



Republic v Data Protection Commissioner; Hotel Waterbuck Limited (Exparte Applicant); Siele (Interested Party) (Judicial Review E011 of 2024) [2025] KEHC 5801 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
JUDICIAL REVIEW E011 OF 2024**

JM NANG'EA, J

MAY 5, 2025

BETWEEN

REPUBLIC APPLICANT

AND

THE DATA PROTECTION COMMISSIONER RESPONDENT

AND

HOTEL WATERBUCK LIMITED EXPARTE APPLICANT

AND

VICTOR KIBET SIELE INTERESTED PARTY

RULING

1. By Notice of Motion dated 2nd August 2024 the Ex-parte Applicant craves orders as hereunder;-
 1. A Declaration be made by the honourable court That the determination of the Data Commissioner in ODPC/COMP/0478/2024 rendered on the 18th day of June, 2024 is invalid; unlawful and illegal in so far as the said decision failed to comply with the dictates of fair hearing, equality and transparency.
 2. An Order of Certoriari do issue to remove into this Honourable Court for the purpose of being quashed the determination of the Data Commissioner in ODPC/Comp/0478/2024 rendered on the 18th day of June, 2024.
 3. An Order of Prohibition do issue restraining the Interested Party, his servants, employees and or agents or any other individual acting under his authority prohibiting them from executing the terms of the determination of the Respondent in ODPC/COMP/0478/2024 rendered



on the 18th day of June, 2024 the same being unlawful and unfair and contrary to the rule of law and justice.

4. Costs of the application be provided for and be borne by the Respondent in any event.
 5. That the honourable Court be pleased to issue any other order That the court may deem fit and expedient to grant.
2. The application is founded on the following grounds;-
1. That vide a determination dated the 18th day of June, 2024 with respect to COMPLAINT NO. 0478 OF 2024, the Respondent directed the Ex-parte Applicant to compensate the Interested Party the sum of KES. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only) for alleged continual use of the former's image on its website for commercial purposes.
 2. That in arriving at the impugned determination, the Respondent misconstrued, misinterpreted and/or misapprehended the definition of consent, holding That the Ex-Parte Applicant had failed to obtain the consent of the Interested Party pursuant to the use of the former's image in its website and the said publishing was undertaken for commercial purposes.
 3. That the Respondent arrived at a decision That was irrational and irregular in the circumstance by holding That the use of the image of the Interested Party by the Ex-Parte Applicant vide displaying the same on its website was contrary to the law despite the former leading irrefutable, comprehensive and concise evidence That the consent of the Interested Party had been obtained prior to such use.
 4. That the proceedings before the Respondent That culminated in the impugned decision were farcical and did not accord with the Ex-parte Applicant's legitimate expectation of a Fair Hearing or otherwise due process contemplated under Article 50 of *the Constitution* and or proceedings contemplated under the Data Protection Act 2019.
 5. That the decision of the Data Protection Commissioner flies in the face of Article 47 of *the Constitution* in so far as the proceedings of an independent and impartial tribunal or administrative body are expected to be undertaken and disposed of.
 6. That pursuant to the Ex-parte Applicant's application dated the 26th day of June, 2024, the Honourable Court granted leave to the former to commence judicial review proceedings against the decision of the Respondent.
3. The application is further supported by a Statutory Statement; the Respondent's Affidavit in verification of facts and further affidavit evidence of Davies Kinyanjui, one of the Ex- parte Applicant's Directors. Lodging of this Judicial Review Application was preceded by requisite leave the court granted to the Ex- parte Applicant on 21st July 2024.
4. The Statutory Statement dated 26th June 2024 indicates That the Ex-parte Applicant challenges the Respondent's decision dated 18th June 2024 over complaint No. 0478 of 2024 by which the former was directed to compensate the interested party in the sum of Kshs. 500,000/= for alleged continual use of his website for commercial purposes. The reliefs sought are as hereinbefore set out.
5. In support of the claim, the following grounds as per the Statutory Statement are relied upon;
1. That the Ex-parte Applicant is a Company registered under the *Companies Act* and operates a hotel business in Nakuru County within the Republic of Kenya.



2. That the Interested Party herein was employed by the Ex-parte Applicant as a Receptionist effective from the 8th day of January, 2022 for a period of three (3) months on a renewable basis.
3. That the duties of the Interested Party entailed receiving guests to the hotel and being the head receptionist, doubled as the face of the Ex-parte Applicant hotel being the first point of contact between customers of the hotel and the management.
4. That the Interested Party dutifully and diligently carried out the duties assigned to him as specified under the employment contract absent any complaints from the management and other staff of the hotel.
5. That sometime in September, 2022, due to the ravages of the COVID-19 virus That had decimated businesses and nearly crippled the hotel industry in the country and other parts of the world, the management of the Ex-parte Applicant decided to engage in a robust marketing campaign in order to improve the visibility of the hotel and also improve its profit making capability.
6. That conversant and fully appraised of the diverse advantages of digital marketing and given the increased viability of the digital space as a forum for expression, engagement and publicity, the management of the Ex-parte Applicant sought the services of Eneza IT Solutions, a reputed Digital Media Marketing firm to undertake the abrasive digital media campaign contemplated by the latter.
7. That pursuant to the objectives of enhancing the visibility and viability of the Ex-parte Applicant hotel business, Eneza IT Solutions elected to include the photographs of the staff of the Ex-parte Applicant and the premises in its website in a bid to signify the top-notch hospitality skills That said staff boasted of and also to demonstrate the enviable infrastructural set-up of said hotel and this necessitated the carrying out of an elaborate photography session on the 2nd day of September, 2022.
8. That prior to the photography session, the hotel staff, including the Interested Party herein were informed of the purpose of the session, the dress code That they were required to abide by on the material day and the activities That they would be required to undertake.
9. That most importantly, alive to the rigors of privacy laws in the country and appreciative of the rights of data subjects to give their consent before their details, credentials and photographs are taken for any given purpose by the Data Controllers, the management of the Ex-parte Applicant sought the consent of the hotel staff including the consent of the Interested Party herein who was designated as the face of the company at the time, owing to his position as the lead Front Office Receptionist.
10. That on the material day, the photography session was successfully conducted and the photographs That were taken later displayed on the website of the Ex-parte Applicant demonstrating a robust, efficient and effective staff who worked with passion and zeal to satisfy the needs of the hotel's clientele.
11. That at no point, prior to, during and even after the said photography session did any of the hotel staff, including the Interested Party herein; object to the photography session or to the display of the said photographs on the website of the Ex-parte Applicant as they were all aware of the object and purpose of the session and had also lent their consent to have the subject photographs taken.



12. That for clarity purposes and for avoidance of doubt, no coercion; compulsion and/or duress was directed at any of the staff so as to ensure their compliance with the process and no such coercion was reported before, during and after the session was successfully conducted.
13. That the Interested Party later absconded his duties at the Ex-parte Applicant hotel and did not give any notice of any intended resignation from his post.
14. That in the meantime, and in innocent cognizance of the position That the Interested Party was still under its employment as no formal letter of resignation had been tendered to this effect and That no termination letter had been drafted so far, the Ex-parte Applicant continued to display on its website, all the images taken by Eneza IT Solutions, including the image of the Interested Party during the photography session in pursuance of the robust social media campaign That it had earlier undertaken.(sic)
15. That the Ex-parte Applicant was later dumbfounded when, on the 26th day of October, 2023 over one year after the Interested Party had unceremoniously left its employment with the former, it received a demand letter from the Advocates representing the Interested Party That detailed a purported infringement of his right to privacy as contemplated under Article 31 of *the Constitution* of Kenya, 2010 due to the display of his image on its website.(sic)
16. That the subject letter also required the Ex-parte Applicant to pull down the images That depicted the Interested Party and the former moved with speed and promptly extricated the said images from its website.
17. That the Ex-parte Applicant's Advocates responded to the subject demand letter vide a response sent to the Advocates for the Interested Party dated the 25th day of April, 2024 clearly stipulating the fact That the consent of the Interested Party had been sought prior to the photography session and also That the offending photograph would be removed from its website, said removal which was promptly undertaken.
18. That the subject response also set out the fact That the Ex-parte Applicant had not in any way, shape or form, breached the provisions of the *Data Protection Act, 2019* in relation to the processing and display of the Interested Party's image on its website and also expressed its wish to settle the matter out of Court maximizing the potential of the extant Alternative Dispute Resolution (A.D.R) systems and methods as opposed to engaging in a lengthy and laborious adjudication process That would not serve the interests of both parties since the facts precipitating the dispute were largely uncontested and the same did not merit a judicial adjudication. (sic)
19. That in disregard of the good will of the Ex-parte Applicant to pull down the offending image from its website and in clear disregard of the olive hand extended to him to settle the matter out of court, the Advocates representing the Interested Party escalated the dispute to the Office of the Data Protection Commissioner and vide a correspondence to the Ex-parte Applicant dated the 15th day of April, 2024, the former confirmed receipt of the allegations of impropriety with respect to the use of the Interested Party's image on the Ex-parte Applicant's website and required the Ex-parte Applicant to present amongst other requirements, a response to the said allegations, a contact person who can provide further details regarding the complaint, any relevant materials or evidence in support of the response, the lawful basis relied upon to process the Complainant's personal data, evidence as to whether the Complainant consented to the processing of their personal data and a detailed description of whether the Ex-parte Applicant had fulfilled the rights of data subjects under its control.



20. That vide its response dated the 9th day of May, 2024, the Ex-parte Applicant provided all the details needed by the Office of the Data Protection Commissioner (ODPC) in full appraisal of the fact That the former is the body charged with deciding cases relating to alleged violation of rights and duties provided for in the [Data Protection Act, 2019](#) and would render a decision That was in conformity with the principles of justice and the rule of law.
21. That the response to the Office of the Data Protection Commissioner (ODPC) to this end was comprehensive both in scope and substance as it set out the nature of the Interested Party's employment; the events leading up to and after the subject photography session That formed the substance of the Interested Party's complaint and even provided photographic evidence of the fact That-the Interested Party participated in the subject photography session consensually and That the offending image belonging to the Interested Party That was displayed in the Ex-parte Applicant's website had been removed. The response also provided legal basis underpinning the concept of consent as contemplated, not only under the auspices of the [Data Protection Act, 2019](#) but also the general nature of consent as a normative concept and how the Interested Party had knowledge of the objective and purpose of the subject photography session and had also clearly provided consent prior to the subject session.
22. That the Ex-parte Applicants were blindsided by a decision of the Data Commissioner dated the 18th day of June, 2024 where the former found in favor of the Interested Party and awarded the sum of KES. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only) to the Interested Party for alleged continual use of his image on its website for commercial purposes.
23. That the determination of the Respondent was illegal and unlawful in the sense That it failed to fully comprehend the nature of the concept of consent as provided for under the [Data Protection Act, 2019](#) and as envisaged under the auspices of Article 39 of [the Constitution](#) of Kenya, 2010 in so far as it provided That consent can only be given in the context of a clear written statement or in instances where consent has been obtained orally, the same must be reduced into writing or recorded electronically and a record of the script thereof be kept contrary to established principles regarding consent more specifically with regards to instances where, as provided for under the law That consent may be sought either by a statement or by a clear affirmative action signifying agreement to the processing of personal data relating to the data subject as the one granted by the Interested Party herein with respect to the Ex-parte Applicant's use of his image in its website.
24. That the decision of the Respondent to award the sum of KES. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only) to the Interested Party for alleged continual use of his image on its website for commercial purposes is irrational and unlawful as the same does not meet the threshold of damages awarded for compensation as said award is punitive in nature.
25. That the decision of the Respondent to award the sum of KES. 500,0001= (Kenya Shillings Five Hundred Thousand Shillings Only) to the Interested Party for alleged continual use of his image on its website for commercial purposes is unreasonable, unfair and illegal as the former failed to set out the basis for said award in the absence of any injury suffered by the Interested Party.
26. That the decision of the Respondent to award the sum of KES. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only) to the Interested Party for alleged continual use of his image on its website for commercial purposes is unreasonable, unfair and illegal as the former failed to set out the basis for said award in the absence of any injury suffered by the Interested Party.



27. That the decision of the Respondent to award the sum of KES. 500,000/= (Kenya Shillings Five Hundred Thousand Shillings Only) to the Interested Party for alleged continual use of his image on its website for commercial purposes is capricious, egregious and an abdication of the Respondent's duties to safeguard the rights of individuals and corporations as envisaged under the auspices of the Data Protection Act, 2019 and the Constitution of Kenya, 2010 thereby making the data protection regime as an unlawful profiteering regime.
 28. That the proceedings before the Respondent That culminated in the impugned decision were farcical and did not accord with the Ex-parte Applicant's legitimate expectation of a fair hearing or otherwise due process contemplated under Article 50 of the Constitution of Kenya, 2010 and or proceedings contemplated under the Data Protection Act 2019.
 29. That there is therefore need for this court to intervene grant the prayers sought herein to prevent an apparent miscarriage of justice.
6. The above grounds are more or less reiterated in the Ex-parte Applicant's Director's Affidavit. It is averred That the Respondent's decision was based on a gross misinterpretation of the law on consent relating to processing of personal data. The Ex- parte Applicant further laments That the Respondent failed to accord them a right of hearing before the impugned decision was made in violation of Article 50 of the Constitution. The decision the Respondent arrived at is attacked as irrational and irregular in the circumstances. It is contended That contrary to the Respondent's stance, the Interested Party in fact gave consent to use of his image on the Ex-parte Applicant's website.
 7. The Respondent is further faulted for infringing the provisions of Article 47 of the Constitution which guides proceedings before administrative bodies or tribunals.
 8. The Respondent reacted to the application by filing an affidavit in reply sworn on 16th September 2024 and lodging a Preliminary Objection dated 24th January 2025 faulting the Ex-parte application for failing to comply with the Provisions of Section 64 of the Data Protection Act. The affidavit evidence and preliminary objection will be set out later.
 9. The Interested Party also opposes the application through an affidavit in reply he swore on 18th September 2024 whose averments will also be set out later in this ruling.
 10. On 12th February 2025 the court directed That both the application and the Preliminary Point be canvassed together by means of Written Submissions. Learned Counsel for the parties duly put in their respective submissions.
 11. The Respondent's Deputy Data Commissioner (Oscar Otieno) deposes in his affidavit in response to the application That the Ex-parte Applicant was accorded a fair hearing before the decision in favour of the Interested Party was arrived at.
 12. The court is further told That after conducting investigations and hearing both parties the Respondent found That the Ex-Parte Applicant did not obtain the consent of the Interested Party before using his image for commercial purposes on its website contrary to the requirement of the law. The Ex-parte Applicant's complaint regarding the Respondent's decision is therefore described as baseless.
 13. Learned Counsel for the Respondent contend vide the Preliminary Point thus;
 1. That under Section 64 of the Data Protection Act, the Applicant ought to move the court by way of an appeal and not a judicial review application. The court therefore lacks jurisdiction to hear this matter as filed by the Ex-parte Applicant.



2. That the suit lacks merit, is an abuse of the court process and time. It should be dismissed with costs to the Respondent.
14. Counsel submit That the Ex-parte Applicant had, in reply to the allegations against it by the Interested Party, asserted That the Interested Party gave express consent to use of his image on their website. In support of the argument That the court is bereft of jurisdiction, reference is made to the Supreme Court of Kenya’s decision in *Samwel Kamau & Another v Kenya Commercial Bank & Others* [Application 2 of 2011] 92012] KESC (KLR) in which it was held;
- “A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding That which is conferred upon it by law.”
15. This established legal position was also underscored in the famous case of *Owners of Motor Vessel “Lilian “S” v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989)* cited by Counsel in which the court counselled That;
- “A court of law must down its tools in respect of the matter before it the Moment it holds the opinion That it is without jurisdiction.”
16. The Respondent further places reliance on Section 64 of the Data Protection Act which provides That a person aggrieved by an administrative action taken by the office of Data Protection Commissioner created under the Act, including enforcement and penalty notices may appeal to the High Court.
17. The Respondent’s advocates seek to impress upon the court the difference between judicial review and appeal jurisdictions. Guidance is drawn from the scholarly work of David Foulkes in his book titled “*Foulkes Administrative Law*” in which the learned author observed That an appeal lies only when and to the extent That statute so provides; and the power of the appeal body to review and/or reconsider its decision likewise depends on the statute.
18. In contrast, the learned author explains That;
- “The court’s common law, power of judicial review exists unless it is taken away or limited by statute. Thus where no appeal to the court is provided by statute the only possible challenge in the courts is by judicial review....”
19. To further buttress the Respondent’s Submissions Counsel allude to this court’s determination in *Swara Acacia Lodge v Office of the Data Protection Commissioner & Another (Application E072 of 2024) [2025] KEHC (KLR)* where it was noted:
- “There is a clear distinction between appeal and judicial review and one cannot be substituted for the other, particularly where the statute has expressly stated the one form of procedure rather than the other ought to be adopted in addressing any particular grievance.”
- Further, in *Cares Tech Limited v Office of Data Protection Commissioner [2024] KECH 123833 (KLR)* also relied upon by the Respondent it is contended That in similar circumstances the court held That it lacked jurisdiction. The court observed in That case That;
- “The applicant failed to lodge an appeal as provided for under Section 64 of the Data Protection Act (supra).



20. Concerning the merits of the application, the Respondent argues That it allowed the Interested Party’s application because the Ex-parte Applicant had not fulfilled conditions for obtaining a data subject’s consent under Sections 2, 30(1), 32 and 37 of the Data Protection Act.
21. While making reference to various other decided cases, the Respondent therefore maintains That its decision on the Interested Party’s Complaint was fair and rendered in accordance with the applicable law.
22. By his affidavit in reply to the application the Interested Party dismisses the application as an abuse of the court process, scandalous, frivolous, unmerited and a desperate attempt at stalling execution of the Respondent’s determination in issue which is described as lawful. Stating That at the material time he was the Ex-Applicant’s Junior Receptionist, he laments That his photographic image was taken and used on his employers website without his express consent.
23. The Interested Party therefore inter alia avers That the Respondent’s handling of his complaint was fair and That the decision arrived at was legally sound.
24. The Interested Party also filed Written Submissions through his advocates which submissions fully agree with the position taken by the Respondent. Like the Respondent, the Interested Party faults the Ex-parte Applicant for breaching the law in failing to appeal the impugned decision pursuant to Section 64 of the Data Protection Act quoted supra. Moreover, the court is told That the Ex-parte Applicant has not sought guidance from provisions of Section 9(2) of the Fair Administrative Actions Act which enacts as hereunder;-

“(2) The High Court or Subordinate Court under Subsection (i) 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.”

25. The Interested Party submits That having failed to exhaust the appeal mechanism provided by Section 64 of the Data Protection Act as stated hereinabove, this application cannot lie.
26. The Interested Party’s advocates further inter alia cite in reliance the judicial determination in R v Kenya Revenue Authority Ex-parte Yaya Towers Limited (2008) eKLR in which it was held That;

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself.”
27. For the foregoing submissions inter alia the Interested Party prays for dismissal of the application with costs.
28. The Ex- parte Applicant retorts in its Submissions That the Objection lacks merit. Counsel cite various decided cases including the famous case of Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors (Ltd) (1969) EA 696 in which the Court of Appeal for East Africa delivered itself 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.”



29. Reference is further made to the judicial determination in *Bio systems Consultants v Nyalı Links Arcade* (Civil Appeal No. 185 of 2023 [2023] KEHC 21068 (Ken) (31 July 2023) (Ruling) in which it was observed;
- “ A point of Preliminary Objection cannot be raised if any fact has to be ascertained in the court of deciding it. It only consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings. Obvious examples include;-
- objection of the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeals; where an appeal is lodge when there is no right of appeal lodged; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required....”
30. The Ex-Parte Applicant places further reliance on Sections 7, 8 and 9 of the Fair Administrative Actions Act, 2015 which allow persons aggrieved by an administrative action or decision, to apply for judicial review of the decision.
31. The Ex-parte Applicant’s Advocates continue to submit That there are three long established grounds upon which administrative action is subject to control by way of judicial review to wit; illegality, irrationality and procedural impropriety of the administrative action (see Case Law in *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374,410 among may other local decisions cited by Counsel of this point). The court is told That this application only seeks to impugn the illegality, irrationality and unreasonableness of the Respondent’s decision and not the merits of the decisions which is the province of an appellate court.
32. Counsel, however, allude to recent judicial decisions That have extended the ambit of judicial review to include merit review of decisions cited in this regard is *Republic v Public Procurement Administrative Review Board & Another Ex-parte Interreck Testing Services (EA) PTY Limited & Authentic Inc; Accounting Officer, Energy and Petroleum Regulatory Authority & Another* [2022] eKLR. This decision holds That judicial review is also concerned with whether in making the impugned decision;
- “ the decision maker took into account relevant matters or did take into account irrelevant matters.... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself, such as whether there was or there was not sufficient evidence to support the decision.”
33. The Ex-parte Applicant quotes at least two decisions to wit; *Republic v Joel Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 Others; Katiba Institute & Another* (Ex-parte); *Immaculate Kasait, Data Commissioner* (Interested Party) reported in 2021 as well as *Gichui & 2 Others v Data Protection Commissioner; Mathenge & Another* (Interested Parties) reported in 2023 as supporting the Ex-Applicant’s position herein. In the Joe Mucheru Case supra the court quashed a decision to roll out Huduma Cards for being ultra vires. Section 3, of the Data Protection Act governing data protection impact assessment. In the Gichui case supra on the other hand, judicial review Order of Certoriari was issued against a decision of the Data Protection Commissioner made outside a 90 day timeline provided for by the Data Protection Act.
34. The Ex-Applicant therefore submits That its application is well taken and That the preliminary objection is misconceived and is for dismissal.



35. The Ex-parte Applicant also filed a separate set of submissions on the merits of the application. It complains That it was not afforded the Constitutional and legal right of hearing before the subject decision was rendered. Various judicial decisions touching on this matter are cited and include the case of *Githiga & 5 Others v Kiru Tea Factory Company Ltd* (Petition 13 of 2019 [2023] KESC 41 (KLR) (16 June 2023) (Judgment) where it was held thus;

“..... procedural fairness in decision making requires courts not to deprive any person of their right without due process of the law, a fundamental precept That implies That the right of a person affected by any adverse decision or action is present before a tribunal That pronounces judgement upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting, by proof every material facts which bears on the question of right in the matter involved.”

36. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 6 Others* [2013] eKLR also relied upon by Counsel, all courts are enjoined;

“to consider the principles and values of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency, and accountability. This is because the four corners of due process of the law, specifically the right to be heard and the right to a fair hearing require That both parties be heard if an issue is raised before the court in order to accord the court the opportunity to pronounce itself on the issue.”

37. Learned Counsel further submit That litigants have a legitimate expectation to be heard on merits by a decision maker before decisions affecting them are entered. To buttress this position Section 91(d) of the [Data Protection Act, 2019](#) is referred to and is in the following terms;

“The Data Commissioner shall have the power to;-

(d) issue summons to a witness for the purpose of investigation.”

38. Further reference is made inter alia to the Supreme Court’s decision in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others* Supreme Court Petition Nos. 14, 14A, 14B & 14C of 2014 to underscore the underpinning of the doctrine of legitimate expectation. The apex court observed as follows;-

“Legitimate expectation would arise when a body, by representation or by past practice has aroused an expectation That is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise of practice by a public authority That is expected to fulfil the expectation.”

39. The Ex-parte Applicant continues to insist That the Interested Party gave his consent to use of his image for its commercial purposes in issue. Counsel make reference to Section 2 of the Data Protection Act on the definition of consent which enacts as hereunder;

“Any manifestation of express, unequivocal, free, specific and informed indication of the data subject’s wishes by a statement or a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject.”



40. The Ex-parte Applicant therefore contends That such consent need not only be express but may be implied by conduct as noted in *Masibo v Nation Media Group Ltd*. Petition 158 of 2021 [2023] KEHC 20569 (KLR) (Constitutional & Human Rights) on which the Ex-parte Applicant also pitches tent.

41. In support of the agreement That the Respondent's decision was irrational and thus liable for judicial review, Learned Counsel for the Ex-parte Applicant cite Section 7(2) (i) of the Fair Administrative Actions Act which provides;-

“A court or tribunal under Subsection (1) may review an administrative action or decision if;-

i. the administrative action or decision is not rationally connected to-

- a) The purpose of which it was taken;
- b) The purpose of the empowering provision;
- c) The information before the administrator; or
- d) The reasons given for it by the administrator.”

42. Appreciation of the test of rationality is further given in the case of *Republic v Public Procurement Administrative Review Board; Trippex Construction Company Limited & Edmar Enterprises Limited Ex-parte Rongo University* (2018) KEHC 9643 (KLR) among other relevant decisions alluded to by Counsel. While referring with approval to the South African Case of *Pharmaceutical Manufacturers Association of South Africa & Another; Re Ex-parte President of the Republic of South Africa and Others* the court proffered;-

“The question whether a decision is rationally related to the purpose for which the power was given calls for an objective inquiry. Otherwise a decision That, viewed objectively, is in fact irrational might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.”

43. As regards the reasonableness test of an administrative action, the Ex-parte Applicant cites the *Rongo University Case supra* for the proposition That the test is whether the decision in question was one which a reasonable authority could reach.

44. Further reference is made to Case Law in *Republic v Betting Control & Licencing Board & Another Ex parte Outdoor Advertising Association of Kenya* (2019) eKLR which offers guidance on what constitutes unreasonableness as follows;

- i. Unreasonableness is the reflex of the implied legislative intention That statutory powers be exercised reasonably;
- ii. This ground of review will be made out when the court concludes That the decision fell outside the area of decisional freedom which That legislative assumption authorizes That is, outside the range within which reasonable minds may differ;
- iii) The test of unreasonableness is whether the decision was reasonably open to the decision maker in the circumstances of the case. To say That the decision



was “not reasonably open” is the same as saying That “no reasonable decision maker” could have made it.”

45. Due to the foregoing submissions, the Ex-parte Applicant argues That the application is merited and ought to be granted.
46. I have perused the parties’ affidavit evidence, their submissions and the entire material placed before the court in relation to the application. All the relevant facts appear to be undisputed. The following issues are identified for determination;-
 - a. Whether the Court has jurisdiction to hear and determine the application.
 - b. Whether the application is merited.
 - c. The orders commending themselves to the court including as to the costs thereof.
47. Learned Counsel for all parties rightly submit on the authorities cited That where a court lacks jurisdiction to entertain any legal action it should immediately decline to proceed with it. As there is common ground on matters of fact, the Respondent’s preliminary point has been properly urged and will be considered on its merits.
48. The Interested Party complained to the Respondent about the Ex-parte Applicant’s use of his photographic image on its website for the purpose of promotion or marketing its business without seeking and obtaining his consent.
49. After investigating the complaint and hearing the parties the Respondent faulted the Ex-Parte Applicant for using the Interested Party’s image without obtaining his “express” consent in the manner contemplated by the law or at all. For the transgression, the Ex-parte Applicant was ordered to pay a sum of Kshs. 500,000/= (Five Hundred Thousand) to the Interested Party in compensation.
50. The Ex-parte Applicant is aggrieved by this decision which it complains to be based on “gross misinterpretation of the law on consent related to processing of personal data.” as contended in the affidavit in support of the motion. It is further deponed in the affidavit inter alia That the impugned decision was reached without affording the Ex-Parte applicant the right of hearing contrary to the law.
51. This court’s decisions in Ceres Tech Limited and Swara Acacia Lodge and supra are on all fours with the instant matter and I am persuaded thereby. It was held in the cases That any complaint over the decision of the Data Protection Commissioner ought to be appealed in line with the provisions of Section 64 of the Data Protection Act supra. Where statute law provides for a particular mechanism of seeking a remedy, then That mechanism must be followed and judicial review relief is not available to the aggrieved party.
52. The same legal position was articulated in the English Case of R v Peter Kin, ex Soni [1972] IMM AR 253 where Lord Widgery CJ observed That prerogative order/writs like certiorari do not issue where other remedies exist. It was exhorted That;

“The court should not allow its jurisdiction under the prerogative orders to be issued merely as an alternative form of appeal where other adequate jurisdiction exists elsewhere.”
53. Further emphasis on the doctrine of exhaustion of remedies was made by the Court of Appeal in Geoffrey Muthinja & Another v Samuel Muguna Henry & 1956 Others [2015] eKLR and Paul Partoire Ole Kaika v Orange Democratic Movement [Petition No. 87 of 2014] eKLR.



54. The preliminary point is accordingly found to be sustainable. As the court has no jurisdiction. I will not venture into the merits of the application. Instead, the application is struck out with costs to the Respondent and the Interested Party for want of jurisdiction.

J. M. NANG'EA - JUDGE

RULING DELIVERED VIRTUALLY THIS 5TH DAY OF MAY, 2025 IN THE PRESENCE OF:

Ex-Parte Applicant's Advocate, Ms Mwangi for Mr. Kisilah

Respondent's Advocate, Mr. Lang'at

Interested Party's Advocate, Mr. Hussein

Court Assistant (Jeniffer)

J. M. NANG'EA - JUDGE

