



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 581 OF 2016

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS & PROHIBITION**

AND

**IN THE MATTER OF NATIONAL TRANSPORT AND AUTHORITY ACT, (ACT NO. 33 OF
2012)**

AND

IN THE MATER OF A JUDICIAL REVIEW APPLICATION

BETWEEN

PATRICK NJOROGE KIMANI.....1ST APPLICANT

JOHN KUNG’U WAMBUI.....2ND APPLICANT

MICHAEL KENDA3RD APPLICANT

JOSEPH GICHUKI MUTUNGU.....4TH APPLICANT

ROBERT MWANGI NDERITU.....5TH APPLICANT

STANLEY NGUGI GACHERU.....6TH APPLICANT

VERSUS

THE NATIONAL TRANSPORT & SAFETY AUTHORITY...RESPONDENT

AND

KANGEMI MATATU OWNERS SACCO.....INTERESTED PARTY

RULING

1. This ruling determines the preliminary objection filed by the interested party **KANGEMI**

MATATU OWNERS SACCO on 8th December 2016 and canvassed before me **this morning at 11.00 a.m. of 9th December 2016.**

2. The preliminary objection is predicated on the grounds that:

- 1. The instant suit has been brought to court in total disregard of the law thus an abuse of the due process of court and the legal process.**
- 2. That the instant application has been brought in total violation of Sections 67(3) of the Sacco Societies Act Cap 490 Laws of Kenya.**
- 3. That the instant application has been filed in gross violation of the provisions of Sections 76 and 77 of the Co-operative Societies Act, Cap 490 Laws of Kenya.**
- 4. That the Honourable court has no jurisdiction to hear and determine the suit herein.**

3. The above preliminary objection was filed pursuant to Order 51 Rule 14 of the Civil Procedure Rules in response to prayer No. 4 of the chamber summons dated 21st November 2016 wherein the exparte applicants seek from this court an order that the leave granted in 6th December 2016 to them to institute Judicial Review proceedings do operate as stay of the respondent and the interested party uttering, using, further using, or otherwise howsoever purporting that the exparte applicant's PSV vehicles registration numbers KBK 023J; KBK 961C, KAM 347D, KBN 670N, KBR 081P, KPH 190Y, KAT 647Z and KCB 503S constitute or form part of the PSV vehicles under the interested party fleet of PSV vehicles.

4. The above prayer for stay was left to interpartes consideration after the interested party herein through its counsel, Mr Kago, did, on 6th December 2016 indicate that his clients had no objection to leave to apply for Judicial Review orders of Mandamus and prohibition being issued in terms of prayers Nos 2 and 3 of the chamber summons dated 21st November 2016 which prayers as granted are that;

2. That leave be and is hereby granted to the exparte applicant to seek by way of Judicial Review, an order of mandamus do forthwith issue, compelling the respondent herein, National Transport & Safety Authority, and not later than 1 day from the date of making of this order, and service thereof upon the respondent, to remove the exparte applicant's PSV vehicles KBK 023J; KBK 961C, KAM 347D, KBN 670N, KBR 081P, KPH 190Y, KAT 647Z and KCB 503S from the National Transport & Safety Authority portal under the membership aegis, and control of the interested party as such PSV vehicles, and to forthwith communicate to the interested party the cessation of the exparte applicant's PSV vehicles registration Nos KBK 023J; KBK 961C, KAM 347D, KBN 670N, KBR 081P, KPH 190Y, KAT 647Z and KCB 503S from being part of the Kangemi Matatu Owners Sacco fleet of PSV vehicles.

3. That leave be and is hereby granted to the exparte applicant to seek by way of Judicial Review, that an order of prohibition do issue, prohibiting the respondent, and the interested party, or any person acting under the behest, direction and authority, from including the exparte applicant's vehicles registration Nos KBK 023J; KBK 961C, KAM 347D, KBN 670N, KBR 081P, KPH 190Y, KAT 647Z and KCB 503S as part of the PSV vehicles under the interested party fleet of PSV vehicles.

5. After the above orders for leave were granted, the interested party was granted leave to file and serve its response to the prayer No 2 which they did by way of replying affidavit sworn by Stanley Mugweru on 7th December 2016 and a preliminary objection notice dated 7th December 2016, as canvassed this morning and which is subject of this expeditious ruling.

6. The arguments for and against prayer No. 4 of the chamber summons were to be canvassed

today but in view of the preliminary objection raised, the court directed that the preliminary objection be considered first.

7. According to Mr Kago counsel for the interested party, Section 76 1 (b) of the Co-operative Societies Act provides that all disputes concerning the business of the Co-operative Society between members and between members and the Co-operative Society shall be referred to the Co-operatives Tribunal and that the applicants herein are members of the interested party which is a Co-operative Society and that they own vehicles operated by the interested party and which Co-operative Society is registered under Cap 490B Laws of Kenya, the Sacco Societies Act.

8. Further, that Section 67(3) of the Sacco Societies Act provides that any dispute arising in the business of the Co-operative Society shall be referred to the Tribunal created under Section 77 of the Co-operative Societies Act Cap 490 Laws of Kenya.

9. It was therefore submitted that the dispute herein was brought to the wrong forum as it should have been filed before the Co-operatives Tribunals as it is between members of a Co-operative Society and the Society.

10. Reliance was placed on the case of **Kirinyaga District Farmers Vs Kirinyaga Co-operative Union Ltd [2000] e KLR** where the court upheld a preliminary objection to the effect that the dispute fell within the jurisdiction of the Co-operatives Tribunal to determine.

11. The interested party's advocate therefore urged this court to strike out the application by the exparte applicant as the court lacks jurisdiction to hear and determine the dispute.

12. In opposition to the preliminary objection, Mr H. Kinyanjui counsel for the exparte applicants submitted that the court should uphold the Dictum of Newbold J in the famously quoted **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors** where the court warned parties against raising unjustifiably preliminary objections and that that practice should be deprecated.

13. Mr Kinyanjui further submitted that the preliminary objection raised is an afterthought and is in bad faith since the interested party agreed to have leave to apply granted and therefore it cannot turn around and raise a preliminary objection to the prayer for stay.

14. It was submitted that the interested party's preliminary objection is a delaying path to make the exparte applicants suffer which is an economic sabotage.

15. According to Mr Kinyanjui, the preliminary objection must fail because the ground has since 2007 changed when the Co-operative Societies Act Cap 490 Laws of Kenya was enacted in that at the present, Article 159(2) (d) of the Constitution envisages dispensation of justice without undue regard to procedural technicalities which the interested party is allegedly employing. Further, that access to justice under Article 48 of the Constitution and the right to Fair Administrative Action as stipulated in Article 47 of the Constitution are paramount considerations for the court in these kind of matters, and not Cap 490 and 490B of the respective statutory provisions.

16. That the court cannot derogate from those provisions which guarantee rights in the Constitution by shutting the exparte applicants out of the justice system and that is why Order 53 of the Civil Procedure Rules has eliminated the requirement for service of notice to the Registrar, so as to make it easier for Judicial Review proceedings.

17. Further, that the interested party had not demonstrated any prejudice that it will suffer by the continuation of these proceedings since it conceded to leave to apply being granted on 6th December 2016.

18. Mr Kinyanjui further submitted that Article 165 of the Constitution is what vests jurisdiction in this court to hear and determine disputes and that Article 77 of the Co-operative Societies Act is

subjugated to Article 165 of the Constitution.

19. Further, that Article 47(2) of the Constitution empowers Parliament to enact legislation to implement Article 47(1) of the Constitution on the right to Fair Administrative Action hence the Fair Administrative Action Act No. 4 of 2015.

20. In addition, it was submitted on behalf of the *ex parte* applicants that the transitional provisions of the constitution are clear on how the old law should be interpreted, which should be in accordance with the new Constitution.

21. Further, that Section 3(1) (c) of the Fair Administrative Action Act of 2015 confers on the court jurisdiction to grant prayer No. 2 and 3 of the application dated 21st November 2016.

22. That the Fair Administrative Action Act applies to all state and non state agencies. Further, that Section 77 of the Co-operative Societies Act does not envisage the grant of relief as against the respondent herein such as envisaged under Section 7 of the Fair Administrative Action Act.

23. Mr H. Kinyanjui relied on **Republic Vs Commissioner of Co-operative Development *ex parte* Lawrence Mwangangi [2015] e KLR** and submitted that the issues in both cases are similar and that there was no efficacious remedy before the Co-operatives Tribunal.

24. Further, Mr H. Kinyanjui urged the court to find that leave having been granted, any objections can come later at the substantive motion and that since the interested party had filed a replying affidavit, the court should allow the main motion to be considered. He distinguished the **Kirinyaga Farmers** (*supra*) case as having been decided before the 2010 Constitution and the enactment of the Fair Administrative Action Act, 2015 hence that authority was said to be irrelevant to these proceedings.

25. In a brief rejoinder, Mr Kago for the interested party maintained that remedies were available under Cap 490 and 490B of the Laws of Kenya, the Co-operative Societies Act and Sacco Societies Act respectively since the two Acts provide for resolution of disputes hence litigants cannot nominate which fora to appear before.

26. Further, that Article 159 2 (d) of the Constitution does not oust statutory and procedural laws and rules.

Determination

27. I have carefully considered this preliminary objection filed on 8th December 2016 by the interested party and argued this morning. I have also considered the submission in favour thereof and against the preliminary objection which I consider to have been very able submissions.

28. In my humble view, the issues that flow for determination are

i. Whether the court's jurisdiction under Article 165 of the Constitution can be limited by an Act of Parliament to wit the Co-operative Societies Act Cap 490 Laws of Kenya, and the Sacco Societies Act, Cap 490B of the Laws of Kenya.

ii. What would be the effect of such restrictions and

iii. Whether this court has jurisdiction to hear and determine these proceedings.

iv. What orders should this court make.

29. The above issues shall be determined together. But first things first. A preliminary objection is a point of law when taken would dispose of the suit. It is what was formerly called a "demurrer." The

Respondent's Preliminary Objection fits the definition of a preliminary objection per the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In the said case, Law J.A. stated that a preliminary objection is:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold, President stated in the same judgment as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The interested party in this case does not seek the exercise of judicial discretion. No, what the preliminary objection seeks to do is determine the issue of whether there is a cause of action *in limine*. It is well taken because if it succeeds the Court will be saved the cost of a lengthy trial and attendant expenses on either side.

30. On the issue of whether the court's jurisdiction under Article 165 of the Constitution can be limited by Section 76 and 77 of the Co-operative Societies Act and Section 67(3) of the Sacco Societies Act which provide that disputes between members of a Co-operative Society and Co-operative Society or among members of a Co-operative Society shall be referred to the Co-operatives Tribunal for hearing and determination, Article 165 of the Constitution vests in the High Court unlimited original and appellate jurisdiction in civil and criminal matters, save for matters reserved for the exclusion jurisdiction of the Supreme Court and the courts of equal status contemplated in Article 162(2) (a) and (b) of the Constitution.

31. In addition, Article 47 of the Constitution as read with Article 165(6) of the Constitution donate to the High Court supervisory Powers over decisions of the subordinate courts and inferior tribunals or bodies or authorities exercising judicial or quasi judicial jurisdiction.

32. To implement Article 47 of the Constitution, Parliament enacted the Fair Administrative Action Act No. 4 of 2015 and under Section 9(2), (3) and 4 of the Act, it provides:

“1. 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.

2. 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 the applicant shall first exhaust such remedy before instituting proceedings under Subsection (1).

3. 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.
(emphasis added).

33. From the above provisions, it is clear that the Fair Administrative Action Act mandates an applicant to show that they have exhausted the alternative remedies available under any other law or avenue before resorting to court. However, the onus is on the applicant to demonstrate to court that he ought to be exempted from resorting to the available remedies.

34. In the present case, the preliminary objection which I find a pure point of law is anchored on the provisions of Sections 76,77 of Cap 490 and Section 67(3) of Cap 490B Laws of Kenya; which make provision that disputes between members of a Co-operative Society and the Society, like the one before this court, ought to be resolved through the Co-operatives Tribunals established under Section 77 of Cap 490, and appeals from that Tribunal lie to the High Court which is the final arbiter on those matters.

35. The position that is exempted in Section 9 of the Fair Administrative Action Act No. 4 of 2015 is not new. In **Republic vs National Environmental Management Authority [2011] e KLR** 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. The Court of Appeal went on to state that:

“ 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 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 Republic Vs Birmingham City Council ex parte Ferrero Ltd Case, the learned Judge, in our respectful view, considered those structures and came to the conclusion that the appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute, with respect we agree with the judge.”

36. In **Revital Healthcare (EPZ) Ltd & Another V Ministry of Health & 5 Others [2015]** Emukule J citing with approval **Damian Belfonte V The Attorney General of Trinidad & Tobago CA 84 of 2004** where it is stated:

“ where there is a parallel remedy, constitutional relief should not be made unless the circumstances of which the complaint is made include some feature which made is 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 misuse, an abuse of the court process.”

37. From the above authorities among others, it is clear that if there is a particular procedure provided under the Constitution or any written law, then unless it is shown that the alternative remedy is ineffective, and or inapplicable to the dispute before the court, the court ought to ensure that the dispute is resolved in accordance with the relevant statute.

38. 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** held inter alia and I agree that it is not only the Constitution that can limit or confer jurisdiction of the court but that any other law may by express provision confer or limit that jurisdiction.

39. in **Samson Vuko V Nelson Kilumo & 2 Others[2016] e KLR**, the Court of Appeal quite recently, citing with approval several decisions among them: **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 prescribed by the Constitution or the Act of Parliament, that procedure should be followed...”

40. In **Mutanga Tea & Coffee Company Ltd Vs Shikara Ltd & 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).

41. 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 on **Samson Chembe Vuko V Nelson Kilumo** (supra), 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.

42. In the instant case, it is not denied that the dispute herein relates to the exparte applicants’ membership to the interested party Cooperative Society. It is also not in dispute that the exparte applicants are members of the interested party cooperative society and that they are stuck to the online portal which is regulated by the Respondent National Transport Safety Authority hence, the orders being sought to compel removal of the exparte applicant’s vehicles listed herein from that portal; and to prohibit the respondent and the interested party from including the exparte applicant’s vehicles as part of the Public Service Vehicles as part of the PSV vehicles under the interested party’s fleet of PSV vehicles.

43. it is also not disputed that the running of the exparte applicant's fleet of PSV vehicles named herein is the business of the interested party.

44. With those clear provisions of sections 76 and 67(3) of Cap 490 and 490 B of the Cooperative Societies Act and Sacco Society Act respectively that disputes between the exparte applicants herein and the interested party should be resolved by the Cooperatives Tribunal established under section 77 of Cap 490 Laws of Kenya, I have no doubt in my mind that this dispute squarely falls in and can be efficaciously be resolved through those established mechanisms under the statute and moreover, when the Fair Administrative Action Act No 4 of 2015 which was expressly invoked by the exparte applicant, and which implements Article 47 of the Constitution thereby crystallizing the right to fair administrative action provides for exhaustion of alternative remedies before approaching this court.

45. In **International Centre for Policy and Conflict & 5 others v. The Attorney General & 4 others (2013) eKLR** as cited in the case of **DIANA KETHI KILONZO & ANOTHER –V- IEBC & 10 OTHERS 2013 (2013) EKLR** it was stated:

“An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act. For instance, in the case of IEBC, the court would end up usurping IEBC’s powers. This would be contrarily to the institutional independence of IEBC granted by Article 249 of the constitution.” Where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted.....”(Emphasis added).

In **Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004** 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.”

In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000**, the Court of Appeal expressed itself as follows:

“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”.

In **PETER OCHARA ANAM & OTHERS –V- CONSTITUENCIES DEVELOPMENT FUND CDF BOARD & OTHERS KISII PETITION NO.3 OF 2010 (unreported) (2011) eKLR**, Hon Mr. Justice Makhandia, as he then was stated as follows:

“The provision is couched in mandatory terms and has no exceptions and or provisos. Coming to court by way of a constitutional petition is not expected either as much as the constitution is superior law to the statute aforesaid. In view of this provision and there being no allegations or evidence that the petitioners exhausted these remedies, in bringing this petition, the petitioners have deliberately avoided the procedure and remedy provided for under the Act. They have not proffered any explanation as to why they did not refer any of the complaints they have raised to the 1st respondent as required by law. It has been stated constantly that where there exists sufficient and adequate Legal Avenue, a party ought not to trivialize the jurisdiction of the court pursuant to the constitution. Indeed, such a party ought to seek redress under the relevant statutory provision; otherwise such available statutory provisions would be rendered otiose...”

46. In this case, it has not been demonstrated that the Co-operatives Tribunal has no jurisdiction to determine the dispute between the parties herein, noting that the respondent is only but the regulator of business between the exparte applicants and the interested party.

47. Furthermore, if the applicants believed that there is no efficacious remedy before the Co-operatives Tribunal, they would have applied, as stipulated under Section 9(4) of the Fair Administrative Action Act No. 4 of 2015 for leave of this court to be exempted from pursuit of alternative remedy and the court would then have considered if there are any exceptional circumstances for grant of such exemption. They have not.

48. In addition, albeit the exparte applicants contend that the interested parties validated the prayers for leave, this court does not agree. Jurisdiction can only be conferred by the Constitution or statutory provisions and not by consent of parties. It follows that anything which is done without jurisdiction is null and void and the court is vested with inherent jurisdiction, to prevent abuse of court process. In this case, jurisdiction of this court to hear the dispute in issue is, in the first instance, ousted by section 9 of the Fair Administrative Action Act No. 4 of 2015 such that the court is the last resort. In **Macfoy Vs United Africa Company Ltd [1961] 3 ALL ER 1169 at 1172** it was held inter alia:

“If an act is void, it is in law a nullity, it is bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it so.”

49. Thus, with regard to jurisdiction of this court to hear and determine these proceedings where leave was granted by consent, I find that that consent cannot invalidate clear provisions of the law that vests jurisdiction elsewhere.

50. In **Joseph Njuguna Mwaura & Others vs. Republic Criminal Appeal No. 5 of 2008** it was held:

“It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision

making function. In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act.”

51. In Alice Mweru Ngai vs. Kenya Power & Lighting Co. Ltd [2015] eKLR where it was held by Olao, J held:

Government to handle specific grievances, the Courts must respect and up-hold the law... In view of the clear legal provisions cited above and which stipulate the forum that ought to deal with a dispute of this nature and which forum the plaintiff has not approached as a first point of call, it would be an un-warranted intrusion into the jurisdiction of another organ if this Court were to purport to handle this dispute. It is in the interest of the proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the organs mandated to arbitrate over such disputes be respected and allowed to perform their Statutory responsibilities. That is why those procedures were formulated and such organs established. It is clear from the above that the Preliminary Objection on th “Where the law has granted jurisdiction to other organs of is Court’s lack of jurisdiction to hear this dispute is well taken.”

52. In Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000, the Court of Appeal expressed itself as follows:

“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.”

53. I have no reason to depart from the above decisions for they are good law. In the result 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.

54. However, the decision of Nyamu, J (as he then was) in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 ought to be taken note of. In that case, the learned Judge expressed himself as follows:

“The Courts guard their jurisdiction jealously, but recognize that it may be precluded or

restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal...It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court"

55. Accordingly, I am persuaded that as the provisions of Cap 490 and 490B Laws of Kenya limit and restrict the jurisdiction of this court, this court would be acting in vain if it proceeded to take one more step.

56. In that regard, I cannot end without citing the locus classicus case on jurisdiction. This is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held:

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

The authority for this holding by the learned Judge of Appeal is to be found in the writings of **John Beecroft Saunders** in a treatise which is no longer published headed **Words and Phrases Legally defined – Volume 3: I – N** and it states at page 113 the following about jurisdiction:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

57. In the end, I find that the preliminary objection taken by the interested party is well founded. I uphold it and proceed to strike out these proceedings in their entirety.

58. In view of the relationship between the ex parte applicants and the interested party which are members of the latter, I order that each party bear their own costs of these proceedings which are struck out, and of the preliminary objection.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 9th day of December 2016 at 3.30 p.m.

R.E. ABURILI

JUDGE

In the presence of:

Mr Harrison Kinyanjui for the exparte applicants

N/A for the Respondent

Mr Kago for the Interested Party

CA: Victor