REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 99 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE RESIDENT MAGISTRATE, HON. R. O. MBOGO.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

ALFRED NDEMO NYAKUNDI.....INTERESTED PARTY

AND

DIANA MUTHEU & TERESA KIMANI MUTINDI.....*EX PARTE* APPLICANT

JUDGMENT

The Parties

1. The applicants, Diana Mutheu and Teresa Kimani Mutindi are female adult Kenyans. The second applicant is the first applicant's biological mother.

2. The first Respondent, **Hon. R. O. Mbogo** is a Resident Magistrate, at the Children's court, Nairobi. He presided over Nairobi Children's case number 898 of 2018, *Alfred v Ndemo Nyakundi v Diana Mutheu and Teresia Kimani Mutindi* in which he issued the orders under challenge in these proceedings.

3. The second Respondent is the Honorable Attorney General. Under Article **156 (4)** of the Constitution, he is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. He performs any other functions conferred on the office by an Act of Parliament or by the President. Under Article 156 (6) of the Constitution, he is obligated to promote, protect and uphold the rule of law and defend public interest.

4. The Interested Party, Alfred Ndemo Nyakundi is a male Kenyan of sound mind and the biological father of the two minor children, namely, AKN and QBN, the subject of the dispute in Nairobi Children's case number 898 of 2018, *Alfred v Ndemo Nyakundi v Diana Mutheu and Teresia Kimani Mutindi*

Factual Matrix

5. The factual chronology of the events which triggered these proceedings is essentially common cause or not disputed. *My reading of the respective parties' pleadings is that the history of this dispute is uncontroverted. Notably,* the first applicant is the biological mother of AKN and QBN, minors aged 12 years and 4 years respectively as at the time of filing this suit. The Interested Party is their biological father.

6. It is also common ground that on 31st July 2018, the Interested Party instituted Nairobi Children's case number 898 of 2018, Alfred v Ndemo Nyakundi v Diana Mutheu and Teresia Kimani Mutindi at the Nairobi Children's court against the applicants seeking to be granted legal custody of the said minors. He also prayed for an order compelling the applicants to produce the said minors in court. He also sought a

restraining order to stop the first applicant from moving the minors outside the jurisdiction of the court.

7. It is uncontested that the applicants herein filed and served a statement of defense and a counter-claim in the said suit seeking legal custody, care and control of the minors, and a sum of Ksh. 8,000/= per month for their maintenance/general up keep of the minors. She also prayed that expenses for the children's clothing, medical care, school fees and related costs be provided and an order to review the said orders if and when circumstances necessitate.

8. The applicants state that on 13th November 2018, the Hon. Resident Magistrate directed that the matter proceeds to full hearing so that all the issues raised in the pleadings could be addressed on merits.

9. The point of departure is that the applicant states that on 12th March 2019, the Hon. Resident Magistrate, "out of the blues, ordered that that the first applicant to return AKN back to St. Mary's Academy in Tala-Kangundo when she was sitting for her end of first term exams in her current school- the Mustard Seeds Academy." The applicant states that after she was unable to implement the said orders, on 15th March 2019, the learned Magistrate ordered that all the children be produced in court on the 18th March 2019.

10. They also state that on 18th March 2019, the learned Magistrate arbitrarily granted legal custody of AKN to the Interested Party without conducting a hearing on merit, thereby condemning the applicants contrary to the rules of natural justice. They state that the Magistrate acted without jurisdiction and in violation of Articles 10, 25, 27, 48 and 50 of the Constitution and the Childrens Act.[1]*Lastly, they state that they are aggrieved by the learned Magistrate's decisions made on 12th March 2019 and 18th March 2019.*

Legal foundation of the application

11. The applicants state that the learned Magistrate's decision made on 12th March 2019 without hearing them violated the rules of natural justice and Articles 10, 25, 27, 48 and 50 of the Constitution. They state that the learned Magistrate deliberately refused to consider or to take into account what the first applicant told the court on 12th March 2019 in opposition to the Interested Party's requests to have the said child transferred to St. Mary's Academy in Tala Kangundo when the said child was revising and preparing to sit for her end of the first term exams in her current school- The Mustard Seeds Academy.

12. The applicants state that in his statement of claim filed in the Children's Court, the Interested Party did not pray that AKN be transferred to St. Mary's Academy in Tala, Kangundo, hence, the learned Magistrate lacked jurisdiction to grant the Interested Party the reliefs he did not pray, thereby going against the best interest of the minor.

13. The applicants state that they were procedurally ambushed on 12th March 2019, when the matter was scheduled for hearing on merits, and, that, they were denied a fair hearing by the learned Magistrate when he ordered the child to be transferred to St. Mary's Academy in Tala, Kangundo from her current school when the child was revising for her end of the term exams at the Mustard Seeds Academy.

14. They also state that the said orders were arbitrary and were made in bad faith and not in the best interests of the child and that the applicants could not implement the orders since they do not own the said school. Further, the applicants state that the decision is irrational, arbitrary and unreasonable in that it offends Articles 10, 25, 27, 48 and 50 of the Constitution.

15. The applicants also state that the impugned decision is null and void considering that it was arbitrarily given on a mention date without hearing them thereby contravening the Rules of natural justice contrary to Articles 10, 25, 27, 48 and 50 of the Constitution. They also state that the learned Magistrate lacked jurisdiction to condemn them contrary to the rules of natural justice and to grant the impugned orders on a mention date on 18th March 2019 in contravention of Articles 10, 19, 20, 21, 25, 27, 48 and 50 of the Constitution.

16. They state that the orders made on 18th May 2019 were biased, unreasonable, irrational, and arbitrary and were not made in the best interests of the child. Also, they state that unless the impugned orders are quashed, the applicant cannot be afforded a fair trial on equal footing with the Interested Party. They also state that the learned Magistrate is biased and cannot discharge his judicial duties fairly and in the best interests of the child.

17. Further, they state that the said orders violate Article 4 of the African Charter on the Rights and Welfare of the Child (1990/1999) which Kenya freely ratified and domesticated by enacting the Childrens Act.[2]

Applicants' further affidavit

18. The first applicant swore the further affidavit dated 8th April 2019 annexing copies of the proceedings of the said case. She deposed that the proceedings show that she was deprived the legal custody of her child thereby unlawfully shutting the doors of justice.

Reliefs sought

19. As a consequence of the foregoing, the applicants pray for the following orders:-

> **a. That** orders of prohibition be issued forthwith to restrain the learned Resident Magistrate Hon. R. O. Mbogo from proceeding any further with children's case No. 898 of 2018 on 13th May 2019 or at all.
>
> **b. That** orders of certiorari be issued forthwith to remove to this honorable court for the purposes of quashing the orders made by

the learned Magistrate Hon. R. O. Mbogo on 12th March 2019 and on the 18th March 2019 in children's case No. 898 of 2018.

c. That a declaration that that any further proceedings conducted by the learned Resident Magistrate Hon. R.O. Mbogo in children's case No. 898 of 2018, before the conclusion of these proceedings is null and void because the applicant herein and the children in issue cannot be accorded fair trial on equal footing with the interested party herein contrary to Articles 10, 25, 27 and 50 of the Constitution by the learned Magistrate who has proven to be biased against the applicants and the said children.

d. That AKN be produced before the honorable court forthwith by the interested party herein and her actual custody be given back to her biological mother, the first applicant herein.

e. That general and exemplary damages be assessed and awarded to the applicant herein and to the said child AKN for deliberately condemning the applicants and the said child contrary to rules of natural justice and contrary to Articles 10, 25, 27, 28, 29 and 50 of the Constitution and for deliberately failing to take into account the best interest of the said child, contrary to the Childrens Act and contrary to Article 4 of the African Charter on the Rights and Welfare of the Child (1990/1999) which Kenya has freely ratified.

f. That the costs of these proceedings be provided for.

First and second Respondent's grounds of opposition

20. The Hon. Attorney General filed grounds of opposition on 3rd July 2019 stating that the application is unmerited, and, that it is intended to curtail the statutory obligations and duties of the Respondent. Further, he stated that the applicants are challenging the merits of the decision and not the procedure, and, that if they are aggrieved by the decision, they ought to appeal or apply to set it aside.

Interested Party's Replying affidavit

21. Alfred Ndemo Nyakundi, the Interested Party swore the Replying Affidavit dated 17th May 2019. He deposed that the applicants transferred the minor to a different school without his consent and the leave of the court prompting him to file Childrens Case Number 898 of 2018.

22. He also averred that the minor's mother works as a bar maid and she is not always in touch with the minors but instead the grandmother has their custody. He deposed that it is not true that the learned Magistrate condemned the applicants unheard, and added that the applicants disobeyed the direction of the court and disobeyed the court order requiring that the child be returned to her former school.

Determination

23. Upon carefully analyzing the pleadings and the party's respective positions, I find that the following issues distil themselves for determination, namely:-

a. Whether the suit against the first Respondent is sustainable in law.

b. Whether the impugned decision is amenable to judicial review.

c. Whether the provisions of section 9 (2) (3) (4) of the Fair Administrative Action Act *are inconsistent with Articles 10, 19, 22, 23, 25, 27, 47, 48, 50, 159 and 160 of the Constitution.*

a. Whether the suit against the first Respondent is sustainable in law.

24. The applicants' counsel Mr. Ngoge submitted that the first Respondent is a judicial officer, and, therefore he is subject to the supervisory jurisdiction of this court under Order 53 of the Civil Procure Rules, 2010 and section 8 of the Law Reform Act.[3] *To buttress his argument, he relied on Kenya National Examinations Council v Republic & others*[4] *for the holding that section 8 (2) of the Law Reform Act*[5] *permits the High Court to issues orders of Mandamus, Prohibition or Certiorari.*

25. The Respondents' counsel and counsel for the Interested Party did not address this issue.

26. As the pleadings show, the applicants named Hon. R. O. Mbogo, the Resident Magistrate, Children's Court, Milimani as the first Respondent. The Magistrate has been sued in his name.

27. None of the parties deemed it fit to address the competence or otherwise of suing a judicial officer in his name in civil proceedings arising from the performance of his judicial functions. The practice of litigants naming judicial officers in civil suits arising from their exercise of judicial functions is gaining root in this country despite the existence of clear provisions of the law granting judicial officers immunity from being sued in civil proceedings arising from the exercise of their judicial functions. Such practice is not only unlawful, but if unchecked, it has the potential of eroding the administration of justice, a key component of the Rule of Law, one of the founding values in Article 10 of the Constitution.

28. The Constitution is clear that judicial authority is derived from the people and vests in, and is to be exercised by the courts and tribunals established by or under the Constitution.[6] In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. The Constitution is the supreme law of the land

and it binds all persons and all State organs at both levels of government.[7]

29. Section 6 of the Judicature Act[8] offers protection to judges and officers in the following words:-

> No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.

30. The above provision received a seal of constitutional underpinning in Article 160 (5) of the Constitution which provides that "A member of the Judiciary is not liable in an action or suit *in respect of anything done or omitted to be done* in *good faith in the lawful performance* of *a judicial function*."

31. In *Bradley v. Fisher*,[9] Justice Field used the following language:- "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. The test in article 160 (5) is that the judicial officer must have done the thing complained of or omitted to do it in good faith in the lawful performance of a judicial function. Lawful in this context means "conforming to, permitted by, or recognized by law or rules."[10]

32. The adjective of the word lawful is **(a)** allowed or permitted by law; not contrary to law: a lawful enterprise. **(b)** recognized or sanctioned by law; legitimate, **(c)** appointed or recognized by law; legally qualified, **(d)** acting or living according with the law; law-abiding. Allowable or permissible by being in conformity with laws, principles, regulations, statutes, etc., meant to govern or regulate a particular activity or conduct. It also means legal and legitimate.

33. The above provisions shields judicial officers from civil proceedings arising from the conduct of their judicial functions and not criminal proceedings. In *Cooley on Torts*,[11] the author says:-

> "Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely and without favor and he may exercise it without fear; that the duties concern individuals but they concern more especially the welfare of the State and the peace and happiness of society; that if he shall fail in the faithful discharge of them, he shall be called to account as a criminal, but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer. The rule thus laid down applies to large classes of offices, embracing some, the powers attached to which are very extensive and others whose authority is exceedingly limited."

34. In *Griffith vs. Slinkard*,[12] the court held that "Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which the said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done."

35. The primary purpose of immunity is to protect the judicial process by maintaining the judiciary's independent decision making. In 1978 the U S Supreme Court, in *Stump v. Sparkman*,[13] enunciated the test to determine whether a judge's conduct is protected by absolute immunity. Under Stump's two-part test, absolute immunity is limited first to those acts normally performed by a judge, provided, second, that they are performed in his "judicial" capacity.

36. The judicial function under challenge falls squarely within these two tests. This correct statement of the law extinguishes the applicants case as framed because as the law stands, once the two tests are satisfied, absolute immunity kicks in to protect the judicial officer against suits brought for actions done in the performance of his judicial function.

37. Absolute immunity is intended to protect the judicial function from suits against judges brought by individual parties.[14] The most frequently offered justification for absolute immunity is preservation of independent judicial decision making. According to this rationale, immunity for judicial acts is necessary so that judges can make the sometimes controversial decisions that are their legal obligation to make, independent of personal considerations, including fear of personal liability.[15] As was I held in *Abdulkadir Athman Salim Elkindy v Director of Public Prosecution and Another*[16] a judicial officer cannot be held to be under civil liability for good faith actions done in the course of his duties.

38. The immunity afforded to judicial officers helps to guarantee the independence and impartiality of the courts. Judicial officers are not liable to be sued for the legitimate exercise of their powers. It should be obvious that if judges and Magistrates were to be sued for delivering a judgment which was not in accordance with the law, but which the judge believed to be in accordance with the law, the judicial function would be impossible to exercise. However, a judge may be sued if it can be proven that his or her judgment was actuated by malice. Judicial immunity may be traced to the early 16thcentury. In an old English case of *Floyd v Barker*,[17] Lord Coke explained that the significance of judicial immunity lies in ensuring that judicial officers decide disputes before them freely and without fear of adverse consequences that may arise. In *Sirrors v Moore*,***[18]***Lord Denning likewise expressed the significance of judicial immunity by stating:-

> "Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete

independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: 'if I do this, shall I be liable in damages?'

39. Perhaps the clearest articulation of the rationale of judicial immunity was in the case of *McC v Mullan*,[19] where it was stated that:-

> "The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction."

40. In *Regional Magistrate Du Preez v Walker**[20]*** the South African Appellant Division held that a cost order against a judicial officer arising from the performance of judicial functions solely because he has acted incorrectly is incompetent. Judicial officers would be unduly hampered in the exercise of their functions if it were otherwise. While many people may agree or disagree with the decision and the judge's reasons, it must be remembered that a judge has the authority and the power to be wrong as well as right. Disenchanted litigants or other citizens should not be able to influence a judge about judicial decision through the threat of disciplinary sanction or law suits.

41. In 1978, the Supreme Court of the United States of America in the case of *Stump v Sparkman* (supra), held that the doctrine of judicial immunity forbade a suit being brought against a judge who had authorized sterilization of a slightly retarded 15 year old girl under the guise of appendectomy. Apparently the judge had approved the operation without a hearing when the mother alleged that the girl was promiscuous. After her marriage two years later, the girl discovered she was sterile.

42. In *Dykes v Hosemann**[21]*** the court held that a judge who had issued an "emergency" order, granting custody of a child to its father (a fellow judge), without notice to the mother or a proper hearing was immune from legal suit at the instance of the mother. The principle that judges can be wrong as long as their decisions are arrived at in good faith is meant to ensure that there should be no threat of personal liability for decisions which are later found to have been incorrect.

43. However, I should clarify that judicial immunity is not applicable where the judiciary intends to use it as a shield from public scrutiny. Judicial independence and immunity does not shield a judicial officer from accountability. In a democratic polity, it is inconceivable, that any person, whether an individual or an authority, exercises power without being answerable for the exercise. Judicial accountability like judicial independence has thus come to be recognized as a bulwark of the Rule of Law. What constitutes abuse of judicial authority is improper/ inappropriate use of the power of a judicial office. This must be differentiated from a judicial officer's error in law which can only be the subject of appeal.

44 I have considered the grounds cited in support of the application against the principles discernible from the above jurisprudence. The grounds cited by the applicant clearly show a litigant dissatisfied by a court decision and persistent allegations of perceived bias. The said allegations can if well founded be argued as grounds of appeal or grounds for recusal but not as grounds to sue the judicial officer in his personal capacity. This suit is an affront to the judicial immunity granted to judicial officers. It follows that the suit against the first Respondent offends the clear provisions of section 8 of the Judicature Act[22] and Article 160 (5) of the Constitution. As a consequence, the suit against the first Respondent is unsustainable in law .On this ground, this suit is struck off. Equally, the claim against the Hon. Attorney General which is based on vicarious liability is unsustainable once the suit against the first Respondent collapses. It is also dismissed.

b. Whether the impugned decision is amenable to judicial review jurisdiction

45. Mr. Ngoge placed reliance on David Mugo T/A Manyatta Auctioneers v Republic[23] *for the holding that the existence of an alternative remedy is not a bar to the granting of an order of certiorari and that what matters is whether the Respondent is a body amenable to the supervisory jurisdiction of the High Court. He argued that the first Respondent in amenable to the judicial review jurisdiction of this court. He placed reliance on the binding nature of the said decisions which were pronounced by the Court of Appeal, hence, are binding to this court.*

46. Mr. Ngoge argued that the impugned decision is a nullity, in that, it was granted in violation of natural justice contrary to Articles 10, 25, 27 and 47 of the Constitution and Article 4 of the African Children's Charter. For this proposition he placed reliance on Republic v The County Director of Education[24]*and Govindji Popatlal Madhavji v Nasser Alibhai & Another*.[25]

47. Mr. Ngoge argued that the minor was irrationally and arbitrarily placed under the legal and actual custody of the Interested Party and that the best interests of the minor is the special and most unique set of circumstances and in the event of a conflict between Article 4 of the African Charter on the Rights and Welfare of the Child (1990/1991) and section 9 (4) of the Fair Administrative Action Act[26] *(herein after referred to as the FAA Act), the former prevails in order to protect the child.*

48. Miss Chilaka, the Respondents' counsel relied on the grounds of opposition and argued that the learned Magistrate heard both parties as reflected by the record. She argued that the applicant is challenging the merits of the decision and pointed out that the Magistrate has jurisdiction to hear the matter.

49. Mr. Ondieki, counsel for the Interested Party relied on his client's Replying Affidavit.

50. It is critical to identify whether the decision of the learned Magistrate is an *'administrative action'* within the meaning of the definition at section 2 of the FAA Act, thereby rendering it amenable to Judicial Review under section 7 of the FAA Act or even under section 8 of the Law Reform Act[27] and Order 53 Rule 1 of the Civil Procedure Rules, 2010.

51. The FAA Act defines *"administrative action"* to include "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." The decisive question is therefore whether a court judgment, ruling or orders made by a court of competent jurisdiction such as the decision under challenge in this case can be classified as an administrative action or decision falling with the above definition capable of being reviewed.

52. The implication of the above definition is that the decision of a public authority or quasi-judicial tribunal is out rightly amenable to judicial review while the decision of any other person or body is amenable to judicial review if it affects the legal rights or interests of the concerned party. Judicial bodies are the ordinary courts of law - such as the Supreme Court, High Courts and the Magistrates Courts. A quasi-judicial body is a non-judicial body which can interpret law. It is an entity such as an arbitrator or tribunal board, generally of a public administrative agency, which has powers and procedures resembling those of a court of law or judge, and which is obliged to objectively determine facts and draw conclusions from them so as to provide the basis of an official action.

53. Article 165(6) of the Constitution provides that the High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or a quasi-judicial function but not a superior court. The applicants in the substantive application did not did not invoke the supervisory jurisdiction of the High Court conferred under the above provision nor do I find any basis for invoking the said provision. The applicants invoked judicial review jurisdiction under section 8 of the Law Reform Act[28] and Order 53 Rules 1, 2 & 3 of the Civil Procedure Rules, section 11 of the FAA Act and sections 1A & 1B of the Civil Procedure Act.[29]

54. There is a clear distinction between supervisory jurisdiction and judicial review jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control the power is conferred on superior courts to issue the necessary and appropriate writs.[30]

55. This power of superintendence conferred by Article 165 (6) of the Constitution, as pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee*,[31] is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of the Constitution to interfere.[32]

56. The reasons cited by the applicants do not disclose grave miscarriage of justice to warrant the invocation of the High Court's supervisory jurisdiction. On the contrary the reasons cited are grounds for appeal. As noted earlier, the impugned decision is a judicial function as opposed to an administrative function, hence, it is not amenable to judicial review but is appealable to the High Court. In fact, the reasons cited by the applicants are grounds for appeal as opposed to grounds for judicial review. Grounds for judicial review are *ultra vires*, illegality, irrationality and procedural impropriety. These grounds have been expanded under section 7 of the FAA Act. None of these grounds is evident in this case.

57. Differently put, if the first Respondent committed an error of law on the issues under consideration, that is a ground of appeal as opposed to judicial review.

58. To me, all the grounds cited by the applicants are simply invitations to this court to engage in merit review. Whatever the purpose of Judicial Review is deemed to be, some propositions have become clear: orthodox principles of administrative law prescribe that courts engaged in review should not reconsider the merits of the decision because they are not the recipients of the discretionary power. [33] Judicial review is not an appellate procedure in which a judge reverses the substantive decision of an administrative body because of the sole ground that the merits are in the applicant's favour. Rather, it is a supervisory procedure whereby a judge rules only upon the lawfulness of an executive decision, or the manner in which one was reached. The question for review, therefore, is whether the decision was 'lawful or unlawful;' the question for appeal by contrast is whether the decision was 'right or wrong.'

59. Craig has sought to justify this distinction between review and appeal by reference to the source of judicial powers: powers of review derive from the courts' inherent jurisdiction, whereas appeals do not – they are statutory.[34]

60. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in Judicial Review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

61. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

62. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[35]:-

> "Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was

made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant..."

63. It is my finding that the applicants are inviting this court to enter into a forbidden arena of exercising its appellate jurisdiction in a judicial review application. I decline the invitation to travel along the said forbidden route. On this ground, this application fails.

c. Whether section 9 (2) (3) (4) of the Fair Administrative Action Act *are inconsistent with Articles 10, 19, 22, 23, 25, 27, 47, 48, 50, 159 and 160 of the Constitution.*

64. Mr. Ngoge submitted that the provisions of section 9 (2) (3) (4) of the FAA Act ousting the jurisdiction of the High Court conferred by sections 8 of the Law Reform Act are inconsistent with Articles 10, 19, 22, 23, 25, 27, 47, 48, 50, 159 and 160 of the Constitution. To justify his proposition, he argued that the jurisdiction conferred by section 8 of the Law Reform Act[36] *is the most practical, expeditious, efficient, lawful, reasonable, and transparent and procedurally fair. He submitted that the scope of judicial review conferred by section 8 of the Law Reform Act*[37] *cannot be ousted by section 9 (2) (3) (4) of the Law Reform Act.*[38] *Mr. Ngoge argued that by legislating the said provisions, Parliament restricted the scope of judicial review denying victims of gross human rights violations to effectively access the High Court. He suggested that instead of enacting sections 9 of the FAA Act, Parliament ought to have amended section 8 of the Law Reform Act.* [39] *He argued that by enacting the said provisions, Parliament deliberately permitted administrative bodies and inferior tribunals to get away with gross violations of fundamental rights.*

65. Additionally, he argued that the best interests of the minors do constitute exceptional circumstances to warrant this court to entertain this application. He urged the court to grant the prerogative orders sought.

66. Miss Chilaka, counsel for the Respondent submitted that the applicants ought to have filed an appeal as opposed to a judicial review application.

67. With tremendous respect, Mr. Ngoge's argument highlighted above is legally flawed and unsustainable. It collapses on not one but several fronts. First, it ignores the fact that the FAA Act, flows from the provisions of Article 47 of the Constitution, hence, it has a constitutional underpinning. The argument fails to completely to appreciate that the FAA Act was enacted to give effect to the provisions of Article 47 of the Constitution, and that, at section 4, the FAA Act speaks the language of Article 47 while section 7 stipulates the grounds for judicial review. In fact, section 12 of the FAA Act imports the common law principles hitherto governing judicial review into the act. These common law principles were imported through sections 8 and 9 of the Law Reform Act.

68. Second, Mr. Ngoge's argument is largely based on traditional common law Judicial Review principles imported through sections 8 and 9 of the Law Reform Act and Order 53 of the Law Reform Act. The Constitution of Kenya, 2010, fundamentally changed the legal landscape in this country. Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the FAA Act.

69. 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." All law must conform to the constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act and Order **53** of the Civil Procedure Rules must be 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[40] *"All statutes must be interpreted through the prism of the Bill of Rights."* This statement is true of provisions of the Law Reform Act and Order 53 of the Civil Procedure Rules. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution and the legislation enacted to give effect into the said Article. *Third,no matter how beautiful the common law principles are, they must conform with the Constitution.*

70. Fourth, judicial review in 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 the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[41]*** 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.

71. Fifth, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3) (f)** of the Constitution while section **7** of the FAA Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section **7 (2)** of the act provides for grounds for applying for Judicial Review.

72. Seventh, 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.[42] Judicial Review is no longer a common law prerogative as Mr. Ngoge suggests, but it 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. The FAA Act was enacted to provide a mechanism to enforce Article 47. Its provisions cannot be said to offend sections 8 of the Law Reform Act or Order 53 of the Civil Procedure Rules or the various provisions of the Constitution cited by Mr. Ngoge.

73. Eigth, even if I were to be persuaded to accept Mr. Ngoge's argument which suggests that section 9 (2) (3) & (4) of the FAA Act offends the provisions of 8 of the Law Reform Act (which I am not), OR if I were to agree that the said provisions contradict the provisions of section 8 of the Law Reform Act, I am reminded of the doctrine implied repeal.

74. The doctrine of **implied repeal** is a concept in constitutional theory which states that where an Act of Parliament (or of some other legislature) conflicts with an earlier one, the later Act takes precedence and the conflicting parts of the earlier Act becomes legally inoperable. This doctrine is expressed in the Latin phrase *"leges posteriores priores contrarias abrogant."* The Law Reform Act is a colonial legislation while the FAA Act is a post-2010 legislation.

75. When Parliaments repeals legislation, it generally makes its intentions both express and clear. Sometimes, however, Parliament enacts laws that are inconsistent with existing statutes. A. L. Smith J set out the courts' traditional response in cases of this nature in *Kutner v Philips.*[43] He said that "if … the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later." That is, the later statute impliedly repeals the earlier one to the extent of the inconsistency.

76. For a court to hold that Parliament has repealed one of its own statutes without expressly, saying so is a drastic step. For this reason, courts faced with apparently conflicting statutes should strive to reconcile them, only holding that there has been an implied repeal as a last resort.[44] There are a number of ways in which courts may avoid an implied repeal or at least may reduce an implied repeal's effect. For example, where the earlier statute is specific in application and the later one is general, the courts may conclude that Parliament has not intended that the later Act should apply to the circumstances to which the earlier one relates.[45] Conversely, where a later specific rule is inconsistent with an earlier general one, implied repeal operates only *"pro tanto"*, that is, only to the extent that the Acts are inconsistent, with the general rule preserved as much as possible.[46]

77. It did not escape the courts attention that all the authorities cited by Mr. Ngoge are pre-2010 decisions, yet there is a rich jurisprudence generated by all our superior courts interpreting section 9 of the FAA Act. In addition, our superior courts have pronounced themselves with sufficient detail on the changing character of judicial review jurisdiction with clear emphasis on the import of the 2010 Constitution which altered the legal landscape in this country. Mr. Ngoge's attempt to lift section 8 of the Law Reform, Act ignores the fact that the FAA Act codified judicial review in this country unlike in the past when we relied on the common law. It even prescribes the grounds for judicial review and the procedure.

78. Additionally, Mr. Ngoge's view of section 9 (2) (3) (4) of the FAA Act is that they oust the jurisdiction of this court. With respect, the correct position is that the said provisions create what is called in legal parlance as the doctrine of exhaustion. This doctrine simply states that where a law provides for a dispute resolution mechanism, the High Court shall not entertain a judicial review application unless the person has exhausted the mechanism established by the law. At subsection (4) the act provides that the court can entertain the judicial review application if the person applies for exemption and demonstrates exceptional circumstances. Strictly speaking, this is not an ouster clause in *stricto sensu.* Morever, this provision has a constitutional underpinning at Article 159 (2) (c) of the Constitution.

79. As held above, the decision under challenge is a judicial decision as opposed to an administrative action. Thus it is not amenable to judicial review. I have already concluded that the decision can only be challenged by way of a review in the lower court or an appeal in the High Court. In fact, Mr. Ngoge argued that an appeal would ordinarily take long, suggesting that he approached this court to obtain a speedy resolution of the case. That is not a ground to justify by passing the appellate mechanism.

80. As stated earlier there is a clear distinction between the powers of this court under Article 165(6) of the Constitution and the judicial review jurisdiction. I have indicated the circumstances under which the court can exercise its powers under Article 165(6). This case does not fall under any of the circumstances I referred to earlier. Judicial review jurisdiction is invoked to challenge an administrative decision as opposed to a judicial decision which is challenged by way of review in the same court or appeal to a higher court.

81. Mr. Ngoge argued that the best interests of the minors constitute exceptional circumstances. The exemption from the obligation to exhaust judicial review remedies applies to administrative remedies as opposed to judicial decisions which are subject to the appellate mechanism. A court cannot properly exempt a litigant from exercising his constitutional right of appeal to a higher court which is different from the doctrine of exhaustion of administrative remedies. The right to appeal is conferred by the law and the court cannot exempt a litigant from exercising such a right. Such an order would be legally frail.

82. Statutory or public bodies or private institutions have provisions in their enabling statutes providing internal dispute resolution mechanisms. A right of appeal against a decision of a competent court is not an internal dispute resolution mechanism. It is an appellate process provided by the law and a means of seeking justice to a higher court thus providing an opportunity to aggrieved parties to have their cases reconsidered. Such a right cannot to waived or taken away by a judicial fiat nor did the law contemplate such a scenario. Such an order will be tantamount to amending the law conferring the right to appeal to a litigant. On this ground alone, the applicant's plea fails.

83. As stated above, the applicant has confused the right to appeal with the question of exhaustion of administrative remedies which arise when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya. [47]It was perhaps most felicitously stated by the Court of Appeal[48] in *Speaker of National Assembly vs Karume*[49] in the following words:-

> "Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament,

that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

84. The above case was decided before the Constitution of Kenya, 2010 was promulgated. However, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.[50] The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*,[51] where it stated that:-

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

85. In the *Matter of the Mui Coal Basin Local Community*,[52] the High Court stated the rationale thus:-

> "The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

86. From the above jurisprudence at least two principles can be discerned:- *First*, 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.[53] 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.

87. Section **9(2)** of the FAA Act provides that the High Court or a subordinate court under subsection **(1) shall not** review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. This section refers to an administrative action. I have already held that the impugned decision is a judicial function as opposed to an administrative decision.

88. Section **9(4)** of the FAA Act provides 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. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

89. Even though I have held that the impugned decision is not an administrative action, it is useful to consider what constitutes exceptional circumstances.[54] Article **47** of the Constitution and the FAA Act are heavily borrowed from the South African Constitution and their equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions may offer useful guidance. The following points from the judgment of **Thring J** are relevant:-[55]"

> 1. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . ."
>
> 2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
>
> 3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.
>
> 4. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
>
> 5. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

90. There is no definition of 'exceptional circumstances' in the FAA Act, but this court's interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. In yet another South Africa decision[56] the court said the following about what constitutes exceptional circumstances:-

> "What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

91. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule. The grounds cited, which as stated earlier are perfect grounds for appeal do not disclose exceptional circumstances which are out of the ordinary to qualify for exemption. In any event, the provision cited applies to administrative decision as opposed to judicial decisions.

92. The *second* requirement is that on application by the applicant, the court may exempt the person from the obligation. It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the FAA Act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[57] Section **9(4)** of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

Disposition

93. In view of my analysis and the determination of the issues discussed above, the conclusion becomes irresistible that the applicant's application dated 10th May 2019 is fit for dismissal. Accordingly, the application dated 10th May 2019 is hereby dismissed with no orders as to costs.

Orders accordingly.

94. **Signed, dated and delivered at Nairobi this 12th day of February 2020**

John M. Mativo

Judge

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[1] Act No. 8 of 2001.

[2] Act No. 8 of 2001.

[3] Cap 26, Laws of Kenya.

[4] Nairobi Civil Appeal No. 266 of 1996.

[5] Cap 26, Laws of Kenya.

[6] Article 159 of the Constitution.

[7] Article 2 (1) of the Constitution.

[8] Cap 8, Laws of Kenya.

[9] 13 Wall. (80 U. S.) 335, 337, 347, 20 L. Ed. 646, 647.

[10] https://www.google.com/search?q=meaning+of+lawful&ie=utf-8&oe=utf-8&client=firefox-b.

[11] 3rd Ed. vol. 2, p. 795.

[12] 146 Ind. 117, 44 N. E. 1001, 1002.

[13] 435 U.S. 349 (1978).

[14] See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872) ("Liability to answer to everyone who might feel aggrieved by the action of the judge, would be inconsistent with ... that independence without which no judiciary can be either respectable or useful."); *Gregoire v. Biddle*, 177 F.2d 579, 580-81 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950); Nagel, Judicial Immunity and Sovereignty, 6 Hastings Const. L.Q. 237, 245-46 (1978) (judicial function protects itself through the doctrine of judicial immunity).

[15] See *Butz v. Economou*, 438 U.S. 478, 512 (1978) ("Absolute immunity is necessary to assure that judges.., can perform their.., functions without harassment or intimidation."); *Stump v. Sparkman*, 435 U.S. 349, 363 (1978) ("a judicial officer... [should] be free to act upon his

own convictions, without apprehension of personal consequences to himself" (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872))).

[16] {2017} e KLR.

[17] (1607) 77 ER 1305.

[18] (1975) 1 QB 118.

[19] (1984) 3 ALL ER 908 (HL).

[20] 1976(4) SA 849.

[21]776 f.2d 942(11th Cir.1985).

[22] Cap 8, Laws of Kenya.

[23] Civil Appeal No. 265 of 1997.

[24] HC JR No. 61 of 2018.

[25] Mombasa Civil Case No. 284 of 1954.

[26] Act No. 4 of 2015.

[27] Cap 26, Laws of Kenya.

[28] Cap 26, Laws of Kenya.

[29] Cap 21, Laws of Kenya.

[30] *Gallagher v. Gallagher*, 212 So. 2d 281, 283 (La. Ct. App. 1968).

[31] AIR 1951 Cal. 193.

[32] *See D. N. Banerji v. P. R. Mukherjee 1953 SC 58.*

[33] S. De Smith, H. Woolf and J. Jowell, *Principles of Judicial Review* (Sweet and Maxwell, 1999) at 20.

[34] P. Craig, *Administrative Law*, 5th ed (Sweet and Maxwell, 2003) at p. 9.

[35] {2014} eKLR.

[36] Cap 26, Laws of Kenya.

[37] Ibid.

[38] Ibid.

[39] Ibid.

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

[41] *2000 (2) SA 674 (CC) at 33.*

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

[43] *Kutner v Philips* {1891} 2 QB 267 (QB).

[44] Ibid n 2, 272 A L Smith J? see also Paine v Slater (1883) 11 QBD 120, 122 (EWCA) Brett LJ.

[45]See for example, *Cox v Hakes* (1890) 15 AC 506, 517 (HL) Lord Halsbury? *Bishop of Gloucester v Cunningham* [1943] KB 101, 105 (CA) Lord Greene MR, Scott and MacKinnon LJJ.

[46] *Craton v Winnipeg School Division* (No 1) [1985] 2 SCR 150, para 8 McIntyre J.

[47] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[48] Ibid.

[49] {1992} KLR 21.

[50] Ibid.

[51] {2015} eKLR.

[52] {2015} eKLR

[53] Ibid.

[54] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[55] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

[56] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)*2010 (4) SA 327 (CC) para 39, Mokgoro J

[57] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]