REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COURTS

JUDICIAL REVIEW APPLICATION NO. 193 OF 2017

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF *MANDAMUS*

AND

IN THE MATTER OF ARTICLES 2,3,10,19,20,21,22,23,28,29,48,157,243,244,258,259 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REFUGEES ACT, LAWS OF KENYA

AND

IN THE MATTER OF THE KENYA'S RESPONSIBILITY TO PROTECT

AND

IN THE MATTER OF NATIONAL POLICE SERVICE ACT

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE KIDNAPPING AND ENFORCED DISAPPEARANCE OF SAMUEL DONG LUAK AND IDRI AGGREY EZBON

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 READ WITH ORDER 53 CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE APPARENT UNWILLINGNESS AND OR DECISION BY THE INSPECTOR GENERAL OF POLICE NOT TO INVESTIGATE THE DISAPPEARANCE OF SAMUEL DONG LUAK AND IDRI AGGREY EZBON

REPUBLIC...APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE.....................................1ST RESPONDENT

DIRECTOR, CRIMINAL INVESTIGATIONS........................2ND RESPONDENT

AND

***EX PARTE* APPLICANT.............EDMUND POLIT JAMES AND AYA BENJAMI**

JUDGMENT

Introduction.

1. It is convenient to commence this determination by observing that the Constitution does not distinguish in some respects between the rights of citizens and non citizens. The only right denied to foreigners is the right to vote or vie for elective offices. All other rights, however, are written without such a limitation. U.S. Supreme Court Judge Justice William Brennan[1] once quipped that even "illegal's had rights because they were "persons." He stated:-

> *"The illegal aliens…may claim the benefit of the Equal Protection clause which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' Whatever his status under immigration laws, an alien is a 'person' in any ordinary sense of the term…."*

2. But even before the U.S. Supreme court laid the issue to rest, a principal author of the Constitution, James Madison, the fourth president of the United States, wrote: "that as they [aliens], owe, on the one hand, a temporary obedience, they are entitled, in return, to their [constitutional] protection and advantage. In 2001, the U.S. Supreme Court ruled***[2]*** that "due process" applies to all aliens in the United States whose presence may be or is "unlawful, involuntary or transitory."

3. There is much truth in the proposition that while natural law theories hold less influence today, the human rights movement of the last fifty years reflects a remarkably parallel secular understanding, namely that there are certain basic human rights to which all persons are entitled, simply by virtue of their humanity. Human rights treaties, including those that Kenya is a party to or has ratified, uniformly provide that the rights of due process, fundamental rights and freedoms, and equal protection are owed to all persons, regardless of nationality.

4. The Universal Declaration of Human Rights (UDHR), for example, aptly described by Professor Richard Lillich as the *"Magna Carta of contemporary international human rights law*," is expressly premised on *"the inherent dignity and ... the equal and inalienable rights of all members of the human family.*"[3] The UDHR explicitly guarantees the rights of due process, political expression and association, and equal protection.[4] Article **2(5)** of the Constitution expressly imports the general rules of international law and makes them part of the laws of Kenya.

5. The normative idea underlying this broad consensus is that fundamental rights are owed to persons as a matter of human dignity and should be honored no matter what form of government a particular community chooses to adopt. As David Feldman has written, "there are certain kinds of treatment which are simply incompatible with the idea that one is dealing with a human being who, as such, is entitled to respect for his or her humanity and dignity."[5] The rights of political freedom, right to life, freedom from inhuman and degrading treatment, due process, and equal protection are among the minimal rights that the world has come to demand of any society. In the words of the U.S. Supreme Court, these rights are "implicit in the concept of ordered liberty."[6]

The reliefs sought.

6. Pursuant to leave granted on **8th** May 2017, the *ex parte* applicant moved this court by way of Notice of Motion dated **16th** May 2017 expressed under the provisions of Order **53** Rules **3 & 4** of the Civil Procedure Rules, 2010, seeking :-

> *a. An order of **Mandamus** directing the Respondent's jointly and severally to immediately commence proper, thorough, objective, exhaustive, detailed, adequate and conclusive investigations as to the disappearance of the subjects.*
>
> *b. The costs of this application be paid by the Respondents.*

Factual matrix.

7. The facts disclosed in this application as far as I can distil them from the application seeking leave, the statutory statement, the verifying affidavit and annextures are rather sad and shockingly inhuman.

8. It is uncontested that **Dong Samuel Luak**, a renowned South Sudanese Human Rights lawyer was until his abduction and/or disappearance from Kenya, under the protection of the United Nations High Commission for Refugees (UNHCR), in Nairobi. Similarly, a one **Aggrey Ezbon Idri**, also a South Sudanese national and politician, as at the time of his kidnapping and/or enforced disappearance, had a valid visa to remain in Kenya and was seeking UNHCR protection in Nairobi.

9. It is also undisputed that on the evening on the **23rd** January 2017, **Dong Samuel Luak** was last seen at Dream Bean House restaurant along Kaunda Street in Nairobi, and, that, though he left the restaurant on the same day to return to his home in South **C**, Nairobi, he never got home, and, to date his whereabouts are unknown. It is admitted that the disappearance was reported at the Industrial Area Police Station on **24th** January 2017 (OB51/24/1/2017).

10. Further, it is uncontested that on **24th** January 2017, a **Aggrey Ezbon Idri** left his home in the Lavington area, Nairobi for his morning jog but he never returned. A formal report of a missing person was made at Muthangari Police Station on the same day (OB No. 27/24/1/2017) and at Kilimani Police Station under OB No.27/24/1/2017.

11. The contested fact is that despite the said reports the police did not undertake any investigations. The *ex parte* applicant's case is that fearing that the missing persons may be deported to South Sudan against their will, they filed an application for *Habeas Corpus* being Nairobi High Court being Misc. App No. **28** of 2017 in which the court recommended that the police to investigate the crime of abduction and an investigation into the whereabouts of the missing persons. The *ex parte* applicants contend that the Respondents have neglected, failed and or refused to institute exhaustive, objective, thorough and adequate investigations to locate the missing persons.

12. The *ex parte* applicants further aver that failure by the Respondents to undertake the said investigations months after the aforesaid disappearance led them to conclude that the failure is wilful neglect of duty contrary to the law, and that, the police failed to analyze mobile phone data or interview persons whose names were provided as persons who were in the company **Dong Samuel Luak** moments before he left the Dream Bean House Restaurant.

Legal foundation of the application.

13. The *ex parte* applicants case is that under the Constitution, the Respondents are obliged to uphold the States obligation and responsibility to provide security and liberty of the person which are essential in promoting the dignity of the person. Further, they contend that the Respondents ought to have immediately undertaken thorough, objective and adequate investigations that would lead to the location of the missing persons. Lastly, they aver that the State is bound by international law to protect those in vulnerable situations.

14. Additionally, the *ex parte* applicants' aver that the missing persons are entitled to the protection and benefits of the law, and, that, as at filing this application, there was no known investigation undertaken by the Respondents to locate them. Further, the *ex parte* applicants contend that the Respondents are not interested in mounting a credible, thorough, objective and adequate investigation because the said persons are not Kenyans. Lastly, they contend that the said failure or reluctance to investigate is unconstitutional and unjustified.

Respondent's Replying Affidavit.

15. **Chief Inspector Fidelis Ndolo,** the lead Investigator in the investigations in question swore the Replying Affidavit dated **7th** September 2017. He averred that the Police Stations where the disappearances were reported opened inquiry files for the investigations. Further, he averred that following the ruling in Nairobi Misc. Criminal Application No. **28** of 2017 himself and **6** officers were assigned to investigate the disappearance.

16. He further averred that he called the inquiry files from the police stations and found that they had recorded a total of **5** statements from witnesses, and, his team recorded further **6** statements and undertook exploitation of phone numbers of the two subjects to ascertain the people they last communicated with and also exploited the phone number of a one **John Tap Lam** who was suspected to be involved by the families of the subjects. **Chief Inspector Ndolo** deposed that it is not true they failed to interview persons who had been in the company of **Samuel Dong Luak** as alleged. Also, he averred that they interviewed and recorded statements from a one **Michael Kuajien** and **Luke Thompson** who were last seen with **Samuel Dong Luak** and were captured on the restaurants' Hotel CCTV.

17. He also averred that in the *habeas corpus* application, he swore two affidavits detailing the investigations carried out. Also, he averred that the phones of the missing persons went off immediately they disappeared making it difficult to establish their location, and, that thorough investigations were undertaken, and, the files are still open for investigations.

Oral evidence.

18. On **23rd** May 2017, Aburili J ordered that owing to the nature of the case, the same be determined by way of oral evidence and **Chief Inspector Ndolo** was cross-examined on the contents of his affidavit, and, pursuant to courts further directions, the Directorate of Criminal Investigations filed a report dated **5th** February 2018 in response to the *ex parte* applicants' advocate's letter dated **1st** November 2017 highlighting the steps taken by the investigators and reiterated that the two inquiry files are still open.

Issues for determination.

19. Upon analyzing the above facts presented by the parties and the law, I find that two issues falls for determination, namely:-

a. Whether the ex parte applicants have established any grounds for this court to grant the order of Mandamus prayed.

b. Whether this suit offends the doctrine of exhaustion of available remedies.

a. Whether the ex parte applicants have established any grounds for this court to grant the order of Mandamus prayed.

20. The crux of the *ex parte* applicant's advocates submissions is that the State owes the missing subjects a duty to protect them, and, that, it is responsible for the security of the citizens.[7] Counsel argued that the Respondents have a duty to conduct prompt, efficient and professional investigations. To buttress his argument, he cited the European Court of Human Rights (ECHR) case of *Cas Romania*[8] in which it was held that investigation should in principle be capable of leading to the establishment of the facts of the case to the identification and punishment of those responsible.

21. Further, in the said case, the ECHR held that *"any deficiency in the investigation which undermines its ability to establish the cause of the injuries or the identity of the persons responsible will risk failing foul of this standard and requirement of promptness and reasonable expedition."* The ECHR proceeded to state *"...where the effectiveness of the official investigation has been at issue, the court has often assessed whether the authorities reacted to the complaints at the relevant time. Consideration has been given to the opening of the investigations, delays in taking statements and to the length of time for the initial investigation."*

22. Additionally, the *ex parte* applicants' counsel cited section **24** of the National Police Service,[9] and argued that the investigations conducted reveal failure by the Respondents to thoroughly question potential sources of information including relatives of the subjects, friends both in Kenya, South Sudan, government agencies and information obtained from mobile service providers. To fortify his argument, he cited missing location information for numerous calls in the phone records, failure by the police to liaise with mobile service provides, failure to question some people, and failure to publish a notice in the local dailies. Counsel argued that the *ex parte* applicants have demonstrated various gaps on the part of the Respondents in the execution of their duties,[10] hence, they have established grounds for the orders sought.

23. The Respondent's counsel in his submissions acknowledged that all are entitled to equal benefit and protection of the law.[11] He cited the constitutional mandate of the Director of Public Prosecutions under Article **157** of the Constitution and in particular Article **157(4)** of the Constitution and section **5(2)(b)** of the Office of the Director of Prosecutions[12] which confers the Director of Public Prosecutions power to direct the inspector General of Police to undertake investigations. He submitted that the police are expected to professionally conduct investigations and that the mere fact that a complaint is made, does not justify the institution of a criminal prosecution.[13]He submitted that the Replying Affidavits both in this case and in the *habeas corpus* application details the steps taken by the police and that before instituting and criminal charges, there must be sufficient evidence to support the case[14] otherwise the case will be without factual foundation. Lastly, he argued that the Director of Public Prosecutions is required to act in public interest.[15]

24. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[16]*Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally a common law writ, *Mandamus* has been used by courts to review administrative action.[17]

25. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[18]

26. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

27. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[19] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[20] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv*) No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

28. It is imperative that the above tests must be satisfied before an order of *mandamus* can issue. It is common ground that the disappearances were reported to two police stations. It is uncontested that the *ex parte* applicants applied for a writ of *habeas corpus*. The Respondent filed a Replying Affidavit in the said case detailed the steps taken by the police. At the time of filing the application, the *ex parte* applicants thought that the missing persons are in the custody of the State. The court did not find any evidence that the missing persons were in the hands of the State. However, the court took the view that the disappearances could have been as a result of criminal acts or abduction and directed investigations to be done.

29. For *Mandamus* to issue, there must be a public legal duty to act. This is not in dispute. The duty must be owed to the Applicants. Again, this is not disputed. There must have been a prior demand for performance; a reasonable time to comply with the demand, unless there was outright refusal; and an express refusal, or an implied refusal through unreasonable delay.

30. There is evidence that the disappearance was reported at two police stations. There is uncontested evidence that the police opened inquiry files and recorded statements from **5** persons. After the court ruling in the habeas corpus application, a team of investigators were appointed. There is evidence that they moved into action, called for the inquiry files and recorded more statements from at least **6** persons and analyzed mobile phone data. It is uncontested that the subjects mobile phones went off soon after their disappearance making it difficult to locate their whereabouts.

31. A core function of the National Police Service is to investigate crime. This entails decisions to commence and to terminate investigations. It may also entail decisions to suspend investigations, pending the occurrence of a particular event, for purposes of ensuring that resources are used more effectively. It also entails a decision to keep an investigation file open in the event more useful leads are unearthed. It is my view that the foregoing decisions fall within the constitutional and statutory docket of the Police.

32. The penultimate issue concerns the authority of the court to direct the Respondents *"to immediately commence proper, thorough, objective, exhaustive, detailed, adequate and conclusive investigations as to the disappearance of the subjects."* This raises questions pertaining to the doctrine of the separation of powers. Underlying this is the concept of deference, in respect of which the learned author, Cora Hoexter, commented as follows:-

> *"… the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate."**[21]***

33. The Constitutional Court of South Africa has preferred to refer to this as the notion of respect, where it remarked that:-[22]

> *"a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field… A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."*

34. In other words, a court must be slow to intervene in the exercise and performance of powers and functions by the police in relation to the investigation of crime, especially where the officials involved possess the experience and expertise to make a better decision than a court on how to conduct such an investigation.

35. The court is inclined to respect the decision by the police to keep the inquiry files open two reasons; namely:- **(a)** it is a constitutional imperative that the Constitutional independence of the independence of the Inspector General of Police and the DPP must be respected, **(b)** for the court to intervene, there must be clear evidence of breach of their constitutional duty or abuse of discretion. I have carefully considered the law and the authorities and applied the same to the facts of this case and I find that the *ex parte* applicants have not established any grounds to suggest that the Inspector General of Police, or the Director of Criminal Investigations or the DPP illegally exercised their powers. There is no material before me to suggest even in the slightest manner that the decision was undertaken in a manner that can be said to be inconsistent with the constitution.

36. Moreover, given the particular facts of this case, it is not for the court to impose a deadline by which the investigation is to be completed. The court is required to respect the approach adopted by the Respondents of keeping the inquiry files open. Nevertheless, the *ex parte* Applicants remain entitled to communication about progress made in the investigation. To that effect, the *ex parte* Applicants may insist on the provision of proper information and insofar as it is not forthcoming, the *ex parte* Applicant may utilize the remedies already discussed below.

37. The court is satisfied that the decision taken by the Respondents to keep the investigation file open is rational and lawful. Should any new leads emerge, they can be pursued. There is no basis upon which the *ex parte* Applicants can succeed in their application for the orders of mandamus simply because there is no evidence that the Respondents refused to perform their duty. On the contrary, there is evidence that they acted. The nature of investigations is such that at times it may not yield the results a complainant may wish. Provided the investigator has acted prudently and within the law, it cannot be said that they have failed to act. After all, at the end of the day, the success of the case if mounted rests on the quality of the evidence, not the quantity as the *ex parte* applicants seem to suggest.

38. Applying the above tests to the facts and circumstances of this case, I find and hold that the *ex parte* applicants have not satisfied the tests for the court to grant the order of mandamus. It follows that there is no basis at all for the Court to grant the order of *Mandamus*.

b. Whether this suit offends the doctrine of exhaustion of available remedies.

39. Interestingly, despite the fact that this is a fairly dispositive issue, both counsels did not address the question whether or not this suit is bad for want of exhaustion of statutory available remedies.

40. To the extent that the *ex parte* Applicants are not satisfied that the Respondents carried out a sufficiently thorough investigation, the remedies under section **24** of the Independent Policing Oversight Authority[23] as read with section **9(2)** of the Fair Administrative Action Act[24] must first be exhausted.

41. Section **24** of the Independent Policing Oversight Authority[25] provides for lodging of complaints against the police and resolution of complaints initiated under the said section. The provision brings into focus the highly dispositive question of the doctrine of exhaustion of available remedies.

42. The question of exhaustion of administrative remedies arises 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.[26]It was perhaps most felicitously stated by the Court of Appeal[27] in *Speaker of National Assembly vs Karume**[28]*** 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*."

43. 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.[29] 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,*[30] 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*."

44. In the *Matter of the Mui Coal Basin Local Community,**[31]*** 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..."*

45. 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.[32] 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.

46. Section **9 (2)** of the Fair Administrative action Act[33](an act of Parliament that was enacted to bring into operation Article **47** of the Constitution), 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. Also relevant is sub-section **(3)** which provides that *"*the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

47. The use of the word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[34]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[35] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

48. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

49. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[36] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[37] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

50. A proper construction of section **9 (2) & (3)** above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by **9 (4)** which 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. *Second*, on application by the applicant, the court may exempt the person from the obligation. The *ex parte* applicants did not cite any exceptional circumstances.

51. It is settled that the impugned decision constitutes administrative action as defined in section **2** of the Fair Administrative Action Act.

[38] Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the appellant can show exceptional circumstances to exempt it from this requirement.[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue.[40] Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[41] An internal remedy is adequate if it is capable of redressing the complaint.[42]

52. A valid question may arise, that is, whether keeping an investigation file open is an administrative action. The answer is simple. To meet the definition of administrative action under Fair Administrative Action Act[43] and thereby create a platform upon which to launch review proceedings, an applicant must demonstrate that the conduct in question adversely affects rights, and has a direct, external legal effect.[44] For the former, the learned author, Geo Quinot, has expressed the view that any impact on rights, whether negative or positive, will satisfy this element.[45] Consequently, the decision to keep an investigation file open may well have an impact on the rights of the *ex parte* applicants and others, although this will of course depend on a number of variables, for example: the basis of and the intention behind the decision, for how long the investigations will be suspended, the outcome of the investigations, and so on.

53. To that effect, Quinot observes:- "this element furthermore confirms the characteristic of finality in the definition of administrative action... A decision can be viewed as final, and thus potentially an administrative action, if it manifests in a direct and external legal effect. Consequently, administrative conduct that is wholly internal to the administration, often as part of a larger multistage decision-making process, will not constitute administrative action on its own, but only as part of the administrative action that will emerge once a final decision is taken that has the requisite external effect."[46]

54. This court agrees with the learned author, whose argument is supported by a number of cases that have mentioned the requirement of directness or finality.[47]

55. Back to the doctrine of exhaustion of remedies, the exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. Indeed, in this case, no such argument was advanced nor can I discern any virgin argument touching on Constitutional interpretation.

56. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it. In the case before me, no argument was advanced that the mechanism under the above act was not adequate nor do I find any reason to find or hold so.

57. The *second* principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This argument was not advanced before me nor do I discern it from the facts of this case.

58. In view of my analysis herein above, it is my conclusion that the *ex parte* applicants have not satisfied the exceptional circumstances requirement under subsection **(4)** above. It is also my finding that the *ex parte* applicant ought to have exhausted the available mechanism before approaching this court. On this ground alone, I find that this case offends section **9 (2)** of the Fair Administrative Action Act.[48] On this basis, this suit is dismissed.

Final orders.

59. In view of my analysis and determination of the two issues discussed above, the conclusion becomes irresistible that this application is fit for dismissal. The effect is that the orders sought herein are hereby refused. The *ex parte* applicants' Notice of Motion dated **16th** May 2017 is hereby dismissed with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **17th** day of **January** 2019

John M. Mativo

Judge

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[1] *Plyler v. Doe* {1982}

[2]In *Zadvydas v. Davis* {2001}

[3] Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, 41 (Manchester University Press 1984); Universal

Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d. Sess., Supp. No. 13, at 71,U.N. Doc. Al810 (1948).

[4] Universal Declaration of Human Rights, pmbl.,art. 7-11, 19,20(1). G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[5] David Feldman, *Human Dignity as a Legal Value -Part I*, 1999 Pub. L. 682, 690-91.

[6] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

[7] Citing *R v Commissioner of Police & 3 Others ex parte Phylis Temwai Kipteyo* HC Misc App No 27 of 2008 {2011] eKLR-Bungoma.

[8] Cas Romania European Court of Human Rights 26692/05 2012.

[9] Act No. 11 of 2011.

[10] Citing *CK (a child) v The Commissioner of Police/The Inspector General of National Police Service* Pet No. 8 of 2012.

[11] Citing Article 2(5)(6) of the Constitution.

[12] Act No. 2 of 2013.

[13] Citing *Thomas Nyakambi Maosa v Kibera Chief Magistrate & 3 Others* {2015}eKLR.

[14] Citing *Republic v Commissioner of Police & Another ex parte Michael Monari & Another* {2012}eKLR.

[15] Citing Article 157(11) of the Constitution and *Thomas Mboya Oluoch & Another v Lucy Muthoni Stephen & Another*, Nairobi HCCC No. 1729 of 2001.

[16] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[17]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[18] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[19] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[20] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff’d 2003 FCA 233 (CanLII), 2003 FCA 233).

[21] Hoexter C *‘The Future of Judicial Review in South African Administrative Law’* SALJ (2000) 117(3), 501-502.

[22] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), at para 48,

[23] Cap 88, Laws of Kenya.

[24] Act No. 4 of 2015.

[25] Cap 88, Laws of Kenya.

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

[27] Ibid.

[28] {1992} KLR 21.

[29] Ibid.

[30] {2015} eKLR.

[31] {2015} eKLR

[32] Ibid.

[33] Act No. 4 of 2015.

[34]*Dr Sanjeev Kumar Tiwari*, *Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[35] Ibid.

[36] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[37] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[38]Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

[39] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[40] Koyabe supra para 39.

[41] Ibid para 44.

[42] Ibid paras 42, 43 and 45.

[43] Act No. 4 of 2015.

[44] In the matter between: *Reformed Presbyterian Church v Minister of Police & Another*, In the High Court of South Africa Eastern Cape Local Division, Mthatha Case No. 3642/2015 Date heard: 19 October 2017 Date delivered: 6 February 2018.

[45] 7 Quinot (2015), at 88. The learned author’s conclusion is drawn from an analysis of the treatment of the meaning of administrative action in, inter alia, Grey’s Marine [2005], *Minister of Home Affairs and Others v Scalabrini Centre and Others 2013* (6) SA 421 (SCA), *Wessels v Minister for Justice and Constitutional Development and Others* 2010 (1) SA 128 (GNP), and *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).

[46] Quinot (2015), at 89.

[47] For example, see *Registrar of Banks v Regal Treasury Private Bank Ltd* 2004 (3) SA 560 (W), at 567G-I; *Sasol Oil (Pty) Ltd v Metcalfe* NO 2004 (5) SA 161 (W), at 13. See, too, the discussion in Hoexter (2012), at 232-4, where the above cases are mentioned.

[48] Act No. 4 of 2015.