



Republic v Retirement Benefits Appeals Tribunal & another; Housing Finance Company of Kenya Retirement Benefits Scheme (Interested Party); Kilonzo & 39 others (All Suing as Former Members of the Housing Finance Company of Kenya Pension Scheme) (Exparte Applicant) (Judicial Review Application E112 of 2024) [2025] KEHC 8136 (KLR) (Judicial Review) (11 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E112 OF 2024**

RE ABURILI, J

JUNE 11, 2025

BETWEEN

REPUBLIC APPLICANT

AND

RETIREMENT BENEFITS APPEALS TRIBUNAL 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

HOUSING FINANCE COMPANY OF KENYA RETIREMENT BENEFITS SCHEME INTERESTED PARTY

AND

ABRAHAM MACKIE MUTISYA KILONZO & 39 OTHERS (ALL SUING AS FORMER MEMBERS OF THE HOUSING FINANCE COMPANY OF KENYA PENSION SCHEME) EXPARTE APPLICANT

RULING

1. The application dated 21st May 2024 it is brought under Order 53 Rule 1 (2) of the Civil Procedure Rules, Sections 8 and 9 of the [Law Reform Act](#) and Section 3A of the [Civil Procedure Act](#). The application seeks the following orders:



- a. That leave be granted to the ex parte Applicants herein to apply for a Judicial Review Order of Certiorarito quash the Judgment and Orders of the 1st Respondent dated 14th March 2024 in RBAT Appeal No.3 of 2022-Abraham Mutisya Kilonzo & 39 others -vs- Retirement Benefits Authority & Another.
 - b. That leave be granted to the ex-parte Applicants herein to apply for a Judicial Review Order of Mandamus compelling the 1st Respondent to determine their complaint filed on 23rd February,2021 in accordance with the [Retirement Benefits Act](#) and the Housing Finance Company of Kenya Pension Scheme Rules.
 - c. That costs of this Application be provided for.
2. The application is predicated on the grounds on the face thereof, the statutory statement and the affidavit of Abraham Mackie Mutisya Kilonzo sworn on 21st May 2024.
 3. The Applicants' case is that they are former employees of the Housing Finance Company Kenya Limited and that they were members of the Housing Finance Company of Kenya Limited Staff Retirement Benefits Scheme.
 4. It is their case that they were aggrieved by the computation and underpayment of their retirement dues and as such, they filed a complaint with the Retirement Benefits Authority on 25th April 2014 and that before the same could be determined, they filed an Appeal with the 1st Respondent seeking for their complaint before the Authority to be determined without delay. The Appeal was dismissed in a Ruling dated 18th June 2020 following a Preliminary Objection that had been raised by the Authority.
 5. The Applicant subsequently wrote to the Authority on 23rd February 2021 seeking answers on several issues which included the breach of the rules of the Retirement Benefits Scheme on the contributions to be made by the employees and employers, the failure to disclose their contribution history and also the payment of amounts that were not correct.
 6. The Authority responded in a letter dated 19th January 2022 in which it dismissed the complaint for being time barred and an afterthought on the Applicant's part. According to the Applicants, this was contra the [Retirement Benefits Act](#) as it denied them a chance to properly present their case and also due to the fact that the Act does not provide for a time frame within which an individual should file a complaint.
 7. Aggrieved by the Authority's decision contained in the said letter, the Applicants lodged an Appeal with the 1st Respondent but the Appeal was dismissed. The Applicants urge that the 1st Respondent abdicated its duty to independently investigate the claim and also acted in total disregard to the rules of procedure. It is also their case that the 1st Respondent's actions were made irrationally, in bad faith, procedurally unfair and disproportionate to any interest sought to be protected.

- Response

8. In response, the Interested Party filed a Replying Affidavit sworn by Catherine Olaka on 30th July 2024. The Interested Party contends that the Chamber Summons application before this court is incompetent and ought to be struck out as it has been brought in the name of Republic as opposed to the name of the Applicant.
9. It is the Interested Party's response that the Ex parte Applicants were all former employees of the founder company of the Interested Party who left employment on diverse dates spanning between 1st



July 2001 and 31st December 2008. That upon their exit, they were all issued with detailed worksheets as to their retirement benefits and thereafter received lumpsum and monthly payments in respect thereof.

10. The Interested Party asserts that the 1st Respondent analysed the record, reviewed the relevant documents and applied the relevant law. The 1st Respondent is said to have found that the decision was made in full view of the facts and evidence made available.
11. It further asserts that the Ex parte Applicant's appeal was dismissed on merits and as such, the upshot of the Judicial Review proceedings sought to be instituted herein would amount to a merit review of the decision, as no serious procedural complaints are raised in respect of the said decision whilst all parties were accorded a fair hearing before the 1st Respondent.

Submissions

12. The application was canvassed by way of written submissions and oral highlights by counsel for the Applicants and Interested Party were made on 7th May 2025.
13. The Ex parte Applicants filed written submissions dated 12th September 2024. In response to the issue raised by the Interested Party that their application ought to be dismissed having been brought in the name of Republic instead of that of the Applicants they state that pursuant to Article 159(2)(d) of *the Constitution* the same does not render the entire application fatally defective.
14. To support this position, the Applicants rely on the case of Republic vs. Political Parties Dispute Tribunal & 2 Others Ex parte [2015] eKLR where the court held that the failure to indicate the Ex parte Applicants as the Applicant in the proceedings for leave was not fatal. Counsel argued that no prejudice is occasioned owing to the error.
15. They also submit that their reasons for applying for leave is because the 1st Respondent abdicated its mandate to independently consider the actuarial report which supported pension contributions which should have interest alongside. Further, that the 1st Respondent abdicated its duty by failing to direct an independent authority and/or actuary to carry out calculations on the Applicants' entitlement.
16. It is also submitted that the 1st Respondent failed to objectively and impartially consider the issues and evidence before it arriving at a decision erroneously made. Further, that the Tribunal made an improper assumption that clause 7.6 of the actuarial report provided adequate justification for the basis upon which the sponsor's contribution was fixed.
17. The Applicants rely on Multiline Services Limited vs. Nairobi City County Government [2023] KEHC 23794(KLR) (Judicial Review) wherein the Court cited the case of Republic vs. County Council of Kwale & Another Ex parte Kondo & 57 Others where the Court is said to have held that leave may be granted where on the material available, the court is of the view that there is an arguable case the test being whether or not there is a case fit for further investigations.
18. The 1st Respondent filed written submissions dated 15th October 2024.
19. In the submissions, they argue that the present application, despite being brought under Order 53 of the Civil Procedure Rules, 2010, substantially involves issues of merit and not procedure and that for this reason, the judicial review Court lacks jurisdiction to determine the present application.
20. Reliance was placed on the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR), and a submission made that in this case, the Supreme Court clarified that merit review by a judicial review court is only appropriate when the applicants have based their grievances on constitutional questions.



- They also state that the Court held that when a matter is framed as a violation of fundamental rights under *the Constitution*, it warrants a review of both the process and the merits.
21. Further that, when the application is filed under Order 53 of the Civil Procedure Rules, as is in the present case, the court's jurisdiction is limited to reviewing the procedure and not the merits of the decision.
 22. The Respondents submit that under the *Fair Administrative Action Act*, 2015 particularly sections 7(2), 9(1), and 9(2), judicial review is concerned with how a decision was made not whether it was right or wrong. Further, that the court's role is to assess the legality, fairness and procedural propriety of the decision making process, not to reconsider the merits of the case. They also submit that judicial review ensures decisions comply with statutory and constitutional requirements, but it does not function as an appellate court.
 23. They also submit that Section 7(2) of the *Fair Administrative Action Act* provides for the scope of judicial review and therefore any application for judicial review orders must be grounded on the grounds set out therein.
 24. It is also their argument that Section 9(2) of the *Fair Administrative Action Act*, 2015 distinguishes judicial review from appellate jurisdiction by explicitly prohibiting the exercise of judicial review when internal mechanisms for appeal or review have not been exhausted and where there exist remedies available under any other written law.
 25. It is also submitted that when an applicant has the option to appeal a decision which is substantially based on its merits, the proper court with jurisdiction is the High Court exercising supervisory jurisdiction. Further, that the judicial review court, on the other hand, is limited to assessing the legality and procedure as provided under Section 7 of the Fair Administrative Act, 2015.
 26. The Respondents place reliance on the case of Samuel Kamau Macharia and another v. Kenya Commercial Bank Limited and 2 others [2012] eKLR where the court held that a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law.
 27. The Respondents also submit that this court lacks jurisdiction to assess the merits of a case brought under Order 53 of the Civil Procedure Rules, 2010, especially where no specific constitutional violations are pleaded. Also, that the 1st Respondent acted within its lawful mandate under Sections 47,48 and 49 of the *Retirement Benefits Act*, and is now functus officio meaning it cannot revisit the matter and that forcing it to reconsider the complaint would amount to improperly assuming its statutory role.
 28. According to the Respondents, the application is essentially an appeal disguised as a judicial review, and should instead be brought before the High Court under its supervisory jurisdiction as provided in Article 165(6) of *the Constitution*.
 29. The Interested Party filed written submissions dated 7th October 2024.
 30. In the submissions, it is argued that the instant application purportedly brought in the name of the Republic ought to be struck out as the same has been filed without the requisite leave as has been rehashed by the courts in Republic vs. Chief Magistrate Milimani Commercial Courts & 2 others Ex parte Fredrick Bett [2022] eKLR and in the case of Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No.384 of 1996.



31. It is the Interested Party's case that as was held by the Court in the case of Michael Kyambati v Principal Magistrate, Milimani Commercial Courts, Nairobi & Mark Kenani Nyakweba [2016] KEHC 7931 (KLR) judicial review proceedings ought to be titled with the name of Republic.
32. It is also submitted that judicial review is not merit based but rather a review of the process through which the decision was made. This position according to the Interested Party was restated in the cases of Republic vs. Retirement Benefits Appeals Tribunal & 2 others; Mumo & 168 others (Ex parte) [2023] KEHC 766 (KLR) and in the case of Republic vs. Commissioner of Lands Ex parte Hotel Kunste [1997] eKLR.

Analysis and Determination

33. I have considered the chamber summons and the response coupled with the written submissions as well as the oral highlights by the parties' counsel. The main issue for determination is whether the court ought to grant the orders sought.
34. The Applicants have moved this Court by way of a Chamber Summons application dated 21st May 2024, seeking leave to apply for judicial review orders against the decision of the 1st Respondent which upheld the decision of the Retirement Benefits Authority rejecting their complaint on grounds of limitation of time.
35. The Applicants lament that the impugned decisions were irrational, procedurally unfair, disproportionate, and made in bad faith. It is their case that the *Retirement Benefits Act* does not provide a limitation period for the lodging of complaints and that their claims regarding underpaid retirement benefits and actuarial computation of dues were not substantively addressed.
36. The Respondents and the Interested Party oppose the application on grounds, inter alia, that the application is incompetent, raises issues of merit rather than procedure, and that the judicial review court lacks jurisdiction to entertain what amounts to an appeal disguised as a judicial review.
37. The threshold for grant of leave in judicial review is well settled. At this stage, the Court does not determine the merits of the case but only considers whether the Applicant has established an arguable case fit for further investigation.
38. The court must however, exercise discretion judiciously when granting leave under Order 53 of the Civil Procedure Rules, ensuring that the application is not frivolous, statute barred, or an abuse of process see *Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & another* [2016] KEHC 4176 (KLR).
39. The requirement for leave under Order 53 of the Civil Procedure Rules serves as an important procedural filter in judicial review proceedings. It ensures that only serious and arguable claims proceed to a full hearing, thereby preventing abuse of the judicial process. Judicial review is a special remedy focused on the legality of administrative actions, not their merits.
40. In *Republic v County Secretary, Turkana County Government & 2 others; Ekai (Exparte Applicant)* [2024] KEHC 10023 (KLR), the court emphasized that the leave requirement exists to eliminate frivolous, vexatious, or hopeless claims at an early stage.
41. This mechanism also promotes judicial economy by enabling the court to allocate its resources to matters that disclose a prima facie case requiring judicial inquiry. The importance of the leave stage as a statutory prerequisite was reiterated in *Republic v County Secretary, Tharaka Nithi County & 2 others; Mugwetwa (Exparte Applicant)* [2022] KEHC 12596 (KLR), where the court emphasized its function in filtering unmeritorious claims.



42. Leave also protects public bodies from unnecessary litigation by ensuring they only respond to claims that demonstrate arguable grounds. In *James Gacheru Kariuki & 22 Others v Kiambu County Assembly & 3 Others* [2017] eKLR, the court noted that the requirement for leave is a substantive legal safeguard meant to shield public bodies from baseless suits.
43. Further, the leave stage allows the court to assess whether applicants have properly invoked grounds of judicial review such as illegality, irrationality, procedural impropriety, or legitimate expectation. In *Republic v Minister for Lands and Settlement & 2 others; Kipeno (Interested Party)* [2022] KEELC 3409 (KLR), the court affirmed that judicial review is a special jurisdiction and leave ensures that only cases that meet the legal threshold proceed to a substantive hearing.
44. Lastly, the requirement imposes procedural discipline, compelling applicants to present clear, precise claims supported by evidence. The importance of complying with procedural requirements was again emphasized in *Republic v County Secretary, Tharaka Nithi County & 2 others; Mugwetwa (Exparte Applicant)* [2022] KEHC 12596 (KLR), where the failure to obtain leave rendered the application incompetent.
45. In sum, the leave stage under Order 53 of the Civil Procedure Rules has over time, functioned as a necessary procedural safeguard for upholding the integrity of the judicial review process, ensuring that only arguable cases proceed to full hearing and this was intended to protect the court and parties from the strain of unnecessary litigation.
46. However, the above requirement for leave to apply notwithstanding, this Court takes judicial notice of the evolving procedural landscape regarding judicial review under Kenyan law. The long-standing requirement for an applicant to first seek leave before commencing judicial review proceedings, historically rooted in common law and enshrined in Order 53 of the Civil Procedure Rules, is fast fading and becoming obsolete in view of the Fair Administrative Action Rules, promulgated pursuant to the *Fair Administrative Action Act*, 2015.
47. These Rules, which came into operation in October 2024, provide a comprehensive procedural framework for instituting judicial review proceedings by way of Originating Motion, without the need to first seek leave of the court. This represents a deliberate and progressive shift toward simplifying access to administrative justice and is aligned with the constitutional imperative under Article 47, which guarantees every person the right to lawful, reasonable, and procedurally fair administrative action.
48. In light of these developments, the requirement for leave, though still present in legacy jurisprudence and rules, is steadily losing its relevance and may in due course be regarded as moribund.
49. The emphasis now rests on substantive justice, procedural clarity, and the facilitation of access to remedies against administrative excesses, without being unduly fettered by procedural technicalities.
50. On the procedural objection raised, and in view of the above observations, parties now ought not to cling to age-old procedural formalities that have since been overtaken by substantive legal reform. The Fair Administrative Action Rules, made pursuant to the *Fair Administrative Action Act*, were specifically designed to give effect to Article 47 of *the Constitution*, which guarantees the right to lawful, reasonable, and procedurally fair administrative action. These Rules also reinforce the values enshrined under Article 48, which secures access to justice for all persons, and Article 159(2)(d), which mandates that justice shall be administered without undue regard to procedural technicalities.
51. For those reasons, objections founded solely on procedural orthodoxy, such as the argument that the chamber summons was improperly brought in the name of the Republic instead of the individual



- applicant, have no legal merit in the present constitutional and statutory framework. The overriding objective of the Court is to do substantive justice, and not to elevate form over substance.
52. For the above reasons, the objection raised on the form in which the chamber summons was brought is without merit and is hereby dismissed.
 53. The question is whether the applicant has established a prima facie arguable case for consideration on merit at the leave stage.
 54. Upon careful consideration of the material before me, I am satisfied that the Applicants have demonstrated an arguable case. The issues raised including the legal basis for dismissing the complaint as being time barred, the alleged failure to properly investigate actuarial claims and the procedural fairness of the proceedings before the 1st Respondent are not frivolous. They merit judicial interrogation within the scope of the *Fair Administrative Action Act*, 2015, particularly Section 7(2). This is not to say that the motion if allowed to be filed, is meritorious, but that it is arguable.
 55. On the invocability of Judicial Review Jurisdiction, this Court is of the considered view that the Applicants, having duly lodged an appeal before the 1st Respondent and now challenging the dismissal of that appeal, have properly invoked the judicial review jurisdiction of this Court. The Applicants contend that the dismissal was based on alleged time limitations, yet they were not afforded an opportunity to be heard on that question.
 56. Judicial review lies to check the legality, rationality, and procedural propriety of administrative and quasi-judicial decisions. In this instance, the Applicants' grievance alleges all the above and only through a full inquiry by this court giving the applicants and opportunity to be heard as espoused in Article 50(1) of *the Constitution* will the Court determine whether the applicants have established a case for judicial review of the Appeals Tribunal's decision and or that the threshold for invoking judicial review jurisdiction has been met.
 57. Accordingly, I find that the application discloses a prima facie case and meets the threshold for the grant of leave.
 58. Consequently, leave is hereby granted to the applicants to institute judicial review proceedings, in terms of prayers No.1 and 2 of the chamber summons dated 21st May, 2024. The substantive notice of motion to be filed and served within 21 days of today's date in a fresh judicial review application file. No new documents, besides the Notice of Motion shall be filed as the court will utilize the documents already filed in this matter in the main judicial review application.
 59. Costs if any shall be in the main motion.
 60. Each party bear its own costs.
 61. Order to be extracted.
 62. This file is closed

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

R.E. ABURILI

JUDGE

