REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 163 OF 2019

RHODA WANJIRU KIBUNJA.....APPLICANT

VERSUS

HON. R. O. MBOGO,THE RESIDENT MAGISTRATE,

CHILDREN'S COURT, MILIMANI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Introduction

1. A brief historical background to the application dated 6th June 2019, the subject of this ruling will help in contextualizing, appreciating and bringing the issues raised in the application in to proper perspective. As the saying goes, if content gives the colour, context gives the texture. None can be ignored. Both are important.[1]

2. Briefly, the applicant approached this court on 29th May 2019 seeking leave to apply for the following Judicial review orders:-

a. An order of certiorari to quash the orders issued by the 1st Respondent dated 19th December 2018.

b. An order or Mandamus directing the file to be placed before the Honorable Chief Magistrate Children's Court, Nairobi for delivery of final judgment as per court proceedings of the Children's case number 203 of 2009.

c. A declaration that her fundamental rights and freedoms guaranteed under Articles 22, 23 (3) (e) (f), 25 (c), 28, 29 (a), 48, 50 and 53 (1) (e) & (2) of the Constitution were violated by the first Respondent by his partiality, order for unlawful arrest and detention.

d. That the leave so granted operates as stay of the orders against the applicant on the 19th December 2018 in Children's case No. 203 of 2009.

e. That the costs of the application be provided for.

3. At the *ex parte* stage, I directed the application be served and scheduled the matter for directions *inter partes* on 29th May 2019. On the said date, the applicant asked for 7 days to annex proceedings on the lower courts file while Mr. Ngatia, counsel for the Interested Party asked for time to file a Response to the application. I granted the applicant leave to file an amended statutory statement and an amended application if need be and also leave to file a supplementary affidavit to annex the said proceedings within 7 days.

4. I scheduled the matter for Mention on 10th June 2019. On the said date, the applicant stated that she had filed an amended Notice of Motion and an amended Statement both dated 6th June 2019. Contemporaneous with the said documents, she also filed a Notice of Motion dated 6th June 2019, the subject of this ruling. She however stated that she was unable to secure the lower courts proceedings because they were not ready, hence, she did not file the supplementary Affidavit as directed.

5. In the amended Notice of Motion, the applicant prays for leave to apply for an order of *Certiorari* to quash the orders issued by the 1st Respondent dated 19th December 2018 and an order of *Mandamus* directing the file to be placed before the Hon. Chief Magistrate,

Children's Court, Nairobi for judgment as per court the nproceedings. In addition, she prays for the leave sought operates as stay of the orders issued on 19th December 2018.

6. I directed the Interested Party to file and serve their reply within 10 days from the date of service and granted the applicant leave to file a reply if need be. I further ordered the Executive Officer, Children's Court to supply the applicant with certified copies of proceedings and judgment in respect of the said case upon payment of court fees.

7. On 3rd July 2019, the applicant filed the supplementary affidavit in which she essentially highlights the history of the case in the lower court and alleging that the conduct of the first Respondent hindered her right of appeal. Since the proceedings are annexed to the affidavit, it will serve no use for me to rehash the same story here.

The application

8. In her application dated 6th June 2019, the applicant seeks an order that she be exempted from the obligation to exhaust alternative remedies of appeal or review in the interests of justice, and to facilitate access to justice and fair administrative action. She also seeks to be allowed to commence these judicial review proceedings.

9. The applicant cites the following grounds in support of the application, namely:-

a. That she instituted a suit in the Children's Court being Case No. 203 of 2009, and, that she is dissatisfied with the turn of events and is unable to appeal or review decision thereof for reasons captured in the judicial review application.

b. That she has not been able to obtain typed proceedings or orders made in the proceedings which has made it difficult to institute an appeal or review or even annex the proceedings to the judicial review application despite making several requests.

c. That the above scenario has greatly prejudiced her and the minor who is the subject matter in the said suit which situation greatly undermines the interests of the minor therein to the detriment of the rule of law.

d. That given the circumstances, the applicant cannot positively comply with the provisions of order 53, section 9 (2) (3) of the Fair Administrative Action Act.

e. That her intended application has very high chances of success.

Interested Party's Response

10. Peter Kimani Gatheca, the Interested Party filed a Replying Affidavit on 4th July 2019. He averred that the applicant was never willing to be heard on merits, and, that, she tried every trick in the book to derail the hearing for over 9 years by applying for disqualification of the trial Magistrate and when it failed, becoming unruly in court.

11. He also deposed that the applicant filed an application for review which she has chosen not to prosecute and the same is still pending in court. He further averred that the applicant was heard in accordance with the law, and, that, she has not exhausted all the remedies available after the judgment.

12. Counsel for the Honorable Attorney General filed grounds of opposition on 30thJuly 2019 stating:-

a) That the application is defective and has no merits and is based on misconception of the law.

b) That the application offends the provisions of section 9 (2) (3) of the Fair Administrative Action Act. ***[2]***

c) That the facts brought in this case are not within the purview of judicial review court.

d) That the application is without merit, legal reason, backing and is an abuse of court process.

The arguments

13. The applicant argued that she seeks to be exempted from the obligation to exhaust the dispute resolution mechanism provided under the law, which is to appeal or review and be permitted to apply for the judicial review orders sought. She argued that the impugned decision was made in breach of the Rules of Natural justice, and, that, she did not appeal because the period for filing an appeal lapsed.

14. In addition, she argued that the trial Magistrate was biased, and, that he began to testify against her, and, that she was held for 4 hours. She also stated that her case was struck out. She further argued that her case has been in court for 10 years and her suit was dismissed. She relied on the grounds on the face of the application and her affidavit.

15. The applicant also stated that she filed a Judicial Review application because she needed instant justice as opposed to an appeal. Lastly, she stated that she applied for recusal but the Magistrate declined and granted her 14 days to appeal, yet she was sitting for exams

16. Mr. Ngatia, counsel for the Interested Party adopted the Replying Affidavit. He argued that the application is incompetent because it was filed after the Judicial Review application was filed, yet it ought to have been filed before. He pointed out that the applicant is challenging a judicial decision as opposed to an administrative decision and referred to section 2 of the Fair Administrative Action Act[3] (herein after referred to as the FAA Act). Counsel submitted that the law provides for appeals against judicial decisions, and, in any event, even if the court were to find her argument to be valid, she has not established exceptional circumstances. He referred to the impugned decision and pointed out that the applicant applied for recusal before the 3rdMagistrate. He also stated that the applicant's case was dismissed for want of evidence. He also pointed out that the applicant has a pending application for review in the lower court, but she was advised to appeal. Lastly, counsel submitted that the application lacks merits.

17. Mr. Munene, counsel for the Respondents submitted that the impugned decision is a judicial decision and not an administrative decision, hence, not amenable to judicial review. He argued that the exemption she is seeking is not known in law and that the law prescribes an appellate mechanism and urged the court to dismiss the application.

Determination

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

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

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

c. Whether this court can exempt a litigant from appealing against a court decision and permit him/her to institute Judicial Review proceedings instead.

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

19. As the pleadings show, the applicant has named Hon. R. O. Mbogo, the Resident Magistrate, Children's Court, Milimani as the first Respondent. The Magistrate has been sued in his name. The lower court's record shows that the applicant applied for the said Magistrate to recuse himself from the case. The learned Magistrate considered the application and rendered a ruling declining to recuse himself.

20. 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 duties. 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.

21. 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.[4] 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 binds all persons and all State organs at both levels of government.[5]

22. Section 6 of the Judicature Act[6] 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.*

23. 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*."

24. In *Bradley v. Fisher*,[7] 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*."[8]

25. 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.

26. The above section shields judicial officers from civil proceedings arising from the conduct of their judicial functions and not criminal proceedings. In *Cooley on Torts*,[9] 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."*

27. In *Griffith vs. Slinkard*,[10] 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."

28. 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*,[11] enunciated the most recent test to determine whether a judge's conduct is protected by absolute immunity.4 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.

29. Absolute immunity is intended to protect the judicial function from suits against judges brought by individual parties.[12] 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.[13]

30. 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.

31. 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 a persistent plea that the Magistrate should have recused himself. The said allegations can if well founded be argued as grounds of appeal 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[14] and Article 160 (5) of the Constitution. As a consequence, the suit against the first Respondent is unsustainable in law. On this ground, the suit against the first Respondent is struck off.

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

32. Mr. Munene and Mr. Ngaita argued that the impugned decision is a judicial decision as opposed to an administrative decision. It was their position that the decision can only be challenged by way of appeal or review. Differently put, counsel view is that the decision is not amenable to judicial review.

33. 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.

34. The 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 the 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.

35. The implication of the above definition is that the decision of a public authority or quasi-judicial tribunal is outright 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.

36. 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.

37. 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 applicant 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 applicant invoked judicial review jurisdiction under Order 53 Rules 1, 2, 3 & 4 of the Civil Procedure Rules seeking to quash the judgment rendered by the trial Magistrate and also asking the court to compel another Magistrate to decide the case as per the court record.

38. 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.[15]

39. 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*,[16] 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.[17]

40. The power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal, etc. has resulted in grave injustice.

41. Judicial review on the other hand 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. 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.

42. Judicial Review is about the decision making process, not the decision itself. The role of the Court in Judicial Review is supervisory. 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.

43. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. This is the power the applicant is invoking in this case. However, as noted earlier, the impugned decision is a judicial function, which to me is not amenable to judicial review but is appealable to the High Court. In fact, the reasons cited by the applicant are grounds for appeal as opposed to grounds for judicial review. The applicant is on record stating that she did not appeal and that the time prescribed for filing an appeal has since lapsed, hence the reason she seeks to review the decision. The said reasoning is legally flawed, it offends the provisions of the law setting out time limits for filing appeals and seeks to open doors for a litigant to file an appeal disguised as a judicial review.

c. Whether this court can exempt a litigant from appealing against a court decision and permit him/her to institute Judicial Review proceedings instead.

44. There is no doubt that the applicant has a right of appeal to the High Court. In fact, the law provides for appellate mechanism. The applicant's argument, as I understand is that it is that she seeks to be exempted from exercising her right of appeal and instead institute judicial review proceedings. The first reason she cited was that the period for filing an appeal had lapsed. As stated earlier, this ground is flimsy and unstainable. It is an invitation to this court to not only disregard the law on timelines for filing appeals, but is tantamount to inviting the court to open a back door for parties who are unable to appeal, to reopen court proceedings with ease, thus, making litigation an endless game. The argument also confuses judicial review jurisdiction and appellate jurisdiction.

45. First, I have already concluded that that the impugned decision is a judicial decision as opposed to an administrative action. Thus it is not amenable to judicial review. Second, 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, it was contended that the applicant has a pending application for review before the trial court. This alone is a ground to decline the application. Third, as stated above, 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. Fifth, judicial review jurisdiction is invoked under any of the grounds listed earlier 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. This is because the law provides for clear mechanisms for challenging judicial decisions.

46. The applicant wants to be exempted from exercising her right of appeal as permitted under the law. Such an exemption applies to administrative remedies as opposed to judicial remedies under 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. The applicant has utterly confused exhaustion of dispute resolution mechanism under a statute which applies to administrative decision and the legal right to file an appeal against a judicial decision.

47. 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.

48. 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. [18]It was perhaps most felicitously stated by the Court of Appeal[19] in *Speaker of National Assembly vs Karume**[20]*** 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*."

49. 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.[21] 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*,[22] 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*."

50. In the *Matter of the Mui Coal Basin Local Community,**[23]*** 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..."*

51. 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.[24] 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.

52. 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.

53. The applicant applied for exemption section **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.

54. Even though I have held that the impugned decision is not an administrative action, it is useful to consider what constitutes exceptional circumstances.[25] Article **47** of the Constitution and the Fair Administrative Action Act[26] are heavily borrowed 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:-[27]"

> *i. 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 . . . ."*
>
> *ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *iii. 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.*
>
> *iv. 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.*
>
> *v. 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.*

55. 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 ***[28]*** 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."*

56. 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.

57. 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.[29] 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.

58. In the instant case, the applicant approached the court, then after several court appearances, she filed the application for exemption. My reading of the above provision is that the application for leave must be filed first before instituting the judicial review application. This is because the requirement for the exemption is a pre-condition for filing the suit. Thus, even if I were to find that the decision in question is amenable to judicial review, (which I am unable to), then the application is incompetent for two grounds. *First*, the reasons cited do not constitute exceptional circumstances. *Second*, the application for leave is a pre-requisite, meaning, the application ought to have preceded the earlier application for leave. It means the application for leave is hanging in the air, has not roots and is bound to collapse.

59. In view of my analysis and the determination of the issues discussed above, the conclusion becomes irresistible that the applicant's application dated 6th June 2019 is fit for dismissal. It follows that the application seeking leave cannot be entertained. Accordingly, the application dated 6th June 2019 is hereby dismissed with no orders as to costs.

60. Flowing from the above order, the effect is that the applicant's amended Notice of Motion dated 6th June 2019 collapses. It is also dismissed with no orders as to costs.

Orders accordingly.

Signed, dated and delivered at Nairobi this **21st** day of **November**2019

John M. Mativo

Judge

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[1] See *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and other,* {1987} 1 SCC 424.

[2] Citing *Cortec Mining Kenya Limited v Cabinet Secretary of Mining & 9 Others* {2015} e KLR & Magalith Mining Company Limited v Hon AG & Cabinet Secretary Ministry of Mining, NBI ELC Misc (JR) Civil App No. 948 of 2015.

[3] Act No. 4 of 2015.

[4] Article 159 of the Constitution.

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

[6] Cap 8, Laws of Kenya.

[7] 13 Wall. (80 U. S.) 335, 337, 347, 20 L. Ed. 646, 647.

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

[9] 3rd Ed. vol. 2, p. 795.

[10] 146 Ind. 117, 44 N. E. 1001, 1002.

[11] 435 U.S. 349 (1978).

[12] 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).

[13] 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))).

[14] Cap 8, Laws of Kenya.

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

[16] AIR 1951 Cal. 193.

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

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

[19] Ibid.

[20] {1992} KLR 21.

[21] Ibid.

[22] {2015} eKLR.

[23] {2015} eKLR

[24] Ibid.

[25] 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).

[26] Act No. 4 of 2015.

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

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

[29] 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]