REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION NO. 394 OF 2016

IN THE MATTER OF AN APPLICATION BY CYTONN INVESTMENTS MANAGEMENT LIMITED FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF SECTIONS 7, 8 AND 9 OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF THE DECISION BY THE KENYA URBAN ROADS AUTHORITY TO ISSUE EQUITY BANK KENYA LIMITED WITH AN APPROVAL TO BEAUTIFY A ROUNDABOUT UPON A ROAD RESERVE.

AND

IN THE MATTER BY THE DECISION BY THE NAIROBI CITY COUNTY TO ISSUE TWO APPROVALS FOR THE BEAUTIFICATION OF THE SAME ROUNDABOUT

BETWEEN

REPUBLIC... APPLICANT

VERSUS

KENYA URBAN ROADS AUTHORITY.............1ST RESPONDENT

EQUITY BANK KENYA LIMITED.......................2ND RESPONDENT

NAIROBI CITY COUNCIL.................................3RD RESPONDENT

AND

COUNTRY CLOCK (KENYA) LIMITED.......INTERESTED PARTY

EXPARTE

CYTONN INVESTMENTS MANAGEMENT LIMITED

JUDGMENT

1. On 30th August 2016, the exparte applicant **Cytonn Investments Management Ltd** sought and obtained leave of this court to institute Judicial Review proceedings challenging the decisions of the 1st and 3rd respondents **Kenya Urban Roads Authority** (KURA) and Nairobi City County (NCC) respectively made on 7th June 2016 and 20th June 2016 respectively.

2. The applicant was granted 21 days within which to file the substantive motion. On 16th September 2016, the exparte applicant dutifully filed a notice of motion dated 15th September, 2016 seeking the following Judicial Review orders:

> ***1. An order of Certiorari to remove into this court and quash the decision of the Kenya Urban Roads Authority contained in its letter dated 7th June 2016, granting approval to Equity Bank Kenya Limited for beautification of the roundabout at the junction of Hospital Road and Elgon Road in the Upper Hill area, Nairobi.***
>
> ***2. An order of Certiorari to remove into this court and quash the decision of the Nairobi City County contained in its letter dated 20th June 2016 granting approval to Equity Bank Kenya Ltd for Landscaping Scheme of the roundabout at the junction of Hospital Road and Elgon road in the Upper Hill Area, Nairobi.***
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> ***3. An order of prohibition, to prohibit Equity Bank Kenya Limited through itself or through its agents, officers, servants and or employees from pulling down, damaging, tampering with, demolishing, knocking down, wasting, alienating, or in any way interfering with the clock located upon the roundabout of Hospital road, Mara road and Elgon Road, in the Upper Hill area, Nairobi.***
>
> ***4. That costs be provided for.***

3. The application is grounded on the statutory statement and verifying affidavit sworn by **Doreen N. Onwonga** on 30th August 2016 filed together with the application for leave to apply.

Exparte applicant's case

4. The exparte applicant's case is that it is a limited liability company incorporated under the Companies Act Cap 486(Repealed). That as part of its wider strategy for growth and business development, the exparte applicant embarked on an advertisement campaign in Kenya and in the region, which advertisement campaign includes outdoor advertising.

5. That on 5th July 2016 the exparte applicant entered into a contract for advertising with the interested party herein **Country Clock (Kenya)** Limited where the applicant rented an advertising Clock Unit located at the roundabout of Hospital Hill Road, Mara Road and Elgon Road in the Upper Hill area, Nairobi, for a term of two years from 16th August, 2016 upto 16th August 2018.

6. That the **'clock'** is used to display the applicant's corporate brand and identity, including its log. It is alleged that prior to the entering/signing of the contract with the interested party, the applicant had

sought and obtained all necessary approvals from the 3rd respondent Nairobi City County with respect to construction of the clock and the beautification of the roundabout.

7. Therefore, that to the applicant's shock and dismay, on 25th August 2016 the applicant received an email from the interested party Country Clock (K) Ltd forwarding an email from the 2nd respondent Equity Bank Kenya Ltd issuing an open threat to "forcefully remove" the said clock on or about 26th August 2016 and also suggesting that the Kenya Urban Roads Authority had not 'handed over' the roads in question to the 3rd respondent Nairobi City County and further proposing that while the matter was to be pursued, the clock should be relocated to an alternative location to avoid destruction at the hands of Equity Bank of Kenya Ltd.

8. According to the applicant, the decision by Mumbi J in **Petition No. 472/2014 between Council of Governors vs Attorney General and 4 Others [2015] e KLR** made on 11th December 2015 declared that the management, development, rehabilitation and maintenance of all public roads, save for National Trunk Roads, are functions of the County Governments and that the control of outdoor advertising on road reserves is an exclusive function of County Government and that therefore in light of the above judgment, the 1st respondent Kenya Urban Roads Authority had no business issuing approvals for the beatification of the said roundabout as the said approval contravened the above judgment which was in force.

9. In addition, that although the 2nd respondent Equity Bank Limited was granted approval by the 3rd respondent City County of Nairobi for a 'landscaping scheme,' that approval came after the applicant had been granted the approval.

10. That despite lodging a complaint with the 3rd respondent City County, the matter remains unresolved and that having received the first approval for beatification of the roundabout, it was the applicant's legitimate expectation that no other approval would be issued to another party for the same purpose.

11. Further, that so far, the applicant had expended significant amount of money on the 'clock' and the exact location of the 'clock' is key to its advertising strategy. That by the 2nd respondent Equity Bank Ltd threatening to 'forcefully remove' the clock connotes the use of violence and wanton destruction of property which is patently illegal and has no place in the present constitutional dispensation.

12. It was further alleged that should the 'clock' be forcibly removed as brazenly threatened by the Equity Bank Ltd, then the applicant shall suffer unmitigated loss in terms of significant financial costs already invested in the 'clock', and the unquantifiable advertising opportunities that will have gone up in smoke.

The 1st respondent's case

13. The application by the exparte applicant was opposed by the 1st respondent (Kenya Urban Roads Authority) who swore a replying affidavit by **Engineer Joseph Kimanthi Kivanguli** on 22nd September 2016 and filed in court on 28th September 2016 contending that Kenya Urban Roads Authority is responsible for the National Roads and that the Roundabout in question falls in the category of Urban National Roads as it has not been handled over to the Nairobi City County Government.

14. The 1st respondent therefore contended that that it therefore approved the beautification of road reserves on the roundabout and had nothing to do with the outdoor advertising components if any, to be considered by the Nairobi City County. That Kenya Urban Roads Authority is still carrying out construction works on the expansion of Upper Hill roads project and which is nearing completion hence it was not available for let out of the advertising or for a subject Clock until the works are completed and the cited road handled over to Nairobi City County Government hence the prerogative orders sought herein are unmerited.

The 2nd respondent's case

15. The 2nd respondent **Equity Bank of Kenya Limited** also opposed the application and filed a replying affidavit sworn by **Reverend Josphat Gakuya, t**he Administrative Manager of the 2nd respondent Equity Bank Ltd sworn on 24th October 2016 contending that the 2nd respondent in a bid to keep the environment clean and neat sought authority to maintain the subject roundabout and further expressed their wish to install brand advert around the roundabout and so it sought and obtained approval on 7th June 2016 for beautification of the roundabout at the junction of Hospital Road and Elgon Road after payment of requisite fees.

16. That upon obtaining beautification authority, they sought authority to landscaping scheme from the 3rd respondent which approvals were granted on 20th June 2016 and that they immediately engaged **Intriscapes Ltd**, a contacting firm at a cost of kshs 632,605 for purposes of beautification, rehabilitation and direct maintainance and the work commenced at the roundabout.

17. That out of courtesy, the 2nd respondent reached out to the interested party Country Clock on several occasions by phone and email requesting them to remove the country clock erected at the subject roundabout to enable the 2nd respondent proceed with their plans but that the interested party declined.

18. That the applicant has no locus standi before this court because the orders sought are intended to protect private interests over another party's interests.

19. That this is a purely civil dispute and not Judicial Review matter which Judicial Review is preserved for the vindication of purely constitutional rights. That the claim that the applicant will suffer unquantifiable financial loss can only be ventilated or adjudicated upon in civil courts.

20. That under the Physical Planning Act, cap 286 Laws of Kenya, Sections 7-10, Liaison Committees are established and empowered to hear and determine appeals lodged by persons aggrieved by decisions made by local authorities under the Act.

21. That the applicant is challenging the merits of the decisions made by the 1st and 3rd respondents which is outside the purview of Judicial Review.

22. That the court should not entertain this matter as there is an alternative statutory procedure for challenging the decision of the 1st and 3rd respondents.

23. That the judgment of Mumbi J in Petition 472/2014 only applied to the 20 Counties that had appealed and that todate, gazettement of the transfer of functions of the National to County Governments has not been done hence Article 186 of the Constitution shall not apply especially where the subject road has not been transferred to the Nairobi City County Government by Kenya Urban Roads Authority established under Section 49 of the Kenya Roads Act, 2007. That therefore approvals for beautification of the road reserve still lies with Kenya Urban Roads Authority hence it cannot be issued by the City County which had no such authority.

24. That the 2nd respondent respects the rule of law and therefore it would not forcefully remove the clock from the roundabout which would amount to illegal action on its part.

25. That as the interested party had offered to relocate the clock from the roundabout vide email of 25th August 2016, the applicant has come to court with unclean hands.

26. It was contended that this application does not meet the threshold for Judicial Review, is frivolous, vexatious and an abuse of the court process hence it should be dismissed.

The 3rd respondent's case

27. The 3rd respondent's replying affidavit was only send in soft copy format. The court did not trace it in the court file. In opposing the exparte applicant's notice of motion, the 3rd respondent contends that it is the only entity mandated to authorize and license any landscaping within the County and to control outdoor advertisements on road reserves and other public areas as is the case herein.

28. Further, that it granted the interested party to erect the country clock at the disputed venue but denies that the exparte applicant was granted any approval for beautification of the roundabout in issue claiming that the department that granted approval is not authorized, to do so, and that the only lawful and procedural approval is the one given to the 2nd respondent.

29. It was further contended that the department responsible for such approvals is the Department of Urban and Physical Planning and not the Environment, Energy and Water Sector as indicated in the impugned letter of approval given to the exparte applicant.

30. It was contended that in this case, the road in issue was still under construction and had not been handed over to the Nairobi County Government hence; the roundabout was still under Kenya Urban Roads Authority which was constructing it. As such, the control of outdoor advertising does not solely lie with the 3rd respondent until the road has been transferred to the 3rd respondent. It was therefore contended that there is concurrent jurisdiction to grant approval between the 1st and 3rd respondents hence both 1st and 3rd respondents must grant the approval for the beautification.

31. That the 3rd respondent never received any application for consideration for approval to beautify the roundabout from the applicant.

32. mIn addition, it was contended that the 3rd respondent could not grant approval for a road that was still under construction and under the purview of Kenya Urban Roads Authority. That the jurisdiction of the 3rd respondent is only to endorse and ratify approvals given by the 1st respondent (Kenya Urban Roads Authority).

33. It was accordingly contended that the approval granted to the applicant was unilateral hence irregular and unprocedural and fraudulently acquired as it was not given by the department mandated to give such approval.

34. The 3rd respondent claims that the applicant having failed to follow the correct process in seeking approval to beautify the roundabout under contest, they are not amenable to be granted this equitable remedy.

35. Secondly, that as the applicant illegally procured the approval to beautify the roundabout, it is not entitled to the orders sought and that the doctrine of exturpi causa applies.

36. It was also contended that the applicant should have sought the internal dispute resolution mechanisms provided in the County Government of Nairobi before resorting to the Judicial Review. That the ADR is stipulated in Section 10(1) of the Physical Planning Act. It was therefore contended that these proceedings are not deserved and the court was urged to dismiss the Judicial Review application with costs

The Interested party's case

37. The interested party **Country Clock (K) Ltd** filed a replying affidavit on 20th February 2017 sworn by **Mr Paul Mutemi**, its Director, on 17th February 2017 supporting the exparte applicant's case and stating that that it is an incorporated company primarily involved in provision of outdoor advertising features through erecting and installing digital clocks at designated locations around the country.

38. That in June 2015 the City County of Nairobi approved its application to install a clock unit on the roundabout of Hospital Road. That after the approval, the interested party acquired rights over the site upto 31st December 2016 and subsequently it set up a facility at the said location and paid for it.

39. That on 5th July 2016 the interested party entered into a contract of advertisement with Cytonn Investments Management Ltd for two years to brand and identify the applicant at the said location and the branding of the clock with the Cytonn logo was done. That they were shocked when Equity Bank staked a claim on the same location demanding that the clock be pulled down or the same be forcefully removed.

40. That following the threats, the interested party wrote to the City County Director of Urban Planning seeking clarification on the confusion created by the demands of Equity Bank.

41. The interested party claims that the 2nd respondent Equity Bank Limited received approval from a body not mandated by law to approve or issue licences to landscaping activities.

Exparte applicant's further affidavit

42. The exparte applicant filed a further affidavit on 3rd May 2017 sworn by **Doreen N. Onwonga** on 2nd March 2017 responding to the depositions by the 1st, 2nd and 3rd respondents in their replying affidavits as well as the interested party's replying affidavit.

43. The exparte applicant reiterated the contents of its verifying affidavit and claim and averred that Legal Notice No.2 published by the defunct Transition Authority on 22nd January 2016 completed the process of transfer of functions to County Governments, which was also done in compliance with the judgment of Mumbi J in Petition No. 472 of 2014.

44. That the judgment in Petition No. 472/2014 never created a new category of "Urban National Roads" that would fall under the mandate or ambit of the 1st respondent (Kenya Urban Roads Authority).

45. That the 1st respondent's mandate is only limited to National Trunk Roads which the subject road is not hence the word 'beautification' does not distinguish the road.

46. On the depositions by the 2nd respondents, the exparte applicant maintained that the contract between the 2nd respondent and **Intriscapes Ltd** is incomplete, has missing pages and irrelevant to these proceedings.

47. That there was no courtesy exhibited in the email of 24th August 2016 by the 2nd respondent which signs off with threats to forcefully remove the interested party's clock. That the matter is not a civil dispute as it concerns the functions by statutory bodies in breach of their lawful authority and hence it falls squarely in the purview of administrative law.

48. That in any event, the fact that there is a commercial implication arising from the 1st and 3rd respondent's ultravires actions does not render the matter purely commercial but that the commercial harm is incidental or secondary to the exparte applicant's main grievance against the 1st and 3rd respondents.

49. The exparte applicant maintained that the Liaison Committees established under the Physical Planning Act would not have jurisdiction to adjudicate over a matter challenging the 1st respondent's actions nor to issue the nature of the reliefs sought by the exparte applicant which can only be made by the High Court.

50. That there is a contradiction between the 1st respondent and 2nd respondent's contensions on

whether there is a gazettment pursuant to judgment in Petition No. 472/2014 which gazette notice was not even produced.

51. That landscaping and beautification of the roundabout both mean management of roads which is in the preserve of the County Governments and not the 1st respondent, in line with the judgment in Petition 472/2014.

52. In response to the 3rd respondent's replying affidavit, the exparte applicant maintained that it was granted approval to beautify the roundabout and that the interested party was granted approval to erect a clock and that the 3rd respondent avoids the issue of double approval including whether the "first in time" would prevail.

53. On the interested party's replying affidavit, the exparte applicant concurs with the depositions therein and concludes by urging this court to allow the substantive motion as prayed.

Parties' Submissions

54. The parties agreed and filed written submissions to canvass the notice of motion.

The exparte applicant's submissions

55. The exparte applicant filed written submissions on 20th September 2017. They are dated the same day, reiterating the depositions and facts contained in the verifying and further affidavit and the grounds contained in the statutory statement accompanying the chamber summons for leave.

56. According to the exparte applicant, the judgment in Petition No. 472 of 2014 resolved fully and finally the controversy surrounding the role and functions of the Kenya Urban Roads Authority vis avis the County Governments in respect of the matters relating to roads and that , save for national trunk roads which are managed by the National Government, all County roads are managed by the County Governments.

57. It was therefore submitted that the 1st respondent acted ultra vires and illegally when it purported to approve the beautification of the County Road by the 2nd respondent Equity Bank Ltd. Reliance was placed on **SDA Church (EA) vs Permanent Secretary Ministry of Nairobi Metropolitan Development & Another [2014] e KLR** where the court explained what illegality is.

58. It was submitted that the respondents are putting forth the same arguments which they advanced in Petition No. 472/2014 concerning the roundabout being within the definition of a "national trunk road" in which the court held that " the function of construction, operation and maintainance of county roads, as well as the control of outdoor advertising, is vested in County Governments and that the national government is vested with the construction and operation of national trunk roads, and the setting of standards for the construction and maintainance of other roads by counties. It has no role in the construction of county roads, or in the control of outdoor advertising on roads. Its agencies such as Kenya National Highway Authority, Kenya Urban Roads Authority & Kenya National Highways Authority(KeNHA) have no role with respect to county roads upon full transfer of the roads functions to the counties.

59. It was submitted that there was no evidence of gazette notice supplement No. 2 published on 22nd January 2016 creating a new category of roads known as "Urban National Trunk Roads" to fall in the mandate of the 1st respondent and that as such there is no such gazette notice.

60. It was submitted, relying on **Republic V National Transport Safety Authority & 10 Others exparte James Maina Mugo[2015] e KLR** that whoever alleges must prove as espoused in Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya.

61. It was further submitted that the 1st respondent had no power to grant approval to the 2nd respondent, which act was ultra vires and illegal.

62. Further, that with regard to the 3rd respondent's double approval of the beautification/landscaping of the same roundabout to both the applicant and 2nd respondent, such a decision was irrational and unreasonable. Reliance was placed on the **Republic vs National Transport and Safety Authority & 10 Others exparte James Maina Mugo**(supra) citing with approval **Council of Civl Service Unions v Minister for Civil Service [1985] A.D. 374** on irrationality and unreasonableness.

63. It was submitted that the dual approval would breed conflict between the applicant and the 2nd respondent on who between them was entitled to beautify/landscape the roundabout which defies the very logic behind the requirement for approval.

64. Accordingly, it was submitted that the court should find that the earlier approval given to the exparte applicant on 16th June 2016 prevails over the one of 20th June 2016 given to the 2nd respondent. Reliance was placed on **Vekariya Investments Ltd vs KAA & 2 Others [2014] e KLR** where the court cited with approval the decision of the Court of Appeal in **Wreck Motors Enterprises vs Commissioner of Lands CA 71/1997** that "the first time prevails."

65. On whether there was an alternative remedy to the exparte applicant's grievance, it was submitted relying on **Republic vs County Government of Nairobi & Another exparte Insfadian Sohaili [2017] e KLR** where the court made an exemption to the "exceptional circumstances" and that in this case, the exceptional circumstances relate to threats by the 2nd respondent in the email dated 24th August 2016 wherein the 2nd respondent threatened to "forcefully remove" the clock from the roundabout by 26th August 2016; which was a threat to wanton destruction of property and which is patently illegal hence the need for this court to intervene by way of a prohibition, at the leave stage which saved the 'Clock' from the 2nd respondent's bellicose intentions.

The 1st respondent's submissions

66. The 1st respondent's submissions dated 28th April 2017 were filed on 3rd May 2017 reiterating the depositions by Engineer Joseph Kimanthi Kwanguli sworn on 22nd September 2016. The 1st respondent maintains that it is mandated to grant approval hence the 3rd respondent's approval is questionable.

67. That the transfer of road functions to the County Governments, in particular Hospital Road and Elgon Road where the roundabout is located, to the 3rd respondent has not been effected and that the said road are classified as "Urban National Roads" and fall squarely within its mandate.

68. On the exparte applicant's reliance on **Petition No. 472/2014 Council of Governors vs Attorney General & 4 Others [2015] e KLR,** it was submitted that there is an exception to the first declaration by the court to the effect that the 'National trunk roads' are exempted and that the exparte applicant had not adduced evidence to prove that subject roundabout is not situated within the "national trunk roads."

69. Further, that the decision by Mumbi J does not apply to all the 47 counties in Kenya but to 29 counties that had lodged an appeal with the Senate.

70. It was submitted that the applicant herein has not provided evidence to show that Nairobi City County was one of the 29 applicant Counties for transfer of functions by the time the impugned approvals were issued.

71. It was further submitted that this application is not within the scope of Judicial Review which is only concerned with the decision making process and not with the merits of the decision itself. Reliance was placed on **Republic vs Director of Public Prosecution & 2 Others exparte Francis**

Njakwe Maina & another [2015] e KLR and Republic vs Attorney General & 4 Others exparte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014] e KLR on the scope of Judicial Review remedies.

72. Further reliance was placed on **Republic vs Hangsraz Mahatima Gandhi Institute & 2 Others[2008] e KLR** and the writings by **Peter Kaluma** in his book "**Judicial Review Law: Procedure and Practice , 2009** at page 128. The case of **Muyodi vs ICDC& Another [2006] EALR 1 page 243** on the meaning of mistake or error apparent on the face of the record, citing **Nyamogo and Nyamogo v Kogo [2001] IEA 174(sic)** was also referred to.

73. It was further submitted that the exparte applicant had failed to exhaust the alternative available Dispute Resolution Mechanisms to Judicial Review as espoused in Article 47 of the Constitution and Section 9(2),(3) and (4) of the Fair Administrative Action Act No. 4 of 2015.

74. It was submitted that in this case, Sections 7,8,9 and 10 of the Physical Planning Act sets out the functions of the National Physical Planning Liaison Committee which is established ,(a) to hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other liaison committee and that this court in **Republic vs County Government of Nairobi & Another exparte Isfandiar Sohaili** (supra) made it clear that a party must first exhaust alternative remedies before seeking out Judicial Review.

75. The 1st respondent submitted adopting the depositions in its replying affidavit and contended that no illegality, irrationality and procedural impropriety had been demonstrated in its granting of approvals for beautification and landscaping of the roundabout to the 2nd respondent by Equity Bank (K) Ltd and urged the court to dismiss the exparte applicant's case.

The 2nd respondent's submissions

76. The 2nd respondent filed its submissions on 10th August 2017, dated 4th August 2017 reiterating its replying affidavit depositions by Reverend Josphat Gakuya filed on 24th October 2016 and framed two issues for determination namely:

> ***a) Whether the prayers sought by the exparte applicant are available; and***
>
> ***b) Who should meet the cost of the suit.***

77. On whether the prayers sought are available, it was submitted, relying on **KNEC vs Republic CA 266/1996** that in issuing the approvals to the 2nd respondents, the 1st respondent confined itself to the matter under its jurisdiction in compliance with the decision in Petition No. 472/2014 and the publication by the Transition Authority.

78. That only the 3rd respondent has the mandate and authority to licence or authorize any landscaping within the County and control outdoor advertisement on road reserves and other public areas.

79. It was submitted that certiorari sought was not available because it was not demonstrated that the respondents had acted illegally, irrationally or with procedural impropriety or in error of law, or for lack of jurisdiction or in breach of the rules of natural justice or that the determination by the respondents were procured by fraud, collusion or perjury.

80. On who should bear costs, it was submitted that as the application by the exparte applicant is frivolous and an abuse of the court process, it should be dismissed with costs to the 2nd respondent. The 2nd respondent's counsel annexed to their submissions authorities but never submitted on the relevance of these authorities to this case.

The third respondent's submissions

81. The 3rd respondent filed its submissions on 20th September 2017 dated the same day and reiterated the depositions in their replying affidavit while setting out three issues for determination namely:

> ***1. Whether it is the 1st and 3rd respondent that has the mandate to grant approval for beautification of roads:***
>
> ***2. Whether it is the exparte applicant or the 2nd respondent that was granted the lawful approval to beautify the roundabout.***
>
> ***3. Whether the exparte applicant is desiring of the orders sought?***

82. On the first issue above, it was submitted that the Petition No. 472/2014 settled the issue of which state agency is vested with power and responsibility to grant approval for beautification of roads, and that it is the County Governments, with the exception of national trunk roads. However, it was submitted that in this case, the road in issue was still under construction and had not been handed over to the Nairobi County Government hence, the roundabout was still under Kenya Urban Roads Authority which was constructing it. As such, the control of outdoor advertising does not solely lie with the 3rd respondent until the road has been transferred to the 3rd respondent. It was therefore submitted that there is concurrent jurisdiction to grant approval between the 1st and 3rd respondents hence both 1st and 3rd respondents must grant the approval for the beautification.

83. On whether the applicant or 2nd respondent was granted the lawful approval to beautify the roundabouts, It was submitted that the 3rd respondent never granted any approval to the exparte applicant and that the only lawful and procedural approval is the one given to the 2nd respondent.

84. That the 3rd respondent never received any application for consideration for approval to beautify the roundabout from the applicant.

85. Further, that the department responsible for such approvals is the Department of Urban and Physical Planning and not the Environment, Energy and Water Sector as indicated in the impugned letter of approval given to the exparte applicant.

86. In addition, it was submitted that the 3rd respondent could not grant approval for a road that was still under construction and under the purview of Kenya Urban Roads Authority. That the jurisdiction of the 3rd respondent is only to endorse and ratify approvals given by the 1st respondent (Kenya Urban Roads Authority).

87. It was accordingly submitted that the approval granted to the applicant was unilateral hence irregular and unprocedural and fraudulently acquired as it was not given by the department mandated to give such approval.

88. On whether the orders sought are deserving, it was submitted that the applicant having failed to follow the correct process in seeking approval to beautify the roundabout under contest, they are not amenable to be granted this equitable remedy.

89. Further submission was made to the effect that as the applicant illegally procured the approval to beautify the roundabout, it is not entitled to the orders sought and that the doctrine of exturpi causa applies.

90. In addition, it was submitted that the applicant should have sought the internal dispute resolution mechanisms provided in the County Government of Nairobi before resorting to the Judicial Review. That

the Alternative Dispute Resolution mechanism is stipulated in Section 10(1) of the Physical Planning Act. Reliance was placed on **Republic vs County Government Nairobi & Another exparte Isfandiar Sofaili [2017] e KLR.** It was therefore submitted that these proceedings are not deserved and the court was urged to dismiss the Judicial Review application with costs.

The interested party's submissions

91. On the part of the interested party, it was submitted through its written submissions filed on 20th September 2017 framing two issues for determination namely:

> ***a) Who has the first claim of rights.***
>
> ***b) Can the two rights co-exist?***

92. On who has the first claim of rights, it was submitted that the decision in Petition No. 472/14 settled the issue of functions between the National Government and the County Governments hence the 1st respondent has no business issuing approvals for beautifications or landscaping of the said roundabout as the Constitution gives that mandate to the 3rd respondent. As a result it was contended that the approval given by the 1st respondent contravenes the decision on Petition 472/2014 and therefore the licences given to the 2nd respondent are a pure pretense.

93. That as approval by the 3rd respondent with regard to the beautification and landscaping came first, the principle of equity that " where he equities are equal, the first in time shall prevail" is in favour of the applicant and the interested party .

94. On whether the two rights can co-exist, it was submitted that the licence from the 3rd respondent to the 2nd respondent was different from that approval given to the applicant and interested party who already had the advertising lincence whereas the 2nd respondent acquired the landscaping licence, which two rights are different and can co-exist without any conflict between either parties.

95. That the 2nd respondent's actions are in bad faith and will cause financial distress to the applicant and the interested party who have spent a significant amount of resources to their respective causes. That both parties can peacefully co-exist at the said roundabout without infringing on the other's rights. It was submitted that the forceful removal of the Clock by the 2nd respondent will amount to violence and wanton destruction of property which is patently illegal. The interested party urged the court to grant the orders sought.

DETERMINATION

96. I have carefully considered the application for Judicial Review, the statutory statement, verifying affidavit and annextures thereto, the replying affidavits, further affidavit by the exparte applicant and the respective parties' written and oral submissions and authorities cited as adopted by the parties' advocates as canvassing the application. In my humble view, the main issues for determination are:

> ***1. Whether the exparte applicant had an alternative remedy for resolution of the dispute herein and if so, whether it should have first exhausted that remedy before filing for Judicial Review.***
>
> ***2. Whether the judgment in Petition No. 472/2014 applies to this case in material particulars.***
>
> ***3. Whether the 1st respondent had any power to grant an approval for the beautification and landscaping of the contested roundabout.***
>
> ***4. Whether the approval given by the 3rd respondent to the applicant was irregular/fraudulent.***

5. Whether the applicant is entitled to the orders sought.

6. What orders should this court make.

7. Who should bear the costs of these Judicial Review proceedings?

97. There are other anciliary questions which this court will endeavour to answer.

98. On the issue of whether the exparte applicant had an alternative remedy for dispute resolution before resorting to Judicial Review remedies, the respondents have strongly submitted that the exparte applicant is not entitled to the remedies sought because Sections 7,8,9 and 10 of the Physical Planning Act are clear that Liaison Committees are empowered to hear and determine appeals lodged by persons aggrieved by decisions made by local authorities under the Act.

99. It was therefore contended that the applicant ought to have filed an appeal as stipulated in the Physical Planning Act if they were aggrieved by the approvals/decisions of the 1stand 3rd respondents instead of rushing and challenging the merits of the 1st and 3rd respondents' decisions by way of Judicial Review.

100. The respondents also submitted in contention that Section 9(2), (3) and (4) of the Fair Administrative Action Act is clear that where there are internal review or appeal mechanisms, a party challenging an administrative decision or action must first resort to the internal dispute resolution mechanisms before it can be allowed to invoke the Judicial Review jurisdiction. Reliance was placed on this court's decision in **Republic vs County Government of Nairobi & another Exparte Isfandiar Sohaili** (supra) where the court invoked Sections 9(2), (3) and 4 of the Fair Administrative Action Act and declined to grant the Judicial Review orders sought.

101. On the part of the exparte applicant, it was submitted and averred that the Liaison Committees established under the Physical Planning Act have no jurisdiction to adjudicate over a matter challenging the 1st respondent's actions nor to issue the reliefs in the nature of Judicial Review.

102. Further, it was submitted by the exparte applicant that there were special circumstances to warrant this court hear and determine these proceedings following the brazen threat by the 2nd respondent to forcefully remove the clock by 26th August 2016 and that had this court not intervened, the 2nd respondent could have destroyed the property where substantial funds had been spent hence the court has jurisdiction to hear and determine the matter herein on its merits.

103. In deciding whether there was an alternative remedy or internal review or appeal mechanism which the applicant ought to have exhausted first before invoking the Judicial Review jurisdiction, the court must first examine the nature of the complaint.

104. The applicant's complaint is brought under the provisions of Section 7,8 and 9 of the Fair Administrative Action Act, 2015 and Order 53 Rule 3 of the Civil procedure Rules 2010.

105. The applicant claims that it lawfully contracted with the interested party for the provision of outdoor advertising services through the use of the Country clock located upon the roundabout of Hospital Road, Mara Road and Elgon Road in the Upper Hill area, Nairobi.

106. That the interested party obtained necessary approvals to construct the Clock from the 3rd respondent and also obtained approvals to beautify the said roundabout from the same 3rd respondent, only to learn that the 1st respondent and 3rd respondent subsequently granted approval to the 2nd respondent to carry out similar activities on the same roundabout.

107. It is not in dispute that the approval granted to the applicant is dated 16th June 2016 whereas the

one given to the 2nd respondent is dated 20th June 2016 four days later. The approvals were also given by different departments within the 3rd respondent City County Government.

108. Whereas the applicant's approval came from the Department of Environment and Energy and Water Sector, the one given to the 2nd respondent came from the Department of Urban Planning.

109. Although the 3rd respondent claims that the approval given to the applicant is irregular and fraudulent, that allegation has not been proved as there were no particulars of fraud or irregularity stated and neither did the two signatories to the two approvals swear any affidavits to demonstrate that the approvals as given to the applicant were fraudulent. The Chief Officer, Urban Planning never swore any affidavit to disown the approval given by Engineer Christine Ogut of Environment, Energy and Water Sector and vice versa. It follows that as no fraud was proved, and as there was no denial that both departments exist within the 3rd respondent, both approvals came from the City County of Nairobi. As to which approval would be valid, and not necessarily fraudulent, in my view, is a dispute that can only be resolved by a relevant body mandated to deal with such disputes.

110. The 2nd respondent, before getting approval from the Nairobi City County Government , obtained approval from the 1st respondent who were constructing the road in question and the 1st respondents claims that the road had not been handed over to the 3rd respondent hence the 1st respondent was in order to grant the approval on 7th June 2016 subject to the 2nd respondent complying with certain conditions among them, obtaining necessary permits from relevant authorities before commencement of works.

111. On 20th June 2016, the City County of Nairobi, Urban Planning Department granted the 2nd respondent approval to landscaping scheme of the same roundabout.

112. The question is, where would a party aggrieved by the decisions of the 1st and 3rd respondents seek redress from?

113. The complaint against the 1st respondent is that it had no power to grant any authority/approval by dint of the judgment of Mumbi J in Petition 472 of 2014 which declared the functions of the 1st respondent and those of the 3rd respondent with regard to the management of national trunk roads and county roads to be distinct. The court in that case also clarified on the function or control of outdoor advertising to belong solely to the 3rd respondent.

114. The 1st and 3rd respondents agree with the applicant on this aspect but with a rider that the judgment only affects those counties that had appealed to the Senate for transfer of the functions and that in this case, there was no evidence that Nairobi City County is one of the 29 counties which were affected by the decision in Petition No. 472 of 2014. Further, that in any case, the subject road which was still under construction by Kenya Urban Roads Authority had not been handed over to the 3rd respondent.

115. The exparte applicant avers that this court in granting leave and stay must have considered the exceptional circumstances prevailing namely, the brazen threat to "forcefully remove" the clock from the roundabout.

116. However, this court wishes to remind the parties that the judge's task on the exparte application for leave is to do no more than to decide whether there is an arguable prima facie case for consideration at the substantive stage if leave is granted and with regard to stay, whether the court was of the view that unless stay is granted, the intended application if successful would be rendered nugatory and therefore the applicant would at the end of it all be rendered a pious explorer in the judicial process.

117. It is not for the court to determine any issues finally in favour of the applicant at the exparte stage

for leave and stay.(see **Exparte Worth[1985] STC 564 cited in Regina v Criminal Injuries Compensation Board Exparte A(AP) decided by the House of Lords HL [1998-1999]**

118. In this case, the court on receipt of the exparte chamber summons under certificate of urgency, certified the matter as urgent and upon being satisfied that *prima facie*, the applicant had established that it had a prima facie case, proceeded to grant leave and such leave to operate as stay.

119. The court did not consider the "exceptional circumstances" contemplated in section 9 of the Fair Administrative Action Act, 2015.

120. What the applicant needed to show at the leave stage was to demonstrate that on the material placed before the court, its case was not frivolous or vexatious but that it had a case and needed an opportunity to ventilate, seeking for protection against abuse of power or legal process. Section 9 of the Fair Administrative Action Act, 2015 stipulates that: ***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.***

121. The section does not mandate the court to exclude all applications that it deems should have been considered in a different forum at the leave stage especially where the matter is considered exparte. Furthermore, in most instances, it is only after hearing all the parties to the review application that the court would be in a position to fully appreciate whether the dispute ought to have been determined elsewhere or before this court. The section further provides at subsections 3 and 4 that:

> ***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 sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

122. The above section makes it clear that in ***'exceptional circumstances'*** and ***on application,*** the court can ***exempt*** the applicant from exhausting alternative remedies or internal review mechanisms.

123. In this case, the applicant claimed that there were exceptional circumstances warranting this court to hear this matter only after the respondents raised the issue of the matter falling within the jurisdiction of the Liaison Committee under the Physical Planning Act.

124. The applicant herein never included in its application for leave or in the substantive notice of motion, a prayer seeking for exemption from exhaustion of the internal review/appeal mechanisms. No such internal review or appeal mechanisms were disclosed to this court by the applicant to enable the court consider whether it should exempt the applicant from resorting to the alternative dispute resolution mechanisms, and no order on exemption from resort to alternative remedies on account of exceptional circumstances was ever made by this court in favour of the exparte applicant.

125. Part III of the Physical Planning Act, Cap 286 Laws of Kenya provides for the establishment and composition of Physical Planning Liaison Committees. Under Section 7, Physical Planning Liaison Committees are established and the composition is as per Section 8 of the Act. The Director General of the 1st respondent Kenya Urban Roads Authority is a member of the Liaison Committee.

126. In Section 8(2) of the Act, the Nairobi Physical Planning Liaison Committee is established and consists of members among them, the Director of City Planning and Architecture as Secretary; Director General of Kenya Urban Roads Authority, Town Clerk of the Nairobi City Council(as it then was). The functions of National Liaison Committee are, inter alia; to hear and determine appeals lodged by a person or local authority aggrieved by the decision of any other Liaison Committee. The functions of other

Liaison Committees include:

> ***a) To inquire into and determine complaints made against the Director in the exercise of his functions under the Act or Local Authorities in the exercise of their functions under the Act.***
>
> ***b) Enquire into and determine conflicting claims made in respect of application for development permission.***
>
> ***c) To hear appeals lodged by persons aggrieved by decisions made by the Director or Local Authorities under this Act.***

127. The Liaison Committees are mandated to meet at least once every month. Any person aggrieved by a decision of the National Liaison Committee under the Section may appeal to the High Court against such decisions in accordance with the rules of procedure for the time being applicable to the High Court.

128. Section 8 of the Act stipulates the functions of the Liaison Committees which include:

> ***"To inquire into and determine complaints made against the Director or Local Authorities in the exercise of their functions under the Act.***

129. It is not disputed that the 3rd respondent has a constitutional mandate as stipulated in Petition No. 472/2016, to manage, develop, rehabilitate and maintain all public roads, save the national trunk roads and to control outdoor advertising on road reserves."

13o. It is also not in dispute that the Physical Planning Act stipulates that any decision made by the Local Authority (County Government) is appealable to the relevant Liaison Committee and the decision of the Liaison Committee is appealable to the National Liaison Committee. The decision of the National Liaison Committee is appealable as of right to the High Court or to the Environment and Land Court, as the case may be, depending on the nature of the dispute, in view of the stipulations in Articles 162(2) (b), 165(5), (b) of the Constitution and Section 13(1) and (7) of the Environment and Land Court Act, among other statutes conferring jurisdiction to the court, noting that the dispute herein relates to the right to the use for advertising of the space of land on the road and therefore it is unlikely that the appeal would lie to the High Court.

131. In this case, the 3rd respondent made 2 decisions to approve the applications by both the applicant and 2nd respondent to undertake beautification and landscaping on the roundabout of Hospital Road, Mara Road and Elgon Road. The 2nd respondent also obtained permission from Kenya Urban Roads Authority who were said to be in the process of constructing the subject road which though a county road, had not been completed and handed over to the 3rd respondent. The two approvals from different departments granted to different persons or parties for the same task are no doubt conflicting decisions anticipated to generate a dispute.

132. Therefore, in my humble view, any person aggrieved by the decision of the 3rd respondent would be expected to file an appeal to the relevant Liaison Committee for resolution of the dispute. The 1st respondent being a member of the Liaison Committee would be a participant and therefore all the issues which have been raised before this court would be resolved by the Liaison Committee with room for an appeal to the National Liaison Committee and to the Environment and Land Court.

133. This court takes cognizance of the fact that the Physical Planning Act which is an old statute has not been reviewed to accord with the constitutional dictates and therefore must read it with the necessary modifications as stipulated in Part 2 sections 7 of the transitional provisions of the Constitution.

134. Albeit the applicant claims that the Liaison Committee has no jurisdiction to grant the orders of judicial review sought herein and which I agree, nonetheless, section 9 of the Fair administrative Action does not anticipate a situation where the alternative remedy or forum for ventilation of the dispute must

be a forum that has jurisdiction to grant judicial review remedies stipulated under the Act. The Act contemplates alternative fora and or remedies for dispute resolution before reverting to the Court.

135. Nothing would have prevented the exparte applicant from filing the dispute over the conflicting approvals by the two entities, before the Liaison Committee and seeking for an injunction before a court of competent jurisdiction to restrain or prohibit the private party who is the 2nd respondent herein from actualizing its threat to forcefully remove and or destroy the Clock from the roundabout, pending the hearing and determination of proceedings before the Liaison Committee, since significant amount of money had been expended in the installation and maintainance of the said Clock and the roundabout

136. It is now settled law and judicial opinion that where the Constitution or any written law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure provided by law. That is the spirit and letter of Articles 50(1) and 159(2) of the Constitution which stipulates that :

> ***""50(1) 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 or impartial tribunal or body."***

137. And Article 159(2) states –

> ***"159(1) ……....***
>
> ***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***
>
> ***(a) justice shall be done to all, irrespective of status;***
>
> ***(b) justice shall not be delayed;***
>
> ***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***
>
> ***(d) justice shall be administered without undue regard to procedural technicalities; and***
>
> ***(e) the purpose and principles of this Constitution shall be protected and promoted."***

138. In **Samson Chembe Vuko V Nelson Kilumo & 2 Others [2016] e KLR,** the Court of Appeal citing with approval several other decisions among them:

> **i. Speaker of the National Assembly vs Karume [2008] 1 KLR 425** where the Court of Appeal held inter alia:
>
> "……..***where there is a clear procedure for the redress of any particular grievances s prescribe by the Constitution or the Act of Parliament, that procedure should be strictly followed…."***
>
> **ii. Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another [2015] e KLR** the Court of Appeal reiterated the foregoing as follows:
>
> > ***"…….This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume)(supra), was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution. In granting the***

order, the court made the often –quoted statement that:

"[W] here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. (see also Kones v Republic & Another exparte Kimani Wa Nyoike & 4 Others [2008] e KLR (ER) 296)

"It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than 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. (Emphasis added).

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, but 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. (Emphasis added).

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a 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 the appellant the right to access the High Court by way of 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 d'etre of the mechanisms provided under the two Acts……"(emphasis added).

139. From the above decisions and others, it is clear that as recent as 27th day of May 2016 when the Court of Appeal rendered the decision in **Samson Chembe Vuko V Nelson Kilumo** (supra) case, parties ought not to invoke the jurisdiction of the High Court in Judicial Review matters where there is an alternative dispute resolution mechanism established by an Act of Parliament and which is efficacious. And where there is need to depart from the established procedure, then a p[arty must apply to the High Court for exemption, citing and proving the exceptional circumstances that exist to enable the court consider and exercise its discretion to exempt the party from resorting to alternative remedies or forum for resolution of the particular dispute.

140. In the circumstances of this case, the Physical Planning Act establishes an elaborate mechanism for resolving any disputes/complaints that may arise from exercise of powers donated by that Act to the 1st and 3rd respondents or any other public authority created under the Act. To this end, **Section 7** of the Act establishes Physical planning Liaison Committees whose functions include:-

"To hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under the Act."

141. Section 10(2) (a) and (e) of the Act stipulates that ***(2) The functions of other liaison committees shall be—(a) to inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act; (e) to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act.***

142. In terms of administrative action, Article 47 as read with Article 165(6) of the Constitution donates to the High Court supervisory jurisdiction over subordinate courts, tribunal and bodies.

143. Pursuant to Article 47 of the Constitution, Parliament enacted the ***Fair Administrative Action Act***, 2015. Section 9(2), (3) and (4) thereof provides:

> ***(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 sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

144. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case the applicant has not shown why the Court ought to exempt it and the interested party from the dispute resolution mechanism provided under the Physical Planning Act. This position is not novel. In **Republic vs. National Environment Management Authority [2011] eKLR**, it was held that ***where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.***

145. The Court of Appeal had this to say at page 15 and 16 of its judgment:

> ***" The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception 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 and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come 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."***

146. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statutes. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume** (supra) as borrowed from other earlier decisions. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy of judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

147. I further associate myself with the position held by the Court of Appeal in its various decisions and

as adopted by the High Court in decisions such as **Revital Healthcare (Epz) Limited & another v Ministry of Health & 5 others [2015] eKLR** where **Emukule, J** at paragraph 10 cited with approval the case of **Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004** in which it was held that:-

> ***"…where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process."***

148. Therefore if there is a particular procedure provided under the Constitution or any written law which remedy is effective and applicable to the dispute before the Court, the judicial review remedies ought not to be resorted to as a first point of call. The Court ought to ensure that that dispute is resolved in accordance with the relevant statute. This is the spirit and letter of section 9 of the Fair Administrative Action Act, 2015.

149. I also agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** that where an obligation is created by statute and a specific remedy is given by that statute, the person seeking the remedy is deprived of any other means of enforcement.

150. I further agree with **Mwera, J** (as he then was) in **Safmarine Container N V of Antwerp vs. Kenya Ports Authority** **Mombasa High Court Civil Case No. 263 of 2010** where it was held that it is not only the Constitution that can limit/confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

151. In other words, Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal fora.

152. Therefore, where there is an alternative remedy and procedure available for the resolution of the dispute, like in this case where the Liaison Committee exist to receive and consider the dispute between and among the parties hereto, that remedy ought to be pursued and the procedure adhered to.

153. I further associate myself with **Majanja J's** views in **Dickson Mukwelukeine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realizing, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.

154. Way back before the promulgation of the Constitution, the Court of Appeal in **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,** expressed itself as follows, and it has persisted thus:

> ***"Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a***

disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity... The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute".

155. In the end, I am of the view and I hold that the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament by donating jurisdiction to other bodies to resolve disputes which, nonetheless, the High Court has jurisdiction of last resort.

156. Having so found, the next question is whether the judgment of Mumbi Ngugi J in Petition No 472 of 2014 should be adopted by this court. It must however be understood that it is not this court that is set to implement the Judgment of Hon Mumbi Ngugi J. There are established mechanisms for enforcing court decisions. The Judgment of Mumbi Ngugi J was cited before this court not for implementation or interpretation. That is not the role of this court to interpret that judgment since there is no dispute on whether or not the Constitution has provided separate and distinct roles for each of the two levels of governments, with some roles overlapping. In addition, that judgment is not properly placed before this court for implementation or enforcement purposes. That judgment needs no adoption by this court. What this court can do is to apply it if the court finds it relevant to the facts of this case not to be asked to adopt it as if the judgment was inchoate.

157. This court determines cases before it on the material evidence placed before it. It was for the parties to demonstrate that the Judgment of Mumbi Ngugi J had crystallized since there was a rider given in the said Judgment by Mumbi Ngugi J that the Judgment applied to the 29 County Governments that had appealed to the Senate for transfer of the functions from the National Government.

158. None of the parties to these proceedings adduced evidence as to whether Nairobi City County Government was one of the 29 County Governments that had appealed to the Senate for the transfer of functions. It was the duty of the applicant to avail such evidence or seek for production of such evidence by the adverse party. It never did so. The burden of proof lies on he who alleges.(see sections 107 and 108 of the Evidence Act, CAP 80 laws of Kenya). However, that failure to adduce evidence on whether or not the 3rd respondent was one of the 29 County Governments that applied for transfer of functions in itself does not take away the distinct functions assigned to County Governments as stipulated in the Constitution and other implementing Statutes.

159. Furthermore, there was no evidence to counter the contentions by the 1st and 3rd respondents that the subject road was undergoing construction by the 1st respondent and that transfer could only be done to the Nairobi County Government, the 3rd respondent herein after completion; and that as matters stood now, the two bodies had joint control over the road and therefore approvals could be given by both entities until such transfer was effected.

160. On whether the 1st respondent had any power to grant an approval for the beautification and landscaping of the contested roundabout, the answer lies in whether or not the said road had been transferred to the County Government of Nairobi in accordance with the Judgment of Mumbi J in Petition No. 472 of 2014. In this case, there was no material to show that the Nairobi City County Government was one of the 29 County Governments that had appealed to the Senate to have the functions transferred to it. Accordingly, I find that where the road had not been transferred to the 3rd respondent and it was still under construction by the 1st respondent, and where there is a dispute as to which body should approve the activity intended to be done by the applicant, it would be appropriate for the parties to appear before the Liason Committee to resolve the conflict bearing in mind the judgment of Mumbi J, before resorting to court.

161. On the issue of whether the approval given by the 3rd respondent was irregular or fraudulent, albeit the issue of fraud was a mere allegation which was not proved by the County Government, I have answered this question in issue No. 1above and held that it is upon the Liaison Committee to determine the validity of the or otherwise of that approval.

162. On whether the applicant is entitled to the orders sought, I find and hold that the applicant is not entitled to the orders sought at this stage as it did not demonstrate that it had exhausted the available alternative remedies under the Physical Planning Act Cap 286 Laws of Kenya before resorting to this court for judicial review.

163. On what order should this court make, I find and hold that the application for judicial review must fail and the same is hereby dismissed.

164. On who should bear costs of this application, I hold that each party shall bear their own costs of the application of the dispute which remains unresolved.

Dated, signed and delivered in open court at Nairobi this 20th day of November, 2017.

R.E.ABURILI

JUDGE

In the presence of:

Miss Kavagi h/b for Mr Mbaluto for the Applicant

Miss Daido h/b for Mr Munene for the 1st Respondent

Mr Oyunge h/b for Miss Mwangi for the 2nd Respondent

N/A for Interested Party

N/A for 3rd Respondent