**Nation Media Group Limited & 2 others v Media Council of Kenya & another; Adera (Interested Party) (Judicial Review Miscellaneous Application E124 of 2023) [2024] KEHC 14866 (KLR) (Judicial Review) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14866 (KLR)

**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION E124 OF 2023**

**JM CHIGITI, J**

**OCTOBER 3, 2024**

**BETWEEN**

**NATION MEDIA GROUP LIMITED ............................................ 1ST APPLICANT**

**HEAD OF CONTENT NATION MEDIA GROUP PLC .............. 2ND APPLICANT**

**PETER MBURU ................................................................... 3RD APPLICANT**

**AND**

**MEDIA COUNCIL OF KENYA ................................................ 1ST RESPONDENT**

**THE COMMISSIONERS, MEDIA COUNCIL COMPLAINTS COMMISSION ............................................................... 2ND RESPONDENT**

**AND**

**JOHNSON OTIENO ADERA ............................................ INTERESTED PARTY**

**RULING**

1. The application before this court is the one dated 8.12.23 herein the applicant is seeking the following orders:

    1. ...spent...

    2. That the Order issued by this Honorable Court on 16th November, 2023 in Judicial Review Application No E124 of 2016 be reviewed and set aside on the ground that there is a mistake and/or error apparent on the face of the record.

3. That the Applicant's Originating Notice of Motion Application dated be set down for hearing on merit.

4. That the First Respondent whether by themselves, their servants, agents, officers, successors and/or assigns, be restrained from recovering the aggregate sum of Kshs. 50,000.00 ordered as a fine imposed against the Third Applicant in Media Complaints Commission Complaint No. 11 of 2023, as a debt due to it, pending the hearing and determination of this Application.

5. That costs of the application be provided for.

2. The application is supported by the affidavit of Wanjiku King'ori.

**The Applicants Case;**

3. On 15th November, 2023, the Applicants filed an Originating Notice of Motion seeking inter alia, injunctive orders against the First Respondent and the decision of the Second Respondent set aside.

4. On 16th November, 2023, this Honorable Court directed the Applicants to comply with Order 53 of the Civil Procedure Rules.

5. It is their case that the Applicants' Originating Notice of Motion dated 9th October, 2023 was premised on the provisions of *the Constitution* and the *Fair Administrative Action Act*.

6. The Applicants stand to be prejudiced as the First Respondent may proceed to recover the fines awarded in the Second Respondent's determination despite having a meritorious ground for judicial review.

7. The Applicants decision to file the Originating Notice of Motion was premised on the provisions of the *Fair Administrative Action Act* which provide that an application for judicial review shall be heard and determined without undue regard to procedural technicalities.

8. The reliefs sought under the Originating Notice of Motion are based on the provisions of *the Constitution* and the *Fair Administrative Action Act* and not Order 53 of the Civil Procedure Rules.

**The Respondent's Case;**

9. The 1st & 2nd Respondents oppose the application through the Replying Affidavit of Eric Ngaira who maintains the application offends Order 53 Rule 1 of the Civil Procedure Rules 2010 and Section 9(2) of the *Fair Administrative Action Act*.

10. The applicable law on leave to commence judicial review proceedings is Order 53 Rule 1 of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted.

11. They argue that the purpose of an application for leave to apply for judicial review like is firstly to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless and secondly to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.

12. It is their case that The Fair Administrative Actions Act, made no departure from the salient features of judicial review, and the Act did not provide an alternative procedure of moving the court under judicial review and as such Order 53 of the civil procedure Rules has never been repealed.

13. Judicial review application as evidenced from the Applicant's Originating Notice of Motion dated 9th October 2023 relates to the court's power to supervise the exercise of administrative actions by the 2nd Respondent.

14. It is a special jurisdiction that must be distinguished from petitions to remedy breaches of fundamental rights and freedoms under *the Constitution*.

15. Reliance is placed in the case of Felix Kiprono Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) [2021] Eklr where it was held that the procedural rules in Order 53 of the Civil Procedure Rules that governed judicial review prior the promulgation of *the Constitution*, 2010 are still in force as they have not been repealed.

16. The Applicant's Originating Notice of Motion dated 9th October 2023 sought substantive judicial review reliefs without the Applicant seeking leave to institute judicial review proceedings and the application was thus fatally defective for flouting clear statutory provisions.

**The Interested Parties Case;**

17. The interested party opposes the application through the replying affidavit of Johnson Otieno Adera.

18. It is his case that this Court is bereft of jurisdiction to review any of its orders and anyone that is aggrieved can only appeal to the Court of Appeal and that is the express position set out at Section 9(5) of the *Fair Administrative Action Act* and Section 8(5) of the *Law Reform Act*. He argues that his Court became functus officio the moment and time it made its order of dismissal on 16th November 2023.

19. It is in total agreement with the Court in dismissing the so called "originating notice of motion" application dated 9th October 2023 for want of leave and more so for being, a strange document that is unknown to the substance and procedure of the law in our judicial system.

20. They call it a classic case of abuse of the process of this Court and a waste of this valuable Court's time as what the Applicants have done is to turn themselves into either the Rules Committee envisaged under Section 81 of the *Civil Procedure Act* and make their own rules of procedure for this Court or the Chief Justice under Section 10(2) of the *Fair Administrative Action Act* to "make rules of practice for regulating the practice and procedure in matter relating to judicial review of administrative action".

21. It argues that the Applicants have acted ultra vires and usurped the powers of the Rules Committee and the Chief Justice by making their own rules of procedure and attempting through the instant application to impose the same on the Court and the Judge.

22. The application seeks to introduce an unknown concept called "originating notice of motion", a phrase that is unknown to *the Constitution*, *the Constitution* of Kenya {Protection of Rights and Fundamental Freedoms; Practice and Procedure Rules, 2013, the *Fair Administrative Action Act*, the *Law Reform Act* and Order 53 of the Civil Procedure Rules.

23. It believes that Judicial review is a special jurisdiction of the High Court that is neither civil nor criminal and consequently the provisions of the *Civil Procedure Act* do not apply to judicial review proceedings.

24. It argues that it has been settled by this Court and the other superior courts, the Court of Appeal and the Supreme Court, that the Civil Procedure Rules, save for Order 53 of the Civil Procedure Rules, that is sui generis, does not apply to judicial review proceedings.

25. The application has been brought under the provisions of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Orders 25 and 51 of the Civil Procedure Rules and consequently the said application is fatally defective and incurably incompetent.

26. Judicial review orders can only be obtained in a petition filed under Article 23 of *the Constitution* with the procedural rules being *the Constitution* of Kenya {Protection of Rights and Fundamental Freedoms; Practice and Procedure Rules, 2013 or by way of a substantive notice of motion under Section 8 of the *Law Reform Act* with the procedural law rules being Order 53 of the Civil Procedure Rules which require leave of this Court before the substantive. Order 53 of the Civil Procedure Rules which require leave of this Court before the substantive notice of motion can be filed.

27. It is its case that although the *Fair Administrative Action Act* at Section 11 makes provision for orders that this Court in the exercise of its judicial review jurisdiction can grant, there are no rules by the Chief Justice in place as envisaged under Section 10(2) of the said Act and this is a matter that this Court and the other superior courts have had occasion to consider and the decisions of this Court and the other superior courts has been that a party is free to choose to move the Court either by way of a petition under *the Constitution* of Kenya {Protection of Rights and Fundamental Freedoms; Practice and Procedure Rules, 2013 or Order 53 of the Civil Procedure Rules, the only available rules of procedure for judicial review.

28. He further argues that the fact that the Chief Justice has not made rules as envisaged under Section 10(2) of the *Fair Administrative Action Act* to regulate judicial review proceedings under the Act does not mean that there is a lacuna in the law for the Applicants to fill the said lacuna by usurping the powers of the Chief Justice by creating their own rules of procedure.

29. In any event the *Fair Administrative Action Act* is a product of Article 47 of *the Constitution*, the Bill of Rights, that has clear procedural rules and provisions for their enforcement by way of a petition.

30. Judicial review orders sought within a petition under Article 23 of *the Constitution* and *the Constitution* of Kenya {Protection of Rights and Fundamental Freedoms} Practice and Procedure Rules, 2013 do not require leave of this Court. The Applicants ought to have filed a petition instead of creating their own rules of procedure if they wanted to eschew leave of this Court.

31. The Applicants have posited that there is no provision for leave when seeking judicial review orders under the *Fair Administrative Action Act* but the Applicants have failed to demonstrate to this Court where is provides under the *Fair Administrative Action Act* that judicial review orders are to be sought in an action commenced by way of an "originating notice of motion", a phrase that does not exist in the *Fair Administrative Action Act* and *the Constitution*.

32. It is the interested parties case that it stands to be prejudiced highly and irreparably by this baseless application since it has a final and binding decision of the 2nd Respondent courtesy of Section 43 of the *Media Council Act*.

33. The Applicants are also guilty of delay since they had 30 days to challenge the determination of the 2nd Respondent that was issued on 16th October 2023 and the Applicants waited until the last day, to move this Court.

34. It is his case that the application is an invitation to this Court to give a free pass to the Applicants and by extension any other litigant to create their own rules of procedure and impose them on a Court and that would open the floodgates is chaos and uncertainty that can never be allowed in any modern judicial system anywhere in the world and so the instant application is for dismissal with costs as lacking in merit.

**Analysis and determination;**

**Whether the court is functus officio;**

35. The Supreme Court in the case of Raila Odinga & 2 oth*ers v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto (Petition 5, 4 & 3 of 2013*) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) held as follows on the doctrine of functus officio;

> " 18. We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept: "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."
>
> 19. This principle has been aptly summarized further in Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available" [emphasis supplied]."

36. It is my finding that this court retains residual jurisdiction to review its judgment under Section 80 of the *Civil Procedure Act* which provides that;

> " Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

37. Order 45 of the Civil Procedure Rules provide that:

> " 1.
>
> (1) Any person considering himself aggrieved—
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> a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

38. The applicants herein have pleaded that there was an error on the face of the record which warrants this court to exercise its discretion and review the orders issued on October 3, 2022.The burden of proof lies on the Applicants.

39. In the case of Muyodi v Industrial and Commercial Development Corporation & another [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> " ...In Nyamogo & Nyamogo v Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

40. From the above quoted decisions, it is clear that the courts agree that the error or omission must be self-evident without there being a need for additional arguments.

**Whether leave is required to institute judicial review suit;**

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

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

42. In the case of Nicholas Kiptoo Arap Korir Salat vs. the Independent Electoral and Boundaries Commission and 6 Others [2013| eKLR the court held that:

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

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

> "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.

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

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

45. The clear objective of the FAA Act under Section 10(2) is to have a regime of rules made by the Chief Justice governing judicial review of administrative action.

46. The Section provides:

> "The Chief Justice may make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action."

47. The Application does not meet the principles as enunciated in the Supreme Court of Uganda case of Edison Kanyabwera v Pastori Tumwebaze (2005) UGSC 1, provided for what constitutes an error apparent on the face of the record, it stated as follows;

> "It is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, ie an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law."

**Disposition;**

48. The court finds no error apparent on the face of the record of the Impugned decision.

Order;

The Application lacks merit and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024.**

**.........................................**

**J. M. CHIGITI (SC)**

**JUDGE**