



**Amazon Transporters Limited v Public Procurement Administrative Review Board & 2 others;
 Jennygo Enterprises Limited (Interested Party) (Judicial Review Miscellaneous Application
 E025 of 2025) [2025] KEHC 2457 (KLR) (Judicial Review) (11 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2457 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 JUDICIAL REVIEW
 JUDICIAL REVIEW MISCELLANEOUS APPLICATION E025 OF 2025
 RE ABURILI, J
 MARCH 11, 2025**

BETWEEN

AMAZON TRANSPORTERS LIMITED APPLICANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST
 RESPONDENT**

**ACCOUNTING OFFICER, KENYA NATIONAL BUREAU OF
 STATISTICS 2ND RESPONDENT**

KENYA NATIONAL BUREAU OF STATISTICS 3RD RESPONDENT

AND

JENNYGO ENTERPRISES LIMITED INTERESTED PARTY

RULING

1. Before me for determination is the preliminary objection dated 6th March, 2025 seeking to have these Judicial Review proceedings namely, the Originating Motion dated 28th February, 2025 and filed pursuant to section 175 (1) of the *Public procurement and Asset Disposal Act* and Rule 11 of the Fair Administrative Action Rules to be struck out on account that the Originating motion was filed out of the statutory period provided for under section 175 (1) of the *Public procurement and Asset Disposal Act*, since the full court filing fees was paid for the application after the 14th day meaning, the last day for filing of the judicial review application.
2. The preliminary objection which was vigorously opposed by the exparte applicant was argued orally with Mr. Justus Omollo Advocate relying on statutory and case law, submitting on behalf of the



interested party mover of the preliminary objection while Ms Nungo advocate argued on behalf of the exparte applicant. The exparte applicant also filed two affidavits sworn by Elsa Maina advocate in opposition and relied on statutory as well as case law.

3. In support of the preliminary objection, Mr. Omollo relied on the Court of Appeal decision in the case of *South Nyanza Sugar Co. Ltd vs Samuel Osewa Ochillo* [2007] eKLR where it was held that documents are only validly filed if fees is paid for and argued that full court fees in this case was paid on 5/3/2025 meaning that the proceedings were validly filed on 5/3/2025. Further, that the impugned decision having been rendered on 17/2/2025, fourteen days elapsed on 3/3/2025.
4. On the exparte applicant's reliance on Section 96 of the *Civil Procedure Act*, it was submitted on behalf of the interested party that the authorities cited provide those reasons have to be provided for, for the court to exercise discretion. Additionally, that Section 71(1) of the *Interpretation and General provisions Act*, Chapter 2 Laws of Kenya permits the Registry to decline the filing of any document until fees is paid for.
5. Further reliance was placed on *Republic vs District Land Adjudication Officer Tigania West*, where Kasango J found the provision applicable on payment of court fees, which decisions were rendered when Section 96 of *Civil Procedure Act* was in place.
6. Counsel for the interested party prayed for a finding that the Originating Motion dated 28th February, 2025 was filed out of time hence it should be struck out with costs to the interested party because e-filing of documents involves self-assessment by parties lodging the documents in court hence the exparte applicant's counsel ought to have known better that the Rules prescribe Kshs. 10,750 for Judicial Review proceedings.
7. It was argued that the applicants cannot plead ignorance of what the Rules prescribed and that neither should they have waited until the last minute, noting that Public Procurement matters have very strict timelines in terms of filing by the parties and determination by the court.
8. Opposing the Preliminary Objection, Ms Nungo counsel for the exparte applicant relied on the affidavits sworn by Elsa Maina advocate on 10/3/2025 and the filed list of authorities. She submitted that the instant Preliminary Objection was not properly taken as it invited the court to investigate on the facts and exercise discretion in favour of the applicant hence it does not meet the threshold of what a preliminary objection is. She maintained that the Judicial Review proceedings were commenced on 3/3/2025.
9. Counsel submitted as deposed that upon the uploading and filing of the documents, the e-filing was guided by the Case Tracking System (CTS) assessment and an invoice which enabled them to pay the assessed court fees at Kshs 4,500 for the Originating Motion on 3rd March 2025. Further, that the non-payment of full fees on the Originating Motion was neither deliberate nor willful as no alert was sent to them of any fees deficiency until this Court issued directions on 4th March 2025 directing them to pay full court fees on the Originating Motion, which fees was paid in full immediately upon receiving the notification directive.
10. According to counsel for the exparte applicant, the CTS situation should not be visited on their client because on 3/3/2025, it was the same CTS that confirmed to them that there was zero balance, as per the annexed invoices and payments made.
11. Citing section 96 of the *Civil Procedure Act* as the statutory guide to resolving the issue at hand, counsel for the exparte applicant submitted that the section provides that once payment is done, the document is deemed to be filed. Further, that this court already appreciated that Section 96 of the *Civil procedure*



- Act and directed the Registry to notify the applicant to pay up which they did upon notification. Additionally, it was submitted that this court also observed that the Originating Motion was filed on the 14th day hence this court cannot sit on its own appeal, having done what Section 96 of the Civil Procedure Act prescribes.
12. The cases of John Mugambi T/A Mugambi & Co. Advocates & Another v Showcase properties Ltd [2021] eKLR paragraph 6 – 9; Femina Dawoodia v Klarissa Wills & others [2021]e KLR; and Constitutional Petition No. 177/2015-Mombasa Cement v The Speaker of The National Assembly & Attorney Genral [2018]e KLR were relied on to support the above position. Further reliance was placed on the case of KCB vs Osebe – Law J’s Dictum which appreciates Section 96 of the Civil Procedure Act, a situation which is similar to this case and not that of the Sony Sugar Co. Ltd case which latter decision does not mention Section 96 of the Civil Procedure Act and that the said latter case concerned the application to file suit without payment of court fees.
 13. Counsel for the applicant maintained that they had given reasons why the full filing fees were not paid initially hence the test set out in the Mombasa Cement case had been made.
 14. Concerning the applicability and relevance of Section 71(1) of the Interpretation and General Provisions Act, (Cap 2), it was submitted that Section 96 of Civil Procedure Act is the substantive law on filing of documents. On the decision by Kasango J, it was submitted that the learned judge allowed the application before her in keeping with the overriding objective of the law under Sections 1A & 1 B of the Civil Procedure Act, otherwise known as the Oxygen (O2) principle hence that decision does not support the position by the Interested Party. She urged this court to dismiss the Preliminary Objection with costs.
 15. In a brief rejoinder, Mr. Omollo submitted and maintained that the Preliminary Objection is competent and that it relates to a point of law under Section 175(1) of Public Procurement and Asset Disposal Act (PPADA). Counsel denied that the preliminary objection as raised was laced with any disputed facts, now that the applicant admitted that court fees was paid on 5/3/2025.
 16. On the KCB vs Osebe case, it was submitted that the application was commenced without payment of court fees in time as stipulated in the Fair Administrative Action Rules and that the authorities relied on by the interested party have a common thread being the discretion of the court and reason for failure to pay court fees on time before the court can exercise discretion in favour of the applicant herein. Further, that Section 96 of Civil Procedure Act involves a defaulting party applying to court for leave to pay fees and to deem the application as duly filed. That in this case, no such application was made by the applicant hence it cannot hide under Section 96 of the Civil Procedure Act, as the authorities submitted are clear that the applicant did not apply to court to be allowed to pay court fees.

Determination

17. I have considered the preliminary objection and the opposition thereto. The main issue for determination is whether the said preliminary objection is merited.
18. First things first. The applicant contended that the preliminary objection was not well taken as it involves contested facts and invites discretion of the court. On the part of the interested party, it was argued that the preliminary objection was a pure point of law based on the statutory timelines set out in section 175(1) of the Public Procurement and Asset Disposal Act.



19. So, what is a preliminary objection and what does it consist of? As was stated and settled in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696:

“...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.”

20. Further Sir Charles Newbold, JA stated in the above locus classicus case that:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

21. Thus, a Preliminary Objection, raises a pure point or points of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

22. In the case of *Oraro v Mbaja* (2005) 1KLR 141, the Court asserted that:

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

23. Section 175 (10) of the *Public Procurement and Asset Disposal Act* provides that:

175. Right to judicial review to procurement

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

24. The Notice of Preliminary objection is anchored on the provisions of section 175(1) of the *Public Procurement and Asset Disposal Act* which prescribes the period within which judicial review application must be filed challenging the decision of the Review Board which 14 days of the date of the decision of the Review Board. It follows that where the judicial review application is filed outside that period, then this court's jurisdiction would be ousted and the application would be struck out in limine even on the court's own motion without delving into its merits.

25. This is because jurisdiction of the court is the first thing that a court of law must first be certain that it has to entertain any claim before it. Jurisdiction is everything without which a court of law acts in vain. Jurisdiction is conferred by *the Constitution* or statute. Parties cannot clothe a court of law with jurisdiction, even by consent. Neither can a court of law arrogate itself of the jurisdiction that it does not have or possess and purport to entertain a claim which the statute considers to be stale or statute barred.



26. A preliminary objection can be taken on the court's lack of jurisdiction on account of the claim being statute barred or the claim being filed outside the established statutory timelines. The Court of Appeal decision in *Owners and Masters of Motor Vessel "Joey" v Owners and Masters of the Motor Tugs "Barbara" and "Steve B."* [2008]1 EA 367 echoing the decision in the locus classicus case of *Owners of Motor Vessel "Lillian S"* held, inter alia:

"The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. 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 and without it, a court has no power to make one more step..."

27. In this case, I am satisfied that the preliminary objection is on a pure point of law since it is the filing of the judicial review application within the prescribed statutory timelines set out in section 175(1) of the *Public Procurement and Asset Disposal Act* that confers this court with jurisdiction to entertain the challenge to the decision of the Review Board.

28. Having found that the preliminary objection taken is on a pure point of law, the question is, whether the preliminary objection had merit. The preliminary objection rests on the question of validity of the originating motion which was filed on 3/3/2025 but the court fees paid was less than the prescribed fees for judicial review applications as is ordinarily filed under Order 53 of the Civil Procedure Rules.

29. Similar situations have arisen in cases before this court and in other superior courts where either no fees is paid or partial payment is made by a party filing pleadings. How then have the courts resolved the issue of deficiency of court fees?

30. *Majanja J (RIP) in Agnes Kwamboka v Philemon Matoke Mosioma & 2 others* [2019] eKLR had this to say concerning the payment of court fees by litigants:

"I now turn to consider whether the claim was invalid for failure to pay court fees for the claim. Any person who files a plaint is required to pay court filing fees prescribed by the Chief Justice under section 10 of the *Judicature Act* (Chapter 8 of the Laws of Kenya) unless the person is exempted from paying such fees as a pauper under Order 33 of the Civil Procedure Rules. The *Civil Procedure Act* does not state the consequence of failure to pay court fees but section 96 of thereof implies that payment of the assessment filing fee is an imperative for validity of a claim. However, failure to pay such fee does not ipso facto invalidate the suit. It provides as follows:-

96. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

31. In *Mbogo v Nanda Ogange & Co Advocates (Miscellaneous Civil Application 104 of 2022)* [2023] KEHC 19074 (KLR) (19 June 2023) (Ruling) the Court was asked to determine whether the reference by the Applicant should be struck out on account that it was predicated on an invalid Notice of objection as no court fees had been paid for its filing. In determining that issue, the court cited Section



96 of the Civil Procedure Act as reproduced above which provides for power to make up deficiency of court fees.

32. The court found that Section 96 of the Civil Procedure Act therefore grants this Court power to exercise discretion to allow the person affected to pay the whole or part of the Court fees if not paid.
33. On whether a court would exercise discretion and allow a party to make up the deficiency for court fees, in *Mombasa Cement Ltd v Speaker, National Assembly & Another* NRB Pet. No. 177 of 2015 [2018] eKLR Mativo J stated:

“The discretionary powers of this Court will ‘not be exercised where the applicant’s own conduct has been unmeritorious or unreasonable, or where the applicant has not acted in good faith. Examples include where-

- (i) the failure to pay the Court fees or part thereof is willful or fraudulent aimed at denying the government revenue,
- (ii) where no sufficient explanation is given for the failure,
- (iii) or where it is evident that a party is not candid in the explanation given or there is wilful concealment of material information,
- (iv) where there is evidence of fraud or collusion in failing to pay the Court fees, obtaining the judgment,
- (v) where allowing the party to pay is prejudicial to the administration taking into account the time when the failure to pay was brought to the attention of the defaulting party and has failed to remedy the situation.”

34. I agree with all the above decisions. As earlier stated, payment of Court filing fees is a jurisdictional prerequisite to the commencement of an action. While on the face value it appears that such a jurisdictional prerequisite or defect cannot be waived, the Court in its inherent jurisdiction may make such orders as may be reasonable and necessary to ensure payment and also give the affected party an opportunity to remedy the situation.

35. The Court in the *Mombasa Cement* case further stated as follows in regards to failure to pay court fees:-

“The filing of a civil case requires the payment of filing fees. It follows that failure to pay Court fees renders the suit incompetent because there is no competent suit filed before the Court. Whereas the Court has inherent powers to allow a party who has not paid fees time to remedy the situation, where a party as in this case is afforded the opportunity to remedy the situation or demonstrate that he paid, and fails to remedy the situation or offers out rightly conflicting explanations as happened in this case which culminated in the above affidavit. In such circumstances as has happened in this case, the Court is left with no option but to declare the suit incompetent and strike it off as I am compelled to in this case.”

36. In *Ayoti Distributors Ltd v Erick Engine Oduor t/a Health Consult Auctioneer Services* (Civil Appeal E094 of 2021) [2024] KEHC 3880 (KLR) (22 April 2024) (Judgment), the court after reproducing section 96 of the Civil Procedure Act had this to say where the issue was whether the court fees as directed by the trial court had been paid within the 30 days period given by the said trial Court:

“From the above provisions of the law, as read with Article 48 of the Constitution on the right to access justice, I find that the moment the respondent paid further court fees, the process of



execution of decree as commenced by the auctioneer was validated and therefore the further court fees having been filed within the period or timelines given by the trial court, I find no deficiency in the execution process which was validated by the trial court.

37. From the case law above interpreting section 96 of the Civil Procedure Act, it is clear that where there is deficiency of court fees, a party should be notified to settle and only if the party declines or takes too long to settle or it is established that a party willfully colluded to avoid payment of fees and to deprive the state of revenue, would the court decline to exercise discretion under section 96 of the Civil Procedure Act to allow that party to make up for the deficiency and proceed to strike out a suit or pleading.

38. Besides, Section 10 of the Judicature Act, Chapter 8 Laws of Kenya provides for making of Rules by the Chief Justice. The section stipulates as follows:

10. Rules

The Chief Justice may make rules of court for regulating the practice and procedure of the High Court and, subject to any other written law, that of subordinate courts, and the power to make rules under this section shall include the power to prescribe fees and scales of remuneration.

39. In other words, the law acknowledges that fees payable to court is not an option, except where exempted by law or by the court, a party must pay court fees as may be assessed, taking into account Article 48 of the Constitution on access to justice.

40. This court is also aware that the Practice Directions To Standardize Practice and Procedures in the High Court made pursuant to the HIGH COURT (ORGANIZATION AND ADMINISTRATION) ACT, 2015 and IN EXERCISE of the powers conferred under Articles 159 (2) and 161 (2) (a) of the Constitution of Kenya, section 10 of the Judicature Act and section 81 (3) of the Civil Procedure Act, and section 39 of the High Court (Organization and Administration) Act, the Chief Justice issued the following practice directions dated 11th January, 2022-

Citation 1. These Practice Directions may be cited as Practice Directions on standardization of Practice & Procedures in the High Court 2021.

Application 3. The Practice Directions shall apply to all High Court stations and Divisions.

Objectives 4. The Objectives of the Practice Directions— (a) Consolidate and standardize practice and procedure in the High Court; (b) Enhance access to justice; (c) Facilitate timely and efficient disposal of cases; (d) Ensure uniformity in court experience.

41. The practice directions have the objectives of among others, to enhance access to justice.

42. Under Direction 5 on Court fees, it is stated as follows: 5. (a) Court Fees Schedule as published from time to time shall be applicable to proceedings in the High Court. (b) The registry shall maintain an automated fee assessment system to facilitate e-payment of all forms of court fees. (c) Where court fees is payable, it shall be the responsibility of each party to ensure correct fees is paid in the prescribed manner. In the event fees is not correctly assessed and paid, the party shall be notified and requested to pay the additional fees. [emphasis added]

(d) The Procedure on payment of fines and refund of deposits is outlined in the Registry Operations and Procedures Manual. An offline payment solution shall be applied when the e-payment system is not responsive.



43. As highlighted above, although the duty lies on the party filing suit to ensure correct fees is paid as prescribed in the fees schedule, where fees is incorrectly assessed as was in the instant case, where filing is done through an online system, the court is under a duty to notify the party to pay the additional fees. Moreover, section 96 of the Civil Procedure does not require a party to apply to court for an order allowing them to pay the additional court fees, as submitted by the interested party's counsel. The section also provides in the last part that:
- ...and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance. Thus, upon payment of the requisite fees to make up full fees, it shall be deemed that such fees were paid when the initial deficient or incorrectly assessed fees was first paid.
44. Section 71 of the *Interpretation and General Provisions Act* on the other hand provides for acts for which payment required need not be performed until payment made. Under subsection (2), where the fees paid is incorrect, a party shall be notified to adjust and pay up. The section stipulates as follows:
- (1) Where a person, public officer or local authority is required to do anything for which a fee is to be paid or a charge made under a written law, that person, public officer or local authority may decline to do that thing until the fee is paid or until payment of the charge is made, or, where the precise amount of the payment to be made cannot be ascertained until the thing has been done, until there is paid such an amount as may be estimated to be the correct amount by the person or public officer, or the responsible officer of the local authority, required to do the thing.
 - (2) Where a thing has been done for which, an estimated amount has been paid, that amount shall be adjusted to the correct amount either by means of a further payment or by a refund of the amount overpaid. [emphasis added]
45. From the above provisions, it is clear that the law acknowledges that there could be deficiency of court fees as was the case herein and the remedy lies in the court directing the applicant to make up for the same. That remedy is found at section 96 of the *Civil procedure Act* as read with section 71(2) of the *Interpretation and General provisions Act* not section 71(1) cited by the interested party's counsel, selectively.
46. The subsection (2) of section 71 above allows adjustment to the correct amount by means of a further payment where there is an underpayment or a refund where there is overpayment of fees; while section 96 of the *Civil Procedure Act* as read with the Practice Directions for the High Court reproduced above at Direction 5 mandates the court to notify the litigant to pay the deficit. it follows that all these sections of the law and Directions must be read together to appreciate that indeed, once the deficiency is made by the party, then the document is deemed filed and fees paid on the date that the document was first lodged and filed when the less court fees was first paid, not when the subsequent payment is made to correct the deficiency.
47. In the instant case, as correctly submitted by the applicant's counsel, the Originating Motion was filed on the 14th day after the decision of the Review Board but the fees paid was less than that which is prescribed and it was on that basis that this court directed the applicant to make up for the deficiency, applying the established principle under section 96 of the *Civil procedure Act*. It would have been different if no fees at all had been paid by 3rd March 2025 which was the 14th and last day for filing of the judicial review application.



48. I reiterate that section 96 of the Act as read with the Practice directions and section 71 (2) of the Cap 2 acknowledge such deficiencies and make provision for payment of full fees upon such discovery.
49. There is no evidence of willful failure to pay the full fees and neither was the applicant notified by the system of such deficiency and it refused to settle.
50. Article 48 of the Constitution guarantees every person the right to access justice and that access cannot be curtailed via these proceedings where fees as assessed was paid in the first instance on the lodgment of the Originating Motion, which fees turned out to be incorrect and deficient of the full fees, until the Court made the discovery when handling the certificate of urgency on 4/3/2025.
51. Additionally, the Case Tracking System did not alert the applicant of deficiency in fees payment. Furthermore, the applicant has explained circumstances under which the fees was underpaid paid noting that Judicial Review proceedings commenced under the Fair Administrative Action Act and Rules, the latter being new Rules made in October 2024 prescribing Originating Motion as a mode of filing the judicial review applications are yet to be fully classified in the CTS.
52. The new filing procedure mode will require an adjustment to the system to recognize Originating Motion as anew mode of filing Judicial Review Applications under the Fair Administrative Action Act and Rules. It would therefore be a travesty of justice if this court was to interpret section 96 of the Civil Procedure Act and section 71 of the Interpretation and General provisions Act contrary to the spirit and letter of the said provisions and in a selective manner to the detriment of the applicant.
53. In the end, I find the preliminary objection not merited and cannot be upheld. It is dismissed with no orders as to costs.
54. The Court will now give directions on the disposal of the Originating motion and the prayer for interim relief of stay sought by the applicant.
55. I so order.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2025

R.E. ABURILI

JUDGE

