



**Republic v Were & 2 others; Makhanu & 8 others (Exparte) (Judicial Review E001 of 2024) [2024] KEHC 8139 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
JUDICIAL REVIEW E001 OF 2024  
SC CHIRCHIR, J  
JULY 4, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**BENJAMIN WERE ..... 1<sup>ST</sup> RESPONDENT**

**THE DEPUTY SPEAKER, COUNTY ASSEMBLY OF KAKAMEGA .... 2<sup>ND</sup> RESPONDENT**

**BENARD ISINDU SHITIABAYI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ROBERT MAKHANU ..... EXPARTE**

**HANDMAN SAYA ..... EXPARTE**

**DONALD OKUMU ..... EXPARTE**

**BOAZ OMUKUNDA ..... EXPARTE**

**DANSTAN OMUKOFU ..... EXPARTE**

**JOEL OKWAKO ..... EXPARTE**

**AMOS LIYAYI ..... EXPARTE**

**GEOFFREY SIKOLIA ..... EXPARTE**

**MUKHALA STEPHEN ..... EXPARTE**

**RULING**

1. The Ex- parte Applicants ( The Applicants) are members of the County Assembly of Kakamega county( The county Assembly).



2. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are members of the county Assembly and are sued as the mover and seconder of the motion respectively , which forms the subject matter of this Application.
3. The 2<sup>nd</sup> respondent is the Deputy speaker of the County Assembly, and , according to the Applicants , has been sued for presiding over the passing of the motion which forms the subject matter of this Application
4. Through the chamber summons dated 28/3/2024 the Applicants moved the court seeking for leave to apply for a Judicial review order of Certiorari, to remove to this court for the purpose of being questioned, the entire motion moved by the 1<sup>st</sup> Respondents on 27/3/2024 during the virtual sitting of the County Assembly and all consequential or resultant decision emanating therefrom. The Application is expressed to be premised on Articles 23,24,47,165 and 159(2) (d) of the constitution and accompanied by a statutory statement and a verifying Affidavit.
5. They also sought to have the leave operate as stay. On 3/4/2024 , the court granted leave but declined to grant the order of stay.
6. On 11/4/2024, the Applicants filed the substantive motion. It was supported by the verifying Affidavit, and Statutory statement earlier filed with the chamber summons.

### **The Applicants' case**

7. It is the Applicant's case that on 26<sup>th</sup> march, 2024 at 3 p.m the 2<sup>nd</sup> respondent convened a “virtual meeting of the Assembly” to be held on 26<sup>th</sup> march 2024 at 10 am( sic), through Google meet purportedly pursuant to standing Order No. 203(1) of the Assembly's standing orders The Notice is attached to the verifying Affidavit and marked RM-1.
8. That pursuant to the standing order No. 203 the 2<sup>nd</sup> respondent gave the business to be transacted as follows :
  - i. Consideration of the Report of the budget and Appropriations Committee on the county fiscal strategy paper , 2024; and
  - ii. Consideration of a procedural Motion for the alteration of the County Assembly calendar.
9. That in defiance of the designated business of the day, the 2<sup>nd</sup> respondent proceeded to introduce , orally, a suspension of unspecified members of the County Assembly. This was done without any prior Notice, they stated. The impugned motion was seconded by the 3<sup>rd</sup> respondent.
10. That through the said motion the respondents have purportedly suspended the Applicants for 28 Assembly days.
11. It is the Applicants' case that the oral motion for suspension reeks of illegality and illegitimacy for reasons that :
  - i. That the motion was without prior notice; was not accompanied by investigations report and the motion was unilaterally passed by the 2<sup>nd</sup> respondent who was chairing the session.
  - ii. That the Applicants were not accorded fair hearing and the right to fair administrative action.
  - iii. That the Respondent have no authority to unilaterally pass motions of the Assembly and that the motion and the suspension were ultra vires ab initio



- iv. The motion to suspend them was not in the order paper for the day, that it did not name the people to be suspended and had no investigation report recommending suspension of the Applicants
12. The Applicants further state that the respondent are bound by the constitutional principles and that actions that contravene *the constitution* are not shielded by the County Assembly powers and privileges Act.
13. That the actions of the Respondents' were ultra vires, illegal, went against public interest and constituted an infringement of the Applicant's right to a fair administrative action, and therefore a candidate for a writ of certiorari.

### **Respondent's case**

14. In response, the respondents filed a preliminary objection, ( the Objection), based on the following grounds:
  - i. That the Application is defective and offends the provisions of order 53(1) of the civil procedure Rules for the reason that no leave had been granted by the court in respect to prayer 2 sought in the Application, as mandatorily required under the said provisions.
  - ii. The Application offends the "exhaustion doctrine" requiring that where a dispute resolutions mechanisms exists outside the courts, that mechanisms must be exhausted before the jurisdiction of the court is invoked , as court need to be a fora of last, and not the first port of call. In this regard;
    - a. Standing order No. 110(4) of the County Assembly of Kakamega Standing orders (4<sup>th</sup> Edition) provides that "where a member has been suspended from the house, they may appeal in writing to the powers of privileges and immunity committee".
    - b. There are currently pending Appeals by the ex-parte Applicants (two of which have already been determined ) before the powers, privileges and Immunity committee.
    - c. The Application violates the principle established in the case of Secretary County Public Service Board and Another versus Hulbhai Gedi Abdille (2017) e KLR which determined that;- "...where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court powers if the dispute could very well and effectively be dealt with in that other forum".
  - iii. To the extent that the application seeks to challenge the proceedings and decisions made by the County Assembly, the Application violates the mandatory requirement under section 10 of the County Assemblies Power and Privileges Act Cap 265 C which provides that; "no proceedings or decision of a County Assembly or the committee of powers and privileges acting in accordance with this Act shall be questioned in any court".
  - iv. In view of (1)(2) and (3) above the present suit is therefore incompetent and/or brought prematurely and is an abuse of the process of this honourable court and should be struck out with costs to the Respondent's.
15. The court directed that objection be heard first, and it was canvassed by way of written submissions.



## Respondents' submissions

16. It is the Respondent's submission that the Application offends the provisions of order 53 of the Civil Procedure rules on the manner of making Applications for judicial review, for reason that it was filed in contravention of the terms of the leave granted on 3<sup>rd</sup> April 2024.
17. The respondents further point out that no leave was granted in respect of prayer 2 of the substantive Motion. It is further submitted that the inclusion of prayer 2 in the motion therefore renders the entire motion defective.
18. While relying on the case of Republic versus County Government of Embu, Ex-parte Peterson Kamau Muto of Embu Medical and Dental Clinic and 6 Others (2022) eKLR, the respondents argue that an Application filed without leave is defective.
19. The respondent further submits that whereas the Applicants have conceded to objection No. 1 of the preliminary objection, the concession in itself does not cure the defect in the application since by their very nature "applications cannot be amended". The respondents submit that the Applicants ought to have withdrawn the entire Application instead. In this regard the Respondent has relied on the case of *Jaribu Credit Traders Ltd versus Fidelity Bank Ltd & SBN Bank Ltd. Hcc Comm Case No. 647 of 2015* where the court held that an Applications are not amendable.
20. It is the respondents' further submission that the current proceedings offend the provisions of standing order No. 110 of the Standing Orders for reasons that there is an Appeal Mechanisms within the standing orders in relation to the issues before court. That the said Appeal process is provided for under standing order No. 110 (4).
21. It is further pointed out that indeed the Applicants have submitted their Appeals for consideration by the committee of powers and privileges within the County Assembly and the Appeals are currently under consideration , with some of them having been considered, and suspension period reduced.
22. It further argued that to the extent that the Applicants have filed the present suit, while they have , at the same time submitted themselves to the Appeal mechanism provided for under the standing orders, their action violates the principle established in the case of Secretary, County Public Service Board & Ano versus Hulbhai Gedi Abdille ( supra), where it was held that " Where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not to invoke the court process, if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime... in our view , the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to judicial process in the first instance."
23. The Respondent refutes the Applicants' submission to the effect that the doctrine of exhaustion is limited to statutory mechanism arguing that;
  - a. The Applicant's are contradicting themselves in that they cannot purport to state that the Appeal Mechanism under the standing orders is not mandatory yet they are challenging orders that emanated from a suspension arising from the same standing orders.
  - b. That the standing orders have not been declared unconstitutional in any forum and they continue to have the force of law within the assembly. The Respondent argue that the Applicant's cannot approbate and reprobate the standing orders at the same time.



- c. That alternative dispute Resolution mechanism (ADR) is not limited to statutory enactments but also apply to subsidiary legislation and contractual agreements e.g Arbitration clauses in contracts.
  - d. The Applicant insist that an internal remedy must be exhausted prior to judicial review process , unless the Applicant can show exemptional circumstances to exempt them from the internal Appeal process. In this regard the case of *Capital Market Authority Vs Ciano & Ano (Civ. Appeal No. 314 of 2018)* [2023] KECA 581 (KLR) has been relied on; that the Applicant has not demonstrated exceptional circumstances to exempt them from the requirement of the Appeal System within the standing orders.
  - e. that the Applicant’s have not demonstrated that the committee on powers and privileges is incapable of considering the issues raised by the Applicants.
24. It is finally submitted that to the extent that the matter is under consideration by the committee on powers and privileges, the court should defer to allow the matter to be considered by the committee; that the Applicant’s can only challenge the final decision once the appeal process is concluded
25. On the 3<sup>rd</sup> and final limb of their objection, the respondents submit that to the extent that the matter is under consideration by the committee on the powers and privileges, , the court should give a chance to the committee to address the complain.
26. The respondents finally submit that whereas the court can interrogate the matter , it can only do so once the Appeal process under the standing orders has run its course. It is submitted that this accords well with the principle of separation of powers as well as the decision of the supreme court in *Lorna Kariuki & another Vs County Assembly of Embu & Ano (2019) e KLR* where the court signaled that the courts would be reluctant to question parliamentary processes as long as they did not breach *the constitution*.

### **Applicants’ Submissions**

27. The Applicants submit that they concede to No. 1 of the preliminary objection, to the extent that it affects prayer 2 only, of the substantive Motion.
28. On the doctrine of exhaustion, the Applicants have differed with the respondent on the import of the doctrine . It is submitted that whereas various ADR mechanisms do exist , they are not a bar to the courts’ exercise of jurisdiction . It is argued that the Application of the doctrine in the manner suggested by the Respondents would render the concept of “original jurisdiction” with reference to the high court, meaningless. The respondent insist that the objection as drafted is a hence misapprehension or misrepresentation of the doctrine.
29. It is the Respondent’s further submission that the doctrine of exhaustion is only limited to statutory mechanisms and standing orders are not statutory mechanisms.
30. The Applicants go on to expound on the doctrine by stating that section 14 (1)(a) of the *County Governments Act*, which empowers the Assembly to make standing orders show that the making of such orders is not mandatory. The respondent then went on to contrast the aforesaid section of the *county Governments Act* with Article 124(1) of *the constitution*, which makes the enactment of the standing orders mandatory in respect to the National Assembly. Thus , it is argued , while the National Assembly orders are mandatory, the County Assembly Standing orders are Statutory options.
31. The Applicants have further submitted that standing orders are statutory instruments” within the context of *Statutory Instruments Act* and urge the court to make a finding that County Assembly



- standing orders are not statutes but statutory instruments; and because they are not statutes, there is no requirement that the internal procedures therein be first exhausted before one can move the court.
32. The Applicants further contend that the trend in decided cases is that, deference to internal procedure is only limited where such procedure are provided under a statute. In this regard they have relied on the decision of Republic Vs National Environment Management Authority, Ex-parte Applicant Social Equipment Ltd(2011) eKLR and Flever Investment Ltd Vs Commissioner of Domestic Taxes & Another (2018) eKLR.
  33. The Applicants further submit that even if the mechanism under the standing orders was to be treated as a statutory one, the nature of the dispute do not lend itself for determination under the standing orders as the entire process leading to suspension was marred by illegality and procedural irregularity, justifying the intervention of this Court. The court is urged to look at the dispute as against the purported internal mechanism. In this regard the Applicants have relied on the case of Chief Justice and president of the supreme court of Kenya & Ano vs Khaemba(2021) KECA322(KLR) and Judicial service & Ano vs Lucy Muthoni Njora(2021) e KLR where the court held that the irregularities attendant to the process justified the intervention by the court.
  34. It is further argued that the purported procedure provided under the standing orders was only on suspension, yet the Applicants were challenging not only the suspension, but the legality of the proceedings of the County Assembly; that the issue of legality of proceedings cannot be determined under the mechanism provided for in the standing orders.
  35. It is further submitted that in any event, the Applicants' case is not against the County Assembly but against the individual respondents; that everyone is bound by *the constitution* and that the high court has jurisdiction to determine all constitutional issues.
  36. The Applicants contend that by the use of the phrase;- "where a member has been suspended , they may appeal in writing to the powers and privileges Committee" in standing order No. 110(4), implies that members do have an option.
  37. In response to ground 3 of the objection, the respondents submit that the provisions of section 10 of the County Assemblies (Powers & privileges) Act has no place in Kenya after the enactment of the 2010 constitution.
  38. The Applicants further argue that the question before the court is a constitutional question and while relying on the court of Appeal decision in the case of Martin Nyaga Wambara & Others Vs the Speaker of the Senate & Others ( citation not provided ), argues that the Court can interfere where legislative bodies have gone outside the confines of *the constitution*; The case of County Assembly of Kisumu & 2 Others Vs Kisumu County Assembly Service Board & 6 Others (2015)eKLR is also relied as in this regard.

## Determination

39. I have considered the preliminary objection (the Objection) and the parties submissions in respect thereof. I will at first consider whether the objection herein has met the threshold of a preliminary objection.
40. In Mukisa Biscuit Manufacturing Company Ltd Vs West End Distributors Ltd (1969) E.A 696 the court stated "a preliminary objection consists of a point of law which has been pleaded or which arises from clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are an objection to jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to Arbitration"



41. In present case, the section of Law allegedly breached , that is order 53 of the civil procedure Rules and the doctrine of exhaustion are clearly set out. I am of the view therefore that the objection, if it succeeds, is capable of disposing this suit. The objection meets the threshold of a preliminary objection.
42. The purpose of preliminary objection is two-fold. In the supreme court’s decision in IEBC VS Jane Cheperenyer & 2 Others (2015) eKLR the purposes were stated as follows:- “ the true preliminary objection serves two purposes of merit firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it served the public cause of sparing scarce judicial time so it may be committed only to deserving cases of dispute settlement....”
43. I will now proceed to consider whether the objection is sustainable.

**whether the substantive notice of motion is defective.**

44. The Respondents’ case is that the substantive motion offends the provisions of order 53 of the Civil Procedure Rules in that, there was no leave sought in respect to prayer 2 of the of of Motion.
45. In the Chamber summons , the Applicants sought the following prayers:-
  1. Spent
  2. That leave be granted for the Applicants herein to apply for the judicial review order of certiorari to remove to this honorable court for purposes of being quashed , the entire motion moved by the 1<sup>st</sup> Respondent , Hon. Benjamin Were on 27<sup>th</sup> March 2024 during virtual sitting of the county Assembly of Kakamega and all consequential and /or resultant decisions emanating therefrom.
  3. Such leave to operate as a stay of any and all consequential and / or resultant decisions emanating from the impugned Motion; and
  4. The costs of this Application to be awarded to the Ex- parte Applicants.
46. In the substantive motion the prayers were as follow;-
  1. The honourable court do issue the judicial review order of certiorari to remove to this court for purposes of being quashed , the entire Motion moved by the 1<sup>st</sup> Respondent , Hon. Benjamin Were on 27<sup>th</sup> march 2024 during the virtual meeting of the county Assembly of Kakamega and all consequential and/ or resultant decisions emanating therefrom.
  2. The court do issue the judicial review order of certiorari to remove to this honourable court for purposes of being quashed , the entire proceedings of the county Assembly of Kakamega and all consequential and / or resultant decisions emanating therefrom.
  3. The costs of this Application be awarded to the Applicants
47. The indispensable nature of leave prior to seeking prerogative orders was illustrated in the case of AAR Insurance vs Public Procurement Administrative Review Board, Secretary IEBC and Zamara Risk and Insurance brokers Limited Interested Parties HCJR Case No. E087 of 2021( unreported), where Ngaah J aptly summed up the rationale for the requirement for leave when he stated;

“I must reiterate that that judicial review remedies are discretionary and it is partly for this reason that a judicial review court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review court will weigh between ‘the legitimate requirement



of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.’ If upon examination of the material before it, the court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs. It follows that the application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this Honourable court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.”

48. The Applicants were quick to concede that no leave was sought in respect to prayer 2 of the substantive motion and states that the anomaly therefore in the substantive motion is limited to prayer 2 only.
49. The respondents have countered this concession by stating that the entire Application is tainted and cannot be saved by an amendment, as an Application is not amenable to an `amendment. They therefore insist that the entire Application should be struck off.
50. The pertinent question is does a misplaced, defective or an irregular prayer in an application taints the entire Application?
51. I hold the view that the fact that an additional prayer was added to the substantive motion should not defeat the other prayer(s) , for which leave was sought for.
52. I find support in the case of Bespoke Insurance Brothers VS Philip Kisia, The town Clerk City Council of Nairobi & Another & Another(2013) EKLR, where the Ex-parte Applicant had added the words ‘.....with interest thereon until payment in full’ in the substantive motion, which words had not featured in the Application for leave. The court simply struck out the offending words, without striking out the entire Application.
53. Equally in the case of Republic Vs Attorney general & 4 Other Ex-parte Diamond Ibrahim Lallfi and Ahmed Hashem Lallfi (2014) eKLR the court simply went on to strike 2 prayers for which leave was not sought for in the chamber summons, but not the entire Application.
54. Further , ordinarily , there is no guarantee that when a party moves the court for a number of prayers in an Application , all the prayers will be granted . All, or some may be denied. The fact that some of the prayers may not , or are incapable of being granted therefore, does not make the entire Application defective.
55. On the question of amendment of the Application, while I agree with the respondent that an Application is not amendable, there is nowhere that the Applicants have sought for amendment. This is a misplaced argument on the part of the Respondents.
56. The Applicants have readily conceded that no leave was sought for prayer 2 of the motion. Consequently prayer 2 of the substantive motion is hereby struck off.



## The Doctrine of Exhaustion

57. The doctrine of Exhaustion is defined in Black's Law Dictionary (10th Edition) as follows;
- “... The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”
58. In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR the high court expounded on the doctrine as follows:
- “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*.....”
59. The rationale of the doctrine was further explained in the case of *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
- “It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.....”
60. Part XVII of the county Assembly standing orders deals with “Order” in the county assembly. Standing orders Nos. 105 and 106 deal with misconduct which may attract suspension , and the manner of suspension, respectively . Standing order 110(4) provides a recourse for a member who is aggrieved by the suspension. It provides as follows: “ A member suspended from the house may appeal in writing to the committee of privileges within three days of the suspension”
61. It is the respondents' case that these proceedings therefore offend the provisions of the standing order No. 110(4) which provides an Appeal mechanism in respect of the issues that have been brought before this court; that indeed the Applicants have submitted appeals for consideration by the committee of powers and privileges within the county Assembly and those appeals are currently under consideration.
62. On the other hand the Applicants have argued that , standing orders of a county Assembly are not statutes; that unlike the standing orders of the National Assembly, county Assembly standing orders are statutory instruments, which do not have the force of law. The applicants further argue that the doctrine only applies to statutory procedures, that is, if internal remedy is provided for under a statute, and that therefore the doctrine does not apply to standing orders.
63. The Respondent has countered this by stating that the doctrine applies to non -statutory procedures and gave the example of Arbitration Clauses in contracts.



64. The Applicants have pleaded, inter alia that the action of the respondents violated their right to fair Administrative action. This right is enshrined under Article 47 of the constitution. The Article provides as follows:
- (1) Every person has a right to administrative action that is expeditious , efficient , lawful, reasonable and procedurally fair
  - (2) .....
  - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
    - (a) provide for review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
    - (b) promote efficient administration
65. The Fair Administrative Action Act ( cap 7L, laws of Kenya) was enacted to operationalize Article 47 of the constitution. Section 2 of the Act defines Administrative action to include:-
- a. The powers functions and duties exercised by Authorities or quasi-judicial tribunals;
  - b. Any act, omission or decision of any person, body or authority that affects the legal rights or interest of any person to whom such action relates. (Emphasis added).
66. Thus going by the aforesaid definition, Administrative acts contemplated by Fair Administrative action Act includes not only actions emanating from exercise of powers under a statute but virtually all Administrative actions or omissions.
67. Further, there are a number of decisions in which the courts have held that non- statute based internal procedures must be exhausted before a complainant seek redress by way of judicial review . It applies for instance to universities’ student disciplinary procedures ( Ref: Waweru Edwin vs university of Nairobi (2020) e KLR), as well as Employer- Employee relationships ( Ref: Mulwa msanifu Kombo vs Kenya Airways( 2013) e KLR
68. I therefore disagree with the Applicants argument that the need for exhaustion of internal remedies only apply if those remedies are provided for under a statute. It is evident that the doctrine of Exhaustion applies across the Board.
69. Section 9 the Fair Administrative action Act provides as follows:-
- “ procedures for judicial review.
1. Subject to subsection 2, a person who is aggrieved by an administrative action may, without reasonable delay apply for judicial review of any administrative action to the high court or a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the constitution.
  2. The high court or 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 subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted direct that the applicant first exhaust such remedy before instituting proceedings under subsection (1)
  4. Notwithstanding subsection (3) the high court or 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.”
70. There are several decisions which reinforce the provisions of section 9(2) of the [Fair Administrative Action Act](#).
  71. In the case of capital markets [Authority vs Ciano & Ano \( Civil Appeal No. 314 of 2018\)](#) [2023] KECA 581 (KLR) (26 May 2023) Judgment, cited by the Respondent, the court held:- “ Thus any person affected by an Administrative action must submit to internal dispute resolution procedures if such a procedure exists , save in exceptional circumstances.
  72. The findings of courts in William Odhiambo Ramogi (supra) and Geoffrey Muthiga Kabiru ( supra ) as set out herein before are a restatement of the same principle.
  73. Further in The matter of Mui coal Basin local community & 15 others vs the permanent secretary Ministry of Energy & 17 others ( 2015)e KLR, the court while addressing the importance of resorting to alternative systems of dispute resolution mechanisms in the first instance, envisaged under Article 159 of [the constitution](#) stated: “... in reaching this position the courts are not merely being formalistic . The reasoning is based on the constitutional policy, embodied in Article 159 of [the constitution](#); that of matrix dispute resolution system in the country. Our constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Justice Ojwang called an “Ascendant judiciary” . [The constitution](#) does not create an imperial judiciary zealously fueled by tenets of legal – centism, and the need to legally cognize every social, economic or financial problem in spite of the availability of better suited mechanisms for comprehending and dealing with the issues entailed. Instead, [the constitution](#) creates constitutional preference for other mechanisms for dispute resolution – including statutory regimes in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and hence at certain prudential points intersect with the judicial system), while some will remain parallel to the judicial system.” ( Emphasis Added)
  74. The decision in Mui’s case (supra) not only highlights the need for the courts to respect out- of- court disputes resolution mechanisms, but also demonstrate that contrary to the Applicants’ submission, the doctrine envisages both statute- based and non- statute based alternative dispute resolution mechanisms.
  75. The Applicants have further argued that the process was marred with illegalities and procedural irregularities from the beginning; that the remedy provided in the standing orders only deals with the suspension and not these procedural irregularities; that ,consequently this court should be guided by the decision in the case of Chief Justice and president of the supreme court of [Kenya & Ano vs Khaemba\( Civil Appeal 522 of 2019\)](#) [2021] KECA 322(KLR) (17 December 2021) (Judgment), where for reason of irregularities , the Applicants were exempted from having to exhaust alternative internal dispute resolution mechanisms
  76. The above submission, that the committee of privileges cannot deal with those irregularities, has been made without any basis. The Applicant seems to suggest that the committee on privileges will look at the suspension in isolation. Won’t the committee be looking at the process and reasons for suspension



in determining the legality of the suspension? The Applicants have not bothered to demonstrate that the committee of the privileges is not empowered to look at the procedure of suspension when determining the legality or regularity of the suspension itself . In the absence of any evidence to the contrary, it is not incorrect to assume that the said committee has the powers to investigate the entire process leading to the suspension of the Applicants.

77. Further, there is evidence that some of the Applicants have already submitted themselves to the Appeal process under the committee of privileges . There are letters of Appeal by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 8<sup>th</sup> Applicants. They could only have submitted themselves because they believed in the validity of the process.
78. What is apparent is that the Applicants have decided to cast their lot both ways, perhaps with the hope of getting a fast relief from either the court or from the committee of privileges.
79. The Applicants have further argued that , in any event they have not sued the County Assembly; but rather individuals. However, as earlier demonstrated, there is evidence that indeed the Applicant's have subjected themselves to the Appellate process provided for under the standing orders of the County Assembly. The pertinent question is, why would the Applicants subject themselves to the process provided for under the institutional procedure of the Assembly, if their claim was against individuals? This argument is misplaced, in my view.
80. To conclude this ground of objection, it is my finding that the Applicants have not exhausted the internal remedies provided by the standing orders of the county Assembly and this suit is therefore premature.

**Whether these proceedings violate section 10 of the County Assemblies powers of privileges Act (cap 265 C, Laws of Kenya)**

81. In their last ground of objection, the respondent have stated that to the extent that the proceedings seek to challenge the decisions made by the county Assembly, the Application violates the mandatory requirement under section 10 of the [county Assemblies powers and privileges Act](#) cap. 265 C . The section provides that the decisions of the assembly done in accordance with the Act, cannot be challenged in any court.
82. It is now well settled that the privilege such as accorded by section 10 of the [county Assemblies powers and privileges Act](#) is not absolute. There are a host of decisions by the superior courts stating that the courts will intervene if the processes and functions of the other two arms of government breach [the constitution](#).
83. In *Njenga Mwangi & Ano vs The truth, justice and reconciliation Commission & 4 others* , Nairobi High court petiton No. 286 of 2013 Justice Lenaola stated "... under section 29 of the powers and privileges Act, courts can not exercise jurisdiction in respect of acts of the speaker and other officers of the National Assembly but am certain that under Article 165(3)(d) of [the constitution](#) this court can inquire into any unconstitutional actions on their part"
84. In the case of *speaker of the senate & Ano vs Attorney General & 4 others* (2013)e KLR the supreme court held: " we are persuaded by the reasoning we have referred to from other jurisdictions to the effect that parliament must operate under [the constitution](#) which is the supreme law of the land . The English tradition of parliamentary supremacy does not commend itself to nascent democracies such as ours. This court would be averse to questioning parliamentary procedures that are formulated by the house to regulate their internal workings as long as the same do not breach [the constitution](#)" .



85. In the same decision the court went on to state : “while all state organs, for instance, the two chambers of parliament are under an obligation to discharge their mandate as described or signaled in *the constitution* , a time comes such as this , when prosecution of such mandate raises conflicts touching on the integrity of *the constitution* itself. It is our perception that all reading of *the constitution* indicate that the ultimate judge of the “ right” and “ wrong” in such cases , short of a solution in plebiscite , is only the courts”
86. It is trite law therefore that the courts can intervene where actions of parliament , including their internal operations are in breach of *the constitution*.
87. The Applicants case herein is that their rights to be heard were violated and that they were denied the right to fair administrative action. These are constitutional rights and in view of the foregoing cited decisions the court , subject to the exhaustion principle as aforesaid, have the mandate to interrogate if such violations indeed occurred.
88. The third limb of the preliminary objection is therefore without merit.
89. It is evident from the principle stated in Geoffrey Muthiga ( supra) interalia , that it is imperative any dispute resolution mechanism available outside the court be exhausted before the jurisdiction of the court is invoked. It follows that this court has no jurisdiction to entertain this suit as long as the Applicants have not exhausted the internal remedies provided by the standing order No. 110(4) of the Kakamega county Assembly standing orders.
90. On Jurisdiction, Nyarangi JA in Owners of the motor vessel “ Lilian” vs Caltex oil ( Kenya ) Ltd ( 1989) KLR1 at page 14: stated “ without jurisdiction , a court has no power to make one more step. Where the court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”
91. Am duly guided ;- it is my finding that this court has no jurisdiction to entertain this matter and consequently , it is hereby struck off .
92. Each party to meet their own costs.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 4<sup>TH</sup> DAY OF JULY 2024.**

**S. Chirchir**

**Judge.**

**In the presence of :**

Godwin – Court Assistant

Ms. Wanyonyi holding brief for Mr Sore for the Applicants

Mr. Kubai for the Respondents

