

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT NAKURU

JUDICIAL REVIEW NO. E012 OF 2024
(Before Hon. Lady Justice Anna Ngibuini
Mwaure)

REPUBLIC.....

APPLICANT

VERSUS

CHIEF MAGISTRATES COURT NAKURU..... 1ST
RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND
RESPONDENT

AND

ELEMECH ENGINEERING CO. LTD..... 1ST

INTERESTED PARTY

AMOLAK SINGH ISHER & SONS..... 2ND

INTERESTED PARTY

AND

MAINA KAGARA MUTHENDU..... *EX-PARTE*

APPLICANT

RULING

Introduction

1. The 1st and 2nd interested parties filed a Preliminary objection dated 12th February 2025 seeking the following grounds that:

- i. *The entire application dated 13th January 2025 is in gross violation of section 9(2) of the Fair Administrative Actions Act.*

- ii. *The entire application is in gross violation of Rule 10(a) and (b) of Fair Administrative Action Rules 2024.*
 - iii. *The application herein is misconceived, hopelessly and incurably defective, a monumental substantive and procedural legal nullity and an abuse of the court process.*
2. Both parties canvassed the preliminary objection by way of written submissions as pertaining to the application seeking Judicial Review orders of *certiorari* dated 13th January 2025.

1st and 2nd interested parties' submissions

3. The 1st and 2nd interested parties submitted that the doctrine of exhaustion requires that parties first utilize all available internal mechanisms for appeal or review before seeking judicial intervention. This principle is enshrined in **Section 9(2) of the Fair Administrative Action Act**, which explicitly prohibits courts from reviewing administrative actions unless such remedies have been exhausted. In ***Ndiara Enterprises Ltd V Nairobi City County Government [2018] KECA 825 (KLR)***, the Court of Appeal affirmed that judicial review is impermissible where internal remedies remain

unexhausted. Similarly, in ***Geoffrey Muthinja & Another V Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR)***, the Court emphasized that courts should be a last resort, advocating for the use of alternative dispute resolution mechanisms in line with ***Article 159 of the Constitution***.

4. The 1st and 2nd interested parties argued that the Magistrate Court, established under the Magistrate Court Act and the Constitution of Kenya, properly exercised jurisdiction over employment matters, making the Employment and Labour Relations Court (Procedure) Rules, 2024 applicable. Specifically, Rule 74(1) and (2) provides a clear mechanism for review of decrees or orders where no appeal is preferred or allowed.
5. The 1st and 2nd interested parties argue that the *ex-parte* Applicant failed to utilize this internal review process regarding the order issued on 13th December 2024, instead prematurely seeking judicial review. The 1st and 2nd interested parties submitted that the *ex-parte* Applicant ought to have exhausted the prescribed review and appeal procedures, especially since no exemption from the exhaustion requirement was sought.

6. The 1st and 2nd interested parties urged this Honourable Court to allow the preliminary objection as prayed.

Ex-parte Applicant submissions

7. The *ex-parte* Applicant contended that the current judicial review proceedings were properly instituted under **Order 53 of the Civil Procedure Rules**, following leave granted by the Court on 17th December 2024, to seek an order of *certiorari* to quash the decision issued on 13th December 2024 by Hon. Peter Aloyce Ndege in Nakuru MC ELRC No. E073 of 2022. The *ex-parte* Applicant argues that the leave granted has not been set aside and thus the application is properly before the Court. In response to the preliminary objection raised by the 1st and 2nd Interested Parties who wish to rely on the Fair Administrative Action Act (FAAA), 2015, the *ex-parte* Applicant submitted that the objection is misplaced, as the application was not brought under the FAAA but under **Order 53 of the Civil Procedure Rules and sections 8 and 9 of the Law Reform Act.**

8. The *ex-parte* Applicant relied on the Court of Appeal case in **Independent Electoral and Boundaries Commission (IEBC) V National Super Alliance (NASA) Kenya & 6 Others**

[2017] KECA 436 (KLR), where the Court of Appeal held that judicial review in Kenya is grounded in both constitutional and statutory frameworks, and that Order 53 of the Civil Procedure Act and the FAAA are not mutually exclusive. A litigant may choose either or both procedures, and such choice is not fatal to the application. This position was echoed by Mutungi J. in **Republic V Senior Scheme Manager Mwea Irrigation Settlement & 2 Others; Kimani & Another [2024] KEELC 567 (KLR)**, where the Court held that an application brought solely under Order 53 of the Civil Procedure Act and the Law Reform Act does not attract the application of the FAAA or Article 47 of the Constitution. Therefore, the *ex-parte* Applicant argues that the preliminary objection lacks merit and is an improper attempt to challenge the Court's earlier decision granting leave.

9. The *ex-parte* Applicant argues that although the issue of jurisdiction was not raised in the preliminary objection, it has been addressed in submissions and is central to the matter. Jurisdiction is governed by the Constitution, statute, and judicial precedent. Under **Article 165(6) and (7) of the Constitution**, the High Court has supervisory jurisdiction over subordinate courts and bodies exercising judicial or quasi-judicial functions,

allowing it to call for records and issue appropriate directions to ensure fair administration of justice. This supervisory power is invoked through Order 53 of the Civil Procedure Rules, which permits judicial review including certiorari against judgments, orders, decrees, or convictions of subordinate courts.

10. The *ex-parte* Applicant relied on the cases of ***Faki Mohamed & Another V Principal Magistrate (K. I. Orange); Prestige Shuttle Tour & Travels Ltd (Interested Party) [2022] KEHC 11480 (KLR)*** and ***Leah Tonui V Elias Mwangangi Njoga [2015] KEHC 4706 (KLR)***, where orders of certiorari were issued to quash decisions made by magistrates who lacked jurisdiction. The *ex-parte* Applicant submitted that the interested parties, after being denied stay orders by Justice Rika in NAKURU ELRC Appeal E067 of 2024, improperly sought similar relief from a subordinate court that was ***functus officio***, and obtained orders from Hon. Aloyce Ndege. The *ex-parte* Applicant argues that such a court lacked jurisdiction, and the only remedy available was judicial review.

11. The *ex-parte* Applicant relied on the case of ***Kenya National Examination Council v Republic Ex***

Parte Geoffrey Gathenji Njoroge & 9 others [1997] KECA 58 (KLR), where the Court of Appeal held that *certiorari* is the appropriate remedy to quash decisions made without jurisdiction or in violation of natural justice.

12. The *ex-parte* Applicant concluded stating that this Honourable Court has the authority to quash the irregular order issued by Hon. Ndege on 13th December 2024, and that the conduct of the interested parties amounts to forum shopping and an abuse of court process, which this Court is empowered to address under its supervisory jurisdiction.

Analysis and determination

13. The court has considered the preliminary objection together with rival submissions of both counsels; the issue for determination is whether the preliminary objection is merited.

14. In ***Ethics and Anti-Corruption Commission V Judith Marilyn Okungu & Another [2017] KECA 413 (KLR)*** the Court of Appeal cited the case of ***Mukisa Biscuits Manufacturing Co. Ltd V Westend Distributors Ltd [1969] EA 696*** where the court stated as follows:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

15. The 1st and 2nd interested parties argue that this Honourable Court does not have jurisdiction to handle the judicial review before it. In ***Owners of the Motor Vessel “Lillian S’ V Caltex Oil (Kenya) Ltd [1989] KLR 1***. Nyarangi, JA relying, *inter alia*, on the above cited treatise by John Beecroft Saunders held as follows:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. The 1st and 2nd interested parties contended that the *ex-parte* Applicant failed to pursue available internal avenues for review or appeal regarding Hon. Ndege’s decision. However, this Honourable Court is constituted under **Article 162(2) of the Constitution** and holds equal status to the High Court under Article 165 of the Constitution. Indeed, the High Court which includes specialised courts has authority to quash judgment, order, decree, conviction or other proceedings under Order 53(2) of Civil Procedure Rules. Therefore, this court has jurisdiction to deal with Judicial Review of decisions of the subordinate courts.

17. It is further noted that, there is absence of a formal internal mechanism within the Judiciary except for alternative dispute resolution under **Article 159 (2)**

(C) of the Constitution, and Rule 56 of the Employment and Labour Relations Court (Procedure) Rules 2024 which provide that a court may refer a matter to alternative dispute resolution and review process under **Rule 74(1) of the Employment and Labour Relations Court (Procedure) Rules 2024**. The court is of the view a dissatisfied party retains the right to appeal a subordinate court's decision since this Honourable Court is of equal status as the High Court and does hear appeals from the subordinate courts. The Honourable Court also emphasize that the *ex-parte* Applicant's request for certiorari falls squarely within the scope of judicial review under **Order 53 of the Civil Procedure Rules**, a position well supported by the precedent in **Kenya National Examination Council V Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others(Supra)** which states as earlier cited that "only an Order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons."

18. Similarly, the application did not invoke the provisions of the Fair Administrative Action Act 2015

and the same cannot apply in this matter. FAAA would therefore not sustain an application for preliminary objection.

19. The court is satisfied that the Preliminary objection dated 12th February 2025 is not merited and the court is persuaded it is only fit to be dismissed accordingly and it is so dismissed.

20. Costs of the application are awarded to the *ex-parte* applicant.

Orders accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 22nd Day of October, 2025.**

**ANNA NGIBUINI MWAURE
JUDGE**

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of

21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE