



Republic v Murigi & 88 others; National Bank of Kenya (Exparte Applicant) (Judicial Review Miscellaneous Application E122 of 2024) [2025] KEHC 2966 (KLR) (Judicial Review) (17 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E122 OF 2024
RE ABURILI, J
MARCH 17, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

ELIAS MAINA MURIGI 1ST RESPONDENT

RETIREMENT BENEFITS APPEALS TRIBUNAL 2ND RESPONDENT

RETIREMENT BENEFITS AUTHORITY 3RD RESPONDENT

NATIONAL BANK OF KENYA STAFF RETIREMENT BENEFITS SCHEME 4TH RESPONDENT

NATIONAL BANK OF KENYA STAFF PENSION FUND REGISTERED TRUSTEES & 84 OTHERS & 84 OTHERS & 84 OTHERS 5TH RESPONDENT

AND

NATIONAL BANK OF KENYA EXPARTE APPLICANT

RULING

1. This ruling determines the 1st-84th respondents’ preliminary objection against the exparte applicant’s notice of motion dated 5th June, 2024 raising the following grounds:
 - a. That the application is incompetent, misconceived and otherwise an abuse of the due process of this Honourable Court.



- b. That the ex parte Applicants have not complied with Order 22 Rule 51 and Order 22 Rule 52 of the Civil Procedure Rules, 2010 which provision is a mandatory requirement to be invoked before making an application in objection to the attachment of property.
 - c. That this Honourable Court lacks jurisdiction to entertain the said Application as it offends Order 22 Rule 51 and Order 22 Rule 52 of the Civil Procedure Rules, 2010.
 - d. That the ex parte Applicant's Application is hopelessly misconceived, frivolous, totally devoid of merit and malafides for the reason inter alia, that the ex parte Applicant has not given any notice in writing to this Court and to all the parties herein including the Decree-holder of its objection to the attachment of such property.
 - e. That the Orders sought cannot issue since the Application is improperly on record and is a nullity.
2. A brief background of the events leading up to filing of the preliminary objection before this court are that on 30th May 2024 the firm of Koceyo & Company Advocates on behalf of the Pensioners in The Retirement Benefits Appeals Tribunal Appeal No.8 of 2010, an age-old matter, extracted the impugned warrant of attachment of movable property in execution of decree for money, -Form Civil 7D from the Chairperson of the Retirement Benefits Appeals Tribunal and addressed to Mbusera Auctioneers.
 3. On 30th May 2024, Mbusera Auctioneers went to the ex parte applicant's premises and proclaimed the exparte applicant's properties including office computers, laptops, chairs, desks, telephones, board room equipment, water dispensers, storage facilities, photocopiers and printers, televisions, reception furniture and executive office furniture and equipment for a value of Kshs. 144,494,196.00 as provided under the impugned warrant of attachment of movable property in execution of decree for money-Form Civil 7D.
 4. Aggrieved by this action, the ex parte applicant filed the chambers summons application dated 4th June 2024 seeking leave of this court to apply for judicial review orders of certiorari quashing the impugned warrant of attachment of movable property in execution of decree for money-Form Civil 7D, prohibition restraining the 85th respondent from reissuing the warrants of attachment and finally, that the leave so granted operate as a stay, restraining the respondents from any further enforcement action against them.
 5. In the directions given on 5th June 2024, Justice J. Chigiti (SC) granted leave to the ex parte applicants to apply for the judicial review orders that had been sought in the chamber summons and also directed that the leave granted operate as a stay in line with prayer 4 of the chamber summons. The court also went ahead to give directions on how the parties would proceed with the prosecution of the ex parte applicant's application.
 6. Subsequent to those directions of 5th June, 2024, the 1st-84th respondents filed their preliminary objection dated 17th July 2024 asserting that at the hearing of the ex parte applicant's application dated 4th June 2024 which should be the one dated 5th June 2024 as this is the substantive motion, on record after leave was granted to apply, the 1-84th respondents would raise the grounds that I have reproduced above.
 7. In support of their preliminary objection, the 1st-84th respondents filed written submissions on 4th November 2024 urging that the ex parte applicant's excuse that it was not a party before the 85th respondent during the suit leading up to the issuance of the impugned warrants of attachment is false



as the ex parte applicant and the Pension Scheme are both housed within the same premises, run the same office and share the same address and attached items.

8. According to the 1st-84th respondents, contrary to the ex parte applicant's argument that the 85th respondents has no authority to issue a warrant of attachment, sections 49 and 52 of the [Retirement Benefits Act](#) grant it powers equivalent to that of the subordinate court which include powers to enforce its own decree through the issuance of warrants of attachment.
9. In support of this position, reliance was placed on the case of *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR where the court is said to have observed that the Tribunal had the power of a subordinate court and all processes emanating from it ought to be exhausted including execution proceedings before recourse can be sought before the High Court.
10. The 1st to 84th respondents also urge that the ex parte applicant in filing its application did not comply with Order 22 Rule 51 and Rule 52 of the Civil Procedure Rules which provision is a mandatory requirement to be invoked before making an Application in objection to the attachment. The respondents relied on the case of *Mwaniki Gitau & Co Advocate v Esther Wambui Njoroge; Kambusu Ole Pakine (Objector)* [2020] eKLR where the court observed that it was mandatory for the notice under Order 22 Rule 52 of to be issued.
11. It is also their case that failure to comply with Order 22 Rule 51 and Rule 52 cannot be cured by applying Article 159(2)(d) of the [Constitution](#). According to them, this would amount to an injustice. The 1st-84th respondents rely of the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 others* [2013] eKLR where the court observed that Article 159 of the [Constitution](#) and the oxygen principles were not meant to aid in the overthrow or destruction of rules of procedure.

The Ex parte applicant's submissions

12. The ex parte applicant filed written submissions on 3rd December 2024.
13. The ex parte applicant's submissions provide a brief background of the matter that the 85th respondent delivered 3 rulings and one purported decree in Retirements Benefits Appeals Tribunal No.8 of 2010. That it complied with the first ruling of 23rd February 2012 and also with the second ruling of 8th August 2014.
14. However, that a third ruling was issued contrary to a consent dated 8th April 2016, Trust Deed and Rules of the 87th to 88th respondents and the Tribunal's initial two rulings. The Tribunal is said to have made an order on prayers that were never sought, sat on its own appeal and rewrote its initial rulings condemning the 87th and 88th respondents unheard.
15. According to the ex parte applicant, the 1st-84th respondents attempted to have the 3rd ruling dated 17th February 2017 adopted as an order of the court before the Employment and Labour Relations Court in Miscellaneous Application No.27 of 2020 which was dismissed on 21st January 2020 and before the High Court in Miscellaneous Application No.3 of 2021 which was also dismissed on 2nd May 2023.
16. The 1st-84th respondents are said to have, 7 years later, approached the 85th respondent seeking a decree in line with the 3rd ruling dated 13th February 2017 and the same was given on 23rd February 2012 and issued on 30th April 2024. The impugned decree according to the ex parte applicant, is contested in the



High Court Judicial Review Application No. E059 of 2024 and the Ruling of the Tribunal dated 13th February 2017 remains in contestation in Civil Appeal No. E365 of 2024.

17. In the submissions, it is urged that Order 22 Rule 51 and Rule 52 envisage a scenario where the decree in question is a valid decree, the warrants of attachment are valid and the proclamation of attachment is valid which is the opposite of the present circumstances.
18. It is the ex parte applicant's case that that the 85th respondent lacks authority to issue a decree and that the impugned decree reads contrary to the Tribunal's last ruling of 13th February 2017. It also urges that where the validity of a decree is in question, the resultant warrant of attachment and the proclamation of attachment are equally not valid. According to the ex parte applicant, an illegal decree cannot lead to a valid warrant of attachment.
19. The ex parte applicant further submits that where a Tribunal acts ultra vires, an aggrieved party is entitled to institute judicial review proceedings to interrogate the whole process through which such an action was arrived at and the action itself. Further, that in the instant case, the action being the illegal issuance of warrants of attachment to the ex parte applicant's property.
20. It is also submitted that the ex parte applicant has an inherent right to challenge the validity of the decree itself, the legality of the issuance of the warrants of attachment and the actual attachment of its personal property to proceedings they were not a party to.
21. The ex parte applicant relies on the case of Municipal Council of Mombasa v Republic & another [2002] eKLR where the court held that the court would only be concerned with the process leading to the making of the decision.
22. According to the ex parte applicant, as it has raised issues of illegality and ultra vires, which are issues that purely fall within the ambit of this Honourable Court, the respondents' averments that the matter is not properly before this Court are absurd to say the least.
23. The ex parte applicant also relied on the case of Republic V Secretary of the Firearms Licensing Board & others Ex -parte: Senator Johnson Muthama [2018] eKLR where the court observed that it is the duty of the court to supervise subordinate courts and any person, body or authority exercising a judicial or quasi-judicial function.
24. It is submitted that questions of law revolving around the legality and lawfulness of a decree and the resultant warrant of attachment as issued by the Retirement Benefits Appeals Tribunal are questions that can be interrogated within the supervisory jurisdiction of this Honourable Court and that it is the duty of this Court to ensure that the exercise of any power by the Retirement Benefits Appeals Tribunal is legal, lawful, rational and compliant with the law.
25. The ex parte applicant also submits that there are substantive issues raised in the application which issues cannot be resolved under the limited purview of Order 22 Rule 51 and Rule 52 of the Civil Procedure Rules. Reliance was placed on the case of Leech versus Parkhurst Prison Deputy Governor [1988] 1 ALL ER 485 where Lord Bridge at 496h as cited in Republic vs. Commissioner of Lands ex parte Lake Flowers Ltd Nairobi HC where it was observed that the existence of an alternative remedy is not enough to oust jurisdiction in judicial review.
26. The ex parte applicant also relied on the case of Republic v Kenya Revenue Authority (KRA) & 4 others; New Flamingo Hardware 8: Paints Limited & 22 others (Ex Parte) [2020] eKLR where the court observed that the complaints raised by the ex parte applicants were complaints that could be resolved in the judicial review docket.



Analysis and Determination

27. I have considered the preliminary objection as argued for and against by counsel for the respective parties in their written submissions and the relevant statutory and case law cited. The issue for determination is whether the preliminary objection is merited. Before I determine the merits of the preliminary objection, I must first establish what a preliminary objection is and whether the preliminary objection as raised herein meets the threshold in the long-settled locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696, where the Court of Appeal for East Africa, Law J.A. and Newbold P. held as follows:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”

Newbold, P.:

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 improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

28. In the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR the Court held thus:

“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...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.”

29. The Supreme Court of Kenya also pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR, on the purposes served by preliminary objections.

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary



Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

30. The apex Court stated that disputes should not be resolved prematurely. However, that if a Preliminary Objection helps in efficiently utilizing judicial time and resources, the court should consider it. However, while the principle in *Independent Electoral & Boundaries Commission v. Jane Cheperenger & 2 Others* is progressive and aids in saving judicial time, it should only be applied to undisputed facts that do not require additional evidence.
31. As the respondent’s Preliminary Objection relates to the jurisdiction of this court, this court is under a duty to determine that question before delving into the merits of the case as filed, noting that jurisdiction is everything without which, a court of law acts in vain. Jurisdiction is one of the issues that can be determined in a preliminary objection as was stated in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700 where Law JA stated:
- “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.” [Emphasis added].
32. My finding therefore is that a preliminary objection to the jurisdiction of the court is no doubt a pure preliminary objection. I am satisfied that the 1st to 84th respondents’ preliminary objection is an objection within the meaning advanced in the case of *Mukisa Biscuit* (supra). It is properly before this court and I therefore proceed to determine the merits of that preliminary objection.
33. It is well settled that when jurisdiction is in issue, it must be determined first because without it, a court of law must down its tools since there would be no basis for continuing with the proceedings. (See *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR).
34. The case for the movers of the preliminary objection is that this court is not clothed with jurisdiction to entertain the applicant’s substantive notice of motion and therefore these proceedings as per the application dated 5th June 2024 pursuant to the leave granted on the same day to apply as doing so would be in contravention of Order 22 Rule 51 and Order 22 Rule 52 of the Civil Procedure Rules. The 1-85th respondents argue that the provisions are a mandatory requirement that must be invoked before an application in objection to the attachment of property is made which, according to the respondent, the ex parte applicant did not comply with.
35. Jurisdiction has been defined in *Halsbury’s Laws of England* (4th Ed.) Vol. 9 at page 350 as:
- “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”
36. The 1st to 84th respondents’ main ground of objection is that the ex parte applicant failed to comply with the mandatory requirement under Order 22 Rules 51 and 52 of the Civil Procedure Rules and that therefore, the application is said to be improperly before this court. The Rules in question provide as follows:
- “51. Objection to attachment [Order 22, rule 51]
- (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached



in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.

- (2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
- (3) Such notice of objection and application shall be served within seven days from the date of filing on all the parties.

52. Stay of execution [Order 22, rule 52]

Upon receipt of a valid notice and application as provided under rule 51, the court may order a stay of the execution for not more than fourteen days and shall call upon the attaching creditor by notice in writing to intimate to the court and to all the parties in writing within seven days whether he proposes to proceed with the attachment and execution thereunder wholly or in part.

37. Opposing the preliminary objection, the ex parte applicant argues that the provisions of Order 22 Rules 51 and 52 of the Civil Procedure Rules assume that the decree, warrants of attachment, and proclamation of attachment are valid, which does not apply in the instant case where the ex parte applicant is also challenging the jurisdiction of the 85th Respondent to execute decree by issuing warrants of attachment of the ex parte applicant's property.
38. The ex parte applicant also contends that the 85th Respondent lacked authority to issue a decree, which contradicts its earlier ruling of 13th February, 2017. The ex parte applicant asserts that if the decree is invalid in the first instance, then the warrants of attachment and the proclamation issued to the Mbusera Auctioneers are also invalid. Additionally, it argues that when a Tribunal acts outside its authority, an aggrieved party has the right to challenge the process through judicial review.
39. As I determine this preliminary objection, it is important to note that Order 22 of the Civil procedure Rules as a whole is on execution of decrees and orders and as such, the same would apply to a party who as has been rightfully put by the ex parte applicant, has not challenged the validity of the decree leading up to its execution and the attachment of property as is in the instant case.
40. In this case, and as has been alluded to by the ex parte applicant that the judicial review application not only seeks to stop the attachment by the 1st to 84th respondents' instructed auctioneers but also challenges the 85th respondent's power to issue a decree and subsequently a warrant of attachment of movable property in execution of decree for money-Form Civil 7D.
41. The ex parte applicant has also accused the 85th respondent of issuing warrants of attachment against the ex parte applicant yet the ex parte applicant was not a party to the proceedings, which is a matter within the purview of Order 22 Rules 51 and 52 of the Civil Procedure Rules. However, there is more to it. There are also serious allegations that have been raised in the submissions filed by the ex parte applicant in regard to the process followed by the 85th respondent in issuing the decree that the 1st -84th respondents seek to enforce. There is also an allegation of the Tribunal sitting on appeal of its earlier decision, leading to that execution of decree process and which allegations this court must investigate in line with its supervisory jurisdiction under Article 165(6) and (7) of the *Constitution*. Other allegations



against the Appeals Tribunal are that the Appeals Tribunal delivered a ruling on prayers that were never sought and that it sat on its own appeal and rewrote its earlier rulings, condemning the 87th and 88th respondents unheard.

42. From the above stated positions, it is obvious that the ex parte applicant's grievances do not just revolve around attachment of its goods alone and therefore the procedure to be followed in objecting to attachment under Order 22 Rules 51 and 52 of the Civil Procedure Rules but also on the procedure that the 85th respondent followed in arriving at and issuing the decree and proceeding to execute that decree by issuing warrants of attachment signed by the Chairman of the Retirement Benefits Appeals Tribunal, as annexed to the verifying affidavit of Samuel Mundia as SM1 and sworn on 4th June, 2024.
43. It is important to restate the scope of judicial review and this can be found in the words of the Judges of the Court of appeal in *Kapa Oil Refineries v Kenya Revenue Authority* [2019] eKLR where the court stated that:

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the *Commissioner of Lands –versus Hotel Kunste* [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See *David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR)*. JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See *Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others* [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See *Zakayo Michubu Kibwange case (Supra)*. The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See *Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR)*. Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the *Constitution* of Kenya 2010. See *Child Welfare Society of Kenya –versus- Republic and 2 others, Exparte Child in Family Forces Kenya* [2017] eKLR.”

44. The Court of Appeal in the earlier case of *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996*, elaborated what Judicial Review Orders entail as follows: -

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See *Halsbury’s Law of England*, 4th Edition vol.1 at



Pg.37 paragraph 128.”When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

...Only an order of Certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter.”

45. In the circumstances, I find that the ex parte applicant’s notice of motion dated 5th June 2024 raises seriously disputed facts that require further examination of those facts and evidence placed before this court and as such, the 1st to 84th respondents’ preliminary objection cannot be upheld. The preliminary objection dated 17th July 2024 is hereby dismissed.
46. Costs shall be in the cause.
47. This court will now give directions on the disposal of the substantive notice of motion which has been pending in this court since June, 2024.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 17TH DAY OF MARCH, 2025.

R.E. ABURILI
JUDGE

