REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 201 OF 2018

IN THE MATTER OF AN APPLICATION BY OCHIENG ORWA DOMNICK, AMISI DAVID RODGERS, MASILA MUTUKU ERIC, WAFULA NANGACHO VICTOR, DOMINIC MBOYA, NYAMWEYA GEORGE NGURU AND AGOI KITING'A TREVOR FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF *CERTIORARI* AND *MANDAMUS*

AND

IN THE MATTER OF THE DECISION OF THE SENATE OF KENYATTA UNIVERSITY CONTAINED IN THE LETTERS DATED 22ND DECEMBER 2017

AND

IN THE MATTER OF ARTICLES 27, 29, 33, 36, 37, 43 (F), 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010, SECTION 3A OF THE CIVIL PROCEDURE ACT, ORDER 53 RULES 3 (1) AND 7 (2) OF THE CIVIL PROCEDURE RULES, FAIR ADMINISTRATIVE ACTION ACT, 2015, THE LAW REFORM ACT (CAP 26, LAWS OF KENYA), THE UNIVERSITIES ACT, 2012 AND ALL OTHER ENABLING PROVISIONS OF THE LAW AND THE INHERENT JURISDICTION OF THE COURT.

BETWEEN

1. **OCHIENG ORWA DOMNICK**
2. **AMISI DAVID RODGERS**
3. **MASILA MUTUKU ERIC**
4. **WAFULA NANGACHO VICTOR**
5. **DOMINIC MBOYA**
6. **NYAMWEYA GEORGE NGURU**

7. AGOI KITING'A TREVOR

8. MORARA KEBASO DAVID..........................EX PARTE APPLICANTS

AND

KENYATTA UNIVERSITY..RESPONDENT

RULING

*1. By a chamber summons dated **18th** August 2017, the ex parte applicants seek orders:-*

a. Spent.

b. That Leave be granted to the ex parte applicants to apply for orders of Certiorari and Mandamus against the Respondent.

c. That the said leave do operate as a stay of the decision of the Respondent taken on the **20th** December 2017 and communicated in the letters dated **22nd** December 2017 and **22nd** December 2017 addressed to the applicants.

d. That leave so granted do operate as stay of proceedings in Kiambu Chief Magistrates Criminal Case No. **105** of 2018, Republic vs Morara Kebaso & Others.

e. That costs of and incidental to the Review and this application be provided for.

f. That such further or other relief as this honourable Court may deem fit, just and expedient to grant in the interests of justice.

2. The core grounds relied upon as far as I can discern them from the application, the supporting Affidavit, and the statutory statement are:-

i. That the ex parte applicants were all at varying levels of study at Kenyatta University until their arbitrary expulsions on **22nd** December 2017 on non-academic grounds;

ii. **That** the Respondent in arriving at the decision acted irrationally, unreasonably and ultra vires its mandate under the Universities Act, 2012 by taking into account extraneous issues into consideration and not affording the ex parte applicants a chance to be heard and present their cases on all the allegations leveled against them;

iii. That the Respondent acted irrationally and unreasonably in failing to exercise its mandate under the Universities Act and expelling the ex parte applicants;

iv. That the expulsion was directed against students from particular ethnic communities and or political leanings who were seen to be championing grievances of the student inimical to the interest of the administration, lending the process to bias, prejudice and discrimination;

v. That the decision to expel the ex parte applicants was malicious, unlawful, oppressive and in total breach of the rules of natural justice, the rules and regulations of the University;

vi. That a section of the ex parte applicants were participants in various positions in the elections for the Kenyatta University Students Association (KUSA) for the academic year 2017/2018 which took place on 14th November 2017;

vii. That the elections were fraught with illegalities and irregularities including voter bribery, banning of certain candidates from contesting for various positions, rigging and general harassment of candidates perceived to be anti-administration. Further, due to the said malpractices, the student fraternity intermittently protested against the process, and in at least one circumstances leading to confrontations with the police.

viii. That at the same time, the student population as in the most, idle and let to their own accord because of a national lecturers strike organized by UASU. That the University was consequently closed vide a memo dated **16th** November 2017 owing to the strike.

ix. That by letters dated **16th** December 2017, the Respondent invited the ex parte applicants to appear before the Students' Discplinary Committee on **21st** December 2017 to answer to charges inter alia planning and mobilizing student and other persons to destroy University property. That the Disciplinary Committee purported to hold disciplinary proceedings against the ex parte applicants on or about **21st** December 2017 at which recommendations were made for the expulsion of the ex parte applicants.

x. That by letters dated **22nd** December 2017, the Respondent informed the ex parte applicants that after the conduct of disciplinary hearings, they had been found guilty of the allegations contained in their show cause letter and it had taken the decision to expel them from the University.

xi. That the Students' Disciplinary Committee was improperly constituted against the rules and Regulations of the University and the ex parte applicants were not accorded fair administrative hearing, and action, in the decision to expel them.

xii. That in the letters of **2nd** December 2017 communicating the decision to expel the ex parte applicants, the allegations enumerated therein were not the same as those for which the ex parte applicants appeared before the Student's Disciplinary Committee and defended themselves in line with the invitation letters to the committees thereby not according them the opportunity to respond to the extra charges. In particular, Wafula Nangacho was never questioned on all the charges contained in the expulsion letter except that of "Gross Violation of the University Media Policy" and that the ex parte applicants were interrogated on their political party affiliations and activities.

xiii. That following complaint by the Respondent, the DPP instituted Criminal Case Number **105** of 2018 at the Chief Magistrate's Court in Kiambu against the ex parte applicants wherein they are charged with various offences inter alia destruction of property.

xiv. That the decision to expel the ex parte applicants and charge them in Criminal Case No. **105** of 2018 was fraught with irrationality, unreasonableness, malicious and was actuated by ill-motive.

xv. That the ex parte applicants appealed against the impugned decision but nothing has come out the appeals to date.

Respondent's Replying Affidavit.

3. Antony Tanui, the Respondent's Legal Officer swore the Replying Affidavit dated **8th** June 2018. He averred inter alia that between **4th** November 2017 and **16th** November 2017, events transpired within the University due to incitement to violence leading to destruction of the Respondent's property valued at **Ksh. 13,000,000/=** and setting a blaze of the Respondent's old administration block destroying property worth **Ksh. 82,889,564/=.**

4. He further averred that investigations by the Respondent's Security and the Police identified the ex parte *applicants as the suspects. Further, he averred that the University closed on **16th** November 2017 due to the aforesaid events and the then lectures strike.*

5. He also averred that the first, second, third, fifth, sixth and seventh ex parte *applicants were informed of their suspension vide letters dated **16th** December 2017. He further averred that the fourth ex parte applicant was informed of his suspension vide a letter dated **19th** December 2017. Further, he averred that the eighth* ex parte applicant had already been suspended for persistent violation of the Respondent's Social Media Policy for posting insulting, threatening and inciting messages vide a letter dated **1st** November 2017 pending his appearance before the Student's Disciplinary Committee on **17th** November 2017 which date was postponed vide a letter dated **15th** November 2017.

6. Mr. Tanui also averred that the Student's Disciplinary Committee considered the suspensions of the third, sixth, seventh and eight *ex parte applicants on 20th December 2017. Also, he averred that the sixth* ex parte applicant did not appear before the Student's Disciplinary Committee, hence, it was resolved that he be given a second chance. Also, he averred that the first, second, fourth and fifth ex parte *applicants were heard on **21st** December 2017.*

7. **Mr. Tanui** averred that the ex parte applicants were found to have contravened the General Rules and Regulations Governing Student Conduct as contained in the Student information handbook 2017-2021 and Kenyatta University Student Social Media Policy Guidelines. He averred that they were found guilty and were expelled. Further, he averred that they notified of the expulsion in writing and the reasons for the expulsion.

8. Also, he averred that the ex parte applicants were arrested and charged before the Magistrates Court at Kiambu Law Courts with arson, incitement to violence and malicious damage to property. **Mr. Tanui** also averred that the ex pare *applicants appeals before the Student's Appeals Disciplinary Committee are yet to be heard. He also averred that the prayer seeking to stay the criminal proceedings is a spurious attempt to postpone a justified prosecution.*

9. At the ex parte *stage, I directed that the question of grant of leave and whether the leave if granted shall operate as stay shall be determined inter partes hence this Ruling.*

Issues for determination

10. Upon analyzing the facts presented by the parties and the advocates submissions, I find that the following issues fall for determination, namely:-

a. Whether the applicants have met the threshold for granting the leave sought and for the leave to operate as stay. In the alternative, under our transformative, liberal and progressive Constitution, is Court's leave a prerequisite to commence Judicial Review proceedings.

b. Whether this suit is bad in law under the doctrine of exhaustion.

c. Whether the ex parte applicants have established any grounds to grant leave quash or prohibit criminal case number 105 of 2018.

***a.* Whether the applicants have met the threshold for granting the leave sought and for the leave to operate as stay. In the**

alternative, under our transformative, liberal and progressive Constitution, is Court's leave a prerequisite to commence Judicial Review proceedings.

11. In spite of the importance of this issue, ***Mr. Otieno*** *for the ex parte applicant did not address it at all.* ***Mr. Waswa****, who appeared with him for the* ex parte applicants addressed it casually. He urged the Court to consider that the applicant's are young and to grant the leave sought. In particular the ex parte *applicant's counsel despite being aware that the issue before me was whether or not the leave sought should be granted, they did not address their minds on the purpose of leave in Judicial Review proceedings, nor did they address the tests to be satisfied before leave is granted.*

12. Mr. Otieno, *nevertheless argued that the* ex parte applicants were expelled without being afforded a hearing, while one of the applicants never appeared before the Student's Disciplinary Committee.

13. Mr. Miano, counsel for the Respondent correctly captured the essence of leave in Judicial Review proceedings. He argued that at the leave stage an applicant is required to demonstrate a prima facie *case. He cited Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others.****[1]***He also argued that grant of leave is discretionary.[2] He argued that the University acted within its rights, that the applicants were suspended after they were found culpable after investigations, and they were suspended and expelled after being heard, and that their appeal is yet to be heard.

14. I find it appropriate to address the question "what is the purpose of leave in Judicial Review proceedings.?"The importance of obtaining leave in a Judicial Review application was eloquently stated by **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others****[3]*** cited by the Respondent's Counsel where the learned Judge said:-

> " is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived..”(Emphasis added)

15. In *Meixner & Another vs A.G,****[4]*** it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory **"leave stage."** At this stage an application for leave to bring Judicial Review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*.

16. At the leave stage an applicant must show that:- **(i)** he/she has **'sufficient interest'** in[5]the matter otherwise known as *locus standi*; **(ii)** the applicant must demonstrate that he/she is affected in some way by the decision being challenged; **(iii)** An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success; **(iv)** the application must be concerned with a public law matter, i.e. the action must be based on some rule of public law; **(iv)** the decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function. All these tests are important and must be demonstrated.

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

18. However, it is important to point out that all the above decisions and the jurisprudence on the question of grant of leave discussed above is based on the common law principles of Judicial Review. The cases cited above were all rendered before the promulgation of the Constitution of Kenya 2010. Order **53** of the Civil Procedure Rules, 2010, is borrowed from Sections **8** and **9** of the Law Reform Act[6] which provisions are premised on the common law Jurisdiction governing Judicial Review remedies and procedure for applying for Judicial Review orders.

19. A fundamental question warrants proper judicial consideration. The Constitution of Kenya 2010 has been hailed as highly progressive, liberal and transformative. Article **19 (1)** provides that the Bill of Rights is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies. Article **19** (**2)** provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Article **19(3)** provides that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Bill of Rights and are subject only to the limitations contemplated in the Constitution.

20. Article **22** of the Constitution guarantees the right to institute Court proceedings to enforce the Bill of Rights. Article **23** grants the Court the authority to uphold and enforce the Bill of Rights. More important is the fact that Article **23 (3)** provides the remedies the Court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article **22,** the Court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and *an order of Judicial Review*.

21. This discussion cannot be complete without mentioning Article **48** which guarantees the right to access Court and Article **258** which provides that every person has a right to institute Court proceedings claiming that the Constitution has been contravened or is threatened with contravention. I need not mention the supremacy of the Constitution over all other laws and its binding nature decreed in Article **2.**

22. Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the Fair Administrative Action Act.[7] Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

23. On the face of all the above constitutional provisions and in particular the right to access justice, the question that arises is whether a citizen citing violation of a constitutional right requires the leave of the Court to apply for Judicial Review Orders.

24. 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."

25. The above provision is clear. All law must conform to the Constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act[8] 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.

26. As the Supreme Court of Appeal of South Africa observed[9] *"All statutes must be interpreted through the prism of the Bill of Rights."*This statement is true of decisions made by statutory bodies. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution. It is beyond argument that Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[10] Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.

27. 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 it held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others**[11]*** 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.

28. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second*, the right to access the Court is now constitutionally guaranteed. This makes the requirement for leave in cases citing violation of the Bill of Rights unnecessary. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3)(f).** *Fourth*, section **7** of the Fair Administrative Action 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.

29. 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.[12] Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

30. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the Courts to control the exercise of public power are now regulated by the Constitution.

31. It is therefore my conclusion that in cases citing violation of the Bill of Rights or violation of the Constitution, leave of the Court is not a prerequisite before instituting the proceedings nor is it necessary to invoke the provisions of Order **53** of the Civil Procedure Code, 2010 or sections **8** and **9** of the Law Reform Act.[13]No matter how noble and worthy of admiration Court procures are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail.

b. Whether this suit is bad in law under the doctrine of exhaustion.

32. Mr. ***Otieno****, counsel for the ex parte applicants conceded that the ex parte applicant's appeals are yet to be heard by the University Appeals Tribunal. However, without elaborating, he argued that the this case falls under the exceptions provided under section* ***9 (4)*** *of the Fair Administrative Action Act.*[14] *He relied on Dan Owino & 3 Others vs Kenyatta University,*[15]*Moses Nandalwe Wanjala vs Kenyatta University*[16]and *Losem Naomi Chepkemoi vs Kenyatta University*[17] all of which I have carefully considered.

33. Mr. Miano *for the Respondent argued that the ex parte applicants were suspended and invited to appear before the Student's Disciplinary Committee. All appeared except the sixth Respondent whose appearance was scheduled to another date but the University was closed before the scheduled date. He submitted that the Committee is ready to hear him if he presents himself. He also submitted that all the* ex parte applicants (except the sixth who is yet to be heard) appealed against the decisions and their appeals are still pending awaiting hearing and determination. He argued that the appeals will be heard as soon as the appeal board is constituted. He cited section **9 (2)** of the Fair Administrative Action Act[18] and submitted that this case does not fall within the exceptions provided under section **9(4)** of the Act. He argued that the applicants ought to have exhausted the laid down appellate mechanism before approaching the Court. He submitted that this case is premature since the appeal is pending and the sixth applicant is yet to appear before the Students Disciplinary Committee.

34. 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.

35. This doctrine is now of esteemed juridical lineage in Kenya.[19]It was perhaps most felicitously stated by the Court of Appeal[20] in *Speaker of National Assembly vs Karume**[21]*** 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."

36. 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.[22] 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*,[23] 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."

37. As the High Court stated in the *In the Matter of the Mui Coal Basin Local Community,**[24]*** the rationale is 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..."

38. What emerges from our jurisprudence in these cases are at least two principles:- *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.[25] 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.

39. Section **9 (2)** of the Fair Administrative action Act[26] provides that the High Court or a subordinate court under subsection **(1)** **<u>shall not</u>** review an administrative action or decision under this Act <u>unless the mechanisms including internal mechanisms for appeal or review</u> 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).**

40. 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.[27]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[28] 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.

41. 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.

42. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **<u>not permissive</u>**, it is **<u>mandatory</u>**. 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.[29] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is <u>legally mandatory</u>.[30] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

43. 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.

44. 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.

45. The *ex parte* applicants counsel made a statement that there are exceptional circumstances in this case after the Court drew his attention to the above sections. He however did not provide specific cases that bring this case under the exceptions, except stating that the applicants are young which to me does not fit into the definition of "exceptional circumstances" discussed below.

46. It is settled that the impugned decision constitutes administrative action as defined in section **2** of the Fair Administrative Action Act.[31] Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the appellant can show exceptional circumstances to exempt him from this requirement.[32] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue.[33] 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 our law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[34] An internal remedy is adequate if it is capable of redressing the complaint.[35]

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

48. 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 appeal mechanism was not adequate nor do I find any reason to find or hold so.

49. 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 Courts jurisdiction must be construed restrictively. This argument was not advanced before me nor do I discern it from the facts of this case.

50. 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* applicants ought to have exhausted the available appellate mechanism before approaching this Court. On this ground alone, I find that this case offends section **9 (2)** of the Fair Administrative Action Act.[36]

c. Whether the ex parte applicants have established any grounds to grant leave quash or prohibit criminal case number 105 of 2018.

51. Prayer **4** of the application seeks an order for the leave granted to operate as stay of proceedings in Kambu Chief Magistrates Criminal case number **105** of 2018, Republic vs Morara Kebaso & Others.

52. Counsel for the *ex parte* applicants did not address this prayer at all. But even if they did, it would have been a futile exercise. The Director of Public Prosecutions was not named as a Respondent in this case. The Constitution vests State powers of prosecution on the DPP. The DPP was a necessary party in these proceedings by virtue of his Constitutional mandate.

53. The Director of Public Prosecutions is not a party in this case, yet the order sought seeks to stay or quash criminal proceedings. This is a serious omission. Even though it is an omission that could have been cured by way of amendment, the *ex parte* applicants counsel did not address it at all. The DPP was a necessary party in these proceedings.

54. A court of law cannot issue orders which will affect persons who are not parties to the case. Such a scenario amounts to granting orders affecting other persons without giving them the benefit of a hearing. It is an established principle that a person becomes a necessary party if he is entitled in law to defend the orders sought. The term “entitled to defend” confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. A person or an authority affected by a Court order must have a legal right or right in law to defend or assail.

55. The Supreme Court of India put it succinctly:-[37] “No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles … provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled to the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail...”

Determination

56. Applying the principles laid down in the authorities discussed above, and guided by my determination of the issues and analysis of the law as enumerated above, the conclusion becomes irresistible that the *ex parte* applicants have not established any basis for the Court to grant any of the orders sought.

57. Accordingly, the ex parte applicants application dated **18th** May 2018 must fail. The upshot is that the ex parte applicants application dated **18th** May 2018 is hereby dismissed with no orders as costs.

Orders accordingly.

Dated at Nairobi this 10th day of September, 2018

John M. Mativo

Judge

---

[1] Mombasa HCMISC APP No 384 of 1996

[2] Counsel cited Mirugi Kariuki vs A.G. Civil App No. 70 of 1991.

[3] Mombasa HCMISC APP No 384 of 1996.

[4]{2005} 1 KLR 189

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

[6] Cap 26, Laws of Kenya.

[7] Act No. 4 of 2015.

[8] Cap 26, Laws of Kenya.

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

[10] Article 47(1) of the Constitution of Kenya, 2010

[11] *2000 (2) SA 674 (CC) at 33.*

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

[13] Cap 26, Laws of Kenya.

[14] Act No. 4 of 2015.

[15] Pet No. 54 of 2014.

[16] {2015} eKLR.

[17]{2018} eKLR.

[18] Act No. 24 of 2015.

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

[20] Ibid.

[21] {1992} KLR 21.

[22] Ibid.

[23] {2015} eKLR.

[24] {2015} eKLR

[25] Ibid.

[26] Act No. 4 of 2015.

[27]*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).

[28] Ibid.

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

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

[31]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).

[32] 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).

[33] Koyabe supra para 39.

[34] Ibid para 44.

[35] Ibid paras 42, 43 and 45.

[36] Act No. 4 of 2015.

[37]In *J.S. Yadav vs State of U.P. & Anr* {2011} 6 SCC 570, Paragraph **31.**