



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 347 OF 2018

PATRICK MACHARIA NDERITU.....APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE DCIO CENTRAL POLICE STATION.....3RD RESPONDENT

AND

DOVEY PHARMA LIMITED.....INTERESTED PARTY

RULING

The Parties

1. The applicant, Patrick Nderitu Macharia is a businessman residing and working in Nairobi.
2. The first Respondent is the Director of Public Prosecutions (herein after referred to as the DPP), established under Article **157(1)** of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.^[1]
3. The second Respondent is the Directorate of Criminal Investigations established pursuant to section 28 of the National Police Service Act^[2] under the direction, command and control of the Inspector-General. Pursuant to section 29(8) of the act, the Director of Criminal Investigations in the performance of the functions and duties of office, is responsible to the Inspector-General. Under section 29 (9) of the act, the Director of Criminal Investigations is— (a) the chief executive officer of the Directorate; (b) responsible for— (i) implementing the decisions of the Inspector-General in respect of the Directorate; (ii) efficient administration of the Directorate; (iii) the day-to-day administration and management of the affairs of the Directorate; and (iv) the performance of such other duties as may be assigned by the Inspector General, the Commission, or as may be prescribed by this Act, or any other written law.
4. The third Respondent is the DCIO, Central Police Station.
5. The Interested Party Dove Pharma Limited is a limited liability company incorporated in Kenya under the Companies Act.^[3]

The prayers sought

6. By an application dated 15th August 2018 the applicant seeks leave to apply for:-

a. An order of Certiorari to remove into this honourable court the proceedings in the DCIO Central Police Division's offices for the purposes of being quashed and to quash the charge sheet therein.

b. Leave to apply for conservatory orders restraining/stopping the Respondents from presenting a charge sheet against him or any other director of the company and or charging him or any other director of the company before the Chief Magistrates at Milimani Law Courts or any other Magistrate elsewhere pending the hearing and determination of this application.

c. Leave to apply for an order of prohibition directed at the respondents prohibiting them from presenting or filing a criminal charge sheet and or prosecuting him or any other director of the company at Milimani Law Courts Chief Magistrates Court, or any other court or to bring any charges against the applicant or any other director of the company arising from the same transaction pending the hearing and determination of the substantive notice of motion to be filed upon leave being granted.

d. **That** the grant of leave herein do operate as a stay and or as a conservatory order precluding the respondents from presenting the intended charge sheet against the applicant or any other director of the company before Milimani Law Courts Chief Magistrates Court or elsewhere until the hearing and determination of the judicial review.

e. Costs of this application be provided for.

Grounds relied upon

7. The applicant a director of *Pimp My Ride East Africa Ltd* states that the said company is a tenant at the premises on L.R. No. 209/908 and LR No. 209/918 along Kenyatta Avenue, Nairobi, and, it has a written authority from its landlord to sub-lease the said properties.

8. The applicant states that sometimes on 23rd May 2018, the company offered to sub-lease office space to the interested party on L.R. No. 209/918 for a period of 5 years and 2 months to which the Interested Party agreed and paid by RTGS to the applicants account Ksh. 5,600,000/=, being goodwill of Ksh. 5,000,000/=, rent deposit of Ksh.300, 000/= and security deposit of Ksh. 300,000/=).

9. The applicant states that he undertook the necessary repairs but the interested party declined to pay the advocates charges for preparing the lease, and, after sometime it demanded to be given the signed agreement within 24 hours in default it would rescind the agreement. The applicant states that he tried to arrange a meeting to process a refund, but the interested party opted out of the deal.

10. The applicant also states that he was arrested on 20th July 2018 following a complaint by the interested party of obtaining money by false pretences and his explanation that the issue was a contractual dispute and that the company's directors had to meet to decide the amount due and costs incurred in renovating the premises were ignored.

11. The applicant states that to avoid the charges and confinement at the police station, he out of duress issued 7 post-dated company cheques to secure his release. He further states that the said cheques were drawn on a company account which had two signatories, and his explanation that the account did not have sufficient funds and that it had two signatories and that he was not authorized to issue the cheques fell on deaf ears.

12. He states that upon issuing the said cheques he was released on a free bond and he informed the Interested Party in writing that the post-dated cheques cannot be honoured with one signature, and, that, he should not present the cheques, but, despite being so advised, the Interested Party presented some of the cheques for payment and they were unpaid for lack of a the second signature.

First Respondent's Replying Affidavit

13. PC Ephantus Kandugu, an investigator at the Kenya Police Service Central Police Station swore the Replying Affidavit dated 17th September 2018. He deposed that he was investigating a case of obtaining money by false pretences contrary to section 313 of the Penal Code.[\[4\]](#)

14. He averred that on 29th day of April 2014, the complainant paid Ksh. 5,600,000/=, comprising of Ksh. 5,000,000/= goodwill, Ksh. 300,000/=three month's rent deposit and Ksh. 300,000/=three months' rent in advance. He averred that the applicant purported to be the landlord to the premises through his advocate, and that after effecting the said payments, the applicant became evasive and failed to execute a formal lease. He averred that the complainant through his advocate severally endeavoured to engage the applicant with a view to recovering the money, but the complainant later learnt that the premises belonged to the family of the late Magugu and that the applicant had no authority to lease the premises.

15. He deposed that he summoned the applicant to Central Police Station but he instead reported to DCIO Central, a Mr. Kobina Cheserem who advised the parties to solve the issue amicably and later on 12th August 2018, he informed the investigating officer that he had been issued with cheques totalling to Ksh. 5,600,000/=, but on 20th August 2018 the complainant informed him that the said cheques had been dishonoured. He also stated that there was no proof of post-dated cheques as alleged. He further averred that the applicant has failed to demonstrate that the second respondent acted in excess of jurisdiction.

The Interested Party's Replying Affidavit

16. Harun Muiruri Ndungu, a director of the Interested Party swore the Replying affidavit dated 11th October 2018. He averred that on 23rd May 2018, the applicant through the firm of Mariaria & co advocates issued the Interested Party with a letter of offer for L.R. No. 209/918, Nairobi formerly known as Simmers Restaurant posing as the landlord's advocates. He deposed that in the said letter, Pimp my Ride East Africa represented by the applicant herein as its director posed as the landlord in respect of the suit premises which they had no right or authority as it was only intended to be used as a parking and car wash with no permanent structure.

17. He averred that upon receipt of the letter of offer they transferred Ksh. 5,600,000/= by way of RTGS and not by way of cheques as claimed by the applicant. He deposed that they later learnt that the applicant was not the owner of the premises, hence, they opted out of the transaction vide a letter dated 2nd July 2018.

18. Mr. Ndungu deposed that on 12th July 2018 vide his advocates letter, the applicant agreed to refund the total sum paid, and, he issued various cheques totalling to Ksh. 5,600,000/= which were dishonoured upon presentation for lack of funds. He averred that despite request to furnish the Interested Party with a copy of official search for the title or a letter of authority from the registered proprietors, the applicant never responded.

19. He also deposed that issuance of bad cheques is a violation of section 316A as read with section 23 of the Penal Code [5] and, that, he lodged a complaint with the second Respondent. He further averred that judicial review cannot be used to curtail or stop statutory bodies from performing their duties.

The Interested Party's grounds of objection

20. The Interested Party filed grounds of opposition dated 11th October 2018. He states that the application is an abuse of court process, has no merits, and is aimed at evading justice, it obstructs the course of justice, and, that the applicant has no immunity to prosecution. It also states that the first Respondent is independent and this court should not interfere with its functions, and that the application is based on misapprehension.

The Interested Party's further affidavit

21. Mr. Harun Muiruri Ndungu swore the further affidavit dated 13th March 2019. He averred that the applicant had filed a similar application being JR 326 of 2018 *Patrick Macharia Nderitu v DPP* which was dismissed on 18th September 2018, hence, this application is an abuse of court process.

The applicant's advocates' submissions

22. Mr. Mariaria, the applicant's counsel highlighted his written submissions filed on 19th November 2018. My reading of the written submissions and his oral submissions leaves me with no doubt that the submissions largely address the yet to be filed substantive application as opposed to the narrow question of the tests for granting leave in judicial review applications, which is the issue before the court.

23. The highlights of Mr. Mariaria's submissions were that all the cheques issued to the Interested Party were post-dated, that they were issued under duress, that the bank accounts upon which they were drawn required two signatories, that the Interested Party was advised not to bank the cheques and that the Interested Party declined to return the post-dated cheques and collect good cheques executed by all the signatories. He argued that there is a lease agreement, but the Interested Party refused to pay legal fees for the agreement. He submitted that the dispute is civil in nature.

The Respondents' advocates' submissions

24. Mr. Makori, the Respondents' counsel opposed the grant of leave. He relied on the Replying affidavit filed on 25th March 2019 and argued that there is no basis to grant the leave sought.

The Interested Party's Advocate's submissions

25. Mr. Mwangi, counsel for the Interested Party submitted that the applicant has misrepresented facts. He submitted that in a bid to delay justice, the applicant filed a similar suit being JR No. 326 of 2018 which was dismissed for want of prosecution. He submitted that the application is not merited and urged the court to decline the leave sought.

The applicant's counsels advocates submissions in reply

26. Mr. Mariaria argued that JR No. 326 was not dismissed, but was withdrawn.

Determination

27. I find that two issues falls for determination. One, whether this suit is an abuse of court process. Two, whether the leave sought should be granted.

28. I will first address the question of abuse of court process. On 7th August 2019, the applicant herein filed a totally identical application against the Respondents being judicial review application number 326 of 2018 seeking similar orders as in the instant application. The said application is premised on similar facts, similar grounds, similar averments and similar exhibits. JR No. 326 of 2018 was placed before the duty judge the same day it was filed and the judge directed that service be effected and scheduled the matter for mention for directions on 18th September 2018.

29. On 15th August 2018, the applicant filed the instant application which is essentially a replica of JR No. 326 of 2018 seeking similar orders. The matter was placed before me *ex parte* state on 16th August 2018 and I directed that service be effected and that the question whether the leave sought shall be granted be determined *inter partes*. I fixed the matter for mention on 18th September 2018, coincidentally, the same day JR No. 326 of 2018 had been scheduled for mention.

30. On 18th September 2018, the two matters were listed before Nyamweya J. The applicant's counsel did not attend JR No 326 of 2018. The learned judge noted that the applicant had filed another suit being the instant application and struck off JR No. 326 of 2018 with costs.

31. Curiously, even though the two matters were before the same judge on the same day, when JR No. 326 of 2018 was called (as stated above), there was no appearance for the applicant. However, when JR No. 347 of 2018 (the instant application) was called, Mr. Mariaria was present for the applicant. Despite my directions at the *ex parte* stage, the instant application had not been served as directed, hence, the court directed that the Respondents and the Interested Party be served and gave directions for filing responses and scheduled the matter before me on 24th October 2018.

32. In the meantime the Interested Party filed its bill of costs in JR No. 326 of 2019, and the parties appeared before the Deputy Registrar for taxation. However, the applicant filed an application seeking to set aside the order dismissing the said suit on grounds that by the time the suit was dismissed he had filed a Notice of Withdrawal. After several attendances JR No. 326 of 2018 was by consent marked as settled with no order as to costs on 5th November 2019.

33. The question before me is whether the institution of two identical suits premised on the same set of facts and circumstances constitute abuse of court process. The applicant filed the instant application on 15th August 2018. The application is premised on the same grounds as JR No. 326 of 2018. In the instant suit, the applicant did not mention that he had file a similar suit.

34. It is settled law that a person who approaches the court or a tribunal for grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose at the earliest opportunity possible all the material/important facts/documents which have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court or the tribunal to bring out all the facts and refrain from concealing/suppressing any material facts within his knowledge or which he could have known by exercising diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person. This position was well captured in one of the earliest decisions on the subject rendered in 1917 in *R. v. Kensington Income Tax Commissioner*.^[6]

35. A party is under a duty to disclose to the court or tribunal all relevant information even if it is not to his or her advantage. ^[7]The applicant was under a solemn duty to bring to the attention of the court the existence of the first suit at the earliest opportunity possible and leave it to the court to determine the merits or otherwise of its case. This is even more crucial considering that the two suits are premised on similar facts and they seek similar reliefs. In fact, had the court in the first application granted the orders sought, the instant application would not have been instituted?

36. The duty of a litigant is to make a full and fair disclosure of the material facts. The material facts are those which it is material for the court or tribunal to know in dealing with the issues before the court or tribunal. The duty of disclosure therefore applies not only to material facts known to the applicant, but also to any additional facts which it would have known if it had made inquiries.

37. The question that inevitably follows is whether the non-disclosure in this case was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived. In my view, the non-disclosure in this case cannot be said to be innocent bearing in mind the similarity between the two suits. The disclosure could have cleared the perception that the second suit was filed to achieve what the first application did not achieve.

38. I have in numerous decisions of this court^[8] observed that the court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black's law dictionary defines abuse as "Everything which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use."^[9]

39. The situations that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.^[10]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. [11]

40. Abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process. [12] As stated earlier, had the applicant obtained the orders sought in the first application, the second application would not have been necessary, hence, the possibility that the applicant was attempting to obtain from the court the same orders he could not obtain in the first application.

41. It's settled law that a litigant has no right to pursue *paripasu* two processes which will have the same effect in two courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this court I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. In my humble view, the two processes are in law not available simultaneously, consecutively or concurrently. The pursuit of the two processes concurrently or simultaneously constitutes and amounts to abuse of court/legal process." [13]

42. Thus, the multiplicity of actions on the same matter between the same parties even where there exist a right to bring the action is regarded as an abuse. [14] The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice. [15] By the time the alleged notice of withdrawal was filed or reached the court file, the suit had been struck off. In any event, the purported withdrawal does not help at all because the question before me is whether the applicant had filed a similar suit before instituting the instant application and whether he disclosed the previous suit in his pleadings.

43. On the face of the foregoing facts, I find no difficulty in concluding that it was absolutely necessary for the applicant to disclose to the court the existence of the first suit and leave the rest to the court. Even where a party brings a case to the court and is aware of the existence of similar or previous litigation, the party has a duty to bring such information to the court. This will help the court to avoid rendering conflicting decisions on the same subject. It is my conclusion that the instant application is an abuse of court process. It was a mischievous attempt to obtain the same orders the applicant could not get in the earlier application. The practice of advocates filing multiple suits especially where they do not obtain *ex parte* orders in the first suit has become rampant. Such practice must be brought an end. This court has inherent powers and a sacrosanct duty to prevent its processes from being abused. This is a proper case for the court to flex its muscle and not only denounce such practice, but also to restate that it cannot condone abuse of its processes. The only order that comments itself in the circumstances of this case is to not only denounce the said conduct, but to dismiss the offending proceeding, as I hereby do. This application is hereby dismissed for being an abuse of court process.

44. Notwithstanding my finding herein above, I proceed to examine the question of the leave sought. Closely tied to this issue is the question whether under the 2010 Constitution, leave to commence Judicial Review proceedings is a prerequisite.

45. The importance of obtaining leave in a Judicial Review application was eloquently stated in *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others* [16] as follows:-

"is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed 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.." (Emphasis added)

46. In *Meixner & Another v s A.G.* [17] it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory **"leave stage."** At this stage an application for leave to bring Judicial Review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims that may be *trivial* or without *merit*. **Leave** to institute **judicial review proceedings** had the **purpose** of eliminating frivolous, vexatious or hopeless claims and ensuring that a substantive hearing was only possible where there was a case for further consideration.

47. A frivolous suit is one without any legal merit. In some cases, such an action might be brought in bad faith for the purpose of harassing the defendant. [18] A **frivolous** claim or complaint is one that has no serious purpose or value. Often a "frivolous" claim is one about a matter so trivial or one so meritless on its face that investigation would be disproportionate in terms of time and cost. The implication is that the claim has not been brought in good faith because it is obvious that it has no reasonable prospect of success and/or it is not a reasonable thing to spend time complaining about. A case is frivolous if it has no reasonable chance of succeeding, and is vexatious if it would bring hardship on the opposite party to defend something, which cannot succeed. [19] Frivolous, in general, means lacking in substance. In a legal context, frivolous claims are those which have no basis in fact or for which the law provides no remedy. A frivolous appeal of a lawsuit is one clearly lacking any merit.

48. A **vexatious** claim or complaint is one (or a series of many) that is specifically being pursued to simply harass, annoy or cause financial cost to their recipient. [20] **Vexatious litigation** is legal action, which is brought solely to **harass** or subdue an **adversary**. It may take the form of a primary **frivolous lawsuit** or may be the repetitive, burdensome, and unwarranted filing of meritless motions in a matter, which is otherwise a meritorious **cause of action**. Filing vexatious litigation is considered an abuse of the **judicial process** and may result in **sanctions** against the offender. A single action, even a frivolous one, is usually not enough to raise a litigant to the level of being declared vexatious. Rather, a pattern of frivolous legal actions is typically required to rise to the level of vexatious.

49. At the leave stage an applicant must show that:- **(i) 'sufficient interest'** [21] in the matter otherwise known as *locus standi*; **(ii)** that he/she is affected in some way by the decision being challenged; **(iii)** that he/she has an arguable case and that the case has a reasonable chance of

success; **(iv)** the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; **(iv)** the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.

50. At the leave stage, the applicant has the burden of demonstrating that the decision is *illegal, unfair and irrational*. The applicant must persuade the Court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the Judicial Review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further.

51. The above decisions and the jurisprudence on the question of grant of leave represents the correct legal position. However, the above jurisprudence dates before the promulgation of the 2010 Constitution. Order 53 of the Civil Procedure Rules, 2010, is borrowed from Sections 8 and 9 of the Law Reform Act.^[22] The said provisions are premised on the common law Jurisdiction governing Judicial Review remedies and procedure for applying for Judicial Review orders. The Constitution of Kenya 2010 came with certain guarantees for the people of Kenya.

52. Prior to the promulgation of the Constitution of Kenya, 2010, there was a two tier legal basis for judicial review jurisdiction of the Kenyan courts. The two critical references in search for answers to this question were Sections 8 and 9 of the Law Reform Act^[23] which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules, 2010 which was the procedural basis of judicial review of administrative actions on the other hand. The promulgation of the Constitution of Kenya, 2010 and the legal developments thereafter have brought into focus other legal bases of jurisdiction for judicial review of administrative actions in Kenya. A legal practitioner, judicial officer, student or other researcher in the realm of judicial review as a remedial stream of our courts has to consider all this for completeness sake.^[24]

53. This court has had the opportunity to address similar question several cases among them *Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory limited*^[25] and *Republic v Kenya Revenue Authority, Commissioner for Investigation and Enforcement Department Ex parte Centrica Investments*.^[26] The following excerpt is illuminating and to the point:-

“There are also instances of direct recognition of judicial review remedies, jurisdiction and grounds in the body of the Constitution. Article 23 of the Constitution is the remedial appendage to article 22 of the Constitution. Article 22 vests courts with jurisdiction for enforcement of fundamental rights and freedoms set out in or recognized by the Bill of Rights. Among the reliefs available in proceedings for enforcement of fundamental rights and freedoms is an order of judicial review.

Article 47 of the constitution codifies every person’s right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 6 Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action. Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

Article 165 of the Constitution establishes and vests jurisdiction in the High Court. Part of the jurisdiction vested in the High Court is: “supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function ...” There is explicit judicial review content in this normative prescription of jurisdiction.”^[27]

54. In the above cited cases, this court was confronted with the question whether under the 2010 Constitution, a person requires leave to approach the court. It was emphatic that the entrenchment of the right to access the court in the Constitution opened the doors to access justice, a position aptly captured by the phrase *“Justice is open to all, like the Ritz Hotel”*^[28] attributed to a 19th Century jurist. Article 22 of the Constitution guarantees the right to institute court proceedings to enforce the Bill of Rights. Article 23 grants the court the authority to uphold and enforce the Bill of Rights.

55. Article 48 guarantees the right to access court while Article 258 provides that every person has a right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. I need not mention the supremacy of the Constitution and its binding nature decreed in Article 2.

56. Additionally, Article 47 provides for the right to a fair Administrative Action. To give effect to Article 47, Parliament enacted the Fair Administrative Action Act.^[29] Section 2 of the act defines an **“administrative action”** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Article 23 (3) provides the remedies the Court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article 22, the court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, and invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and *an order of Judicial Review*.

57. The question before me appears to be the issue that confronted the court in *Masai Mara (SOPA) Limited v Narok County Government*^[30] when it stated:-

“On the issue of the application of Order 53 of the Civil Procedure Rules to a constitutional petition where a party seeks judicial review reliefs, I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions and remedies were also subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive constitutional judicial review when one reads Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of rights, to grant by way of relief an order for judicial review. 55. Order 53 of the Civil

Procedure Rules do not consequently apply to Constitutional Petitions where the court is expected to exercise a special jurisdiction which emanates from the Constitution and not a statute. 56. I consequently decline to accede to the Respondent's contention that the Petitioner ought to be denied the reliefs sought on the basis that the Petition was filed more than six months after the action complained of took place."

58. Considering the above constitutional provisions and in particular the right to access justice, the question that arises is whether a citizen citing violation of the Constitution or violation of constitutional rights or challenging an administrative action or a decision of a tribunal requires the leave of the court to apply for Judicial Review Orders. Section 7 (1) of Part two of the sixth schedule to the Constitution provides that (1) all law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.

59. All law must conform to the Constitutional edifice. It follows that the provisions of sections 8 and 9 of the Law Reform Act^[31] and Order 53 of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed^[32] "All statutes must be interpreted through the prism of the Bill of Rights." This statement is true of decisions made by constitutional bodies, statutory bodies and government functionaries. The governing statute and the resultant decision must be interpreted through the prism of Article 47 of the Constitution.

60. Judicial Review is now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where it held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*^[33] that "the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts." The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

61. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second*, the right to access the court is now constitutionally guaranteed. This makes the requirement for leave unnecessary. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamental rights and freedoms under Article 23(3) (f). *Fourth*, section 7 of the Fair Administrative Action Act^[34] provides that "any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Section 7 (2) of the act provides for grounds for applying for Judicial Review.

62. I have severally stated that court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.^[35] Time has come for our courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

63. In the decisions cited earlier this court observed that time has come for Parliament to consider the relevancy and constitutionality of the provisions of the Law Reform Act^[36] and Order 53 of the Civil Procedure Act, 2010 which require a litigant to seek courts leave before approaching the court. This is because our 2010 Constitution guarantees access to justice. The right to approach the court received a seal of constitutional approval, courtesy of Article 48 of the Constitution. This in my view rendered provisions of the law that require a litigant to seek courts leave to commence Judicial Review proceedings obsolete.

64. The use of judicial review as a tool to enforce fundamental rights was appreciated even before the 2010 Constitution in *Republic Vs Kenya Roads Board ex parte John Harun Mwau*,^[37] in which the court had this to say:-

"The remedy of Judicial Review is available as a procedure through which the applicant can come to court for the determination of any Constitutional issue including striking down of legislation which may be unconstitutional. Judicial Review has an entirely different meaning in Commonwealth countries, which have adopted the written supreme Constitutional system. ... Judicial Review in this sense means the power to scrutinize laws and executive acts, the power to test their conformity with the Constitution and the power to strike them down if they are found to be inconsistent with the Constitution..."

Final orders

65. I have already held that the instant application is an abuse of court process, hence it is unsustainable and dismissed it on the said ground.

66. The upshot is that the applicant's application dated 15th August 2018 is hereby dismissed with costs to the Respondents and the Interested Party.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 17th day of January 2020.

John M. Mativo

Judge

[1] Article 157 (6) of the Constitution.

[2] Act No. 11A of 2011.

[3] Act No. 17 of 2015.

[4] Cap 63, Laws of Kenya.

[5] Cap 63, Laws of Kenya.

[6] {1917} 1 KB 486, by Viscount Reading, Chief Justice of the Divisional Court.

[7] *Brinks-Mat Ltd vs Elcombe* {1988} 3 ALL ER 188.

[8] See e.g. *Agnes Muthoni Nyanjui & 2 Others vs Annah Nyambura Kioi & 3 Others* Succ Cause no 920 of 2009 and *Graham Rioba Sagwe & Others vs Fina Bank Limited & Others*, Pet No. 82 of 2016

[9] Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11

[10] *Jadesimi v Okotie Eboh* (1986) 1NWLR (Pt 16) 264

[11] (2007) 16 NWLR (319) 335.

[12] Justice Niki Tobi JSC of Nigeria

[13] Supra note 1

[14] Ibid

[15] Ibid

[16] Mombasa HCMISC APP No 384 of 1996.

[17] {2005} 1 KLR 189.

[18] <https://legal-dictionary.thefreedictionary.com/frivolous>

[19] Justice Barron, *Farley vs Ireland & Others*, [1997] IESC 60 at page 1521.

[20] https://www.ombudsman-services.org/downloads/FrivolousVexatious_Factsheet.pdf

[21] See *R vs Panl for Takeovers and Mergers ex p Datafin* {1987} I Q B 815.

[22] Cap 26, Laws of Kenya.

[23] Cap 26, Laws of Kenya.

[24] See Elisha Ogoya, *The Changing Character of Judicial Review Jurisdiction Under the Constitutional and Statutory Order in Kenya*, <http://lisk.or.ke/Downloads/Elisha%20Ogoya%20-%20Judicial%20Review.pdf>

[25] {2019} e KLR.

[26] {2019} eKLR.

[27] Ibid.

[28] Sir James Matthew, 19th Century jurist.

[29] Act No. 4 of 2015.

[30] Nairobi High Court Petition Number 336 of 2015.

[31] Cap 26, Laws of Kenya.

[32] Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and [2000]

[33] 2000 (2) SA 674 (CC) at 33.

[34] Act No 4 of 2015.

[35] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[36] Cap 26, Laws of Kenya.

[37] **HC Misc Civil Application No.1372 of 2000.**