



**Nation Media Group Limited v Commissioners Media Council Complaints Commission; Njoroge & another (Interested Parties) (Application E046 of 2023) [2024] KEHC 3417 (KLR) (Judicial Review) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3417 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW  
APPLICATION E046 OF 2023**

**J NGAAH, J  
APRIL 12, 2024**

**BETWEEN**

**NATION MEDIA GROUP LIMITED ..... APPLICANT**

**AND**

**COMMISSIONERS MEDIA COUNCIL COMPLAINTS  
COMMISSION ..... RESPONDENT**

**AND**

**DR. PATRICK NJOROGE ..... INTERESTED PARTY**

**MEDIA COUNCIL OF KENYA ..... INTERESTED PARTY**

**RULING**

1. Before court is what the applicant has described as “an originating notice of motion” dated 28 April 2023 expressed to be brought under sections 7,9, 11 and 12 of the *Fair Administrative Action Act*, 2015 and section 42(2) of the *Media Council Act*, No. 46 of 2013. The prayers in the motion have been couched as follows:

- “ 1. That this application be certified urgent and heard ex parte in the first instance.
- 2. That the respondent and second interested party jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns, be restrained from recovering the aggregate sum of Kshs. 500,000.00 ordered as a fine imposed against the applicant in Media Complaints Commission Complaint No. 7 of 2021, as a debt due to the second interested party pending the hearing and determination of this application.



3. That the decision and/or order of the respondent issued on 30<sup>th</sup> March, 2023 in Media Complaints Commission Complaint No. 7 of 2021 by which the applicant was found to be in contempt be quashed.
  4. That the respondent and the second interested party jointly and/or severally, whether by themselves, their servants, agents, officers, successors and/or assigns, be mandatorily restrained from recovering the aggregate sum of Kshs. 500,000.00 ordered as a fine imposed against the applicant in Media Complaints Commission Complaint No. 7 of 2021, as a debt due to the second interested party.
  5. That the costs of this application be provided for.”
2. Prayer (1) has since been spent. Prayers 2 and 4 appear to be seeking the same order and are, more or less, in similar terms; the only variation in prayer (4) is that the applicant is seeking that the respondent and the 2<sup>nd</sup> interested party be “mandatorily restrained” from recovering the sum of Kshs. 500,000/= . The application is supported by the affidavit of Mr. Sekou Owino sworn on 28 April 2023. Mr. Owino has sworn that he is the head of the legal department in the applicant company.
  3. According to Mr. Sekou’s affidavit, on 30 March 2023, the respondent delivered a ruling in determination of an application for contempt filed before it by the 1<sup>st</sup> interested party. In that ruling, the respondent held that it had the requisite jurisdiction to entertain contempt proceedings against the applicant. The applicant contends that this holding by the respondent is contrary to section 38 of the Media Council Act, No. 46 of 2013.
  4. The applicant was eventually found to be in contempt of the respondent’s orders issued on 23 August 2022 in relation to proceedings in respect of a complaint lodged by the 1<sup>st</sup> interested party against the applicant in Media Complaints Commission Complaint No. 07 of 2021. The applicant was condemned to pay a fine of Kshs. 250,000.00 for being in contempt on account for non-compliance with the timeline within which an apology ought to have been published and a further fine of Kshs. 250,000.00 for failure to comply with the order to publish the statement of adjudication as given by the Media Council Complaints Commission.
  5. The applicant is aggrieved that the respondent’s ruling was without any right or authority because the respondent lacks the requisite jurisdiction to hear and determine any application for contempt orders or the power to punish for contempt. It is pleaded that only this Honourable Court has the jurisdiction to entertain such an application in accordance with the Judicature Act cap. 8. In holding that it had jurisdiction to punish for contempt, the respondent acted ultra vires its powers. The decision is also impeached on the ground that the respondent considered extraneous matters that were not pleaded.

### **1<sup>st</sup> interested parties case**

6. The 1<sup>st</sup> interested party opposed the application and filed both grounds of objection and a replying affidavit. In the affidavit, he has sworn, among other things, that at the time material to this motion, he was the Governor of the Central Bank of Kenya; a position he had held since 19 June 2015.  
  
The rest of the affidavit largely contains, in my humble view, legal arguments which are covered in the grounds of objection and submissions filed on his behalf. This is improper as depositions in an affidavit ought to be restricted to evidence only.
7. Be that as it may, his case is that he has been advised by his advocates, which advice he verily believes to be true, that the application before court has been filed against an entity which is non-existent in law.



For this reason, so he has been advised by his advocates, and which advice he accepts as correct, that without a respondent recognised as such in law, the application is fatal, since no order can be issued against a non-existent legal entity.

8. That notwithstanding, it is contended that the application has been brought prematurely and contrary to the provisions of Section 42(2) of the *Media Council Act*, 2013 because these proceedings have been instituted before the lapse of thirty days from the date when the Commission made its decision.
9. Section 27(1) of the *Media Council Act*, 2013 establishes the Complaints Commission. According to Section 31 of the Act, the Commission has the task of ensuring adherence to high standards of journalism as provided in the Code of Conduct for the practice of journalism in Kenya. It also has the duty of achieving impartial, speedy, and cost-effective settlement of complaints against journalists and media enterprises.
10. Section 32 of the Act, on the other hand, gives the Commission all the necessary and incidental powers to effectively discharge its functions under the Act including the power to receive, investigate, and deal with complaints made against journalists and media enterprises in Kenya. Section 34(1)(a) of the Act allows any person aggrieved by any publication by or conduct of a journalist or media enterprise in relation to the Act to lodge complaints with the Commission.
11. Pursuant to this provision of the law, Dr. Njoroge who, as noted, is the 1<sup>st</sup> interested party in this suit, lodged a complaint cited before the respondent as “Complaint No. 7 of 2021: Dr. Patrick Njoroge v Nation Media Group.” It was dated 2 December 2021 and was against the applicant's Daily Nation Newspaper publication of 24 November 2021 titled “CBK boss loses bid to testify in bank suit”. The Commission heard the Complaint and delivered a determination on 23 August 2022 finding the applicant to have violated Clauses 2 and 5 of the Code of Conduct for the practice of journalism in Kenya.
12. The Commission then directed the applicant to publish the Commission's decision and statement of adjudication in the manner specified in the determination within fourteen days of the date of the determination. The applicant neither appealed nor sought for review of the findings and orders of the Commission as set out in the determination. It was open to the applicant to take this course under section 42(2) of the Act. Consequently, pursuant to Section 43 of the Act, the decision of the Commission became final and binding.
13. Despite the finality of the determination of the Commission, the applicant failed to comply with final orders of the Commission as directed and within the timeline imposed by the Commission. The failure by the applicant prompted Dr Njoroge's advocates to file the application dated 17 January 2023 seeking to find the applicant guilty of contempt of the Commission's Orders issued on 23 August 2022. The application also sought the relevant officers of the applicant be committed to civil jail or, in the alternative, be fined accordingly.
14. Dr. Njoroge further sought a fresh order compelling the applicant to publish the correct apology. The application was heard by way of written submissions filed by both parties and a ruling rendered on 30 March 2023 in which the Commission found the applicant to have failed to comply with its orders of 23 August 2022.
15. In exercise of its powers under Section 38 of the Act, the Commission noted that given that there had been three publications on the matter, it could not issue an order for a fourth publication. It further noted that committal to civil jail was not an appropriate punishment in the circumstances. The Commission, thus issued a supplementary Order under Section 38(1)(i) of the *Media Council Act* and fined the applicant Kshs 250,000.00 for failure to comply with the timeline imposed by the



- Commission and a further Kshs 250,000.00 for the applicant's failure to publish the Commission's statement of adjudication.
16. It is Dr. Njoroge's position that the applicant's allegation that the commission did not consider the applicant's response and submissions is untrue. As a matter of fact, the first issue for determination before the Commission was whether the Commission had the jurisdiction to hear the application, which objection had been taken by the applicant. The Commission considered the objection and held that it had the requisite jurisdiction.
  17. Dr. Njoroge's also swore that he had been advised by his counsel, which advice he believed to be true, that under Section 12 of the Fair Administrative Actions Act, 2015, the Commission is bound by the rules of natural justice, which include the right to a fair trial. He also believes to be true his counsel's advice that, in making its decision of 30 March 2023, the Commission accorded both parties an opportunity to make representations and, therefore, the allegation of failure to be heard is not true.
  18. Dr. Njoroge believes that in exercising its discretionary mandate under Section 38(1)(g) of the *Media Council Act*, the Commission was empowered to criticise the conduct of the applicant and its counsel for their attitude towards compliance with the Commission's determination. In any event, so he believes, like any other judicial authority, the Commission has the prerogative to make a decision on an issue that has not been pleaded if it appears the issue has been left to the court for a determination. On this contention, Dr. Njoroge cited the Court of Appeal decision in *John Kamunya & Another V John Nginyi Muchiri & 3 Others* (2015) eKLR.
  19. Dr. Njoroge further believed to be true his counsel's advice that the issue of the jurisdiction of the Commission to sanction contempt of its orders was determined in its decision of 30 March 2023. He contended further that pursuant to Section 38(1)(i) and 48 of the *Media Council Act*, the Commission has the jurisdiction to grant any ancillary or necessary relief and directions to ensure compliance with its orders or directives which include the power to sanction the applicant for disobedience of the Commission's orders and directives.
  20. The Applicant, it is alleged, has not tabled any justifiable grounds as required by Section 7 of the *Fair Administrative Action Act* and that the application does not disclose any proof of procedural impropriety, unreasonableness, or illegality on the part of the Commission as to warrant the quashing of the ruling and orders of 30 March 2023.

## **2<sup>nd</sup> Interested party's case**

21. Mr. Eric Ngaira swore a replying affidavit on behalf of the 2<sup>nd</sup> interested party. In his affidavit, he has aligned himself with the position taken by the 1<sup>st</sup> interested party. Besides the replying affidavit, the 2<sup>nd</sup> interested party also filed a preliminary objection dated 13 July 2023. The grounds in the objection have been couched as follows:
  - a) That the application dated 28th April, 2022 is incurably defective as no leave was sought by the Applicant prior to filling the said application as mandatorily required by Order 53 Rule (1) & (3) of the Civil Procedure Rules Cap 21 of the Laws of Kenya.
  - b) That the Judicial Review application is an abuse of court process, as the same is fatally and incurably defective and ought to be dismissed with costs to the Respondent's & 2<sup>nd</sup> Interested Party."



22. This preliminary objection was filed after directions on the hearing of the main motion had been given. To be precise, directions on the disposal of the motion were given on 13 June 2023. On the material day, I directed as follows:

- “ 1. The respondent and interested parties have seven days within which to file and serve their response.
2. The main motion shall be disposed of by way of written submissions:
  - (i) The applicant’s submissions to be filed and served within seven days of the date of service of the respondent’s and interested parties’ response.
  - (ii) The respondent and interested parties shall file and serve their submissions within seven days of the date of service of the applicant’s submissions.
  - (iii) Highlighting of submissions on 19 July 2023.”

23. When the parties’ counsel appeared before me on 19 July 2023, Ms. Wanjku, the learned counsel holding brief for Ms. Janmohamed for the applicant, informed the court that the applicant’s counsel had been served with the preliminary objection on 13 July 2023. She, therefore, sought directions on the hearing of the preliminary objection, despite the fact that she had filed submissions in respect of the main motion.

24. In the wake of these developments, the respective parties’ learned counsel did not highlight their submissions on the substantive suit on 19 July 2023 as earlier scheduled. As a matter of fact, only the applicant’s counsel had filed submissions on the material date. The court then directed, among other things, that the preliminary objection be heard first. Accordingly, I set the date for highlighting of submissions in respect of the preliminary objection on 9 October 2023.

25. So, this ruling is on the preliminary objection filed by the 2<sup>nd</sup> interested party. Although parties had, on 9 October 2023, requested for and had mistakenly been given a judgment date, it is the ruling on the preliminary objection that is due and which this Honourable Court is concerned about.

### **2<sup>nd</sup> Interested party’s submissions**

26. In support of the preliminary objection, the 2<sup>nd</sup> interested party cited Order 53 Rule (1) and (2) of the Civil Procedure Rules which is to the effect that “no application for an order of mandamus, prohibition, or certiorari shall be made unless leave therefor has been granted in accordance with this rule” and submitted that leave is a prerequisite for any application for judicial review remedies. The learned counsel for the 2<sup>nd</sup> interested party relied on the case of *Wilson Njuguna Gakuru & another V National Transport & Safety Authority, & 2 others* (2016) eKLR, where Odunga, J. (as he then was) reiterated that Order 53, rule 1(1) of the Civil Procedure Rules provides that an application for judicial review is to be made only after leave has been granted. In holding as he did, the learned judge relied on the Court of Appeal decision in *R vs. Communications Commission of Kenya & 2 others Ex Parte East Africa Televisions Network Ltd.* Civil Appeal No. 175 of 2000 (2001) KLR 82; (2001) 1 EA 199 in which the Court was emphatic that proceedings under Order 53 of the Civil Procedure Rules can only commence upon grant of leave. Once leave has been obtained, the proceedings are originated by a notice of motion.



27. The learned counsel also relied on the case of Republic v Chief Magistrate Milimani Commercial Courts & 2 others Ex Parte Fredrick Bett (2022) eKLR where the court is said to have noted that *Fair Administrative Action Act* expands the scope of reliefs in judicial review. Nevertheless, there is no departure from what the court considered to be the salient features of judicial review: these are that judicial review relates to the court's power to supervise the exercise of administrative actions by those in authority or in quasi-judicial bodies and that it is a special jurisdiction that must be distinguished from petitions to remedy breaches of fundamental rights and freedoms under *the Constitution* or ordinary causes of action under the civil jurisdiction of the court.
28. The court also noted that the *Fair Administrative Action Act* does not provide an alternative procedure of moving the court for judicial review reliefs and that Order 53 of the Civil Procedure Rules was not repealed.
- Again, the *Fair Administrative Action Act* did not remove the need to sift applications that met the threshold for grant of leave to apply for judicial review orders. The court concluded that Order 53 of the Civil Procedure Rules remained a mandatory provision governing invocation of judicial review jurisdiction.
29. The other decision cited in support of the argument that leave is necessary is my own decision in High Court Judicial Review Application No. E087 of 2021; AAR Insurance versus Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance Brokers Limited Interested Parties. (unreported).

### **Applicant's submissions**

30. In response to the 2<sup>nd</sup> interested party's submissions, the learned counsel for the applicant relied on the case of Felix Kiprono Matagei vs Attorney General; Law Society of Kenya (Amicus Curiae) (2021) eKLR where Korir J. (as he then was) acknowledged that Order 53 of the Civil Procedure Rules governed judicial review proceedings prior and after the promulgation of *the Constitution* of Kenya 2010 and to the extent that those rules have not been repealed, they are still in force.
- That notwithstanding, the learned judge was of the view that "there is a clear intention to repeal and replace these rules and their originating law being sections 8 and 9 of the LR Act."
31. According to the learned judge, the objective of the *Fair Administrative Action Act* which, in his view is manifest in section 10(2) of the Act, "is to have a regime of rules made by the Chief Justice governing judicial review of administrative action". He went further to opine that the *Fair Administrative Action Act* appears to have created a new legal regime for review of administrative action. This regime, the learned judge reasoned, is consistent with Articles 23 and 47 of *the Constitution* and, for that reason, it "should be the sole foundation of judicial review in this country."
32. With this understanding, the learned concluded that all that needed to be done was to "formally do away with sections 8 and 9 of the LR Act and order 53 CPR." And perhaps to drive his point home, the learned judge noted that:
- "sections 8 and 9 of the LR Act and order 53 of the CPR no longer serve any purpose as the FAA Act has aligned judicial review of administrative action with *the Constitution*."
33. Going forward, so the learned judge opined, was "for the Chief Justice to make rules under section 10(2) of the FAA Act and the Cabinet Secretary for the time being responsible for the administration of justice, in consultation with the Commission on Administrative Justice, to make regulations under section 13(1) of the Act."



34. As far as the *Law Reform Act* is concerned, the learned judge reiterated that “the National Assembly may also need to formally repeal sections 8 and 9 of the LR Act so that the FAA Act becomes the only law upon which applications for orders of judicial review are anchored.” According to the learned judge, sections 8 and 9 of the *Law Reform Act* and order 53 of the Civil Procedure Rules had been rendered otiose and that “their continued retention in our statute books will only serve to promote the wrong notion that Kenya has a two-tracked system for seeking judicial review against administrative action.”
35. The second limb of the applicant’s response to the preliminary objection is that its application has not been brought by way of Order 53 of the Civil Procedure Rules. Rather, it is anchored on sections 7, 9, 11 and 12 of the *Fair Administrative Action Act*, 2015 for judicial review which are themselves founded on Articles 23(3) and 47 of *the Constitution*. The applicant’s argument is that none of these provisions prescribe leave as a mandatory requirement to originate judicial review proceedings.
36. In support of this argument, the applicant has relied on *James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others* (2017) eKLR, where Prof. Joel Ngugi J. (as he then was) held that Article 47 of *the Constitution* expressly “constitutionalizes administrative justice as a right and removes it from the clutches of Common Law” and that the *Fair Administrative Action Act* has been enacted to implement Article 47 of *the Constitution*. The learned judge also held that Article 23 of *the Constitution* spells out the authority of this Honourable Court to uphold and enforce the Bill of Rights and to that end, it expressly permits the Court to grant any appropriate relief including an order for judicial review. (See Article 23(3)(f).
37. Based on this understanding, the learned judge held as follows:
- “My reading of these two provisions is that they have the functional effect of blitting the bifurcation between challenges to the exercise of public power using the traditional mechanism of judicial review rooted in the common law (and, in Kenya, the Kenya *Law Reform Act*) and those based expressly on *the Constitution*. In a straightforward petition to enforce the Bill of Rights under Article 23 of *the Constitution*, the High Court can issue an order for Judicial Review. Conversely, one can found a substantive suit challenging the exercise of administrative power under Article 47 of *the Constitution* or the FAAA which is the statute enacted to perfect that Article.”
38. For this reason, the learned judge was not persuaded that it is intention of *the Constitution* that Judicial Review proceedings should be instituted and maintained as they existed prior to promulgation of *the Constitution* of Kenya, 2010. On this account the learned judge held that:
- “I am even less persuaded that it was the intention of the drafters of *the Constitution* that all suits seeking the review of administrative actions of public bodies would, in the Post-2010 period, take the form of Judicial Review proceedings simpliciter as strictly provided for in Order 53 of the Civil Procedure Rules”.
39. And on that note, the learned judge concluded that:
- “My express holding is that I find no requirement in our law or rules of procedure that a party seeking to commence a suit under the Fair Administrative Actions Act must first obtain the leave of the Court. I also expressly find that, in the absence of Rules promulgated by the Honourable Chief Justice under Section 10(2) of the Fair Administrative Actions Act,



bringing a suit under the Act by way of Notice of Motion does not render such a suit fatally defective and liable to be struck out.”

40. The other decision on which the applicant pitched its argument that the leave is not necessary is that of *Nirmal Sing Sidhu & 8 others v Director General, National Environment Management Authority & another; Lavington United Church (Interested Party)* (2022) eKLR, in which Mboya, J. noted that there exist legal regimes where judicial review reliefs may be sought without leave of the court. In that case, the learned judge invoked Article 23 of *the Constitution* and the Court of Appeal decision of *County Government of Nyeri and another versus Cecilia Wangechi Ndungu* [2015] eKLR where, apparently, this provision of the law was applied. The court is said to have held that one can pursue a judicial review relief without necessarily seeking leave.
41. Other instances where the learned judge noted that the applicant need not obtain leave to commence judicial review proceedings is an application under Section 13(7) of the *Environment and Land Court Act*, and the Fair Administrative Actions Act which the learned judge found to be “a complete code which can be actualized and applied without being subordinated to any other Act and/ or Statute.”
42. According to the learned judge, it is only when one invokes sections 8 and 9 of the Law Reforms Act, Chapter 26 laws of Kenya, and Order 53 of the Civil Procedure Rules in an application for judicial review that he is bound to seek leave as a condition precedent.

#### **Analysis and determination**

43. I am indebted to the learned counsel both for the 2<sup>nd</sup> interested party and the applicant for their invaluable submissions on this question of the requirement of leave in judicial review proceedings. I must state at the very outset that this is not the first time I am confronted with such a question and as my decision in *AAR Insurance versus Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance Brokers Limited Interested Parties* (supra) would show, it is a question that I have previously pronounced myself upon. I will come back to this case later in this ruling.

#### **Anti-leave decisions**

44. I also hasten to say that if all we were to be concerned about in this discourse is whether, in the wake of the promulgation of *the Constitution* of Kenya 2010 and the subsequent enactment of *Fair Administrative Action Act*, 2015 the requirement for leave in judicial review proceedings is still necessary, the conclusion to the contrary, that leave is no longer necessary, would be the most enticing. That is, the conclusion that leave is no longer required would present itself as the most obvious and logical conclusion. This appears to have been the school of thought that influenced the decisions in *Felix Kiprono Matagei vs Attorney General* (supra); *James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others* (supra); and, *Nirmal Sing Sidhu & 8 others v Director General, National Environment Management Authority & another; Lavington United Church (Interested Party)*.
45. In the *Felix Kpronon* case, Korir J. (as he then was) went further and rooted for the repeal of sections 8 and 9 of the *Law Reform Act* and for the Chief Justice to make rules that would guide the institution and conduct of judicial review proceedings. Section 10(2) of the *Fair Administrative Action Act* provides that such rules may be made. It reads as follows:  

10.(2) The Chief Justice may make rules of practice for regulating the procedure and practice in (2) matters relating to judicial review of administrative action. (Emphasis added).
46. In the absence of a repeal of sections 8 and 9 of the *Law Reform Act* and, in the absence of the rules envisaged in section 10. (2) of the *Fair Administrative Action Act*, there is no reason why these



provisions of the law should not be applied. No doubt, the only reason why a repeal of sections 8 and 9 of the [Law Reform Act](#) would be necessary, as has been suggested in *Felix Kiprono Matagei vs Attorney General* (supra) is because of the realization that, until such a time that they are repealed, assuming there is a case for their repeal, these provisions of the law are not only valid law but that they are also available for application in judicial review proceedings.

47. That said, the notion that there is an intention in the Fair Administration Act to repeal sections 8 and 9 of the [Law Reform Act](#) does not appear anywhere in that Act. On the contrary, the Act acknowledges and embraces the law and the practices that existed prior to its enactment. This is apparent in section 14 (2) (a) of the Act. For better understanding, it is necessary that I reproduce the entire section here; it reads 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. (Emphasis added).

48. The question whose answer I could not gather from the quest to repeal sections 8 and 9 of the [Law Reform Act](#) is that if “the practice and procedure obtaining before the enactment of this Act” are founded on sections 8 and 9 of the [Law Reform Act](#), how shall that “practice and procedure” be followed as required under this section if these provisions of the law are repealed?

49. I need not belabour the point save to say that the fact that section 14(2)(a) of the [Fair Administrative Action Act](#) still provides a window for the application of the practice and procedure obtaining before the enactment of the Act is a demonstration enough that, in enacting the Fair Administration Action Act, Parliament did not intend to repeal sections 8 and 9 of the [Law Reform Act](#).

50. And for the avoidance of doubt, section 12 of the [Fair Administrative Action Act](#) is even clearer that the Act is in addition to and not in derogation of common law principles which, no doubt, are the origin of the requirement for leave. This section reads as follows:

12. Principles of common law and rules of natural justice

This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.

51. My reading of sections 12 and 14 of the [Fair Administrative Action Act](#) is that the intention of the legislature is to sustain rather than dispose of the practices and procedures existing prior to the enactment of the [Fair Administrative Action Act](#). If there was any intention to repeal any of the provisions of the [Law Reform Act](#), including sections 8 and 9 of the Act, there is no better place that the legislature could have expressed that intention than in the Fair Administration Act itself, more particularly in the transitional provisions as is ordinarily the case when a new Act seeks to terminate the operation of an old Act or certain provisions thereof.



52. To the extent that section 12 of the Act recognises application of the principles of common law, the position postulated in *James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others* (supra) that “*the Constitution* expressly constitutionalizes administrative justice as a right and removes it from the clutches of Common Law” appears to be contrary to this provision of the law unless, of course, it could be argued that section 12 of the Fair Administration Act is unconstitutional. For the record, there was no such suggestion in that case.
53. It is also worth noting that even *the Constitution* itself has not rendered these provisions of the law redundant; instead, it has embraced them; the only caveat being that these past laws and practices should be construed with such “alterations, adaptations, qualifications and exceptions” necessary to bring them into conformity with *the Constitution*. This is what section 7 (i) of the 6<sup>th</sup> Schedule to *the Constitution* says:
7. Existing laws
- (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
54. It is important to note that *the Constitution* does not purport to do away with the preexisting laws wholesale; however, as long as those laws are in existence, they should be interpreted and applied in a manner that would sit well with *the Constitution*.
55. This then begs the question; is there anything intrinsic in sections 8 and 9 of the *Law Reform Act* and, in particular, the requirement for leave to apply for judicial review reliefs that is not aligned with *the Constitution*? And, assuming there is such an inconsistency, wouldn't the proper question be how these provisions of the law can “be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it (or them) into conformity with this Constitution” rather than repeal them altogether?
56. None of the decisions cited in support of the argument for discarding sections 8 and 9 of the *Law Reform Act* and the requirement for leave came out to declare these provisions or the requirement for leave unconstitutional. Of course they could not; such a declaration would not a tenable position to embrace for it is implausible that the requirement for leave to file a judicial review application can be considered contrary to Constitution or, in particular, an affront to Article 48 of *the Constitution* on the right to access justice.
57. Speaking of Article 48 of *the Constitution*, it is a rather short Article and to the point. It reads as follows:
48. Access to justice
- The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.
58. The state is generally enjoined here to ensure access to justice to all though particular emphasis is on the fee requirement being misapplied as a tool to impede access to justice. It is, perhaps, out of this apprehension, on the one hand, and the pursuit for the enforcement of individuals rights under this Article, on the other hand, that *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provide in rule 35 (1) thereof that a person filing a petition under Article 22 may be exempted from payment of court fees upon an application to that effect. What is more, the application for exemption does not have to be by way of any formal pleadings or documentation.



59. A prescription of the means by which a litigant is to approach court for any relief or reliefs of special character such as judicial review reliefs, cannot be said to be a tool by which the state can be accused of employing to clog the wheels of justice. Unless it is manifestly clear that the prescribed means is calculated to deny a person his right to ventilate his grievances and for which he is entitled to a remedy, it will be stretching the spirit behind Article 48 too far to consider with suspicion the various means of approaching court as prescribed by the various Acts of Parliament.
60. If I may digress for a moment. There are numerous instances in various Acts of Parliament where the law is particular as to when and how a suit ought to be instituted. In the *Marriage Act*, for instance, a party to a civil marriage may not petition the court for separation of the parties or for dissolution of marriage until after three years since the celebration of the marriage. The fact that a spouse in a marriage has to wait for three years before he or she can petition for dissolution of marriage, does not imply the right to access to justice has been clogged. Out of the many reasons for the three-year hiatus, the sanctity of marriage and the seriousness with which it ought to be approached, may have informed the legislature's decision that it is not open to a newly married spouse to seek for its dissolution soon after the marriage. The quest to protect marriage and the family unit cannot be deemed to be an impediment to access to justice and, therefore, contrary to Article 48 of *the Constitution*.
61. Turning back to the applicant's case, it does not follow that since the applicant is required to seek leave to file a substantive motion for judicial review reliefs, its right to justice has been scuttled. There is a rationale behind this requirement which, as far as I can gather, was not discussed in any of the authorities cited by the applicant in support of its position. I will discuss this rationale in due course.
62. Assuming the requirement for leave is a mere procedural technicality as the court in *James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others* (supra) suggested, it is worth noting that it was acknowledged in the same case that the court was bound by the Court of Appeal decision in *Nicholas Kiptoo Arap Korir Salat v IEBC and Others* [2013] Eklr where it was held that despite the provisions of Article 159 of *the Constitution* to the effect that justice shall be dispensed without any undue regard to technicalities, "*the Constitution* did not aim to torpedo all established rules of procedure". The court considered this position to be what it regarded as "a common sense approach".
63. For reasons which I have stated and others which will become clearer in due course, I am hesitant to hold the requirement for leave as a technicality that a judicial review court would be entitled to assume and proceed to hear and determine an application for judicial review on its merits.
- Articles 23 and 47 of *the Constitution*
64. Forceful arguments have been made in support of the position that as long as judicial review reliefs can be granted under Article 23(3) (f) and that the right to a fair administrative action is a constitutional right under Article 47 of *the Constitution*, it would be superfluous to seek for leave to file an application for judicial review. Indeed, I understand the decisions in *James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others* and *Nirmal Sing Sidhu & 8 others v Director General, National Environment Management Authority & another*; *Lavington United Church* (interested party) to be saying that rather than take what may appear to some as the relatively longer route of filing an application for judicial review for judicial review reliefs, it is possible to take a more direct route and file a constitutional petition for the same reliefs.
65. In considering this postulation, it is necessary to give due attention to Articles 23 (3) and 47 of *the Constitution*. Article 23 (3) reads as follows:
23. (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—



- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.

66. Article 47, on the other hand, states:

47. Fair administrative action

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.

Article 22 to which reference has been made in article 23 is about proceedings for the enforcement of the Bill of Rights.

67. *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 that have been made on the authority of Article 22 (3) and which provide guidance on how the proceedings with respect to enforcement of Bill of Rights are to be initiated, conducted and concluded, provide that the court proceeding may only be initiated by way of a petition. This is so stated in rule 10(1) which states as follows:

10(1) an application under rule 4 shall be by way of a petition as set out in Form A in the schedule with such alterations as may be necessary.

68. The application under rule 4 is, of course, an application by a person affected by denial of rights or fundamental freedom provided under *the Constitution* or where such rights or fundamental freedom are alleged to have been denied, violated or infringed or threatened. Such an aggrieved person may file a petition before this Honourable Court.

To my understanding, it is in the determination of such a petition that under Article 23 (3) (f) that a court may grant a judicial review order as an appropriate relief, amongst other orders that the court may be disposed to give in the vindication of an applicant's rights.

69. Neither *the Constitution* nor *the Constitution* of Kenya (Practice and Procedure) Rules 2013 provide that an applicant for judicial review reliefs may now proceed to court by way of a petition instead of filing an application under order 53 rule 1 of the Civil Procedure Rules. What I understand Article 23



- (3) (f) to be saying is that in a petition for enforcement of the Bill of Rights, the court is not limited as to the nature and extent of reliefs it may grant to an aggrieved petitioner. Although such reliefs would include a judicial review relief, it does not thereby follow that the procedure for obtaining such reliefs is deposed to the extent that it is no longer necessary to file an application for judicial review as contemplated under Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.
70. Article 23 (3) (f) ought not to be interpreted as creating room for applications for judicial review to be now fashioned as constitutional petitions. By the same token, the same Article should not be read as supplanting the procedure to obtain judicial review reliefs.
71. If it was to be argued that one can now file a constitutional petition for judicial review reliefs instead of an ordinary application for judicial review only because these reliefs can be granted under Article 22(3)(f) of the Constitution, then nothing stops a litigant from filing a constitutional petition for compensation of damages as a result of, for instance, a running down accident or a wrongful dismissal from employment or a material damage or such other claims where an order for compensation can be made against the state since, according to Article 22(3) (e), the court may make an order for compensation in a constitutional petition filed under Article 22 of the Constitution. This is the absurdity that would be created for assuming that besides filing the judicial review application in accordance with sections 8 and 9 of the Law Reform Act and order 53 of the Civil Procedure Rules, an applicant has an alternative path of filing a constitutional petition for similar judicial review reliefs that he would have sought and, perhaps, obtained in an ordinary judicial review application.
72. The sanctity of constitutional petitions in addressing violations of the Constitution and constitutional rights is a subject that was addressed by the Privy Council in *Kemrajh Harrikissoon Versus Attorney General of Trinidad & Tobago* (1979) 3WLR 62. The brief facts of that case were that the teaching service commission of Trinidad and Tobago, acting under regulation 135(1) of the public service commission regulations 1966 (as adopted and amended by the commission in 1968), made an order transferring the appellant teacher to another school, without giving him the three months' notice that was required unless the exigencies of the teaching service did not so permit. The appellant considered that the transfer was intended as a punishment for allegations he had made of improprieties at the first school and that the exigencies of the teaching service did not justify his transfer on less than three months' notice. Instead of availing himself of the review procedure provided by regulation 135, he applied to the High Court under section 6 of the Constitution of 1962 for a declaration that the human rights and fundamental freedoms granted to him by section 1 of the Constitution had been violated. The High Court rejected the appellant's claim. He appealed to the Court of Appeal of Trinidad and Tobago, which dismissed his appeal. When the matter went to the Privy Council, the latter held as follows:
- “The notion that wherever there is a failure by an organ of the Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely



for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.” (Emphasis added).

73. I cannot put it any better save to reiterate that if courts were to entertain ordinary suits as constitutional petitions only because *the Constitution* allows the courts to grant reliefs that would otherwise be made in those ordinary suits, constitutional petitions would lose their sanctity as the means by which to protect fundamental rights and freedoms under *the Constitution*. The prescription either by Acts of Parliament or rules made thereunder of the means by which particular suits should be filed is meant to, among other reasons, bring order to litigation or court process and avoid the kind of chaos that would result if all those suits were to be filed as constitutional petitions.

### **Rationale for “leave”**

74. The last point I wish to address on the issue of the need for leave to file judicial review reliefs is the rationale or the reason why leave is necessary in the first place. Earlier in this ruling, I mentioned in passing that this particular issue was not addressed in the decisions cited in support of the applicant’s position that leave is not necessary in judicial review applications filed under the *Fair Administrative Action Act* or at all.
75. In *AAR Insurance versus Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance Brokers Limited Interested Parties* (supra) I dealt with the question why leave is necessary irrespective of whether one invokes the provisions of the *Fair Administrative Action Act* to the exclusion of sections 8 and 9 of the *Law Reform Act*.
76. In that case I noted that the need for leave has been explained in several decisions by the courts in England which would be relevant to our local jurisdiction by virtue of section 8 (2) of the *Law Reform Act*, cap. 26. That section reads:
8. (2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, (1 and 2, Geo. 6, c. 63) of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.
77. In *Cocks v Thanet District Council* (1983) 2 AC 286 at page 294F, Lord Bridge said that leave is one of the safeguards built into the Order 53 to protect from harassment public authorities on whom Parliament has imposed a duty to make public law decisions. And in *O’Reilly v Mackman* (1983) 2 AC 237 Lord Diplock said at p. 281 A-C that the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity.
78. Talking about the procedure for applying for judicial review prior to and after the introduction of the new Order 53 of 1977 and, in particular, the retention of the requirement for leave, Lord Diplock had this to say:

“First, leave to apply for the order was required. The application for leave which was ex parte but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented, had to be supported by a statement setting out, inter alia, the grounds on which the relief was sought and by affidavits verifying the facts relied on; so that a knowingly false statement of fact would amount to the criminal offence of perjury. Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a



ground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit. This was an important safeguard, which is preserved in the new Order 53 of 1977. The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. In contrast, allegations made in a statement of claim or an indorsement of an originating summons are not on oath, so the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity. (Emphasis added).

79. The requirement for leave has always provided procedural limitations which, in turn, provide a necessary protection to public authorities against claims which it is not in the public interest for the courts to entertain. It is one of the safeguards imposed in the public interest in respect of groundless, unmeritorious or tardy attacks on the validity of decisions made by public authorities in the field of public law.
80. In *IRC v. National Federation of Self-Employed and Small Businesses Ltd* (1982) AC 617 Lord Diplock explained the need for leave this way:
- “Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”
81. The two purposes identified here are to save court’s time and so as not to leave public authorities in a state of uncertainty as to whether they can safely proceed. In the same case, Lord Scarman saw the need for leave as ‘an essential protection against abuse of legal process’. In his words “It enables the court to prevent abuse by busybodies, cranks and other mischief makers”. (see pages 653 and 113). Woolf, J. has referred to the need for leave as “the unique statutory means by which the court can protect itself against abuse of judicial review.” (*R v Secretary of State for the Environment, ex p Greater London Council* (1985) Times, 30 December.
82. These authorities are clear that the requirement for leave serves a specific purpose in order to meet the ends of justice not least to protect the court itself from abuse of the process. The requirement for leave should be seen neither as an idle nor a bureaucratic hurdle by the state to restrict a litigant from accessing the seat of justice. It is a mandatory procedural step without which the court would not be able to exercise the discretion with which it is clothed either to allow or decline the institution of the substantive suit for judicial review reliefs.
83. Contrary to the suggestion that the requirement of leave is costly and only serves to delay the hearing and determination of a judicial review application when *the constitution* demands that justice must be dispensed expeditiously, the leave stage is a procedure which provides an expeditious method according to which the court sifts out cases with no chance of success at a relatively little cost to the applicant and no cost to any prospective respondent.
84. Back home, as earlier noted, section 8 of the *Law Reform Act* provides the statutory basis upon which the jurisdiction to grant judicial review reliefs of mandamus, prohibition or certiorari is exercised. And as to how an application for these judicial review reliefs should be made, section 9 of the *Law*



Reform Act has delegated that task to the authority empowered to make rules relating to procedures of civil courts but it is also categorical that such rules must include the requirement for leave before an application for certiorari, prohibition and mandamus is made. That section reads as follows:

9. Rules of court

- (1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—
  - (a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;
  - (b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;
  - (c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.
- (2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.
- (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

85. Section 9 (1) is of particular relevance to these proceedings and it is, no doubt, the statutory basis of Order 53(1) of the Civil Procedure Rules. It provides as follows:

- 1.(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

86. This rule leaves no doubt that grant of leave is a precondition to filing of a substantive motion for the prerogative orders of mandamus, prohibition or certiorari; without such a leave the substantive application cannot be entertained.

87. For the reasons I have given, the omission to invoke section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules does not necessarily imply that the applicant is thereby exempted from complying with the procedure for invoking the judicial review jurisdiction of this Honourable Court. As long as an applicant is seeking judicial review reliefs, irrespective of whether they are the traditional reliefs of mandamus, certiorari and prohibition or the expanded ones under section 11 of the Fair Administrative Actions Act, No. 4 of 2015, he is bound by the procedure for filing the application for such reliefs.

88. Granted, the Fair Administrative Actions Act does provide for application for leave as the preliminary step in lodging an application for judicial review. However, none of the provisions in the Fair Administrative Action Act expressly ousts the application of Order 53 (1) of the Civil Procedure



Rules in applications for judicial review. The specific provision in the Fair Administrative Actions Act relating to procedure is section 9 of the Act; it reads as follows:

9. Procedure 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 sub-section (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.
  - (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

89. The Act does not say how the application is to be made and, in my humble view, this is a deliberate omission because the procedure for invoking judicial review jurisdiction remains Order 53 of the Civil Procedure Rules.

90. It is worth repeating that the common law principles upon which the requirement for leave was founded still subsist today and are as much relevant today as they were before. I suppose it is for this reason that sections 12 and 14(2) of the Fair Administrative Actions Act, to which reference has been made before in this ruling, are express that the Act is complementary to and not a substitute of the general principles of common law.

91. Sections 8 and 9 of the *Law Reform Act* will remain the anchor of the leave requirement. The anticipated rules under section 10 (2) of the *Fair Administrative Action Act* or the regulations under section 13 of the same Act will, no doubt, align themselves with this position. Without pretending to preempt the direction those rules will take on the question of leave, it is legitimate to expect, at the very least, that these rules, being subsidiary legislation, will not deviate from the primary or parent law that makes leave a mandatory requirement in applications for judicial review reliefs.

92. Though delivered almost 10 years before the promulgation of *the Constitution* of Kenya 2010 and 15 years before the enactment of the Fair Administration Act, the decision of the Court of Appeal in Republic versus Communications Commission of Kenya (as a successor to Managing Director Kenya Posts & Telecommunications Corporation and Kenya Posts & Telecommunications (supra) would be relevant to issues at hand, and, in particular, on the question of whether the *Law Reform Act* would be subject to any other written law and, if so, how such a law to which it is subject could possibly be worded.

93. Apart from the requirement of leave in judicial review applications, the Court of Appeal considered the question whether judicial review proceedings filed to compel Kenya Posts and Telecommunications



Corporation to reinstate air frequencies that had been given to East African Television Networks but which had been arbitrarily withdrawn were subject to section 109(a) of the Kenya Posts and Telecommunication Act. This section required a thirty-day notice to be served upon the managing director of the corporation before suing the corporation. The Court held that judicial review proceedings could not be subject to such a provision and, in so doing, cemented the place of sections 8 and 9 of the [Law Reform Act](#) in judicial review proceedings. It held, inter alia, as follows:

“There is however, the fact that power to issue judicial review orders of mandamus, prohibition and certiorari is given to the High Court by a separate Act of Parliament, namely the [Law Reform Act](#). We have already referred to sections 8 and 9 of the Act and we need not set them out. Those sections set out in full the circumstances under which the High Court is entitled to issue the orders and what factors the High Court is bound to take into account. Leave is to be obtained before an application is filed and once leave is so obtained only the reliefs set out in the application for leave and the grounds relied on in that application can be argued or granted unless the High Court otherwise allows. In an application for certiorari leave cannot be granted unless the application is made within six months from the date of the decision sought to be quashed. All these provisions are contained in the [Law Reform Act](#) and the Act does not say that these provisions are subject to the provisions of any other Act of Parliament. There is no provision anywhere in sections 8 and 9 of the Act that where another Act of Parliament requires that notice of intention to sue be served, then such a notice must be served before leave is applied for. Section 8(4), for example, provides for other written laws and it says:

“In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.”

So the legislature specifically had in mind other written laws; yet it never subjected the provisions of sections 8 and 9 to those other written laws. Section 109(a) of the KP & TC Act, which we have already set out does not say that it shall apply notwithstanding the provisions of any other written law. Clearly there was no basis for subjecting the provisions of sections 8 and 9 of the [Law Reform Act](#) to the provision in section 109 (a) of the KP & TC Act.” (Emphasis added).

94. By parity of reasoning, if it was the intention of the legislature that the [Law Reform Act](#) and, in particular, sections 8 and 9 of that Act would be subject to the Fair Administration Act, it would have expressly stated so in this latter Act. It is beyond debate that in enacting the Fair Administration Act, Parliament was well aware of the existence of the [Law Reform Act](#) in general and sections 8 and 9 thereof, in particular.
95. In conclusion, I would say that there is no doubt that the reasons for the requirement of the leave still subsist in our current circumstances notwithstanding the apparent developments in the area of judicial review. There is no doubt, for instance, that with the expanded space for agitation of rights and freedoms in the wake of [the Constitution](#) of Kenya 2010, there are bound to be more cases brought before courts for adjudication on the question of individual rights and freedoms. While many of them will be genuine attempts and efforts to assert these constitutional guarantees, it cannot be ruled out that the number of litigants that the Lord Scarman described in *IRC v. National Federation of Self-Employed and Small Businesses Ltd* (supra) as “busybodies, cranks and other mischief makers” will, in all likelihood, also increase exponentially. So, besides other equally important reasons for which leave is



required and to which I have adverted in this ruling, the need for leave to sift out cases of this category of persons, if not for anything else, to protect the integrity of court process cannot be over-emphasised; if anything, it is more necessary now than it has ever been before.

96. On the whole, when the question of the requirement for leave is considered from the wider perspective of why leave is necessary in the first place, it is easier to see why it cannot be the intention of *the Constitution* or the *Fair Administrative Action Act* to discard this requirement. Why? The reasons for this requirement are as much relevant today as they were before the promulgation of *the Constitution* of Kenya, 2010 and the enactment of the *Fair Administrative Action Act*.
97. For all I have said, I am satisfied that there is merit in the 2<sup>nd</sup> interested party's preliminary objection. It is hereby sustained and the applicant's suit struck out with costs to the interested parties. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 12 APRIL 2024**

**NGAAH JAIRUS**

**JUDGE**

