Republic v Sports Dispute Tribunal & 6 others; Luther (Ex parte Applicant) (Judicial Review Application E099 of 2025) [2025] KEHC 10484 (KLR) (Judicial Review) (16 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10484 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E099 OF 2025

JM CHIGITI, J

JULY 16, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE SPORTS DISPUTE TRIBUNAL ..... 1ST RESPONDENT

BOXING FEDERATION OF KENYA ..... 2ND RESPONDENT

NAKURU AMATEUR BOXING CLUB ..... 3RD RESPONDENT

SAMWEL NDIRITU KAHIU ..... 4TH RESPONDENT

TIMOTHY GEORGE KAMAU ..... 5TH RESPONDENT

NELSON OTIENO ..... 6TH RESPONDENT

JOHN WAWEU ..... 7TH RESPONDENT

AND

MARTIN BWANGAH LUTHER ..... EX PARTE APPLICANT

RULING

1. The Exparte Applicant herein filed a Notice of Motion dated 20th April, 2025 Under Article 47 of *the Constitution* of Kenya, Section 7, 8 and 9 of the *Fair Administrative Action Act*, Rule 11[1] of the Fair Administrative Action Rules and all other enabling provisions of the law seeking the following orders against the Respondents;

    1. That this application be certified urgent and service thereof be dispensed with in the first instance.

2. That this Honourable Court be pleased to issue an order of Certiorari to remove into this Honourable Court and quash the decision made by the 1st Respondent, the Sports Dispute Tribunal, on 28th March 2025 approving and upholding the unlawful, irregular and arbitrary decisions taken by the 2nd to 7th Respondents, which did not meet the legal requirements of the law.

3. That this Honorable Court does issue an order of Prohibition restraining the 2nd, 3rd, 4th, 5th, 6th and 7th Respondents from relying on the impugned decision by the 1st Respondent allowing for the unlawful, arbitrary and discriminatory process of suspending coaches and boxers affiliated to the Applicant.

4. That this Honourable Court does issue an order of Mandamus mandating the 2nd to 7th Respondents to immediately nullify their purported suspension of training by the annexed coaches and athletes and to immediately reinstate them to participate in the national boxing tournaments.

5. That costs of this application be provided for. Such further or other relief as this Honorable Court may deem just and expedient in the circumstances.

2. In responding to the application, the 3rd, 4th and 5th Respondents filed a Notice of Preliminary Objection dated 29th April, 2025 that forms the subject for determination. It raises the following grounds:

1. That the application is fatally defective and bad in law.

2. That the application filed is improper and in contravention with the law and clearly set out procedures, thus the same ought to be dismissed.

3. That the application before this Honourable Court is improper as the Applicant did not prior to filing the substantive motion seek the leave of this Honourable Court to institute judicial review proceedings against the Respondents in line with the mandatory judicial review procedure.

4. That the application as drafted offends the mandatory provisions of Order 53 Rule 1 [1] of the Civil Procedure Rules 2010, Article 160 [5] of *the Constitution* of Kenya 2010, Section 6 of the *Judicature Act* and Section 9 [2] [3] of the *Fair Administrative Action Act*.

5. That this Honourable Court has no jurisdiction to hear and determine the Applicant's application as the issues therein ought to have been raised before an Appellate Court and as such, the application is an appeal disguised as a judicial review application.

6. That the application is scandalous, frivolous and vexatious.

7. That the present application is hopelessly incompetent, misconceived, lacks merit and an abuse of court process and the same ought to be struck out with costs

3. The genesis of this suit is Sports Dispute Tribunal Case No. E049 of 2024, Martin Bwangah Luther v Boxing Federation of Kenya & 5 Others, where the Applicant alleged that he took a team from Nakuru Amateur Boxing Club to a tournament in Nanyuki [7th–9th November 2024], only to be informed on arrival that the team had been withdrawn, and later found the club locked. The 3rd to 5th Respondents opposed the claim, stating that the Applicant had misrepresented himself as team manager without proper appointment and had unilaterally taken boxers to the event without club involvement. They further alleged that the Applicant incited chaos at the club, culminating in an invasion and destruction

of property on 8th November 2024, leading to his expulsion by the club committee on 13th November 2024. The Tribunal, in its ruling of 28th March 2025, found the Respondents' actions lawful and procedurally fair, dismissing the Applicant's claim for reinstatement, compensation, and nullification of the disciplinary measures. Aggrieved by this decision, the Applicant filed a Notice of Motion dated 20th April 2025 seeking judicial review orders of certiorari, mandamus, and prohibition.

4. The 3rd, 4th and 5th Respondents submit that the Applicant's application is fatally defective, an abuse of court process, and legally untenable, and should be dismissed at the earliest opportunity. Relying on the principles in Mukhisa Biscuit Manufacturers Ltd v West End Distributors Ltd [1969] EA 696, they argue that the Preliminary Objection raised is proper, as it involves a pure point of law that the Applicant failed to seek leave of the court prior to instituting the judicial review proceedings, thereby contravening Order 53 Rule 1[1] of the Civil Procedure Rules, 2010. Furthermore, it is submitted that the application amounts to an appeal disguised as a judicial review, and the issues raised ought to have been canvassed before an appellate court, not through judicial review proceedings.

5. Reliance is placed in Republic v County Council of Kwale & Another Exparte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996, as cited in Republic v Anti-corruption Commission & Another; Mike Mbuvi Sonko & another [Interested Parties] Ex parte Paul Ndonye Musyimi [2020] eKLR, wherein the court held as follows:

> " The purpose of application for leave to apply. judicial review is firstly to eliminate at an early stage any applications for JR which are frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial review of it were actually pending even though misconceived."

6. It is the 3rd, 4th and 5th Respondents submission that the requirement to seek leave before instituting judicial review proceedings acts as a safeguard to filter out unmeritorious claims and prevent abuse of court process, as affirmed in Republic v Chief Magistrate Milimani Commercial Courts & 2 others Exparte Fredrick Bett [2022] eKLR, IRC v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 and Republic v Chief Magistrate Milimani Commercial Courts & 2 others Exparte Fredrick Bett [2022] eKLR.

7. They maintain that Section 12 of the FAAA clearly states the Act is supplementary to, and not a replacement of, existing common law principles and procedures, and that absent express repeal, the procedural requirements under Sections 8 and 9 of the *Law Reform Act* specifically the requirement for leave under Order 53 remain applicable, as affirmed in Felix Kiprono Matagei v Attorney General [2021] eKLR.

8. The 3rd, 4th and 5th Respondents contend that the Exparte Applicant filed for judicial review seeking to overturn the Tribunal's decision, yet all issues raised have already been conclusively determined and are not suitable for judicial review, but rather for appeal, which the Applicant failed to pursue thus, the application is improperly before the Court and should be dismissed, as litigation must end and unsuccessful parties cannot endlessly relitigate settled matters.

9. On costs, it is their submission that in Judicial Hints on Civil Procedure [2nd Edition, 2011] where Retired Justice Kuloba stated that in Kenya, when a plaintiff enforces a legal right without misconduct,

neglect, or vexatious behavior, the court has no discretion to deny costs; similarly, if a defendant infringes the plaintiff's legal right, the plaintiff is entitled to costs as a matter of course unless there is a valid reason, such as misconduct, to the contrary and urge this Honourable court to observe the much cannons of justice and direct that the Applicant bears the costs.

The Exparte Applicant's case;

10. It is his case that the Judicial Review Application is properly before the Court, complies with relevant laws and constitutional provisions, and thus the Preliminary Objection should be dismissed with costs.

11. The Applicant argues that in Republic v Sports Disputes Tribunal, Football Kenya Federation & 2 Others [Exparte] Football Kenya Federation National Executive Committee & 50 Others [Application 5 of 2020] [2020] KEHC Justice Jairus Ngaah affirmed that the High Court retains supervisory jurisdiction over Sports Dispute Tribunal [SDT] decisions, even though the SDT has appellate powers under the *Sports Act*, 2013. The court may review SDT rulings to ensure they comply with natural justice and administrative fairness, intervening when decisions are illegal, irrational, or procedurally improper. The court recognized that affected parties, such as sports federation members, have locus standi to seek judicial review. Moreover, the court's review extends to whether the SDT's decisions align with relevant laws, regulations, and federation rules, and it can quash decisions exceeding the Tribunal's jurisdiction or violating fairness. These principles confirm that the court has jurisdiction and discretion to hear the Applicant's judicial review, contrary to the Respondents' objections.

12. It is contended that the 3rd, 4th and 5th Respondents' claim that the Applicant's application is "fatally defective and bad in law" lacks specificity and is baseless. He argues that his application complies with Rule 4 of the Fair Administrative Action Rules, 2024, granting the court discretion to make just and fitting orders.

13. It is his submission that his judicial review application challenges the decision of the Sports Dispute Tribunal on grounds of procedural unfairness and jurisdictional error, and is properly brought within the court's supervisory jurisdiction under the *Fair Administrative Action Act*; contrary to the Respondents' assertions that the application is vague, improper, and an abuse of process.

14. It is also his submission that Rule 11 of the Fair Administrative Action Rules, 2024 expressly dispenses with the need to seek leave and mandates that judicial review applications proceed by originating motion supported by affidavit, thereby rendering reliance on the old procedural rules misplaced.

15. It is argument that the Respondents' claim that the application is an appeal disguised as judicial review is misconceived, as decisions of the Sports Dispute Tribunal are not appealable to the High Court. The court, as confirmed in the FKF case by Justice Ngaah, has jurisdiction to review such decisions for illegality, irrationality, or procedural impropriety, with "illegality" meaning the decision-maker must correctly apply the law, a matter for judicial determination.

16. The Applicant contends that the Respondents' claim that the application is scandalous, frivolous, and vexatious is baseless and unsupported by evidence, as established in Trust Bank Ltd v Amin & Co. Ltd, where the court held that an application is frivolous or vexatious only if it lacks any basis in law or fact.

17. The Applicant submits that the Preliminary Objection is without merit, vague, unsupported by evidence, and based on a misinterpretation of the Fair Administrative Action Rules, 2024, and applicable law, and therefore should be dismissed with costs and that the Judicial Review Application be allowed to proceed to hearing on its merits.

Analysis and Determination;

18. The 3rd, 4th and 5th Respondents Notice of Preliminary Objection dated 29th April, 2025 forms the subject for determination.

19. It raises the following grounds:

    1. That the application is fatally defective and bad in law.

    2. That the application filed is improper and in contravention with the law and clearly set out procedures, thus the same ought to be dismissed.

    3. That the application before this Honourable Court is improper as the Applicant did not prior to filing the substantive motion seek the leave of this Honourable Court to institute judicial review proceedings against the Respondents in line with the mandatory judicial review procedure.

    4. That the application as drafted offends the mandatory provisions of Order 53 Rule 1 [1] of the Civil Procedure Rules 2010, Article 160 [5] of *the Constitution* of Kenya 2010, Section 6 of the *Judicature Act* and Section 9 [2] [3] of the *Fair Administrative Action Act*.

    5. That this Honourable Court has no jurisdiction to hear and determine the Applicant's application as the issues therein ought to have been raised before an Appellate Court and as such, the application is an appeal disguised as a judicial review application.

    6. That the application is scandalous, frivolous and vexatious.

    7. That the present application is hopelessly incompetent, misconceived, lacks merit and an abuse of court process and the same ought to be struck out.

20. A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

> " ...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.
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> At page 701 paragraph B-C Sir Charles Newbold, P. added the following:
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> "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...."

Whether leave is required to institute judicial review suit:

21. Order 53 Rule 1 of the Civil Procedure Rules 2010, that an Applicant must seek leave to institute judicial review proceedings. The section stipulates that, Applications for mandamus, prohibition and certiorari to be made only with leave.

> " [2] No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule."

22. Nicholas Kiptoo Arap Korir Salat v the Independent Electoral and Boundaries Commission and 6 Others [2013| eKLR:

> " I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even- handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."
>
> We have said enough of this matter, which to some might appear trivial, though fundamental in the determination of the issue as to whether the appellant's Motion for review of the 1st Respondent's decision stood the competency test weighed against mandatory rules of procedure. Having carefully considered the appeal before us, the judgment of the High Court and the respective positions of the parties considered against *the Constitution*, the statute and judicial precedents relevant to the issue, we reach the inescapable conclusion that the appellant's appeal must fail. It is hereby dismissed with costs to the respondents."

23. Section 14 of the FAA Act provides for transition as follows:

> " 14. Transition provisions.
>
> [1] In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.
>
> [2] Despite subsection [1]-
>
> [a] if, and in so far as it is impracticable in any proceedings to apply the provisions of this Act, the practice and procedure obtaining before the enactment of this Act shall be followed; and

[b] in any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted."

24. In the case of Republic v Chief Magistrate Milimani Commercial Courts & 2 others Ex Parte Fredrick Bett [2022] eKLR; The applicable law on leave to commence judicial review proceedings is Order 53 Rule 1of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. [as he then was], in Republic v County Council of Kwale & Another Exparte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996 as follows:

> " The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived...Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially."

25. In the case of Matagei v Attorney General; Law Society of Kenya [Amicus Curiae] [Petition 337 of 2018] [2021] KEHC 460 [KLR] [Constitutional and Human Rights] [13 May 2021] [Judgment] Felix Kiprono Matagei v Attorney General; Law Society of Kenya [Amicus Curiae] [2021] eKLR Neutral citation: [2021] KEHC 460 [KLR] it was held that the procedural rules in order 53 of the CPR governed judicial review prior the promulgation of *the Constitution* and are still in force as they have not been repealed.

26. There, however, would appear to be a clear intention to repeal and replace these rules and their originating law being sections 8 and 9 of the LR Act.

27. I am satisfied that the Notice of Preliminary raises questions of jurisdiction which is a point of Law.

28. The question of jurisdiction is well established in the locus classicus, Owners of the Motor Vessel "Lillian S" v Caltex Oil [Kenya] Ltd where the Court pronounced itself as such:

> " I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it."

29. In the case of Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another it was held that:

> " ...what is important when determining whether the court has jurisdiction, is not so much the purpose of the transaction, but the subject matter or issue before court, for I think that

the purpose of the transaction, may at times be different from the issue or subject matter before court That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction...”

Disposition:

30. The Notice of Preliminary is meritorious.

Order;

1. The Notice of Preliminary Objection dated 29th April, 2025 is upheld.
2. The application is struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2025

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J. CHIGITI [SC]

JUDGE