Republic v Data Protection Commissioner; Eagleage Limited t/ a Oppo Aed Kenya (Exparte) (Miscellaneous Application E005 of 2023) [2023] KEHC 20418 (KLR) (Judicial Review) (14 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20418 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E005 OF 2023

JM CHIGITI, J

JULY 14, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE DATA PROTECTION COMMISSIONER ..... RESPONDENT

AND

EAGLEAGE LIMITED T/A OPPO AED KENYA ..... EXPARTE

RULING

1. By way of a Chamber Summons brought under Sections 8 of the *Law Reform Act* Cap, Section 3A of the *Civil Procedure Act* and Order 53 Rule 1 and2 of the *Civil Procedure Rule*,2010 and dated 20.01.2023, the ex parte Applicant moved this court seeking for the following orders; -

    1. Spent.

    2. That this Honourable court be pleased to grant leave to the ex parte Applicant to apply for an order of certiorari to remove into this Honorable Court and quash the decision of the Data Protection Commissioner imposing a penalty of Kshs 5, 000, 000/- on the exparte Applicant.

    3. That the leave issued in prayer 2 above do operate as stay of the penalty order imposed by the Respondent on the 20th day of December 2022 in respect to exparte Applicant pending the hearing and determination of the substantive Notice of Motion applying for the Judicial Review orders in the nature of Certiorari.

    4. That costs of this Application be provided for.

2. The Application was supported by a Statutory Statement and a Verifying Affidavit sworn by Charity Njue, and both dated 20th January 2023.

3. The Applicants case is that Leave to apply for an order of Certiorari is a mandatory legal precondition to the making of the Substantive Application for an Order of Certiorari.

4. The Applicant states that on the 3rd November 2022 the Respondent issued an enforcement notice on the-Ex parte Applicant which notice was complied with fully.

5. That the Respondent did not contact the Ex parte Applicant after the issuance of the enforcement notice and did not follow up to inspect compliance or even seek information on the level of compliance if at

6. The Applicant avers that on that 20th day of December 2022, the Respondent without notice, hearing or any known form of engagement arbitrarily imposed a penalty of Kshs 5,000,000/- on the ex-parte Applicant which is the maximum penalty allowed in law without following the laid guidelines in the Act.

7. The Applicant contends that the decision of the Respondent was tainted with procedural impropriety, prejudice, unfairness and was ultra vires as the appropriate action had been taken to comply with its demands dated 7th day of September 2022 and the enforcement notice dated 3rd November 2022.

8. That the decision of the Respondent to penalize the Ex parte Applicant is therefore manifestly illegal, unlawful, improper and irregular as no inspection, investigations and or hearing were not carried out in accordance with the Act.

9. The accusations or charges leading to the decision were not communicated to the Ex parte Applicant in a clear and concise manner.

10. The Applicant further asserted that it was not given an opportunity to be heard on the alleged charge and in mitigation as well and therefore the decision was arbitrary and against the tenets of natural justice.

11. That on the 7th day of September 2022, the Applicant received a notification of a complaint filed against the Ex parte Applicant from the Respondent. Annexed and marked CN-2.

12. Upon examining the said complaint, the Applicant in the process of gathering their records, received a reminder dated 27th day of September 2022. Annexed and marked CN-3.

13. Further on the 18th day of October 2022, the Applicant wrote to the Respondent indicating that it had not in any way breached the law as claimed. Annexed and marked CN-5.

14. The Respondent upon receipt of the above responses deemed them unsatisfactory and proceeded to issue an enforcement notice and further demands without specifying how the reply the Applicant gave was not sufficient vide its letter dated 3rd November 2022. Annexed and marked CN-6.

15. That upon receipt of the notice dated 3rd November 2022, the Applicant complied fully and also prepared a data protection policy. Annexed and marked CN-7.

16. That while in process and without notice, hearing or communication received a penalty notice dated 21st December 2022 penalizing it. Annexed and marked CN-8.

17. The Ex parte Applicant contends that it was not given a chance to be heard or in any way informed the manner in which the Respondent expected compliance with the notice.

18. The Respondent failed and or neglected to give the Ex parte Applicant a structured, systematic and clear methods to demonstrate compliance.

19. The Ex parte applicant stated that having complied with the enforcement order, the Respondent failed neglected and or refused to engage the applicant by way of inspection, hearing, and or request for submission of written document before proceeding to impose the penalty.

20. The Applicant avers that the Respondent imposed the maximum penalty allowed in law without following the criteria well set out in the act.

21. Further, the Respondent failed and or neglected to invite the Applicant for hearing before making a determination as to the quantum of penalty.

22. That the decision of the Respondent lacked any reason, basis, was illegal and irregular-as it was imposed after the Exparte applicant had fully complied with the enforcement notice.

23. The Applicant filed written submissions dated 21st March 2023.

24. The Applicant submitted that the Respondent commenced the alleged proceedings alter receiving a complaint against the Ex-parte Applicant alleging that the complainants image was used by the Ex-parte Applicant in its Instagram page (see Annexure CN2)

25. From the Complaint enclosed, the complainant was Andrew Obwangi. There was some correspondence relating to the matter and by letter annexed as CN 5, the Exparte Applicant stated that it did not share the image of the complainant it its public social media as alleged or at all.

26. The complaint having been addressed in full, the Ex-parte Applicant expected the matter to rest there. Instead the Respondent went ahead to mutate the complaint into other matters not covered by the initial complaint.

27. The Respondent in determining whether to give a penalty notice to a person and determining the amount of the penalty, the Respondent is required to observe the statutory provisions of section 62 of the Act. The Ex-parte Applicant submitted that the Respondent ignored these provisions of the Act without lawful justification.

28. The Respondent is further enjoined by Section 63 to determine the appropriate penalty in accordance with the provisions of that section. The imposition of a maximum penalty is therefore arbitrary and punitive and made without following the due process.

29. The Applicant cited the case of Hon. Lady Justice P. Nyamweya in *Republic v Director of Immigration & 2 others Ex-parte Zarko Knezevic* (2021) eKLR and *Republic v National Transport & Safety Authority and 10 others* (2014) KLR on the threshold to be met when a party wishes to bring an application for judicial review.

30. On whether leave shall operate as a stay is a matter for the discretion of the court. The applicant needs to demonstrate the grievance caused by the Respondent and that the stay is necessary to preserve the status quo to ensure that the proceedings before the court are not rendered nugatory.

31. Order 53 Rule 1(4) of the *Civil Procedure Rule* states as follows:- "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."

32. There no procedure specified in the Act or the regulation to provide how the Respondent will proceed to execute the penalty order. In fact the Respondent in the last line in the penalty notice dated 20th December 2023 States "Failure to comply will lead to enforcement measures being taken to recover the penalty". The Respondent has not spelt out in the Act or the Regulations what are these enforcement measures.

33. The Applicant submitted that any statutory enforcement must be clear and precisely specified so as to check any excesses of the enforcement agency. Leaving it open is a recipe for anarchy and the Court should protect the parties subject to and affected by such enactment.

34. The Applicant concluded by stating that the imposition of the penalty was in contravention of the law and did not follow the due process and the execution mode was not specified, therefore adversely affecting the Ex-parte Applicant.

Respondents' Case

35. In response, the Respondents opposed the Application. The Respondent filed their Replying Affidavit dated 6th February 2023 and sworn by Oscar Otieno and written submissions dated 24th April 2023.

36. The Respondent averred that the Applicant is seeking leave to apply for judicial review against the Respondent's having not engaged the Respondent's dispute resolution mechanisms.

37. The Applicant has also not explained why it did not exercise its right to appeal/review of the Enforcement Notice which eventually led to the impugned Penalty Notice, even after being duly informed of such right

38. This Application is therefore vexatious, misconceived and an abuse of this Honourable Court's process. As such, the same should be struck out with costs to the Respondent (annexed as "O0- 1" is a copy of the Enforcement Notice dated 3 November 2022).

39. The application for leave to file for judicial review and the intended substantive application are based on facts which are misleading. The correct facts are as follows.

40. On or around 29th July 2022, the Respondent received a Complaint from one Andrew Obwangi in which he alleged that the Applicant had used his photo sometime around October 2021 without his consent.

41. The Respondent duly notified the Applicant of this Complaint and requested for more information, clearly outlined in the letter, within 14 days for its consideration. This letter was received by the Applicant in its offices on 9 September 2022 (annexed as "O0- 2" is a copy of the Notification Letter dated 7th September 2022).

42. The Applicant did not respond to this notification within the given 14 days. Nonetheless, the Respondent in good faith sent a reminder to the Applicant in a bid to avail to it a fair opportunity to be heard, and for a speedyresolution of the Complaint (annexed as "O0- 3" is a copy of the reminder letter dated 27th September 2022).

43. The Applicant responded by a letter dated 7th October 2023. Rather than provide the information requested for, the Applicant instead informed the Respondent that while it had engaged the Applicant who had since disappeared, it was of the view that the Complainant ought to contact its human resource department for a sit down, a proposition contrary to the Respondent's complaint handling procedures (annexed as "O0- 4" is a copy of the Applicant's letter to the Respondent dated 7th October 2022).

44. The Applicant also followed up with another letter dated 18t October 2022 in which it denied the allegations in the Complaint and advised both the Respondent and the Complainant to withdraw the matter. Once again, the Applicant did not provide the information requested for in the Respondent's Notification Letter of 7th September 2022 (annexed as "O0- 5" is a copy of the Applicant's letter dated 18th October 2022).

45. The Respondent, in line with its mandate was therefore constrained to issue the Enforcement Notice dated 3rd November 2022.

46. In this Notice, the Respondent informed the Applicant: the background of the matter; the Respondent's regulatory mandate; the provisions of the law that the Applicant was in violation of; the measures to be taken by the Applicant to remedy, mitigate or eliminate the contravention; the period within which to implement these measures; an explanation that the Applicant had a right to appeal; and the consequences of non-compliance with the Enforcement Notice. This was received by the Applicant on 4th November 2022 (annexed as "OO- 1" is a copy of the Enforcement Notice dated 3rd November 2022).

47. Despite the Applicant being informed of the consequence of noncompliance with the Enforcement Notice, the Applicant did not appeal or request for a review and altogether failed to comply.

48. Consequently, the Respondent issued a Penalty Notice against the Applicant on 20th December 2022. Once again, the Respondent explained to the Applicant: the default resulting in the penalty; what the penalty consisted of; the provisions of law further to which it was issued; the period within which the Applicant ought to comply with the Notice; the payment details; and its right of appeal. This Notice was received by the Applicant on 21st December 2022 (annexed as "O0O- 6" is a copy of the Penalty Notice dated 20th December 2022).

49. On 12th January 2023 the Applicant wrote to the Respondent contrary to the assertions in its letter dated 18th October 2022, the Applicant admitted to having handled the Complainant's data. It is also detailed measures and interventions that it had taken in compliance with the Enforcement Notice, which was outside the statutory timelines. The Applicant in addition requested for a waiver/review of the imposed penalty (annexed as "O0- 7" is a copy of the letter requesting for a waiver/review of the penalty dated 12th January 2023).

50. The Respondent responded to the Applicant and informed that it would respond within 14 days. This time would have lapsed on 2nd February 2023 (annexed as "O0- 8" is the Respondent's Acknowledgment Letter dated 20th January 2023).

51. The Applicant's request for waiver/review is therefore currently under consideration by the Data Commissioner and the Applicant is fully aware of this. Nonetheless, the Applicant chose to file this Application. This is not only an abuse of the court process, the application is also premature as the Applicant is well aware that a final decision on its request is yet to be communicated by the Respondent.

52. The Respondent contends that it handled the matter following a fair and just process as required by the law including the *Data Protection Act, 2019* and the *Data Protection (Complaints Handling Procedure and Enforcement) Regulations*, 2021.

53. Section 64 of the *Data Protection Act, 2019* provides for an appeal as the mechanism by which the Respondent's administrative decisions may be challenged.

54. It is also in the interest of justice that the application for leave to file a judicial review application dismissed to allow the Respondent to consider the formal request for waiver/review from the

Applicant, and to have the Applicant exhaust the mechanism under the *Data Protection Act, 2019* and to co-operate and comply with the statutory directions given by the Data Commissioner.

55. The Respondent submitted that this Honourable Court has held that where there exists clear legal provisions and procedure by way of review, setting aside or appeal for an aggrieved party, the matter is outside the purview of judicial review and leave would not be available to such a party (see the holding in *Republic v Chief Magistrate Milimani Commercial Courts & 2 others ex parte Fredrick Bett* [2022] eKLR).

56. The Applicant alleges that the Penalty Notice was issued without following due process but fails to sufficiently establish which procedure as stipulated by the *Act* was not duly followed or ignored.

57. Section 9 of the *Act* vests power in the Respondent to impose administrative fines for failures to comply with the Act and authorizes the Respondent to undertake any activity necessary for the fulfilment of the functions of the Office.

58. In exercising this mandate, the Respondent procedurally issued the Applicant with; a Notification of Complaint in which it was afforded an opportunity to respond, an Enforcement Notice in which it was given a chance to remedy the breach and a Penalty Notice which it had a chance to appeal. All avenues of which were not taken by the Applicant.

59. The Applicant, in alleging illegality of the Penalty Notice, invokes section 62 of the *Act* arguing that in determining whether to give a Penalty Notice the Respondent ought to have been guided by the section - a provision which the Applicant claims was ignored.

60. Our response to this is twofold; first, that the conditions set out in section 62 are not blindly applied but ought to be considered depending on applicability to the situation and second, that section 62 provides that the Respondent is to consider *inter alia*; the extent to which the data controller or data processor has complied with previous enforcement notices and the degree of co-operation with the Data Commissioner, in order to remedy the failure and mitigate the possible adverse effects of the failure.

61. The Applicant was given an opportunity to rectify the breach which it disregarded with impunity. The Applicant failed to comply with the Enforcement Notice issued within the stipulated timeframe - an action that prompted the Respondent, guided by section 62, to issue a Penalty Notice. At all times, equity calls to those seeking its aid to come before it with clean hands.

62. As such, given that the Penalty Notice was issued in response of the Applicant's own default and inaction, it is estopped from seeking the orders of judicial review.

63. It is only upon receipt of the Penalty Notice that the Applicant wrote a letter of waiver/review to the Respondent. In that letter, the Applicant admitted to violating the Complainant's rights and outlined the mitigating steps taken since, in compliance with the Enforcement Notice - all of which the Respondent had agreed to consider before the Applicant prematurely instituted this Application.

64. The Respondent submitted that by failing to demonstrate an illegality in procedure, the Applicant attempted to couch an appeal of the decision in these Judicial Review proceedings, a classic case of an abuse of court process. Urging the court to be guided by the case of *Republic v County Council of Kwale & another Ex Parte Kondo & 57 others*, Mombasa HCMCA No. 384 of 1996 that: "The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless."

65. On whether such leave, if granted, should operate as stay, the Respondent's response is twofold. Firstly, that where a final decision on the waiver sought is yet to be issued by the Respondent, then such orders

of stay would be premature. For this, the Court be guided by *Republic v Clerk of the National Assembly & another ex parte Bernard Njiiru Njiraini; Cabinet Secretary, Ministry of Industrialization, Trade & Enterprise Development & 4 others (Interested Parties)* [2021] where the Court held that where a final decision is yet to be made, an order of stay would be premature.

66. Secondly, the court be persuaded by the case of *Republic v National Transport & Safety Authority & 10 others* [2014] eKLR where the court held that: "The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise, the Court will be reluctant to suspend the operation of a law."

67. In a bid to ensure the enforcement of the *Act* and the protection of data subjects, section 9 as read with section 62 of the *Act* grants the Respondent the power to administer fines to ensure compliance with the *Act*.

68. On its own admission, the Applicant acknowledges being in violation of the law and of the rights of the Complainant. Therefore, to stop the implementation of the law regarding enforcement of fines, the Applicant needed to demonstrate that such implementation will occasion it irreparable harm. It has not, save for stating that its application will be rendered nugatory.

69. Sections 9(2) and (3) of the *Fair Administrative Actions Act*, 2015 requires a party to exhaust internal mechanisms for appeal or review and all remedies available before seeking judicial review orders.

70. The Applicant had an opportunity to review and appeal the Notices issued but failed to exercise this right when availed. Furthermore, upon receipt of the Penalty Notice, the Applicant responded to the Respondent seeking a waiver. A decision which the Respondent was yet to issue at the time that the Applicant instituted judicial review proceedings.

71. The Applicant has not demonstrated any justifiable reasons for filing judicial review proceedings after having taken steps to seek waiver from the Respondent. As such, the Application was premature and offends the doctrine of exhaustion of internal remedies.

72. Where there exists a remedy alternative to judicial review, which is equally convenient, beneficial and effective, the Court must consider this when deciding whether or not to grant judicial review orders. Section 64 of the *Act* provides for a right of appeal to the High Court, a right acknowledged by the Applicant.

Analysis &Determination

73. I have considered the Application filed before this court and the affidavit in support and the parties arguments. There are two issues for determination herein. The first, is whether the leave sought to commence judicial review proceedings in the Chamber Summons dated 20th January 2023 should be granted, and if so, whether it should operate as stay of the decisions of the orders issued by the Respondent.

74. 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.

75. The reasons for leave were explained by Waki J. (as he then was) in *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 and the dictum in that decision is that, leave is meant to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless; to ensure that the applicant is only allowed to proceed to

substantive hearing if the court is satisfied that there is a case fit for further consideration; to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error; and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

76. It is also trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave.

77. In the present application, the Applicant avers that the decision of the Respondent to penalize the Ex parte Applicant is illegal, unlawful, improper and irregular as no inspection, investigations and or hearing were not carried out in accordance with the Act.

78. The ex-parte Applicant herein seeks leave for orders of certiorari to remove into this court and quash the decision of the Data Protection Commissioner imposing a penalty of Kshs 5, 000, 000/- on the exparte Applicant.

79. It is notable that the Applicant did not disclose that it had sought a waiver of the penalty by a letter annexed as "O0- 7" requesting for a waiver/review of the penalty dated 12th January 2023 on its own admission, the Applicant acknowledges being in violation of the law and of the rights of the Complainant. .

80. The Applicant admitted to having handled the Complainant's data. It is also detailed measures and interventions that it had taken in compliance with the Enforcement Notice, which was outside the statutory timelines. The Applicant in addition requested for a waiver/review of the imposed penalty (annexed as "O0- 7" is a copy of the letter requesting for a waiver/review of the penalty dated 12th January 2023).

81. The Respondent responded to the Applicant and informed that it would respond within 14 days. This time would have lapsed on 2nd February 2023 (annexed as "O0- 8" is the Respondent's Acknowledgment Letter dated 20th January 2023).

82. The respondent submits that the Applicant's request for waiver/review currently under consideration by the Data Commissioner and the Applicant is fully aware of this as result of which the application premature given that a final decision on its request is yet to be communicated by the Respondent within the *Data Protection Act, 2019* and the *Data Protection (Complaints Handling Procedure and Enforcement) Regulations*, 2021 and the Applicant has not exhausted all the mechanism under the *Data Protection Act, 2019* and to co-operate and comply with the statutory directions given by the Data Commissioner.

83. The Respondent submitted that this Honourable Court has held that where there exists clear legal provisions and procedure by way of review, setting aside or appeal for an aggrieved party, the matter is outside the purview of judicial review and leave would not be available to such a party (see the holding in *Republic v Chief Magistrate Milimani Commercial Courts & 2 others ex parte Fredrick Bett* [2022] eKLR).

84. Section 9 of the *Fair Administrative Action Act*, 2015 provides for the procedure for judicial review as follows:-

    (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or

to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

85. Section 9 (3) provides that the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

86. Section 9 (4) stipulates that, notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

87. In *Jeremiah Memba Ocharo v Evangeline Njoka & 3 others* [2022] eKLR the Court dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *Republic v Independent Electoral and Boundaries Commission [IEBC] Ex Parte National Super Alliance (NASA) Kenya & 6 others* [2017] after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the

party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

88. The Applicant did not make any Application seeking any exemption orders from exhausting all other remedies. As at the time of determining the issues before me, the only Application that the Applicant has placed before me is the one dated 20th January 2023 wherein the Applicant does not seek the courts leave- to be exempted from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

89. The court has not been invited to apply its mind to any application to exempt the Applicant from the Application of Section 7 of The *Fair Administrative Action Act*. The Applicant did not even attempt to advance an oral application nor seek the leave of the court to allow him to amend the Application so as include a relief for leave.

90. The court can only grant orders that have been sought by litigants. The decision to grant or not to grant a party leave to be exempted from the obligation to exhaust the available alternative dispute resolution mechanisms before approaching this court rests with the court under The *Fair Administrative Action Act* can only be arrived at after a court has been moved appropriately.

91. The Applicant must furnish the court with reasons as to why they are seeking to be exempted before the court grants such leave for obvious reasons. In order to exercise discretion judiciously, the court must be satisfied that the Applicant has made out a compelling case.

92. I have no reason to doubt the Respondent's submissions that the Applicant's request for waiver/ review is currently under consideration by the Data Commissioner and the Applicant is fully aware of this as result of which the application premature given that a final decision on its request is yet to be communicated by the Respondent within the *Data Protection Act, 2019* and the *Data Protection (Complaints Handling Procedure and Enforcement) Regulations*, 2021 and the Applicant has not exhausted all the mechanism under the *Data Protection Act, 2019*

93. It is my finding that the Applicant did not make any application for exemption from Section 9 of The *FAAA* neither has the Applicant furnished the court with an order granting him the exemption.

94. It is this court's finding that this is not a matter that is amenable to judicial review where the issue revolves around the quantum of costs fined, such would fall outside the purview of judicial review.

Disposition:

95. The upshot is that this suit offends the doctrine of exhaustion and the application dated 20th January, 2023 is premature.

96. To grant the orders as prayed will render the Respondent moribund which I hereby decline to do so as to promote Article 159 of the *Constitution* as we promote alternative dispute resolution mechanisms in Kenya.

Order:

The application dated 20th January 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

.....

JOHN CHIGITI (SC)

JUDGE