Republic v PS Ministry of Lands Public Works Housing And Urban Development (State Department Housing and Urban Development & 2 others; Attorney General & another (Interested Parties); Bashir & another (Exparte Applicants) (Judicial Review E001 of 2025) [2025] KEHC 6292 (KLR) (14 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6292 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

JUDICIAL REVIEW E001 OF 2025

JN ONYIEGO, J

MAY 14, 2025

RULING

IN THE MATTER OF ARTICLES 6(3), 10(1) (C), 10(2),27,28,43,47,174(E) & (G), 175(A), 176(2) AND ARTICLE 184(1) OF THE CONSTITUTION

AND

FAIR ADMINISTRATIVE ACTION ACT

AND

THE REFUGEES ACT NO. 10 OF 2021 CAP 173

BETWEEN

REPUBLIC .... APPLICANT

AND

PS MINISTRY OF LANDS PUBLIC WORKS HOUSING AND URBAN DEVELOPMENT (STATE DEPARTMENT HOUSING AND URBAN DEVELOPMENT .... 1ST RESPONDENT

COUNTY GOVERNMENT OF GARISSA .... 2ND RESPONDENT

WORLD BANK (2ND KUSP – KENYA) .... 3RD RESPONDENT

AND

THE ATTORNEY GENERAL .... INTERESTED PARTY

THE COUNCIL OF GOVERNORS .... INTERESTED PARTY

AND

ABDINASIB MAULID BASHIR .... EXPARTE APPLICANT

MOHAMED ADOW DIIS .... EXPARTE APPLICANT

RULING

1. The ex parte applicants herein moved this court via an exparte chamber summons dated 13.01.2025 seeking leave to institute judicial review proceedings for an order of mandamus directing the 1st, 2nd and 3rd respondents to include Bura Municipality in Fafi Constituency in the KUSP – 2 program under the Window for Hosting Communities and Refugees Component similar to Daadab Constituency. That leave so granted does operate as stay of further implementation of the KUSP 2 Programme in Garissa and Turkana West Counties under the window for Hosting Communities and Refugees component.

2. Having considered the application experte, the court made directions for the exparte applicants to file a substantive notice of motion within 14 days and leave sought to operate as stay of implementation of the said project. Consequently, the exparte applicants filed a substantive notice of motion dated 04.02.2025 seeking orders as follows;

   a. Mandamus to issue directing the 1st, 2nd and 3rd respondents to include Bura Municipality in Fafi constituency – Garissa County to the KUSP 2 Programme under the Window for Hosting Communities and Refugees component similar to Daadab Constituency; since both have almost similar number of refugees that they host.

   b. A declaration that:

      The exclusion of Fafi Constituency-Bura Municipality for the KUSP 2 grant is a violation of Article 6(3), 10(1)(c), 10 (2),27,28,43,47,174(e) & (g), 175 (a), 176(2) and article 184 (1) of *the constitution* of Kenya 2010.

   (c) Costs of the litigation

3. The genesis of the suit before the court is that the exparte applicants are challenging the constitutionality of the alleged exclusion of Fafi Constituency, Bura Municipality from the KUSP 2 programme under the Window for Hosting Communities and Refugees component funded by the World Bank; that while Daadab and Turkana West constituencies are poised to receive the impugned grant, fafi constituency which also hosts refugees has been excluded from the same. It is alleged that it was not only unfair but also unreasonable for the 1st, 2nd and 3rd respondents to exclude Fafi constituency from the programme as the same violates various provisions of *the constitution* interalia; articles 6(3), 10(1)(c), 10 (2),27,28,43,47,174(e) & (g), 175 (a), 176(2) and article 184 (1).

4. In opposing the suit, the 1st respondent and 1st interested party filed grounds of opposition dated 26.02.2025 thereby urging that the application was not only frivolous but also an abuse of the court process. That the same did not meet the threshold of issuing the order of mandamus sought as there is no legal duty that the 1st respondent has failed to undertake. It was alleged that the application as presented offends Rule 7(d) of the Fair Administrative Action Rules 2024. It was further averred that there were no orders sought against the 1st interested party and therefore, it ought to be struck out of the proceedings.

5. It was deposed that the application is based on contradictory allegations which borders on mere belief, suspicion and speculation hence incapable of any judicial review determination. To that end, this court was urged to dismiss the application herein.

6. The 2nd respondent through the law firm of Kusow & Company Advocates filed grounds of opposition dated 03.03.2025 stating as follows:

   i. This Honourable Court lacks jurisdiction to hear and determine the matter herein by dint of the express provisions of Item V of the impugned Second Kenya Urban Support Program project appraisal document Report No. PAD5054 on grievance redress mechanism annexed to the applicant's supporting affidavit as exhibit AMB-03 which under page 44 stipulates that

   > V Grievance Redress Service 100. Grievance Redress. Communities and individuals who believe that they are adversely affected as a result of a Bank supported P and R operation, as defined by the applicable policy and procedures, may submit complaints to the existing program grievance redress mechanism or the World Bank's Grievance Redress Service (GRS).

   ii. Section 9(2) of the Fair Administrative Actions Act limits this Honourable Court's jurisdiction to review an administrative action or decision under the Fair Administrative Action or decision under the *Fair Administrative Action Act* unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

   iii. The applicants have failed and/or refused to comply with and/or exhaust the grievance redress mechanism stipulated under the impugned program thus the court lacks jurisdiction to hear the matter as it offends section 9 (2) of the Fair Administrative Actions Act.

   iv. The impugned project concerns implementation of a program based on the grant by the World Bank (multilateral agency) to the government of the Republic of Kenya and is thus governed by article 2(5) of *the constitution* as it is between the government of Kenya and a foreign entity. The document does not provide that the jurisdiction of the High Court shall be invoked in disputes resolution but has a defined mode of settling disputes by anyone affected by the implementation of the programme which the applicants have failed to exhaust.

   v. The applicants have failed to demonstrate with sufficient evidence how the 2nd respondent has acted ultra vires and/or discriminated against them since the 2nd respondent is merely implementing a program conceived, prepared and fully funded by the world Bank.

7. The 3rd respondent through the firm of Hamilton Harrison & Mathews filed a preliminary objection dated 14.02.2025 stating that this court lacks the requisite jurisdiction to hear the matter. That the International Bank for Reconstruction and Development commonly known as the World Bank is governed by the general rules of International Law and its Articles of Agreement, as domesticated by the Bretton Woods Agreement Act, Cap 464 Laws of Kenya. It was alleged that the Articles of Agreement as properly interpreted under the international law provides for jurisdictional immunity with respect to the present suit.

8. As a consequence of the above, the ex parte applicants via a notice of withdrawal dated 17.03.2025 sought for withdrawal of the suit against the 3rd respondent with no order as to costs. The same was allowed and therefore, what falls due for determination is the 2nd respondent's grounds of opposition/objection dated 03.03.2025 citing grounds that this court lacks jurisdiction to determine this suit.

9. The court directed that the preliminary objection touching on the question of lack of jurisdiction be canvassed by way of written submissions.

10. The 2nd respondent in its submissions dated 12.03.2025 basically reiterated their grounds of opposition thereby urging that the court has no jurisdiction to determine the suit at hand. It was submitted that section 9(2) of the *Fair Administrative Action Act* provides that the High Court or a Subordinate Court shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. That in reference to the suit herein, the impugned program appraisal document which is a World Bank prepared document has a provision for redress mechanism in case of a dispute arising from the communities and individuals who believe that they are adversely affected by the project. To that end, the applicants failed to exhaust the grievance/redress mechanism as readily available in the impugned document governing the project.

11. It was urged that the doctrine of exhaustion or alternative remedies is now both a constitutional and legal imperative under article 159(2)(c) of *the constitution* and section 9(2) of the *Fair Administrative Action Act*. In supporting the foregoing, the 2nd respondent relied on the Court of Appeal Case of Speaker of National Assembly vs Karume (1992) KLR 21 where the court stated that it is imperative that where a dispute resolution mechanism exists outside the courts, the same be exhausted before the jurisdiction of the court is invoked.

12. It was contended that the only way out of the mandatory application of section 9 is a provision under section 9(4) which provides that: 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.

13. That in the instant case, the applicants did not demonstrate existence of any exceptional circumstances to warrant exemption and neither did the court exempt the applicants from the obligation. Equally, the applicants did not make any application to the court for it to invoke its discretion. Reliance to that end was placed in the Court of Appeal decision of Wajir Wasco Limited alias Wajir Water & Sewerage Company & Another vs Mohamed & 2 Others, Civil Appeal No. E396 of 2023) [2024] KECA 937 (KLR) where the court stated that "…the respondents never applied for exemption under section 9(2) of the *Fair Administrative Action Act*. We say no more. The import of their failure is that the suit before the trial court was caught up by the doctrine of exhaustion".

14. In the end, this court was urged to find that the applicants invoked this Honourable Court's jurisdiction prematurely as they failed and/or ignored to exhaust the grievance/redress mechanism stipulated under the impugned program appraisal document which is the subject of litigation of this matter.

15. The applicants in their submissions dated 17.03.2025 contended that the suit is frivolous and far-fetched. That even though there are no orders sought against the 1st interested party, the AG is a necessary party to the proceedings hence ought to be a party to the suit for the reason that the outcome of the suit can influence the manner in which he advises the government on issues of contracts in the future.

16. Counsel made reference to the case of Republic vs Public Procurement Administrative Review Board & 2 Others ex parte Rongo University [2018] eKLR, where the court held that; "… the power of the court to review an administrative action is extraordinary. It is exercised sparingly in exceptional circumstances where the illegality, irrationality or procedural impropriety has been proved…"

17. To that end, it was urged that when actions by government bodies offend constitutional principles and values and infringes on human rights as espoused in the bill of rights, then judicial review proceedings can be initiated.

18. On the issue that this court lacks the requisite jurisdiction, it was argued that section 9(4) of the *Fair Administrative Action Act* stipulates that: 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. To that extent, this court was urged that the availability of an alternative dispute resolution mechanism is not a permanent bar to judicial review proceedings. That this suit warrants the application of exemption contemplated under section 9 (4) since this is an issue that deals with interpretation of the constitutional values and alleged violation of the bill of rights.

19. Learned counsel opined that the alternative dispute resolution mechanism in question is not available to the people of Fafi as the same is marked for internal use only. Equally, that the respondent did not demonstrate that the alleged mechanism was made available to all communities hosting refugees. To support the position that this is a matter which ought to be exempted under section 9(4) of the fair administrative actions Act, counsel referred to the case of Night Rose Cosmetics (1972) Ltd vs Nairobi County Government & 2 Others [2018] eKLR where the court held that "…factors to be taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate…"

20. Further, it was urged that in circumstances where the applicants allege serious violation of the bill of rights like in the instant case then they cannot be barred by the doctrine of exhaustion. Reliance was placed on the case of William Odhiambo Ramogi & 3 Others vs Attorney General & 4 Others; Muslims for Human Rights & 2 Others (interested parties) [2020] eKLR where, the court held that "…where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere 'bootsraps' or merely framed in bill of rights language as a pretext to gain entry to the court, it is not barred by the doctrine of exhaustion…"

21. In the same breadth, it was submitted that article 165(1) of *the constitution* vests this court with the original jurisdiction to address issues of constitutional interpretation and intervene where there is infringement of rights whether real or threatened. In the end, it was urged that the grounds of opposition by the respondent be dismissed by this court.

22. I have considered the objection herein by the 2nd respondent and the submissions by the parties. what falls for determination is whether this court lacks the requisite jurisdiction to determine the matter herein.

23. It is trite law that jurisdiction is everything and without it a court cannot move any further step. These were the wise words of Nyarangi JA in the case of Motor Vesel "Lillian" S" v Caltex Oil (Kenya) Ltd. 9 8 [2014] e KLR. 9 [1989].

24. The respondents have submitted that this court lacks jurisdiction as the impugned project concerns implementation of a program based on the grant by the World Bank (multilateral agency) to the government of the Republic of Kenya. That the document does not provide that the jurisdiction of the High Court shall be invoked in disputes resolution but has a defined mode of settling disputes by anyone affected by the implementation of the programme which the applicants have failed to exhaust.

25. On the other hand, the applicants urged that noting that this is a matter involving alleged violations of the rights of the people of Fafi and further, that the bill of rights provisions have been violated, this court in view of article 165(1) has the jurisdiction to entertain the matter.

26. A reading of the Doctrine of of Exhaustion as defined in Black's Law Dictionary (10th Edition) states as follows; "… if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary."

27. Additionally, in the case of William Odhiambo Ramogi & 3 others vs Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (supra), the High Court in expounding on the said doctrine stated as follows:

> " The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*… "

28. Article 47 of *the constitution* which has been quoted as the pillar of the preliminary objection herein provides:

    1. (Every person has a right to administrative action that is expeditious , efficient , lawful, reasonable and procedurally fair

    2. …

    3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-:

       (a)provide for review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

       (b)promote efficient administration.

29. It is not in doubt that the *Fair Administrative Action Act* was enacted to operationalize article 47 of *the constitution*. I am particularly concerned about article 47 because the main contention is on whether this court has jurisdiction to hear this suit or not. Section 2 of the Act defines Administrative Action to include:-

    a. The powers, functions and duties exercised by Authorities or quasi-judicial tribunals; or

    b. Any act, omission or decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relates.

30. In the same breadth, section 9 the *Fair Administrative action Act* provides as follows:-"procedures for judicial review.

    1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

2. The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).

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

31. In the instant case, this court has independently perused the agreement under which the project is run. It is true that the 3rd respondent in liaison with the state and the county governments of the respective affected areas, run the project in an attempt to lift the lives of the communities hosting refugees. The said project has a blue print in the name of an agreement upon which it is run. From the said agreement, it is noted that:

> V Grievance Redress Service
>
> 100. Grievance Redress. Communities and individuals who believe that they are adversely affected as a result of a Bank supported P and R operation, as defined by the applicable policy and procedures, MAY submit complaints to the existing program grievance redress mechanism or the World Bank's Grievance Redress Service (GRS).

32. From the above, it is clear that any dispute touching on adverse effects on the refugees host communities or individual funded by the 3rd respondent MAY at the first instance be resolved as provided above or look for another option which option does not preclude a court of law. My view of the foregoing is supported by the findings of the Court of Appeal holding in the case of Kenya Wildlife Service vs Joseph Musyoki Kalonzo [2017] eKLR KECA 234(KLR) where the court had this to say while interpreting the word 'may';

14. In our view, even from a literal interpretation, this provision does not oust the jurisdiction of the High Court to hear any matters raised under that Act. If the Act meant to remove those matters from the realm of the High Court or the other courts, then it would have expressly stated so. It gives an aggrieved party an option to go to the committee as a first option. This in our view was meant to ease matters for the poor people whose crops and domestic animals are ravaged by wild animals occasionally, and which people may be far removed from the structured judicial system... The Act in our view meant to make it easier for such people to access justice that is more easily accessible in terms of not traveling long distances and also in terms of simplicity in lodging their claims. It could not have been meant to shut out everybody else who would prefer to pursue their claims before the conventional courts. That would explain the use of the word 'MAY' and the absence of any provision expressly limiting or ousting the jurisdiction of the High Court.

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16. ...In this case, Section 25 of the Act only gives an aggrieved party an option to pursue its claim either through the process stipulated under the Act, or through the court".

33. In my view, the clause providing for redress is not mandatory and it is only referring to disputes related with the adverse effects of the project on the community or individuals but not the right to resource

allocation or distribution. This court's jurisdiction is therefore properly summoned pursuant to article 165 of *the constitution*. Noting that the applicants have desired to be heard before this court, it is only fair that they be given their day in court.

34. In applying the above principles to the case at hand, I find and hold that at the first instance, this court's jurisdiction is not ousted by the provision as enunciated in the 3rd respondent's internal provision. Consequently, the preliminary objection herein is dismissed. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUAL THIS 14TH DAY OF MAY 2025

J. N. ONYIEGO

JUDGE