



Republic v Deputy County Commissioner Buuri East & 4 others; Kiirua Buuri Water Users Association (Suing through its Chairman) Kinyua Ikabu (Exparte Applicant) (Judicial Review Miscellaneous Application E002 of 2023) [2023] KEHC 3218 (KLR) (19 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2023**

**EM MURIITHI, J
APRIL 19, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

DEPUTY COUNTY COMMISSIONER BUURI EAST 1ST RESPONDENT

MEMBER OF COUNTY ASSEMBLY KIBIRICHIA WARD 2ND RESPONDENT

**MEMBER OF COUNTY ASSEMBLY KIIRUA NAARI WARD 3RD
RESPONDENT**

**MEMBER OF COUNTY ASSEMBLY RUIRI-RWARERA WAR 4TH
RESPONDENT**

THE HON ATTORNEY GENERAL 5TH RESPONDENT

AND

**KIIRUA BUURI WATER USERS ASSOCIATION (SUING THROUGH ITS
CHAIRMAN) KINYUA IKABU EXPARTE APPLICANT**

RULING

- By Chamber Summons under certificate of urgency dated 30/3/2023 expressed to be brought
“under articles 23, 47, & 48 of the Constitution, Order 53 Rule 1 (2) of the Civil procedure Rules, section 8 and 9 of the Law Reform Act cap 26 Laws of Kenya and all other enabling provisions of the law,”

the *ex parte* applicant seeks orders as follows:



- (a) That the application be certified as urgent.
 - (b) That the ex- applicant be granted leave to institute judicial review proceedings to of certiorari directed at the Respondents to remove into this quash the decision of the respondents in the meeting held on March 18, 2013 purporting to appoint a committee to manage the applicant's projects to wit Nkando, Ntugi and Njoteene boreholes and Kiirua Buuri Irrigation Water Project.
 - (c) An Order prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from interfering with the *ex parte* applicant's water projects, boreholes and assets or in any interfering with the applicant's projects to wit Nkando, Ntugi and Njoteene boreholes and Kiirua Buuri Irrigation Water Project.
 - (d) An order of temporary injunction do issue restraining the 1st to 4th Respondents whether acting jointly or severally by themselves, their servants, agents or representatives or otherwise from interfering with the applicant's running of their water projects to wit Nkando, Ntugi and Njoteene boreholes.
 - (e) An order of prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from interfering with the applicant's water projects, boreholes and assets or in any way interfering with the ex-parte applicant's projects to wit Nkando, Ntugi and Njoteene boreholes and Kiirua Buuri Irrigation Water Project.
 - (f) The leave so granted do operate as a stay of the decisions of the respondents especially the meeting on March 18, 2023 purporting to appoint a committee to manage the exparte applicant's projects.
 - (g) That the costs for this application be provided for.”
2. The Grounds of the application are set out in the application as follows:
- a) That the *ex parte* applicant is a community based organization whose purpose is to implement irrigation system and operate, maintain and manage the system for the betterment of its members.
 - (b) That the *ex parte* Applicant owns and manages among other projects Njoteene, Ntugi and Nkando boreholes and Kiirua Buuri Irrigation Water Project. These projects were funded by members of the applicant with assistance from the National Irrigation Authority.
 - (c) The projects were competed and handed over to the Ex-parte Applicant by the National Irrigation Authority.
 - (d) That the 1st to 4th Respondents in abuse of their authority have incited non-members of the applicant to use the ex-parte applicant's assets without the applicant's consent.
 - (e) That it is in the interest of justice that leave is granted for the applicant to file his judicial review.”
3. The Verifying Affidavit of the applicant sworn on 30/3/2023 and filed in accordance with the Order 53 Rule 1 (2) (b) of the [Civil Procedure Rules](#) sets out similar facts relied upon as follows:
- (1) That I am male adult of sound mind, the chairman of the Applicant herein well versed with the facts of this case and I am competent to swear this affidavit.



- (2) That the ex-parte applicant is a community-based organization within Buuri East Sub-County Meru County comprising of 3750 members. (Annexed and marked as KI 1 is a copy of certificate of registration)
 - (3) That the *ex parte* Applicant owns and manages among other projects Njoteene, Ntugi and Nkando boreholes and Kiirua Buuri Irrigation Water Project. These projects were funded by members of the applicant with assistance from the National Irrigation Authority. The projects were competed and handed over to the Applicant by the National Irrigation Authority. (Annexed and marked as "KI2 (a-d)" are copies of the project handing over certificates)
 - (4) That applicant vide letters dated 1st May 2022 the Applicant wrote to the National Irrigation Authority requesting for funding of among other projects Nkando, Ntugi and Njoteene boreholes in order to supplement the applicant's existing irrigation water project. (Annexed and marked as KI 3 are copies of the letters)
 - (5) That the National Irrigation Authority approved the applicant's proposal and awarded tenders to various contractors for construction and maintenance of the boreholes.
 - (6) That the National Irrigation Authority convened a meeting with the some of the applicant's members and stakeholders on 3rd February 2023 to hand over the completed bore holes projects to the applicant for management and service to the community.
(Annexed and marked as KJ 4 are copies of the minutes of the ex-parte meeting held on 3rd February 2023)
 - (7) That the Chief Engineer of the National Irrigation Authority during the said meeting stated that the management of the boreholes shall be through the by-laws of Kiirua Buuri Irrigation Water Project. (Annexed and marked as KI5 is a copy of the by-laws)
 - (8) That the applicant other made other similar requests for funding of bore hole projects and is currently awaiting approval from the National Irrigation Authority. (Annexed and marked as "KJ 6 a-f" are copies of the letters)
 - (9) That the 1st to 4th Respondents in abuse of their authority have incited non-members of the applicant to use the applicant's assets and water projects without the applicant's consent.
 - (10) That the 1st to 4th respondents have since been interfering with the management of the applicant's projects and are inciting non-members of the applicant to use the applicant's facilities without the applicant's consent.
 - (11) That the respondents held a meeting on 18th March 2023 and appointed a committee to manage the applicant's projects and have organized through the Chief Nkando area for another meeting to be held on 31st March 2023.
 - (12) That the 1st to 4th respondents' acts contravenes the National Irrigation Authority decision to vest the management and control of the boreholes to the applicant herein."
4. Upon perusal at the *ex parte* stage, the Court directed pursuant to Order 53 Rule 1(4) Proviso of the [Civil Procedure Rules](#) that the application be served for inter partes hearing as follows:

"Court:

1. Application dated 30/3/2023 is certified urgent.



2. Application to be served pursuant to Order 53 Rule 1 (4) Proviso of the Civil procedure Rules for hearing inter partes on the question of leave and leave operating as stay.
3. Hearing on 5/4/2023.
4. In the meantime, status quo to be maintained.

E.M. Muriithi

Judge

30/3/2023”

5. Order 53 Rule 1 (4) Proviso of the [Civil Procedure Rules](#) is in the following terms:

“ 4. The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave.

Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

6. The Court considered that the nature of the dispute involving the Association, the Deputy County Commissioner representing the national government, the relevant Members of the County Assembly who are the local representatives of the people, concerning the management of water resources in the area called for an inter partes hearing, not least in an attempt to foster, at the first instance, an amicable settlement obviously desirable for dispute resolution in the governance of the local authority area and management of resources therein. The Court should then adjudicate the dispute in the event of unsuccessful out of court approach.
7. The principal complaint by the *ex parte* applicant, allegedly an association of 3750 members, is that the Respondents, the Deputy County Commissioner for Buuri East and 3 members of the County Assembly of Meru have abused their authority in inciting non-members of the Applicant Association to use the applicant’s assets and water projects without the applicant’s consent, and by a meeting of 18/3/2023 appointed a Committee to manage the Applicant’s projects which were constructed with funds from its members with assistance of the National Irrigation Authority. It is proposed by the judicial review proceedings to seek orders of certiorari, prohibition, injunction and stay of the decision of 18/3/2023 to appoint a management committee.
8. It is noteworthy that the National Irrigation Authority is not a party to the suit.
9. The 2nd, 3rd and 4th Respondents have raised a Preliminary Objection dated 5/4/2023 as follows:

“Notice Of Preliminary Objection

Take Notice that the 2nd, 3rd & 4th Respondents herein; shall, at the earliest possible opportunity raise a preliminary objection to the sustainability of the chamber summons dated 30th March 2023 and the suit thereto in its entirety on the Grounds tailored as follows:



1. That the ex-parte applicant has no locus standi to commence this suit through and or on behalf Kiirua Buuri Water User Association.
2. That the suit is incurably defective as it offends the mandatory provisions of Order 1 Rule 13 and Order 4 Rule 4 of the Civil Procedure Rules.
3. That Kiirua Buuri Water User Association has no juridical character with legal capacity capable of suing as it does not exist. It is not a legal entity and orders sought of judicial review are incapable of being granted or enforced by itself.
4. That the suit herein does not meet the prerequisites and requirements of a judicial review claim as it does not disclose the infringement of a fair administrative action but that of a normal dispute contrary to the tenets and creeds guiding judicial review proceedings.
5. That the ex-parte applicant has not discharged the evidentiary burden required under section 107 (1) of the Evidence Act as no supporting documentation or evidence has been tendered demonstrating the existence of the alleged decision, resolution passed on March 18, 2023 and the assertions therein are baseless and pure surmise.
6. That the said suit is therefore bad in law, incompetent, premature, speculative, incurably defective and abuse of the court process as it does not disclose any justifiable cause of action to form the basis of judicial review proceedings.

Reasons Wherefore the 2nd,3rd & 4th Respondents herein prays that the said chamber summons and suit be struck off/ dismissed with costs at the 1st instance.”

10. The 1st and 5th Respondents representing the national government supports the Preliminary Objection but have not filed any response to the application for leave to commence judicial review proceedings herein.
11. The Applicant’s chairman by a Replying Affidavit of 12/4/2023 responded to the preliminary Objection as follows:
 - 1) That I am male adult of sound mind, the chairman of the Applicant herein well versed with the facts of this case and I am competent to swear this affidavit.
 - 2) That I have read and where necessary had explained to me the preliminary objection dated 5th April 2023, and wish to respond to the same as hereunder.
 - 3) That I am advised by my advocates on record which advise I verily belief to be true that the 2nd, 3rd and 4th Respondents objection do not as a matter of legal principle a true preliminary objection as the respondents’ assertions which claims to be a preliminary objection bears factual aspects calling for proof. A preliminary objection cannot be raised if any fact has to be ascertained.
 - 4) That I am further advised by my advocates on record which advise I verily belief to be true that the allegation that allegation that the applicant has no locus standi to institute this suit is misinformed.



- 5) That I have pleaded in the verifying affidavit that I am the chairman of the ex-parte applicant and I have therefore demonstrated sufficient interest as the boreholes which are at stake are a matter of public use which justify locus standi.
- 6) That article 22 of the Constitution codify the traditional standing rules based on sufficient interest while at the same time expanding and liberalizing standing rules by conferring standing upon those without sufficient interest within an objective sieving system hence enhancing access to court and therefore justice by prescribing a standard for measuring presence or absence of standing.
- 7) That the 2nd, 3rd, and 4th respondents hold positions that are a creation of statute exercising public functions and their actions amount to administrative action amenable to judicial review.
- 8) That I have been advised by my advocates on record which advise I verily believe as true that without a full hearing, it is not possible to determine at this preliminary stage whether the ex-parte applicant has established illegality, irrationality or procedural impropriety to justify the court's intervention as applied for.
- 9) That I urge this Honourable Court to find that I have the necessary locus to commence this suit on behalf of Kiirua Buuri Water User Association and I urge the court to dismiss the Preliminary objection with costs.”

Submissions

12. Counsel for the parties then made oral submissions on the Preliminary Objection, the counsel for the Respondents principally taking objection to the locus standi fo the applicant chairman of the applicant and pointing to the Article 10.1 of the Constitution of the Association which gives the right to sue on behalf fo the applicant on the Secretary and not Chairman as is the case here; the lack of resolution by the applicant's members to file the representative suit and to the want of the decision sought to be quashed by certiorari as required by Order 53 Rule 7 of the Civil Procedure Rules. The persuasive authorities of the High Court in Kabindi Katana Mwangi & anor. v. Cannon Assurance K. Ltd (2013) eKLR Malindi ELC No 102 of 2012 (Angote, J.) and R. v Kenya National Highway Authority & 7 Ors., ex parte Kenya Transporters Association, Nairobi HC JR No 208 of 2011 (2013) eKLR (Odunga, J. as he then was).
13. In response, the *ex parte* applicant's counsel set up the expanded locus standing rule under Article 22 of the Constitution and the constitutional right to access to justice under Article 48, and urged that at the Preliminary stage, it was not possible for the Court to determine whether the *ex parte* applicant had established the grounds for the court's intervention on illegality, irrationality or procedural impropriety standards. It was also urged that the Preliminary Objection requires evidence tial proof and was thus inappropriate to be raised as a preliminary Objection where any fact has to be ascertained, as held in Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributers Ltd. (1969) EA 696.



Determination

Nature of Preliminary Objection

14. As held in the leading case of *Mukisa Biscuit*, (per Law JA, at p. 700 and Sir Charles Newbold, P. at p. 701 with Duffus JA., agreeing) a Preliminary Objection is defined as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

“A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

15. In this case, the Preliminary Objection does not depend on facts to be ascertained, and the Respondents have not filed any affidavit on facts but merely rely on what is in the applicant’s application and annexures thereto. It is a Preliminary Objection properly so called.

Failure to attach the decision

16. Order 53 rule 7 of the *Civil Procedure Rules* provides in express terms as follows:

“7. Provisions as to orders of certiorari for the purpose of quashing proceedings [Order 53, rule 7.]

1. In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.
2. Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court.”

17. In the decision relied on by the Respondents, *Republic v Kenya National Highway Authority & 7 others Ex parte Kenya Transporters Association & 8 others* [2013] eKLR, the Court (Odunga, J. as he then was) took the view that failure to attach a decision could be explained and it is failure to explain that made such an application incompetent, observing that:

15. The foregoing determination goes hand in hand with the failure to comply with the provisions of Order 53 rule 7. Under the said provision the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or



accounts for his failure to do so to the satisfaction of the High Court. However, in *Republic vs. The Commissioner of Lands ex parte Lake Flowers Limited Nairobi HCMISC. Application No 1235 of 1998*, it was held that the decision to alienate land or to allocate is not formal because the commissioner may in most cases issue titles without necessarily identifying the decision and the date he made the decision formal and therefore the time limitation would not apply to such a decision and the question of attacking it under order 53 rule 7 would not arise and there is nothing capable of being exhibited under Order 53 rule 7. The Court further held that in a deserving case the Court can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.

16. On my part, I am of the view that where the *ex parte* applicant for any reason is unable to exhibit the decision sought to be quashed, then he ought to satisfy the Court on his failure to exhibit the decision which decision is required to be verified by affidavit with the registrar. Failure to comply with this mandatory provision renders the application incompetent. In my view it is important to annex a copy of the impugned decision not only for the court to satisfy itself as to the time it was made and also to be certain that the decision actually exists.”
18. For me, it is clear that the decision need not be one which is capable of attachment to the application, it could be an oral decision on which action follows or part of a decision making process. This Court so held in the case of *Said Mbarak Awadh v Commissioner of Lands & 4 others & another* [2014] eKLR, where I had opportunity to consider this very issue and held as follows:
 11. “On the procedural question whether having not lodged a copy of the decision the subject of the judicial proceedings, pursuant to Order 53 rule 7 of the Civil Procedure Rules the applicant could be allowed to challenge it, I find that in exhibiting the District Land Adjudication settlement officer’s letter of 22nd April 2010 indication that adjudication with regard to the suit property had been done and that the title deed would be issued in the names of the 1st Interested party would be sufficient compliance with the rule. I have noted the decision of B. K. Tanui, J in *Kisumu Misc Civil Case No 196 of 2003 Republic v. Bondo Town Council ex parte Gordon Ouma Odongo & 5 Ors.* that where the applicants had not complied with Order LIII rules 1 (3) and 7 (1) with regard to the full Council minutes of the County sought to be quashed by certiorari.
 12. However, I prefer the view taken in *R v. The Judicial Inquiry into the Goldenberg Affair ex parte Hon Mwalulu and Others* (2004) eKLR and *R v The Commissioner of Lands ex parte Lake Flowers Council Ltd. Nairobi HC Misc App. No 1235 of 1998* that the provisions of Order 53 rules 2 and 7 only apply to the formal orders mentioned in the rules, and they would therefore not apply to other types of decisions that may be challenged by certiorari. The reason for this is that some decisions may be part of a process and not a single identifiable decision, as in the case of land adjudication decision in respect of a parcel of land, as in this case, which would involve the declaration of the adjudication section, the objection proceedings and the final decision to allocate a parcel of land to a particular person. Order 53 rule 7 (1) of the Civil Procedure Rules refers to specific type of orders as follows:
 - “7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.”



13. Similarly, the Court of Appeal decision in *Republic v Kenya National Highways Authority & 2 others ex-parte Amica Business Solutions Limited* [2016] eKLR, while dealing with the question of the six months limitation on grant of certiorari held that the impugned decisions were of judicial or quasi-judicial character, as follows:

“In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here.

We are persuaded in this respect by the High Court decision in *The Goldenberg Affair Ex-parte Hon. Mwalulu and Others*, HCMA No 1279 of 2004 [2004] eKLR, and *Republic vs The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi*, H.C. Misc. Application No 1235 of 1998 where the courts held that the six (6) months limitation period set out in order 53 Rules 2 and 7 only applied to specific formal orders mentioned in Order 53 Rules 2 and 7 and to nothing else, certainly not to contents of one private letter in response to another.”

14. If Order 53 Rule 7 of the Civil Procedure Rules does only apply to decisions of judicial and quasi-judicial character, the requirement for attachment of the formal decision did not apply to decisions in letters, oral decisions, etc. Moreover, it is the view of this court that the default may be explained or remedied by further affidavit filed in the cause before hearing of the Notice of Motion as prescribed by the Rule 7 itself in words that the decision must be attached “before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court”, and therefore, the court has discretion now to allow the filing of the decision before hearing of the Motion. It is trite in the classic definition of a Preliminary Objection in *Mukisa Biscuit* case that Preliminary Objection should not be raised if what is sought is the exercise of a discretion. If this were the only objection to the *ex parte* applicant’s suit, the Court would not have hesitated to invoke the holding in *DT Dobie & Co. (Kenya) Ltd. v. Muchina* (1982) KLR 1 (per Madan, JA.) that no suit should be struck out unless it is so weak as to be beyond redemption and incurable by amendment.”

Representative suit

19. As the Association is not incorporated to make it a separate legal entity, the *ex parte* applicant association is merely a group of persons, one or some of whom may sue for the others as plaintiffs the procedure for which is prescribed under Order 1 Rule 13 of the *Civil Procedure Rules* making the following provisions for representative suits as follows:

- “ 13. Appearance of one of several plaintiffs or defendants for others [Order 1, rule 13.]
- (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them



may be authorized by any other of them to appear, plead or act for such other in any proceeding.

- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

20. The *ex parte* applicant association has sued through its chairman allegedly on behalf of 3750 members, as Article 3.1 (2) (a) of the Applicant’s Constitution merely, and not so coherently, provides that “for purposes of registration the number of the association shall be unlimited membership but not to exceed 3,750 (three thousand seven hundred fifty) unless proper irrigation scheduling is put in place.” (sic)

21. There has not been attached any resolution by the association demonstrating consent for the suit to be filed by the association with the Chairman as representing the members. Such a resolution is important in view of the Constitution of the Association which requires that suits by the Association be filed by the Secretary under Article 10.1 Part IX of the Constitution of the Kiirua Buuri Water Users Association, the *ex parte* applicant herein, which provides as follows:

“10.1 Part IX Suits and Legal Proceedigns

The water users association shall sue in the name of the Secretary of the Water Users Association.”

22. In response to the Preliminary Objection, the *ex parte* applicant sought refuge under the provisions of Article 22 of the Constitution which grants expanded locus standi to an applicant who sues on behalf of an Association as follows:

“22. Enforcement of Bill of Rights

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.
3. The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—
 - a. the rights of standing provided for in clause (2) are fully facilitated;
 - b. formalities relating to the proceedings, including commencement of the proceedings, are kept to the



minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

- c. no fee may be charged for commencing the proceedings;
- d. the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
- e. an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

4. The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.”

23. This defence of the wide locus standi may have been valid had the present proceedings been constitutional petition for the protection and enforcement of rights and fundamental freedoms under Article 22 of the Constitution. The applicant as chairman may have been heard to sue in the public interest on behalf of the association. He cannot even be heard to sue on behalf of the association or any of its members under Article 22 (1) (d) of the Constitution it is “an association acting in the interest of one or more of its members”, not a member suing on behalf of the association or its members!
24. Even where an applicant seeks to represent an association, there should be evidence of his membership and of consent of the members of the association to have him represent the association. A resolution of the Association in accordance with the Association’s constitution is necessary to demonstrate the consent. Indeed, the court notes that the actual membership of the association is not established as the 3750 membership is the upper limit of the Association’s members in accordance with section 3.1 Article IV of the Constitution. The court would require clear authority from the membership of the Association allowing the chairman to sue on the behalf of the association.
25. The right to access to justice under Article 48 of the Constitution is right which over-arcs the spectrum of litigation to give access to justice to litigants who use any procedures available to seeking redress before all the courts of Kenya. It does not exempt the observance of the rules of court on the procedure for approaching court and invoking its various jurisdictions. Indeed, the rule of law implies the observance of due process of the court. A party cannot found a claim for access to justice in disobedience of the provisions of law prescribed for the pursuit of such redress. For instance, the epistolary jurisdiction where under Article 22(3) (b) of the Constitution where a person may launch a suit by informal documentation - including a letter to the Court - is available for the enforcement of rights and fundamental rights, but it is not available in ordinary litigation by regular suit by way of Complaint, Originating Summons or Judicial Review etc. The Court must, therefore, consider the nature of the proceedings before it to determine whether appropriate rules have been followed and whether the application is competent.



Nature of the Application before the Court

26. In *Makupa Transit Shade Limited & another v Kenya Ports Authority & another* [2015] eKLR, the Court of Appeal counselled against joinder of procedure of judicial review and the constitutional application as follows:

“Finally, we would observe that Judicial Review Jurisdiction is a special Jurisdiction that it is neither criminal nor civil. It operates within narrow confines of the *Law Reform Act* and order 53 of the Civil Procedure Rules. As it is narrow, it should never be mixed or combined with other Jurisdictions. In this appeal we note that though the appellants came to Court specifically seeking Judicial Review orders, they also wittingly or unwittingly roped in Constitutional Jurisdiction. We do not think that this was proper or appropriate. The two are different jurisdictions that should not be mixed. We appreciate that under Article 23 of the *Constitution* that deals with authority of courts to uphold and enforce the bill of rights, the Court may grant many reliefs including an order of Judicial Review. However, this can only happen where a party has properly invoked the Constitutional Jurisdiction of the Court. One cannot come to Court vide Judicial review proceedings and expect to be granted Judicial Review orders on the basis of an infringement of a constitutional right. A party should make an election.”

27. The case is a complete answer to the application for Judicial review proceedings herein which purports to invoke the constitutional provisions of Article 22 in defending the *ex parte* applicant’s locus standi. The *ex parte* applicant must elect which procedure is appropriate for his cause of action.

Conclusion

28. The Court, therefore, finds the Preliminary Objection has merit on the grounds that the chairman of *ex parte* applicant has no locus standi to file the present suit as it has not been demonstrated that there was a resolution of the Association giving consent and authority for the Chairman to file the suit in view of the Article 10.1 of the Constitution of the Application which gives such authority to the Secretary. The *ex parte* applicant who has filed for judicial review proceedings cannot rely on the expanded provisions of locus standi under Article 22 of the *Constitution* as this is not a constitutional application but merely a judicial review application and on authority there is no possibility of joinder of the two procedures of constitutional petition and judicial review proceedings. The applicant must elect the procedure he wished to invoke and then in accordance with the law comply with the provisions as to locus standi and procedure. The requirement for authority to sue on behalf of members of an un-incorporated association is not a mere technicality as it goes to the root of a valid decision to sue, as the un-incorporated association with no legal entity can only act through its members. Indeed, even an incorporated company must show authority to sue by resolution of the Board of its directors.
29. The chairman of the applicant not having demonstrated authority to sue on behalf of the association renders the proceedings before the Court incompetent, and the application shall be struck out. Moreover, the remedy of injunction sought under these proceedings while available in constitutional petitions under Articles 22 and 23 of the *Constitution* is not available under judicial review procedure.

Orders

30. Accordingly, for the reasons set out above, the Preliminary Objection dated April 5, 2023 is allowed to the extent that the chairman of the Kiirua Buuri Water Users Association as representative of the *ex*



parte applicant has no locus standi to bring the Judicial Review proceedings before the Court and the suit is consequently incompetent, and it is struck out.

31. The applicant or its chairman, as the case may be, is at liberty to file a Judicial Review application under Order 53 of the *Civil Procedure Rules* through a competent person properly instructed to represent it or a constitutional application pursuant to Article 22 of the *Constitution*, as they may be advised by their legal advisors.
32. There shall be no order as to costs.
Order accordingly.

DATED AND DELIVERED ON THIS 19TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. K. Mugambi instructed by M/S G. M. Wanjohi, Mutuma & Co. Advocates for the *ex parte* Applicant.

Mr. Mwirigi B. instructed by M/S OMK Advocates LLP for the 2, 3 & 4 Petitioner Respondents.

Ms. Mirang'a for Mr. Wachira Nguyo for the Attorney General for 1st & 5th Respondents.

