REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 371 & 372 OF 2015

IN THE MATTER OF AN APPLICATION BY SYNER-CHEMIE LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AGAINST THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

AND

IN THE MATTER OF ARTICLES 10.22.23(3) (f), 47(1), 50(1) AND 165(6) & (7) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF PART III OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26

AND

IN THE MATTER OF ORDER53 (1) OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF SECTION 175(1) OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

AND

IN THE MATTER OF THE TENDER FOR SUPPLY OF NON PHARMACEUTICALS (SURGICAL TUBES AND CANNULAES) TENDER NO. KEMSA /01T7/2015-2017 BY KENYA MEDICAL SUPPLIES AUTHORITY

BETWEEN

REPUBLIC…….....APPLICANT

VERSUS

PUBLIC PROCUREMENT

ADMINISTRATIVE REVIEW BOARD……...….....……RESPONDENT

KENYA MEDICAL SUPPLIES AUTHORITY.....1ST INTERESTED PARTY

REVITAL HEALTHCARE (EPZ) LIMITED….....2ND INTERESTED PARTY

ANOCMA ENTERPRISES…….…..…...……...3RD INTERESTED PARTY

SYNER- CHEMIE LIMITED ……....…….…..…....EX-PARTE APPLICANT

RULING

1. This ruling determines the exparte applicant's application dated 31st August 2016 which seeks for enlargement of time within which Judicial Review notice of motion application for substantive orders of certiorari and mandamus ought to have been filed, after lapse of the initial period granted by the court, and for extension of orders granted on 19th August 2016 pending hearing and determination of the application herein.

2. The application is supported by the grounds that on 19th August 2016 this court did grant to the exparte applicant leave to file Judicial Review Orders of certiorari and mandamus within 10 days and that on 26th August 2016, the applicant's counsel's inadvertently filed a notice of motion replicating the chamber summons which sought for leave to apply for the substantive Judicial Review orders, instead of filing the substantive motion. That the filing of notice of motion for leave instead of seeking for substantive prayers was an inadvertent error of the advocate for the applicant which should not be visited upon the applicants; that this court has jurisdiction to enlarge time which lapsed due to that innocent error since the erroneous application was withdrawn; and that it is in the interest of justice that the prayers sought be granted since no party will be prejudiced by the orders sought as Section 175(1) of the Public Procurement And Asset Disposal Act, 2015 provides for an automatic stay of execution upon Judicial Review proceedings being initiated which, in this case, were filed in time and without any delay.

3. The supporting affidavit which is sworn by Mr Mwaniki Gachuba advocate for the applicant reiterated the grounds on the face of the application, while admitting that the error in filing a notice of motion for leave instead of notice of motion for substantive Judicial Review orders was occasioned by their offices and not the exparte applicant who should not be made to suffer for the inadvertent mistakes of their advocates on record, and that they are now ready to file an appropriate notice of motion once time granted in the leave application is enlarged.

4. The application is opposed by the 1st and 2nd interested parties who filed their grounds of opposition on 5th September 2016 and 6th September 2016 respectively.

5. According to the 1st interested party, the application by the exparte applicant is misconceived, frivolous, devoid of merit, incompetent and *malafides*. That although the exparte applicant was granted leave to apply for Judicial Review orders on 19th August 2016, the exparte applicant never served on the 1st interested party any stay order or at all hence it proceeded with the procurement of the goods herein.

6. Further, that the leave granted lapsed on 29th August 2016 since the substantive motion was not filed within the said 10 days from 19th August 2016. That the Judicial Review proceedings ceased to exist when the applicant failed to file its substantive notice of motion within the timelines provided and that there are no valid orders in place for extension and neither is there any valid notice of motion on record. Further, that enlargement of time for filing a substantive notice of motion can only be premised on existing valid orders; that Section 175(1) of the Public Procurement And Asset Disposal Act, 2015 is no longer available to the applicant; that the application is an abuse of the court process and that the application has no merits in law and fact and ought to be dismissed with costs.

7. In the 2nd interested party's grounds of opposition, it is contended that the applicant having withdrawn its application dated 25th August 2016, this court became *functus officio*; that the application for enlargement of time is fatally defective and cannot be cured by amendment for the orders of extension of time sought by the applicant.

8. That Section 8 of the Law Reform Act, Orders 53 of the Civil Procedure Rules 2010 and Section 175(1) of the Public Procurement and Asset Disposal Act, 2015 do not provide for the discretion of the court to grant an extension of time.

9. That the motion application is fatally defective and cannot be cured by amendment for there is no jurisdiction to extend time for hearing of Judicial Review application; that the issue of Limitation is not a procedural technicality which can be entertained by application of Article 159(2) of the Constitution; that in view of the special nature of Judicial Review Orders and the limited jurisdiction provided by statute to the court, that upon withdrawal of the previous motion, the applicant's rights of Judicial Review are extinguished and cannot be activated by the court for the same would be time barred, for Section 175(1) of the Public Procurement And Asset Disposal Act, 2015 stipulates that an application for Judicial Review must be filed within 14 days of the decision made by the respondent herein.

10. The parties also filed submissions which echo their respective positions as set out above. They also filed their list of authorities for consideration by the court.

11. The application was argued orally before me on 7th September 2016 with the parties' advocates agreeing that the ruling in Judicial Review 371/2016 to apply to Judicial Review 372/2016 since the two matters are closely related.

12. In his submissions, Mr Gachuba advocate for the exparte applicant submitted that the application dated 31st August 2016 was necessitated by mistakes of counsel who, on realization that he had filed a wrong application, panicked and withdrew the notice of motion instead of seeking leave of court to amend the same.

13. Further, that his client was keen to prosecute the substantive notice of motion because there is a public interest in the matter in that a statutory body reduced the statutory period to less than 14 days which is illegal.

14. Further, that the error of the filing a wrong application was genuine, inadvertent and not intended to mislead the court, and that it can be excused since courts recognize that advocates make errors which should not be visited on the innocent litigants especially when explained by advocates themselves. He relied on **Remco Ltd Vs Mistry Jadva Parbat & Company Ltd [2002] IEA 227** and Order 50 Rule (6) of the Civil Procedure Rules and submitted that the court has powers to extend the period for filing of Judicial Review application where leave was already granted.

15. Further reliance was placed on **Kenya Bureau of Standards Vs Kenya Maritime Authority [2014] e KLR** where Mureithi J held that the court has jurisdiction to enlarge the 21 days after grant of leave.

16. In addition, it was submitted that in **Republic Vs District Land Registrar Thika [2014] e KLR the Honourable** Korir J held that extension of time is in the interest of justice.

17. Further, Mr Gachuba submitted that none of the parties would suffer any prejudice since Section 175(1) of the Public Procurement And Asset Disposal Act, 2015 provides for Judicial Review to be instituted within 14 days and that there is an automatic stay of proceedings until the court makes a determination under Subsection 3 of Section 175 of the Public Procurement And Asset Disposal Act, 2015. Reliance was placed on **Republic V Public Procurement Administrative review Board & 2 Others exparte Noble Gazes International Ltd [2013] e KLR** where Majanja J held at paragraph

16 that Section 100(1) of the then Act was an automatic stay of all proceedings before the High Court.

18. It was further submitted that in **Republic V Public Procurement Administrative Review Board & Others exparte Avante International Technology [2013] e KLR** , Odunga J agreed with Majanja J in the above case that Section 100(1) which is the same as Section 175(1) of the Public Procurement And Asset Disposal Act, 2015 is an automatic stay until the court makes a substantive determination of the matter.

19. Regarding the grounds of opposition filed, it was submitted that he served the stay order on 22nd August 2016 by way of an email send to the 1st interested party notifying the Chief Executive Officer of the order of 19th August 2016 staying the decisions of the Public Procurement Administrative Review Board hence the 1st interested party was aware of the stay orders and therefore any contracts entered would be null and void.

20. Further, that a contract entered into after commencement of Judicial Review proceedings is of no effect. Reliance was placed on **CA 24/2014 Justus Kariuki Mate & another Vs Martin Nyaga Wambora & Another.**

21. **The applicant's counsel also** submitted that no party will suffer any prejudice as the court will settle the issue of whether tenderers have 14 days to file submissions to the Board. It was further submitted that the authorities filed by the 1st interested party do not address the Judicial Review proceedings and or whether the court can enlarge time.

22. On whether the application is valid, the applicant's counsel relied on Order 50 rule 6 of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act and submitted that although the orders granted lapsed on 29th August 2016 there is an automatic stay until the court determines the substantive motion. That the error was a typing error which can be corrected.

23. In opposition to the applicant's counsel's submissions, Mr Ogamba submitted, relying on his grounds of opposition and submissions filed and asserted that once an application was withdrawn, the application for leave and stay orders went with that withdrawal. Further, that the jurisdiction of the court to sustain the motion was dependant on the motion being filed within 10 days as granted. That in this case, both the stay orders and leave lapsed on 29th August 2016 hence the application before this court is an application to bring Judicial Review proceedings based on Section 175(1) of Public Procurement Asset Disposal Act which must be made within 14 days of the date of the decision. That since 14 days have lapsed, this court has no power to grant leave to bring Judicial Review proceedings and that therefore there is nothing to extend. Counsel urged the court to dismiss the application with costs.

24. On behalf of the 2nd interested party, Mr Mogambi associated himself with the submissions by Mr Ogamba and emphasized that the error is not a procedural technicality where Article 159(2) (d) of the Constitution applies and that once the application was withdrawn there is no application.

25. In a brief rejoinder, Mr Gachuba submitted that there was no failure to comply with orders but that the errors committed are curable by enlargement of time to file the Judicial Review notice of motion. Counsel for the exparte applicant further submitted that the withdrawal of the application was in respect of an erroneous notice of motion not the chamber application for leave to apply.

26. That the 14 days granted by Section 175 (1) of the Public Procurement Asset Disposal Act have not lapsed since the Judicial Review application for leave was filed within the 14 days set by the statute and that a withdrawal of the erroneous notice of motion did not bar the applicant from seeking time to file a competent application.

27. On 16th September 2016, the date when this ruling was expected to be delivered, this court did

hear the parties advocates submissions based on the Court of Appeal decision in **Paul Mafwabi Wanyama Vs The Chairman Amagoro Land Disputes Tribunal CA 4/2013** which the court brought to the attention of the parties advocates as none of them had cited it.

28. In her submissions, Miss Chichi averred that the Mafwabi case is distinguishable from the present case on the grounds that:

29. The Civil Procedure Act is an Act of Parliament to make provision for procedure in civil courts whereas the Law Reform Act is an Act of Parliament to effect reforms on the Law relating to civil action and prerogative writs. That the Law Reform Act therefore applies in reforms to the law relating to civil proceedings and Judicial Review proceedings as well.

30. Miss Chichi also submitted that the reform in the civil courts are made pursuant to Section 81 of the Civil Procedure Act while reforms in the Judicial Review procedure are made pursuant to Article 47 of the Constitution and the Fair Administrative Actions Act of 2015.

31. In addition, Miss Chichi submitted that Section 9(1) of the Law Reform Act is clear that the Rules of Court that it contemplates relate to procedure in civil courts which include procedures where orders of Mandamus, certiorari and prohibition are sought; with Subsection 2 of Section 9 providing for time for filing of Judicial Review.

32. Miss Chichi submitted that the cited case of Paul Mafwabi Wanyama, Judicial Review is not in the preserve of the Law Reform Act but also Articles 22,23, and 47 of the Constitution and that the Court of Appeal decision was made in 2014 whereas in 2015. That Parliament enacted the Fair Administrative Action Act pursuant to Article 47 of the Constitution with Section 4(b) of the said Act empowering the court to act in accordance with Order 50 Rule 6 of the Civil Procedure Rules. That Section 5(2) of the Fair Administrative Action Act empowers the exparte applicant to bring this application under Sections 18(1) 89 and 95 of the Civil Procedure Act and Order 50 Rule (6) of the Civil Procedure Rules, 2010.

33. According to Miss Chichi, Judicial Review procedure is now substantially governed by Part III of the Fair Administrative Action Act 2015 and that the said Act being the latter Act of Parliament, it amended or repealed the provisions of the Law Reform Act. Reliance was placed on **Martin Wanderi and 19 Others V Engineers Registration Board of Kenya & 5 Others** where the court held that where provisions of an earlier Act, the latter Act abrogates the inconsistency in the earlier Act.

34. Further, that under Section 11(1) (i) of the Fair Administrative Action Act 2015, the court has powers to grant any order that is just and equitable including temporary relief such as the one sought by the exparte applicant in these proceedings.

35. In response to Miss Chichi's further submissions, Mr Ogamba counsel for the interested party submitted that the leave granted lapsed after 10 days, the moment the exparte applicant failed to file the substantive motion within the period granted and the moment the notice of motion erroneously filed was withdrawn. In his view, the lapsing of leave means that the court was left with no jurisdiction to extend what is not in existence because Section 175 of the Public Procurement and Asset Disposal Act is couched in Mandatory terms.

36. Further, that the Court of Appeal decision in Paul Mafwabi Wanyama case was clear that Judicial Review is a special jurisdiction governed by the Law Reform Act hence the reasons why one has to first come court to seek and obtain leave before instituting Judicial Review proceedings.

37. It was also submitted that the Rules governing the procedure in Judicial Review proceedings is Order 53 which does not give room to the court to extend time and that once leave is granted, time starts running and one action is dependent on the other action.

38. According to Mr Ogamba, Article 23 of the Constitution and the provisions of the Law Reform Act as well as the Fair Administrative Action Act presupposes that one is before the court properly and that the court has the jurisdiction to hear you and grant the reliefs sought. It was further submitted that the Law Reform Act is what gives jurisdiction to court to hear Judicial Review proceedings and if the court does not have that jurisdiction, it cannot grant the reliefs sought by the parties.

39. According to Mr Ogamba, the Paul Mafwabi Wanyama case is so clear that the High Court has no jurisdiction to enlarge time and that Judicial Review proceedings being special proceedings in nature, the court could not import the provisions of Order 50 Rule (6) of the Civil Procedure Rules to enlarge time for filing the substantive motion.

40. Mr Ogamba submitted that the application herein seeks time to file a notice of motion out of time but that there is no leave which leave expired when the notice of motion was withdrawn and in the absence of any provision for extension of time, the applicant's application for enlargement of time is misplaced.

41. It was submitted that the Fair Administrative Action Act 2015 does not provide for extension of time hence the applicant is improperly before the court. Further, that Article 159(2) (d) of the Constitution is inapplicable because the issue at hand is not a technical error but a substantive jurisdictional error.

42. Mr Mugambi counsel for the 2nd Interested Party submitted that he associates himself with submissions by Mr Ogamba and maintained that this court has no jurisdiction to entertain the application.

DETERMINATION

43. I have anxiously considered the application dated 31st August 2016, grounds in support thereof, the supporting affidavit, grounds of opposition filed by the 1st and 2nd interested parties, the written as well as the oral submissions argued by all the parties present and supported by the authorities which are also filed on record.

44. The issue for determination is whether the application lies and if so, whether it is merited.

45. According to the interested parties, there is no jurisdiction to enlarge time for filing of Judicial Review proceedings and secondly, that the withdrawal of the erroneous notice of motion determined the whole proceedings for Judicial Review hence there is nothing to be determined further as this court became *functus officio.* The applicants counsel argued otherwise.

46. On whether or not the court has the power to enlarge the time for the filing of an application for Judicial Review Orders, the applicant approached this court with an application for leave to apply for Judicial Review Orders and on 19th August 2016 upon which the court granted such leave to apply. The court also ordered the applicant to file and serve the substantive motion within 10 days from 19th August 2016.

47. However, the applicant, instead of filing the substantive motion as ordered, filed a motion but whose prayers were a replica of the chamber summons for leave to apply. In other words, there was no prayer for Judicial Review orders to issue pursuant to the leave granted. It is this court that brought to Mr Gachuba's attention the defects in the applications in this matter and in JR 372/2016, as a consequence of which he withdrew the application wrongly filed and lodged this application. The court did strike out the wrongly filed notice of motion in JR372/2016.

48. According to the 1st and 2nd interested parties, Judicial Review proceedings are special proceedings commenced under Section 8 and 9 of the Law Reform Act, Order 53 of the Civil Procedure Rules and in this case, Section 175(1) of the Public Procurement Asset Disposal Act, 2015 which latter provisions set the period of initiating the Judicial Review application for leave to be 14 days from the

date when the decision of the Review Board is made and that the above provisions of the law do not provide for enlargement of the time fixed by statute or rule.

49. Section 175(1) of the Public Procurement Asset Disposal Act, 2015 provides that an aggrieved party following the decision of the Review Board must lodge Judicial Review proceedings within 14 days from the date of the decision. The Act is silent on extension of any period for doing any act, upon expiry of the 14 days or any other period. Neither does the Law Reform Act provide for extension of the six months period under section 9 of the Act. Further, there is no specific provision under the Fair Administrative Action Act, 2015 for enlargement of any time.

50. It is not in dispute that the application for leave to apply for Judicial Review orders was made by the exparte applicant within 14 days from the date of the decision by the Review Board, and as a consequence, an automatic stay of enforcement of the decision took effect, pursuant to section 175(1) of the Public Procurement and Asset Disposal Act, 2015.

51. However, appropriate substantive motion was never filed within the time limits of 10 days given by the court and therefore, undoubtedly, the leave as granted also lapsed automatically, on 29th August, 2016.

52. I must however point out that the decisions in **Udaykumar Chandulal Rayani & 4 Others Vs Charles Thaiti [1997] e KLR** and **Elegant Colour Labs Nairobi Ltd V HFCK Ltd & 2 Others [2010] e KLR** cited by the 1st interested party are quite irrelevant and inapplicable to the case herein as they were referring to proceedings relating to summons to enter appearance and which is quite different from the enlargement of time envisaged under Order 50 Rule 6 of the Civil Procedure Rules.

53. Similarly, the case of **Julius Njoroge Muira Vs Harrison Kiambathi Mburu [2011] e KLR** which concerned abated summons to enter appearance is not applicable to this case. The **Macfoy Vs United African Limited [1961] 3 ALL ER 1169 at 1172** is relevant as far as the argument that there being no leave, then no application for extension can lie.

54. I also find the decision on **Zakaria Okoth Obado Vs Edward Akonyo Ayugi & Others CA 7/2014** not applicable to this case as the applicant is not seeking for enlargement of time to file an application for leave to institute Judicial Review proceedings since such application for leave was instituted within the 14 days stipulated in Section 175(1) of the Public Procurement Asset Disposal Act, 2015 following the decision rendered by the Review Board on 5th August 2016.

55. In my humble view, the question to be answered in this case is, whether, upon such leave as granted, in the absence of a valid Notice of Motion filed by 29th August 2016, the period for filing of such proper notice of motion can be enlarged under Order 50(6) of the Civil Procedure Rules and or Section 59 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya as read with section 95 of the Civil Procedure Act as well as Section 63(e) of the Civil Procedure Act, in order to permit the applicant to file the Notice of Motion within an enlarged period.

56. There are two schools of thought on this issue. The first is the school which propagates that no such enlargement of time for filing of a substantive motion is envisaged in Order 53 of the Civil Procedure Rules. The same proponents argue that owing to the special procedure adopted in Judicial Review proceedings, a party, other than invoking Order 53 of the Civil Procedure Rules cannot invoke the provisions of the Civil Procedure Act and the Rules made there under. See **Republic Vs Kahindi Nyafula & 3 Others Exparte kilifi South East Farmers Co- Operative Society [2014] e KLR** by Angote J, applying **Welamudi vs The Chairman Electoral Commission of Kenya [2002] KLR 285** and **Republic V Kenya Bureau of Standards & Others [2006] EA 345** wherein the Learned Judge held that:

> ***"The law provides that the substantive motion seeking for prerogative orders must be filed within 21 days. The Law Reform Act, which is the substantive law dealing with prerogative***

orders, does not provide for the enlargement of time within which a party should file the motion .

57. In the case of **Ako of Ako Vs Special District Commissioner Kisumu & Another [1959] KLR 163** the Court of Appeal held as follows:

> ***" The prohibition is statutory and absolute and is not therefore challengeable under the procedural provisions of the Civil Procedure Rules, more specifically Order 49 Rule 5 (now Order 50 Rule 6) which makes provisions for the enlargement of time". Consequently, the provisions of Order 50 Rule 6 of the Civil Procedure Rules which allows enlargement of time by the court for doing of a particular act does not come to the exparte applicant's aide, neither does Article 159(2) of the Constitution."***

58. Similarly in **Njeru Njagi Vs Gabriel Njue Joseph & Honourable Attorney General [2015] e KLR,** F. Muchemi J struck out an application which sought to enlarge time for the filing of substantive motion for Judicial Review order out of time although the applicant had claimed that his advocate fell ill after obtaining leave and subsequently passed on hence, he was unable to file the substantive motion within 21 days. The Judge in rejecting the application for enlargement of time relied on **Republic Vs Kahindi Nyafula & Others & Kilifi East Farmers Co-operative Society** (supra) and **Eldoret Judicial Review Application 5/2014 John Kotut Exparte applicant Vs Patrick Cheruiyot & 3 Others.** The court also relied on the Court of Appeal decision in **Civil Application 41 of 2013 Paul Mafwabi Wanyama Vs Jacinta Papa & Amagoro Land Disputes Tribunal** where the Court of Appeal was dealing with the application for setting aside the ruling of the Judge in **Busia HCC Judicial Review 10/2010** where the court had granted orders for extension of leave to file Judicial Review proceedings. In allowing the appeal, the court of Appeal held that:

> ***" The Judicial Review proceedings before the Learned Judge, which have given rise to this appeal, were therefore special in nature and the Learned Judge erred in importing provisions s of the Civil Procedure Act and Rules to proceedings governed by the said provisions of the Law Reform Act and Order 53 of the Civil Procedure Rules. We agree with the learned counsel for the appellant that the Learned Judge erred in extending time which he had no jurisdiction to do. This appeal is therefore allowed with the consequences that the order extending time for filing Judicial Review proceedings is hereby set aside. The applicant shall have costs of this appeal and costs of proceedings in the High Court.***

59. The Learned Judge in the **Njeru Njagi Vs Gabriel Njue Joseph & Another** (supra) case wholly relied on the **Paul Mafwabi Wanyama** (supra) case in holding that Sections 95,1A, 1B and 63(e) and Order 50 Rule 6 of the Civil Procedure Act and Rules were inapplicable in Judicial Review matters which are governed by Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

60. In my humble view, the 1st and 2nd interested parties belong to the above school and thought which firmly believes that the periods stipulated in Order 53 of the Civil Procedure Rules for the filing of Judicial Review proceedings cannot be enlarged where such period lapses.

61. On the other hand, there is the second school of thought which supports the applicant's position that although the court has no jurisdiction to enlarge the six months period given by the Law Reform Act Cap 26 Laws of Kenya or section 175(1) of the Public Procurement and Asset Disposal Act stipulated for the filing of an application for leave to apply for Judicial Review orders, nonetheless, that once such leave is obtained within the statutory 6 months or such period as may be set by statutory provisions like in the case of Section 175 (1) of the Public Procurement Asset Disposal Act , 2015 , then such period for filing of the substantive motion can be extended where it so lapses before the substantive Judicial Review motion is filed and that therefore Order 50 Rule (6) of the Civil Procedure Rules, Section 59 of Cap 2 as well as Section 95 of the Civil Procedure Act and Article 159(2) (d) of the Constitution are all applicable. Further, that these cited provisions confer jurisdiction on the court to enlarge time for the filing of the substantive motion, beyond the time stipulated by Order 53 of the Civil

Procedure Rule or as may be set by the court. This is what the court in **Kenya Bureau of Standards & 3 Others Vs Maritime Authority Exparte Car Importers Association** (supra) held that the court has discretion to enlarge the 21 days period for the filing of the notice of motion upon grant of leave to commence Judicial Review proceedings (per Edward Muriithi J on 22nd September 2014 in **Republic Vs District Land Registrar Thika Exparte Stephen Kiongo Kairu[2014] e KLR** that extension of time to file notice of motion is in the interest of justice and in **Remco Ltd V Mistry Jadia Parbat & Company Ltd & Others (supra)** where the court excused a party for blunders made by an advocate, to avoid a party suffering the penalty of not having his case heard on merits.

62. In **Mahaja V Khufwalo [1983] KLR 553**,Hancox JA (as he then was) at page 561 held that it could not have been intended that time could not be enlarged as follows;

> ***"……Nonetheless, I would hesitate to reach a finding that no power of enlargement of time was intended to be given in such cases, for there are instances in which to deprive the applicant of the right to apply therefore would work definite injustice. Unless persuaded by cogent argument to the court to the contrary I would lean against an interpretation of the subsection which would impose an absolute time limit. I derive support for this view from Republic V London County Council Exparte Swan & Edgar[1927] Ltd [1929] 141 LT at page 579 where the Divisional court held that the Rules of the Supreme Court did give power to enlarge the time limit set by rule 21 of the Crown Office Rules."***

63. Although some courts have applied strict interpretation regarding extension of time within which to file the Judicial Review notice of motion, in some jurisdictions like in the Federal courts of the USA, if one misses a deadline of filing of Judicial Review applications as stipulated in the statutes for example under Sections 41 of the Access to Information Act, where one has to file Judicial Review proceedings within 45 days, then one must file a motion for an extension of time in writing and providing an explanation justifying the extension of time as was held in **Stanfield V Canada paragraph 3 pursuant to the Federal Courts Rules 8 and 369,** but that the parties cannot consent to extend a deadline imposed by legislation.

64. From the rival positions presented to this court, the question is whether this court, in the present constitutional framework should still let the former intricacies and obscurities hamper the provision of effective redress to facilitate access to justice for all or should it adopt a flexible approach, which is not necessarily crafting or innovating its jurisdiction, but bearing in mind that much of the old case law on the reach of the Judicial Review remedies may not be of such practical relevance today. But because the Legislature has given no explicit direction on the issue, the Court must adopt the interpretation of the silent provisions that best effectuates the legislative intent.

65. In arriving at such a view, this court appreciates that Judicial Review has its origin in common law which is still applicable in our statutes today (see section 12 of the Fair Administrative Action Act, 2015), and which is judge made law, law made by judges in the absence of relevant constitutional or statutory provisions **(see Kenneth Culp Davis, Administrative Law Treatise 2:18 at 140 2 ed 1978**.

66. According to **Professor Louis L Jaffe, Judicial Control of Administrative Action 329 [1965]:**

> ***"Common law has been particularly prevalent in Judicial Review, an area that encompasses "a whole congeries of judicial theories and practices" which constitutes " the common law of review," and which is a significant part of the administrative law of the jurisdiction. Accordingly, it is expected that where there is a specific statutory and constitutional provision on enactment, then those enactments must slowly replace the traditional common law doctrines."***

67. Professor Louis L.Jaffe was, however, quick to observe that "***the change to embrace the new thinking will be slow and halting because of the doctrine of stare decisis as was observed by the*** Court of Appeal in **City Chemist (Nbi) & other vs. Oriental Commercial Bank Ltd, Civil Application No. Nai. 302 of 2008 (Ur. 192/2008) held that**:-

"…….that however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application*."***

68. In other words, although the rule of precedence promotes certainty and predictability and consistency in judicial decision making process, it has been argued and rightly so, that the doctrine hinders originality and precedent setting, for the courts are unwilling to abandon their own creations and their own notions of good policy in favour of the statutory law.

69. Nevertheless, with the new Constitution in place and its implementation through statutory law and judicial interpretation, my view is that courts in Kenya must take bold steps with renewed respect and responsibility for constitutionality rather than dangle on common law instincts.

70. Furthermore, in this case, the period being sought for enlargement for filing of the substantive motion was granted by the court out of the 21 days fixed by the Order 53 which uses the word "shall" and which is a procedural Rule and not a substantive law. In the persuasive decision by the High Court of **Uganda at Kampala** sitting at **Kololo Miscellaneous Application No. 89/2009 between Dr James Akampumuza & Another Vs Makerere \university Business School & 2 Others,** Honourable Justice Akiiki –Kiiza considered the provisions of Rule 5(1) of the Judicature (Judicial Review) Rules 2009 which provides:

" 5(1) An application for Judicial Review shall be promptly and in any event within 3 months from the date when the grounds of the application first arose, unless the court considers that there is good reason for extending the period which the application shall be made."

71. Albeit in the Kenyan Civil procedure Rules, the Public Procurement and Asset Disposal Act and the Law Reform Act as well as the Fair Administrative Action Act there is no such proviso for enlargement of time, the Court of Appeal in **Sony Holdings Ltd v Registrar of Trade Marks & another [2015] eKLR** considered at length the use of the words"shall" in a statute, and on whether the Registrar of Trade Marks had the discretion where the Statute used the word "shall" and had this to say:

"As was noted long ago by Tindal CJ in the <u>Sussex Peerage</u> case [1844] 11CI & Fin 85 in explaining the literal rule of statutory interpretation,

> ***"……the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case best declare the intention of the lawgiver."***
>
> ***The Rules (46 and 102) do not provide the consequences of failure to comply with the provisions but are only guidelines and directory. It follows that if the application for trade mark has not been opposed within sixty (60) days, then in terms of section 22 (1) (a), it is directed that the Registrar shall register the trade mark. He cannot, however, register a trade mark within a period less than sixty (60) days from the date of advertisement. It is, therefore, for the court to ascertain if Parliament or the Minister (in exercise of powers to make rules under section 41) intended the provisions to be mandatory, in which case failure to comply with them would render the act complained of null and void; or if the provisions are merely directory or permissible then non-compliance would only be an irregularity.***

It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision. In Project Blue Sky Inc. Vs Australia Broadcasting Authority [1998] 194 CLR 355, the Australian High Court emphasized the thinking thus:-

"…..a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory, whether there has been substantial compliance. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid…….. In determining the question of purpose, regard must be had to the language of the relevant and the scope and object of the whole statute." (Emphasis added).

Whether the words "shall" or "may" convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters. The Supreme Court in its advisory opinion In the Matter of the Principle of Gender Representation in The National Assembly and the Senate, Application No. 2 of 2012 found that, the use of "shall" in Article 81 (b) of the Constitution on the gender-equity rule as used in the context, incorporates the element of management discretion on the part of the responsible agency or agencies."

72. In **David Njenga Ngugi v Attorney General [2016] eKLR** the Court of Appeal most recently, when considering whether the use of the word "shall" in section13A of the Government Proceedings Act was mandatory or discretionary observed that:

"12. The word "shall" is used in this section in relation to time for filing suit. The section prohibits filing of suit before the notice prescribed has run its course. The cannons of interpretation of statutes show that where the word "shall" is used, it connotes mandatoriness if it confers a power and a duty to act. It shows that the rule must be enforced. But like other statutes, the provisions of the Government Proceedings Act (Cap 40) must be construed so as to carry out the intention of Parliament. Read as a whole, nowhere does the Act manifest any intention to deprive an intending litigant of his/her cause of action on account of failure to fully comply with the Section 13A (supra)……

"The principles of construction of statutes show that where the use of the word "shall" in a statute does not confer a power and a duty to act, it is not imperative; it is directory. In the instant case, the use of the word "shall" in section 13A (supra) is clearly directory. It requires that no suit shall be instituted where a notice has not been given in compliance with the section. The right and power to sue does not spring from compliance with the section and, failure to fully comply with the section cannot hamper the right of a claimant to sue. As indicated above, the foundation of a tortious action against Government is in common law. It is clear that a suit that has been filed without full compliance with section 13A cannot be said to be incompetent nor can it be rightly struck out.

Its competency or otherwise is dependent on considerations of section 13A (supra). It cannot be good law to hold that section 13A which is merely directory, can be regarded as imperative so as to render a competent suit incompetent for failure to fully comply with it.

15. The learned Judge of the High Court in striking out the suit went into error. Procedural rules and directory provisions of the law even where their peremptoriness is clear and unambiguous cannot vitiate a cause of action and

the right to sue. In the instant case, the use of the word "shall" in Section 13A (supra) does not import "mandatoriness". It is directory and procedural. The appeal depicts the period prior to the 2010 Constitution. The 2010 Constitution now binds courts by dint of Article 159 (2) (d) in exercising judicial authority to administer justice without undue regard to procedural technicalities.

73. In **Sitenda Sebalu V Sam N. Njuba and the Electoral Commission of Uganda**(**Supreme Court of Uganda Election Petition N. Petition Appeal No. 26/2007** the learned judges held that:

> *"…the inherent powers of the court can be resorted to so as to extend time, even where there is a law of limitation to an action."*

74. Their Lordships, further held that ***"although the intention of Parliament in setting up time limits was to ensure, in the public interest, that disputes concerning election of the peoples' representatives are solved without undue delay, that was not the only purpose and intention of the legislature***.

75. Their Lordships went on to state that:

> ***" It cannot be gainsaid that the purpose and intention of the legislature in setting up an elaborate system for judicial inquiry with alleged electoral malpractices…..was to ensure equally in the public interest, that such allegations are subjected to a fair trial and determined on merit."***

76. Their Lordships in the above persuasive case found that the court had jurisdiction to hear and determine the application to extend time, despite the time limits set up by the statute.

77. It must always be remembered that the mere fact that a rule applies the word "shall" does not make the said requirement mandatory since the mere use of the word "shall" cannot oust the jurisdiction of the Court. In **Standard Chartered Bank Ltd. vs. Lucton (Kenya) Ltd. Nairobi (Milimani) HCCC No. 462 of 1997 Ringera, J** (as he then was) held that the use of the word "shall" in a statute only signifies that the matter is *prima facie* mandatory and its use is not conclusive or decisive and it may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only.

78. The learned Judge stated:

> ***"There appears to be a common belief by many in these courts that the use of the word "shall" in a statute makes the provision under construction a mandatory one in all circumstances. That belief is in my discernment of the law a fallacious one. As I understand the canons of statutory interpretation, the use of the word "shall" in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only. As long ago as 1861, in the case of LIVERPOOL BOROUGH BANK V TURNER [1861] 30 L. J. Ch. 379, pp. 380-381, Lord Campbell had laid it down that;***
>
> > ***"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered".***

79. From the **PRINCIPLES OF STATUTORY INTERPRETATION by Justice G.P. Singh,** a former Chief Justice of Madhya Pradesh High Court in India, the following instructive passage appears at p. 242:-

> ***"The use of word "shall" raises a presumption that the particular provision is imperative; but***

this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word "shall" has, therefore, been construed as merely directory".

80. In England, presently, whether the court extends time for filing of judicial review proceedings under Rule 3.1(2)(a) of the Civil Procedure Rules is a matter of discretion. Factors relevant to the exercise of discretion include the following, where:

(1) The Claimant reasonably did not know of the decision.

(2) The Claimant was pursuing alternative remedies.

(3) Delay in obtaining CLS funding.

(4) Hardship, prejudice and detriment to good administration.

(5) The merits of the claim and the importance of the issues.

81. In Canada, if one misses the deadline for filing of an application for judicial review, one must file a motion for an extension of time in writing and provide an explanation justifying the extension of time **(see *Stanfield v. Canada* at para. 3; *Federal Courts Rules*, rr. 8 and 369).** This motion can also be heard orally if time is of the essence and if it is contested. If the Federal Court grants the motion for an extension of time, the registry will issue the application. The parties cannot consent to extend a deadline imposed by legislation.

82. In my view, the above decisions are entitled to respect for reasons that strictly enforcing Order 53 of the Civil Procedure Rules as a mandatory requirement diminishes the ability of the citizen to seek relief against administrative or other bodies exercising judicial or quasi judicial authority and which this court has the constitutional mandate to supervise**. *see* Majanja J in Kenya Bus Service Ltd & Another v. Minister For Transport & 2 Others [2012] eKLR** cited with approval in **David Njenga Ngugi v Attorney General** (supra) decided on 16th July, 2016.

83. In addition, for the court to consider whether or not to enlarge the stringent specific timeline provided for in the rule, what it needs is to satisfy itself that there is no demonstrable prejudice caused to the adverse party because of delay, and whether refusal to enlarge time will occasion hardship and result in an injustice to the applicant. In my view, even if Order 50 Rule 6 of the Civil procedure Rules and Sections 63(e), and 95 of the Civil procedure Act and Section 59 of the Interpretation and General provisions Act were inapplicable for purposes of enlarging time in this case, I would still invoke the Court's inherent jurisdiction to ensure that justice is done to the parties since there is no prohibition for enlargement of time that is granted by the court as is the case herein. In this case, it is simply too early for that claim to be credible and I do not believe that the Rules Committee in enacting Order 53 of the civil Procedure Rules intended to preclude meritorious claims in these circumstances.

84. In **Raval V The Mombasa Hardware Ltd [1968] EA 392,t**he court in considering inherent jurisdiction of the court held that the reason usually given by the court for resorting to its inherent jurisdiction is to prevent a miscarriage of justice, especially where the defendant(respondent) is not prejudiced in any way if the court extended the time.

85. In the Republic of Northern Ireland, under the provisions of Order 53 which are in parimateria with the Kenyan Order 53, where leave has been granted to file Judicial Review application, the substantive motion by way of an originating motion must be filed and issued within 14 days from the date of leave otherwise the leave granted lapses (see Order 53 Rule 5(5)). And where such leave has lapsed, an application for extension of time or for a further grant of leave must be made by summons and an affidavit explaining the failure to issue and serve the notice of motion in time. The court may order costs against the party who has failed to comply with the time limits.

86. In my humble view, although Order 53 of the Civil Procedure Rules which relates to the procedure for the filing of Judicial Review proceedings does not specifically provide for enlargement of time, the fact that the Order and Rules thereunder are made under the Civil Procedure Act and Rules and that Order 50 Rule 6 of the Civil procedure Rules does not exclude the application of Order 53 thereof, the court is given latitude to either invoke its inherent jurisdiction to prevent an injustice or hardship being occasioned to the parties, or to apply order 50 Rules 6 of the Civil Procedure Rules and Sections 95 of the Civil Procedure Act, section 63(e) of the Civil Procedure Act and Section 59 of the Interpretation AND General Provisions Act Cap 2 Laws of Kenya and more importantly, Article 159(2)(d) of the Constitution in order to prevent an injustice being occasioned to an innocent party.

87. In **M. MWENESI v. SHIRLEY LUCKHURST & ANOTHER, Civil Application No. NAI 170 of 2000**, the Court of Appeal held that:

> ***" A Court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent a court of law is under a duty to exercise its inherent power to prevent injustice……."***

88. **In Bremer Vulcan Schiffbar and Maschinen fabrick Vs. South Indian Shipping Corporation Ltd [1981] AC 909, Lord Diplock in relation to the inherent powers of the High Court, typified such powers as enabling the court to take necessary actions to maintain its character as a court of justice. According to Lord Diplock,**

> ***"It would dampen the constitutional role of a court if as a court of justice it were not armed with power to prevent its process being misused, in such a way as to diminish its capability to arrive at a just decision of the dispute."***

89. The Supreme Court of the United Kingdom in **Pomiechowski v Powland [2012] UKSC 20** read down the absolute statutory time limit so as to make it compatible with Article 6 of the European Court of Human Rights. See **Lord Mance at para 39** that :

> ***"In these circumstances, I consider that, in the case of a citizen of the United Kingdom like Mr Halligen, the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process held to exist under article 6(1) in Tolstoy Miloslavsky."***

90. The Supreme Court of England further in dealing with an appeal where the Court of Appeal in **(Mucelli v Government of Albania [2009] UKHL 2; [2009] 1 W.L.R 287." (paragraph 24 of JI v HMRC)** held that there was no provision in primary legislation that would permit the Civil Procedure Rules to extend the statutory time limit for appeals against extradition, analogous paragraph 4 of Schedule 5 of the 2007 Act, and further, where the Court was swayed by the strong policy reasons in favour of not permitting an extension of the time limit in extradition cases, with Judge Rowland commenting in the Mucelli case that ***"I am not persuaded that any unfairness is such that I can read into the legislation provisions that are not there" (paragraph 25)*** ***was overruled by the Supreme Court on the ground that the case was wrongly decided and that the removal of the power to extend the time limit in tax credits cases cannot be a proportionate or legitimate restriction on the right of access to an independent Tribunal***.[emphasis added]

91. In this case, the court acknowledges that the relevant statute, which is section 175(1) of the Public Procurement and Asset Disposal Act fixes the time for filing of the Judicial Review application for leave which is 14 days and once such leave is granted, then the provisions of Order 53 of the Civil procedure Rules on the filing of substantive motion comes into operation, which provides for a maximum of 21 days from the date when leave is granted. However, the court is also aware that the same statute and the applicable rules made under the Order 53 of the Civil Procedure Rules do not prohibit extension of the 21 days within which the substantive motion should be filed where there is lapse after leave is granted. In the

circumstances, I find that the Supreme Court of England in the above cited case of **Mucelli v Government of Albania [2009] UKHL 2; [2009] 1 W.L.R 287** though persuasive but good law and therefore applicable in the circumstances of this case.

92. This court granted to the applicant ten days for the filing of the motion. Therefore, did this court retain any residual power to enlarge that time as fixed by the Court? The jurisdiction of the Court to extend time fixed by the Court even where there is a default clause was considered by the Court of Appeal in **Caltex Oil (K) Limited v Rono Limited - Civil Appeal/Application No. 97 of 2008 (unreported**) where the Court stated in part that:

> ***"However the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing it always retains power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the Court still retains control of the order, notwithstanding that there has been default. That would necessarily depend on the true construction of the default clause."***

93. **In this case, the court by granting 10 days out of the stipulated 21 days in my view and on the above decisions considered, and in the interest of justice, still retained the control of the order, to enlarge time in the event of default.**

94. **The Court of Appeal in Syombua Muli Mutuva v Charles A.K. Mulela [2014] eKLR** applied the above **Caltex Oil (K)** (supra) case and held, applying section 59 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya that:

> "***The Court is not functus officio as regards the default clause and therefore, has power to extend time notwithstanding the wording of the default clause.***

95. **In my humble view, if enlargement of time in applications of this nature were excluded in the application of Order 53 of the Civil procedure Rules, the Court's capability to do justice to the parties would be substantially diminished, in view of the glaring fact that the relevant statutory provisions do not prohibit the granting of extension of such time. In addition, although Order 53 of the Civil Procedure Rules uses the word "shall be filed within 21 days,"** the Supreme Court very recently in the case of **Deynes Muriithi & 4 others v Law Society of Kenya & another [2016] eKLR,** applying the decision by the High Court at Kisii in ***Peter Ochara Anam & 3 Others v. Constituencies Development Fund Board & 4 Others,*** **Constitutional Petition No. 3 of 2010; [2011] eKLR,** found that the particular issue, though occurring in a constitutional petition, which was neither civil nor criminal, was *civil in nature.* It thus held:

> ***"In as much as the Constitutional petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, <u>the procedure of handling such a petition must be akin to civil proceedings</u>. It cannot be that merely because it is a special jurisdiction, the rules of evidence for instance should not apply, be ignored nor witnesses should not be sworn, pleadings should not be signed and questions in cross-examination should not be asked. That will be a direct invitation to judicial chaos and legal absurdity. <u>I do not therefore wholly agree or subscribe to the submissions of the petitioners that the petition being neither a criminal nor civil proceedings, it must be conducted in vacuum</u>"*** **[emphasis supplied by the Supreme Court].**
>
> **[37] The Supreme Court in the above matter stated that:**
>
> > ***"It is evident to us that appeals dealing with constitutional issues, May in substance <u>be civil in nature</u>. Accordingly, the Court of Appeal has the power to exercise its original and discretionary jurisdiction to entertain interlocutory applications to preserve the subject matter of any appeals."***

96. Applying the above principles, to this case, in my humble view, the decision in the **Paul Mafwabi**

Wanyama (supra) case which was decided before enactment of the Fair Administrative Action Act,2015 and before the reasoning in the **Deynes Muriithi Supreme Court** case decided on March, 16th 2016 has to be distinguished with the circumstances of this case, in the sense that any matter like the present matter of Judicial Review, which is based on constitutional imperatives fundamentally alters Judicial Review as traditionally and formerly known in common law legal circles.

97. With the enactment of Fair Administrative Action Act, 2015 which Act implements Article 47 of the Constitution to give effect to the right to fair administrative action, the above Act effectively modifies the Law Reform Act and Order 53 of the Civil procedure Rules on flexibility in the application of the law to the circumstances of a particular case, with the sole intention of achieving substantive justice for the parties and especially where no prejudice is shown to be occasioned to the respondents or interested parties herein.

98. In my modest view, no statute can be enacted with the sole intention of doing an injustice to parties. Article 47 of the constitution elevates fair administrative action from a common law action to a constitutional right under the Bill of rights. The same position applies to Article 48 of the Constitution which commands the state to ensure that all persons are facilitated to access justice without any impediments.

99. Further, Article 20(3) (a) of the Constitution commands that in applying a provision of the Bill of Rights like in this case Article 47 of the Constitution on the right to fair administrative action which is invoked by the exparte applicant in this case, a court should '***develop the law to the extent that it does not give effect to a right or fundamental freedom', and to 'adopt the interpretation that most favours the enforcement of a right or fundamental freedom."*** ***[****Emphasis added].in my view, it would hamper the enforcement of the right to administrative action if the law Reform Act and Order 53 of the Civil Procedure Rules were strictly interpreted to exclude any room for enlargement of time where there is sufficient cause shown by the party applying for such enlargement of time.*

100. In addition, Article 159 of the Constitution is clear that judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under the Constitution. In my humble view, the people of Kenya in enacting the Constitution and in enshrining therein Articles 10, 20,47, 48 and 159 among other Articles did not envisage a situation where a statute like the Law Reform Act which has remained inert since 1956 for nearly 60 years, would override the principles enshrined in the Constitution promulgated in 2010 and in the statutes implementing it, having regard to the history of this country where most statutes which were enacted during the colonial period were with the intention of protecting the *crown* and not to do justice to the subjects, and it is for that reason, in my view, that the Judicial Review Orders were then very limited, known as prerogative writs or orders issued in the name of the crown and not as Judicial review orders as are known today.

101. In the current constitutional dispensation, the courts in interpreting any Statute or Rule must ensure that the purposes, values and principles of the Constitution are protected and promoted and that is the task that I have undertaken in this matter. It would be surprising to find that the origin of the Judicial Review remedies which is in England, permits the extension of time whereas in Kenya, we are still stuck to the stringent interpretation of a rule that was meant to curtail aggrieved Africans from seeking Justice, by placing stringent timelines, knowing that courts were few and quite far away and removed from where the aggrieved persons lived, at the time when Order 53 and the Law Reform Act were enacted, on 31st January, 1924 and 1956 respectively.

102. In addition, unlike in private law, a claim for judicial review in England and before the 2010 Constitution in Kenya vide Article 47 could not be made as of right. A claimant must apply for permission to bring a claim for judicial review. Strictly speaking, that is not the with Article 47 of the Constitution which is implemented through the Fair Administrative Action Act, 2015.The stringent requirement is designed to filter out claims which are groundless or hopeless at an early stage. The purpose is:

> ***"…to prevent the time of the court being wasted by busybodies with misguided or trivial***

complaints of administrative error and to remove the uncertainty in which public… authorities might be left…" per Lord Diplock in R v IRC, Ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, 643."

103. Further, Article 10 of the Constitution of Kenya espouses the national values and principles of governance and which values and principles bind all state organs, state officers, public officers and all persons ***whenever any of them applies or interprets the Constitution, enacts or interprets the Constitution and enacts, applies or interprets any law or makes or implements public policy decisions***. Therefore, the Law Reform Act and Order 53 of the Civil procedure Act must be subjected to the same rigours as stipulated in Article 10 of the Constitution.

104. Furthermore, a rule like in this case Order 53 of the Civil procedure Rules which is subject to legislation and the Constitution cannot be given such a strict interpretation as to cause hardship and occasion an injustice even when the Constitution which is the supreme law of the land allows itself to be interpreted in a supple way as espoused in Article 259 of the Constitution.

105. I reiterate that Fair Administrative Action Act is the latter legislation which implements the Bill of rights under Article 47 directly and therefore it supersedes the Law Reform Act and Order 53 of the Civil Procedure Rules. In **Judicial Services Commission Vs Mbalu Mutava & Another [2015] e KLR CA 52/2014** the Court of Appeal held, inter alia that:

" Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of rights. The right to fair administrative action is a reflection of some of the national values in Article 10 of the Constitution such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under common law was developed."

106. Therefore, as correctly submitted by counsel for the applicant Miss Chichi, the Law Reform Act which was assented to on 17th December 1956 and commenced operations on 18th December 1956 is an Act of Parliament to effect reforms in the law relating to civil actions and prerogative writs. And with the prerogative writs now having been converted into constitutionally recognized remedies for violation of the right to fair administrative action,, and with Sections 9 of the Law Reform Act providing that the power to make rules of court to provide for any matters relating to the procedure of civil courts shall include the power to make rules of court- prescribing the procedure and the fees payable on documents filed; in the view of this court, Order 53 of the Civil Procedure Rules being part of the Civil Procedure Act cannot be read exclusive of other Rules under the Act. If that was the case, nothing prevented the drafters of the Civil Procedure Act and Rules excluding the applicability of order 53 and the provisions of Sections 8 and 9 of the LAW Reform Act to the Civil procedure Act and Rules.

107. Section 10(1) of The Fair Administrative Action Act, 2015 eschews undue regard to procedural technicalities in Judicial Review Applications which essentially echoes the language of Article 159 of the Constitution and in my humble view, in recognition that Judicial Review is a tool in defence of the Bill of Rights. Thus, the Constitution of Kenya 2010 demands that formalities relating to proceedings to enforce the Bill of Rights (and the right to fair administrative action) which is a right guaranteed by the constitutions shall be kept to a minimum, and therefore the courts shall in appropriate cases even entertain cases of proceedings on the basis of informal documentation as stipulated in Article 22(3) (b) of the Constitution. Judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism.

108. In addition, the Chief Justice is empowered under Section 10(2) of the Fair Administrative Action Act to make rules regulating the procedure and practice in matters of Judicial Review. Until those Rules

and Regulations are made, and with the Fair Administrative Action Act having effectively amended the Law Reform Act with regard to any strict interpretation regarding the issue of Judicial Review Orders, this court is persuaded that the provisions of Order 50 Rule 6 of the Civil Procedure Rules as read with Sections 95 of the Civil Procedure Act and Section 59 of the Interpretation and General provisions Act Cap 2 Laws of Kenya as well as Article 159(2)(d) of the Constitution are applicable to this case, with the elevation of fair administrative action to a fundamental right espoused in the Constitution, whose remedy is Judicial review.

109. Under Section 59 of the Interpretation and General Provisions Act, where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court to other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.

110. Under Section 95 of the Civil Procedure Act, where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted have expired.

111. On the other hand, Order 50 Rule (6) of the Civil Procedure Rules in clear that where a limited time has been fixed for doing any act or taking any proceeding ***under these Rules (without exception),*** or by summary notice ***or by order of the court***, the court shall have power to enlarge such time upon such terms (if any) as a justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made therein shall be borne by the parties s making such application, unless the court orders otherwise.

112. By virtue of the fact that Judicial Review is now a constitutional tool for the vindication of fundamental rights and freedoms, more specifically, the right to fair administrative action, in my humble view, any conflict between the Law Reform Act in Sections 8 and 9 and the Fair Administrative Action Act , 2015 must be resolved in favour of the latter Act which directly implements the constitutionally guaranteed right since Article 47(3) of the Constitution is what reflects the will of the people of Kenya and therefore in applying Sections 8 and 9 of the Law Reform Act, the court must interpret those sections with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution, as stipulated in Section 7(1) of the Sixth Schedule to the Constitution, until the said provisions are amended as appropriate.

113. Although it was contended that this court has no jurisdiction to enlarge time as the leave granted lapsed, the provisions of Section 95 of Civil Procedure Act, Section 59 of Interpretation and General Provisions Act Cap 2 as well as Order 50 Rule 6 of the Civil Procedure Rules are clear that such application for leave can be made ***even after expiry of the period of doing any act or taking the proceeding for which leave was granted.***

114. In **Gateway Insurance Company Ltd Vs Avies Auto Sprays [2011] e KLR** the Court of Appeal citing with approval several cases including **Periagami Asari V Illupur Penchayert Board AIR 1973 Mad 250** dealing with the rule identical to Order 50 Rule 6 of the Civil Procedure Rules where it was held that;

> ***" The principle that when the effect of the order granting time in the event of non compliance has to operate automatically the court has no power to extend time as it becomes functus officio, will apply when the suit is finally disposed of. If the order is not final and the court retains control over it and seized of the matter, it will have power to extend time."***

115. And in **Gogardhan V Barsati AIR 1972 ALL 246,** dealing with similar provision to Order 50 Rule 6 of Civil Procedure Rule, it was held that:

" Even in cases where an order is made by the court for doing a thing within a particular time and order further provide that the application, a suit or appeal shall stand dismissed, if the thing is not done, within the time fixed, the court has jurisdiction, if sufficient cause is made out, to extend the time even when the application for extension of time is made after the expiry of the time fixed. It is not the application for grant of further time, whether made before or after the expiry of the rime granted, which confers jurisdiction on the court."

116. In this case, the court notes that the applicant lodged the application within the time stipulated in section 175(1) of the Public Procurement and Asset Disposal Act, 2015, which is 14 days from the date when the Review Board made its decision. The applicant was then granted leave to file Judicial Review notice of notion within 10 days from 19th August 2016. The applicant's counsel, however, inadvertently filed notice of motion within the said 10 days but the orders sought were a replica of the orders sought in the application for leave to apply. Admittedly, the advocate panicked and withdrew the defective application and filed the application for enlargement of time to file a proper applications by which time the 10 days had lapsed. This was after the court had struck out the similar defective motion in JR372 of 2016. The stay granted did lapse with the leave. However, in view of the finding of this court that it has the power to enlarge such time, I hold that the court has the power to order for stay of enforcement of the decision of the Public Procurement Administrative Review Board.

117. The applicant's counsel was diligent in bringing this application timeously. His admitted mistake should not be visited on his innocent client who has a constitutional right to access justice.

118. Accordingly, I find the application as filed merited. I grant the orders enlarging time within which the substantive notice of motion ought to have been filed by a further 7 days from the date of this ruling. I further order that there shall be stay of enforcement of the impugned decision of the Public Procurement Administrative Review Board until the substantive motion if filed is heard and determined.

119. As agreed among the parties, this ruling in JR 371 of 2016 shall apply to JR 372 of 2016 with necessary modifications as to the parties.

120. The interested parties shall have costs of this application. The Respondent and Interested parties to file their responses within 7 days from date of service. Mention on 7th October 2016 for directions.

Dated and signed and delivered at Nairobi this 23rd day of September 2016.

R.E. ABURILI

JUDGE