave of the Court first. In my view until Rules of Procedure under FAAA are prescribed by the Honourable Chief Justice, parties may approach the Court in any form that provides adequate notice to the other party as to the nature of the case they

are bringing. In this case, the 1st and 2nd Respondents have nowhere claimed that the suit as filed fails to give them adequate notice of the Applicants' grievances. Instead, Respondents' complaint is a formalistic one: that the Applicants ought to have filed a Chamber Summons Application in the first instance to obtain the leave of the Court.

**E. DISPOSITION AND ORDERS**

40. My express holding is that I find no requirement in our law or rules of procedure that a party seeking to commence a suit under the Fair Administrative Actions Act must first obtain the leave of the Court. I also expressly find that, in the absence of Rules promulgated by the Honourable Chief Justice under Section 10(2) of the Fair Administrative Actions Act, bringing a suit under the Act by way of Notice of Motion does not render such a suit fatally defective and liable to be struck out.

41. Consequently, for the reasons given above, I find the Preliminary Objection unmerited and I hereby dismiss it.

42. The costs of this Application shall be in the cause.

43. Orders accordingly.

**Dated and delivered at Kiambu this 22nd Day of June, 2017.**

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**JOEL NGUGI**

**JUDGE**