REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO.E304 OF 2025

REPUBLIC……………………………………………………….APPLICANT

VERSUS

TRANSPORT LICENSING APPEALS BOARD……………...RESPONDENT

AND

KANGEMI CLASSIC SHUTTLE LIMITED…..1ST EX PARTE APPLICANT
NICHOLAS NDAMBUKI MUTINDA &
10 OTHERS………………………………………2ND EX PARTE APPLICANT

AND

DIGITAL LUXURY TRAVELLERS LIMITED…1ST INTERESTED PARTY
NATIONAL TRANSPORT & SAFETY
AUTHORITY……………………………………….2ND INTERESTED PARTY
CHIEF OFFICER MOBILITY,
NAIROBI CITY COUNTY GOVERNMENT……3RD INTERESTED PARTY
NAIROBI CITY COUNTY GOVERNMENT……4TH INTERESTED PARTY
KANGEMI MATATU OWNERS SAVINGS AND CREDIT
CO-OPERATIVE SOCIETY (KMO)……………..5TH INTERESTED PARTY

RULING

1. This ruling determines the 1st interested party's Notice of motion application dated **26th September 2025**, supported by the affidavit sworn by Stanley Ngugi Gacheru on the even dat. The application is brought pursuant to Article 25 (c) and 50(1) of the Constitution and Rule 35(2) and (4) of the Fair Administrative Action Rules,2024 to have the orders made by this court on **25th September 2025** (the orders were made on 24th September 2025 and uploaded on the CTS on 25th September, 2025) vacated and set aside *in toto*, and that such appropriate directions be issued by the court on the matter. The 1st interested

party also seeks costs of the application and of the entire proceedings dated **23rd September, 2025**(there were no proceedings conducted on 23rd September, 2025).

2. The 1st interested party/applicant's case is that counsel representing it during a Transport Licensing Appeals Board hearing on 25th September 2025, was shocked to learn from counsel for the 1st ex parte applicant, Kangemi Classic Shuttle Ltd, that the High Court had issued an order that morning suspending the Board's earlier order of **16th September 2025 in TLAB Appeal No. E031 of 2025.** The 1st interested party claims that it had not been served with the said order, and only accessed it later through the Court's online system.

3. It is asserted that the application giving rise to the impugned order was fatally defective, having been filed in the name of the Republic, which was never an actual applicant or client of the advocate on record**,** thus amounting to misrepresentation.

4. The 1st interested party states that the Fair Administrative Action Rules, 2024 require judicial review proceedings to be initiated by an originating motion in Form JR2, not by a chamber summons citing the Republic, and that Rule 5(1) and other mandatory provisions were not complied with**.**

5. According to the 1st interested party, the *ex parte* orders were issued without hearing the interested parties**,** contrary to Article 50(1) and Article 25(c) of the

Constitution, thereby violating the right to be heard**.** The 1st interested party also states in deposition that the same plea had already been made before the Transport Licensing Appeals Board and was scheduled for inter partes hearing later that same day, meaning the High Court's order undermined the Tribunal's ongoing proceedings and allowed the ***ex parte*** applicants to gain unfair advantage**.**

6. The 1st interested party further avers that the court acted outside the law by summarily granting orders not contemplated under the Fair Administrative Action Act or Rules**,** contrary to Rules 11, 19(2), and 27(3), which require judicial review proceedings to follow due process and guard against orders that cause hardship, prejudice, or harm to good administration. It is also asserted that the orders of 25th September 2025 were unlawful, procedurally defective, and unjust**,** and that they ought to be set aside immediately as they were obtained through non-disclosure, misrepresentation and denial of the right to be heard**.**

7. It is also alleged that the High Court's order of 25th September 2025 improperly assumed jurisdiction on merit, which a judicial review court does not have**.** The 1st interested party relies on a precedent by this court **Resolution Insurance Ltd v The HIV & Aids Tribunal & Others (HCJR No. 89 of 2018**), where the court is said to have held that judicial review is limited to procedural issues,

not the merits of a dispute, and that parties must first exhaust available statutory mechanisms.

8. The 1st interested party asserts further that the ex parte applicants were engaging in forum shopping, suing a weakened respondent without involving the Attorney General, which was unjust and procedurally irregular. Further, that the Civil Procedure Rules, 2010 do not apply to judicial review proceedings and that the Fair Administrative Action Rules, 2024 enacted under Section 13 of the Fair Administrative Action Act provide the mandatory procedure for instituting judicial review proceedings. It is also the 1st interested party's case that the ex parte applicants failed to comply with these Fair Administrative Action Rules, rendering their proceedings incompetent from the outset.

9. The 1st interested party also accuses the ex parte applicants of deliberate misrepresentation and concealment of material facts, including falsely claiming that Kangemi Classic Shuttle Ltd held a PSV licence issued on 18th March 2024, while in fact no such licence existed and purporting to rely on a letter dated 13th October 2023, a year before the company was incorporated. The deponent describes this as perjury and deception, which misled this Court and pre-empted the Transport Licensing Appeal Board's scheduled hearing.

10. It is also contended that the orders of this Court were issued without any supporting evidence, as the applicants' affidavits contained blank or unsealed

exhibits, contrary to the Oaths and Statutory Declarations Act and Rule 9 of the Commissioners for Oaths (Fees on Affidavits) Rules, rendering them legally invalid. Consequently, that the court's orders were issued without evidentiary basis and in breach of the principle of rule of law under Article 10(2)(a) of the Constitution.

11. The deponent further claims that the High Court's order allowed Kangemi Classic Shuttle Ltd to violate Regulation 5(1)(a) of the NTSA (Operation of Public Service Vehicles) Regulations, 2014**,** which requires any person desirous or operating public service vehicles to be licensed only if they are a member body corporate which owns a minimum of thirty serviceable vehicles registered as public service vehicles.

12. The 1st interested party claims that the order of 25th September, 2025 has caused chaos. Further, that that the ex parte applicants moved to the High Court to evade contempt proceedings lodged against them.

Responses

13. The 1st ex parte applicant filed a replying affidavit sworn on 6th October 2025 by John Ndungu Njuguna who introduces himself as a director of the 1st ex parte applicant. He contends in deposition that the application dated 26th September 2025 is frivolous, vexatious and an abuse of the court process as to begin with, Rule 5(1) of the Fair Administrative Action Rules, 2024 which the

ex parte applicants are accused to have violated was stayed vide a conservatory order issued by the High Court on 28th March, 2025, In **HCCRPET E168 of 2025; Katiba Institute versus the State Law Office and others**.

14. According to the 1st ex parte applicant, the law applicable for leave to institute Judicial review proceeding is Order 53 of the Civil Procedure Rules but not the Fair Administrative Action Rules, and that the said Order 53 of the Civil Procedure Rules same permits the court to entertain application for leave ex parte and in chambers.

15. The ex parte applicants contends that the Fair Administrative Action Act and the Rules made thereunder did not repeal the Civil Procedure Rules. Further, that Order 53 Rule 1(4) permits the court to order that leave granted does operate to stay the impugned decision.

16. Similarly, that the application has been overtaken by events given that, in compliance with the court's orders, a substantive notice of motion for Judicial review orders being **HCJR/E310/2025 Kangemi Classic Shuttle Limited and Nicholas Ndambuki Mutinda vs. Digital Luxury Travelers Limited and National Transport and Safety Authority and 4 Others** was filed, and directions issued by the court.

17. It is further contended that the 1st interested party has not demonstrated any loss that it will suffer if the application is not allowed. That on the contrary, the

impugned decision stayed operations of the ex parte applicants without hearing them; that the decision of the Transport Licensing Appeals Board (TLAB) had severely curtailed its operations and pre-disposed its members and franchisees to great hardships. It is stated that the 1st interested party is just but a bitter competitor out to stifle competition through unjust means.

18. The 5th interested party also filed a replying affidavit sworn on 20th October 2025 by Stephen Kariuki Gachau who introduces himself as the chairman of the 5th interested party.

19. According to the 5th interested party, the 1st interested party via a Memorandum of Appeal dated 11th September 2025, appealed against the decision of the National Transport and Safety Authority issuing a Road Service License to the ex parte applicants herein.

20. That together with the aforementioned memorandum of appeal was a certificate of urgency calling into urgent action, exercise of the Tribunal/TLABS's powers to the issues raised in the said memorandum of appeal, particularly the issue that the operations of the 1st ex parte applicant were against the law as the license allowing such operations was obtained fraudulently and in consequence calling for stay of its operations pending the hearing and determination of the appeal.

21. The Tribunal is said to have issued interim orders on **16th September 2025** staying the operations of the 1st ex parte applicant pending the hearing and determination of the appeal with the hearing set down for 25th September 2025.
22. **The 1st ex parte applicant is said to have filed an application dated 19th September 2025, praying for vacation of the orders staying the operation and while at the hearing on 25th September 2025 of the said application, counsel for the 1st ex** parte applicant made known to the Tribunal and the other parties, the orders of the court issued on 25th September 2025 in respect of the chamber summons application for leave to apply for judicial review orders dated 23rd September 2025. According to the 5th interested party, this is a classic example of forum shopping.
23. It is contended that the Court in exercising its jurisdiction over a matter that was alive at the Transport Licensing Appeals Board, contravened sacred provisions of the Constitution including Article 10 and 159(1) , Sections 6 and 11 of the Civil Procedure Act and Section 38 of the National Transport and Safety Authority Act.
24. It is also the 5th interested party's case that the application is by way of chamber summons while the Fair Administrative Action Rules dictate that the same ought to be by way of originating notice of motion. Further, that the chamber summons were instituted in the name of the Republic as an applicant while the

Republic cannot be an applicant at the leave stage of judicial review application.

25. The 5th interested party further claims that the orders of 25th September 2025 were obtained through concealment of facts including but not limited to the fact that the 1st ex parte applicant had lodged a similar application at the Transport Licensing Appeals Board; that the orders of the Tribunal/Board were interim orders and thus the 1st ex parte applicant's application before this Court was unripe for exercise of supervisory powers of this Honourable Court.

26. According to the 5th interested party, the 1st ex parte applicant had the opportunity to ventilate their issues contesting the orders of the TLAB at the hearing and that the said orders of the Tribunal were subject to review, affirmation or variation after the hearing of the matter and that therefore, by lodging the application before this Court, the 1st ex parte applicant breached the doctrine of procedural exclusivity.

27. The 5th interested party also contends that the aforementioned flaws are so grave to be cured by the provisions of Articles 50 and 159(2)(d) of the Constitution of Kenya, 2010, and Sections 3 and 3A of the Civil Procedure Act, which provisions cannot be a panacea to reckless, ignorant and blatant breach and disregard for rules of procedure.

28. The 5th interested party asserts that by allowing the 1st ex parte applicant to continue operating under a contested licence while the dispute was pending before the competent tribunal, the High Court acted in excess of its powers and undermined the tribunal's authority. It is alleged that this court's orders prompted the lifting of the tribunal's suspension, thereby enabling the 1st ex parte applicant to unjustly benefit from the 5th interested party's resources.

29. The 5th interested party further states that the vehicles in question were financed and managed under its schemes, from which it earned management fees and built financial capacity to assist its members and that the transfer of those vehicles to the 1st ex parte applicant amounted to unjust enrichment at its expense.

<u>Submissions</u>

30. The application was canvassed by way of oral submissions.

31. During the oral highlights Mr. Harrison Kinyanjui counsel representing the 1st interested party reiterated that the order given in favour of the ex parte applicants was not in conformity with the law hence it ought to be vacated. He further submitted the Constitutional Petition did not stay Rule 35(4) and (5) of the Fair Administrative Action Rules.

32. Counsel submitted that the chamber summons invoked the Fair Administrative Action Act and Rules of 2024. However, that it also invoked Sections 8 and 9 of Law Reforms Act and Order 53 of the Civil Procedure Rules, which was erroneous and fatal to these proceedings.

33. Further submission was that the applicant must move the court and that it cannot be the Republic as the Republic never instructed the advocate to file the application for leave. It was his submission that the Republic only comes in at the notice of motion stage. This according to Mr. Kinyanjui, renders the application fatally defective.

34. Further, he submitted that the ex parte applicants having invoked Rule 5 of the Fair Administrative Action Rules which was stayed, is fatal because no leave was required under the Fair Administrative Action Rules. That the applicants ought to have stuck on one lane. He relied on the case of **Matagei vs. Attorney General; Law Society of Kenya (Amicus Curiae) (Petition 337 of 2018) [2021] KEHC 460 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment)** where Korir J is said to have set out 3 jurisdictional frameworks of judicial review.

35. It was also submitted that once a party invokes the Fair Administrative Action, then no leave is necessary. That rules 19 and 27 were not adhered to, which, according to counsel, violated the *audi alteram partem rule*. Mr Kinyanjui also

submitted that the judicial review application was filed without material disclosure that the dispute was pending adjudication before the Transport Licensing Appeals Board and therefore, an abuse of court process.

36. Counsel also submitted that the exhibits were not marked hence the law was violated. He argued that the Tribunal/TLAB had not yet heard the dispute and that the orders issued by this Court brought chaos.

37. Mr. Mugo, counsel for the ex parte applicant submitted that Rule 35 of the Fair Administrative Action Rules was not applicable as the judicial review application was filed under Order 53 of the Civil Procedure Rules. He also submitted that the Fair Administrative Action Rules cannot be invoked where the application is brought under Order 53 of the Civil procedure Rules.

38. Counsel for the ex parte applicant submitted that the Fair Administrative Action Act and its Rules did not repeal Order 53 of the Civil Procedure Rules or Sections 8 and 9 of the Law Reform Act**,** and therefore leave remains a legal requirement for judicial review applications. He argued that while the Fair Administrative Action Act refers to the application of the Civil Procedure Rules, it does not itself provide for or abolish the requirement for leave**.**

39. Counsel further submitted in contention that citing the Republic is a common law practice and that the orders issued by this Court were lawful, as Order 53 of the Civil procedure Rules expressly empowers the court to grant stay. Finally,

counsel maintained that the present application is moot since leave was already granted and a substantive motion filed. He urged this Court to dismiss the application with costs.

40. Mr. Paul Isaac counsel for the 5th interested party submitted that the dispute over illegal motor vehicle transfers and licensing lay within the TLAB's jurisdiction**,** which Tribunal had already granted interim relief. He contended that the High Court application was defective and amounted to forum shopping, as the orders issued were orders that the Tribunal could lawfully grant. The effect, it was submitted, was to unjustly deprive his client of its vehicles and violate its property rights.

41. Counsel maintained that leave should not have been granted since the matter was already before the Tribunal, and that the applicants relied improperly on the Fair Administrative Action Act. Counsel also submitted that there were procedural breaches, including violation of Rule 9 of the Oaths and Statutory Declarations Rules and Regulation 15 of the Transport and Licensing Appeals Board Regulations, and argued that there was no evidence or disclosure justifying the court's orders. Counsel concluded that the application was baseless and urged this court to grant the orders sought.

Analysis and Determination

42. I have carefully considered the application, the grounds, supporting affidavit, annextures and replying affidavits for and against the prayers sought. I have also considered the oral arguments made by the respective participating parties' counsel on record and find the following issues arising for determination:

   i) ***Whether the procedure adopted by the ex parte applicants in filing the application for leave under Order 53 of the Civil Procedure Rules and at the same time citing the Fair Administrative Action Act and Rules, while naming the Republic as the applicant renders the judicial review proceedings incompetent;***

   ii) ***Whether the Court had power to issue the ex parte orders for leave and stay at the leave stage;***

   iii) ***Whether the ex parte applicants were guilty of material non-disclosure and misrepresentation warranting the setting aside of the ex parte orders***

   iv) ***What orders should this Court make?***

i) Whether the procedure adopted by the ex parte applicants in filing the application for leave under Order 53 of the Civil Procedure Rules and at the same time citing the Fair Administrative Action Act and Rules, while naming the Republic as the applicant renders the judicial review proceedings incompetent;

43. There are other ancillary questions that this Court will answer alongside the main issues.

44. On the 1st issue ,the 1st interested party in its application for setting aside the orders of 25th September, 2025 argues that the chamber summons application giving rise to the impugned orders was fatally defective, as the Fair Administrative Action Rules, 2024 requires judicial review proceedings to be initiated by an originating motion in Form JR2, not by a chamber summons, and that the ex parte applicants failed to comply with Rules 5(1), 11, 19(2), and 27(3) of the Fair Administrative Action Rules, 2024. The 1st interested party also argues that the application is incompetent as it was brought in the name of Republic, which is not an actual party or client of the advocate on record.

45. The 5th interested party supports this argument, contending that the application was procedurally defective for being brought by way of a chamber summons and for naming the Republic as the applicant, contrary to the Fair Administrative Action Act and Rules made thereunder.

46. Additionally, that the court's orders were issued in disregard of procedural exclusivity, as the matter was still live before the Transport Licensing Appeals Board, and that the High Court therefore acted in excess of jurisdiction. It submits that such defects are too fundamental to be cured by Articles 50 and 159(2)(d) of the Constitution or Sections 3 and 3A of the Civil Procedure Act.

47. In response, the 1st ex parte applicant contends that Order 53 of the Civil Procedure Rules remains the applicable procedure for judicial review and was not repealed by the Fair Administrative Action Act or the Rules. It contends that the High Court in **Katiba Institute v State Law Office & Others HCCRPET E168 of 2025** issued conservatory orders on 28th March 2025 staying the operation of Rule 5(1) of the Fair Administrative Action Rules,2024 the very provision that the interested parties rely on hence there was no procedural violation.

48. The 1st exparte applicant maintains that the 1st interested party's application is frivolous and vexatious and that a substantive motion **HCJR/E310/2025 Kangemi Classic Shuttle and Nicholas Ndambuki Mutinda vs. Digital Luxury Travelers Limited and National Transport and Safety Authority & 4 Others** has already been filed pursuant to the leave granted, rendering the application overtaken by events.

49. In resolving this issue which is twinned, it is acknowledged that the Fair Administrative Action Rules, 2024 were promulgated to streamline the procedure for matters arising under the Fair Administrative Action Act and to facilitate and enforce the right to fair administrative action. While the Rules prescribe the procedure for instituting such proceedings commenced under the Act, neither the Act nor the Rules repealed the provisions of Order 53 of the

Civil Procedure nor sections 8 and 9 of the Law Reform Act, in so far as they relate to judicial review.

50. It is important to note that the jurisdiction of this Court to entertain judicial review proceedings arises under Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules as well as the Fair Administrative Action Act and Rules, 2024, implementing Article 47 and 23 of the Constitution see this Court's decision in **Charity Wanja Ndambiri vs. The Hon.Deputy Registrar, High Court of Kenya At Milimani Family Division; Judicial Review Misc. Application No. 140 of 2025.**

51. Additionally, this court exercises supervisory jurisdiction over bodies, tribunals, persons and authorities exercising judicial and quasi-judicial functions. This jurisdiction is donated by Article 165(6) and (7) of the Constitution.it is for this reason that this Court does not fathom how it can be said to have violated the Constitutional values and or usurped powers and jurisdiction of the Tribunal by exercising jurisdiction that none other than the Constitution itself confers or vests in it.

52. The 1st and 5th interested parties contend that the chamber summons application referred to **Republic** as the applicant yet the Republic only becomes an applicant in the substantive notice of motion and not before leave has been granted.

53. While it is true that in judicial review proceedings, the name of the applicant ought to be indicated as the applicant in an application for leave, the question is whether such a misdescription is fatal to the proceedings, as contended by the 1st interested party's counsel, Mr. Harrison Kinyanjui.

54. The courts exist with the objective of deciding cases on their merits rather than to punish parties for procedural mistakes. Moreover, the primary test applied by courts is whether a reasonable person, having knowledge of the facts and reading the pleadings as a whole, would know that the claim was intended for them, despite the incorrect names included therein. Thus, if the litigating finger clearly points to the actual party, the error of misdescription is considered a mere misnomer, with Courts focusing more on the substance of the case and the rights of the parties, rather than technicalities and procedural traps.

55. In this case, I find that the fact of the applicant including the **Republic** in the pleadings as **Applicant,** which inclusion should have been in the substantive notice of motion, is not fatal to these proceedings as there is no prejudice that such an inclusion has caused or is likely to cause to any party. More so, anybody reading the pleadings clearly understands who the person applying for the reliefs is, and against who.

56. Article 159(2)(d) of the Constitution enjoins courts to administer justice without undue regard to procedural technicalities. Accordingly, such an omission or

misdescription is in my view, a self-curable defect that does not invalidate otherwise competent proceedings, since from the pleadings as a whole, the intention of the pleadings is clear and the respondents and interested parties have not been misled.

57. The Court of Appeal addressed this issue of misdescription of parties in the case of **Republic v Charles Lutta Kasamani & another ex parte Minister for Finance & Commissioner of Insurance as Licencing and Regulating Officers [2006] KECA 179 (KLR)** as follows:

> ***"As correctly submitted by Mr. Ombwayo, the problems of intitulment of pleadings in judicial review matters is as old and intractable as the law that provides for that remedy. Indeed, the predecessor of this Court was grappling with similar problems in the East African region half a century ago on matters of form in intituling proceedings under the Law Reform Ordinance, as it then was by name, and has since remained in substance. The two cases which illustrate the historical foundation of the problem are Mohamed Ahmed vs. R [1957] EA 523 and Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1957] EA 779. The court also gave guidelines on the proper form to be adopted in such proceedings and the decisions have been cited with approval on many occasions by this Court. It is evident***

however that the problem still persists in our courts fifty years after a solution was made available but it is not for want of authoritative precedent. Perhaps it is a matter that might have to be revisited by the Rules Committee to iron out the creases for the benefit of legal practitioners. Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment. This Court said so in Dipak Panachod Shah & Another Vs. The Resident Magistrate Nairobi and the Attorney General - Civil Application NAI. 81/00 (UR).”

58. Similarly, the Court of Appeal in **Boya Rural Nursing Home Ltd v National Hospital Insurance Fund Board of Management [2005] KECA 39 (KLR)** declined to dismiss an appeal on account of the recital of the forms of heading being incorrect and held thus:

> ***“It is also argued by the Mr. Wasuna that the recital of the forms of heading is incorrect and the appeal should be struck out. Though the form of the proceedings and the heading of the application before the superior court and the appeal lodged do not exactly follow the format prescribed in Farmers Bus Service & Others v Transport Licensing***

Appeal Tribuna**l [1959] EA 779, we do not think that the omission can be a ground to strike out the appeal, the objection having been belatedly raised. Moreover, the objection goes only on the want of form rather than on the substance."

59. In a much earlier case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd (2001) 2 E.A. 460 at page 467,** Ringera J. (as he then was) stated as follows concerning deviations from or lapses in form or procedure:

> ***"...Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue…***"

60. Again, in **Isaac Wetosi v Commissioner of Cooperative Development, Bungoma HC MISC Appl 72 of 2001,** Onyancha J (as he then was) faced with the same argument as the one herein that the applicant had instituted the chamber summons for leave to apply for judicial review orders under Order 53 of the Civil Procedure Rules in the name of the Republic instead of his own name, the learned Judge had this to say and I concur that:

> ***"I will first deal with the Respondent's first ground of objection – that the Ex Parte Applicant's Notice of Motion for a judicial review order is incorrectly instituted, incurably defective, bad in law and incompetent for seeking leave and obtaining the leave in the name of the "Republic" instead of its own name. Mr Kiraido made reference to the cases of Farmers Bus Services and others v Transport Licensing Appeal Tribunal (1957) 1 EA, 779 and Mohamed Ahmed v R (1959) 1 EA, 523, to demonstrate his point. I have carefully perused the case reports above.***
>
> ***What I gather from Mr. Kiraido 's argument is that the applicant obtained leave through an application showing the "Republic" when at that stage the ex parte applicant should have shown himself as the applicant. Effectively therefore, Mr. Kiraido was saying that there was a serious misjoinder of the "Republic" and a non-joinder of the***

ex parte applicant. He argued that this was a matter which went to the root or substance of the application rendering it incurably incompetent.

First, I do not lend credence to Mr. Kiraido's argument that at that stage the "Republic" is not a party. In my view all proceedings under Order 53 of the Civil Procedure Rules are special proceedings. The judicial review orders are specifically declared not to be available or issuable, except through the manner therein provided.

The Order does not categorically state that application for leave to seek a judicial review order must first be sought privately and separately before the Republic becomes a party through which the ex parte applicant can then sue. Nor is the process of seeking the said leave a separate process outside the said Order.

Indeed, the process of seeking relief is a one continuous process which starts with leave application through to the issuance of a judicial order. In my view and finding therefore, the applicant herein was not wrong in procedure in bringing the leave application in the name of the Republic.

If I am wrong in my above finding however, I would still find no reason to disturb the propriety of granting the "leave" which the court granted. This is because irregularity, if there was any, of bringing the Chamber Summons for leave in the name of the "Republic", did not go to the substance or root of the process. In particular, I would hold that since Order 53 does not specifically lay down the actual form which should be used in the Chamber Summons for leave, the one used by the applicant herein cannot be easily condemned, so long as the substantive matters or issues required to be included were actually, included.

I have not heard the respondent/objector state that such matters were not included or placed before the court by the form of the application used. The principle involved was indeed aptly stated in Shah v Resident Magistrate, Nairobi (2000) 1 EA 208 at 210 as follows: -

"On the authority of the decision of the Court of Appeal for Eastern Africa, in Mohamed Ahmed v R (1959) 1 EA 523, in which that court allowed an appeal to proceed to hearing, despite the misjoinder of parties, and following the decision of that court in the case of Farmers Bus Services and Others v Transport Licensing

Appeal Tribunal (1957) 1 EA 779, we were of the view that the misjoinder of the Attorney general and the Resident Magistrate and the non-joinder of the Chief Magistrate, Nairobi, were irregularities which were curable by amendment to the title to the application for leave to apply for an order of prohibition if the applicant's intended appeal was successful"

It follows accordingly that if the applicant's Chamber Summons seeking leave was irregular, which I have ruled it was not, then this court has got power and discretion to allow an amendment to the same to regularize it, just as the appellate court did in the immediately afore cited case."

61. The above decision was rendered on 25th day of May 2011.

62. Additionally, the Court of Appeal in a later decision in **Tom Mbaluto v Jessie Lesiit, Hannah Okwengu, Jackton Ojwang, Festus Azangalala & Luka Kimaru [2012] KECA 242 (KLR)** set aside a ruling of the High Court which had declined to grant the Appellant leave to file for judicial review orders on account of the form of the chamber summons application in that, the same was brought in the name of the Republic and not that of the applicant. This was in wherein the Court held as follows;

"We are satisfied that the learned Judge ought to have granted leave to the appellant for lodging the application for certiorari. As she did not do so, it is within our jurisdiction to grant such leave. And we do so notwithstanding that the format of the chamber summons did not comply with the rules of civil procedure. We invoke the provisions of* Article 159 *of the Constitution, and* sections 3A and 3B *of the Appellate Jurisdiction Act to overlook the defect in the form of the chamber summons. Accordingly, the order we make is that we set aside the order of the learned Judge dismissing the appellant's application for leave and substitute it with an order granting leave as prayed for in the chamber summons dated 30th October, 2008. The appellant shall have 21 days from the date hereof to file his motion for orders of judicial review. The appellant shall have the costs of this appeal."

63. In other instances, some parties object to the competency of pleadings in judicial review applications on the ground that the applicant has not brought the application in the name of the Republic and instead just named themselves as applicants. In other instances, the objections are that the applicant ought not to bring the application for leave in the name of the Republic, as is in the instant case. In **Lucy Wanjiku Gitumbi & another v Dedan Kimathi University of**

Technology [2016] KEHC 3004 (KLR) the High Court dealing with that kind of objection stated as follows:

> ***"27. <u>On the first issue of whether the Judicial Review application herein is competently before the court for reasons that it was not made in the name of the Republic</u>, I have carefully considered this issue in line with the current constitutional order. In my humble view, the Judicial Review Orders of Certiorari, Mandamus and prohibition are strictly speaking founded on the new constitutional dispensation and not the historically related prerogative orders which used to be issued in the name of the crown, in England. Further, Article 23(3) (f) of the Constitution as well as Article 22 of the Constitution clearly guarantee every person the right to approach the court for Judicial Review Orders, as well as Article 47(3) of the Constitution which guarantee that every person is entitled to fair administrative action. Furthermore, Article 159 2 (d) of the Constitution is clear that justice shall be administered without undue regard to procedural technicalities.***
>
> ***28. In my humble view, the mode of bringing Judicial Review proceedings is merely form and not substance that goes to the root or the jurisdiction of the court. The right to fair administrative action***

being a fundamental constitutional right under the Bill of Rights cannot be subject of procedural technicalities to be sacrificed at the altar of substantive justice. The cases cited by the respondent were no doubt decided nearly 60 years ago and followed by decisions made in the early 2000 during the clamour for the new constitutional order. Those decisions, in my humble view, do not override the constitutional provisions of Articles 47(3),22 and 23 of the Constitution as well as Article 159 (2) (d) of the Constitution.”

64. For all the reasons and based on the above judicial pronouncements, I am satisfied that there is no fatal error in the form of the pleadings filed by the applicant being in the name of the Republic. The objection by the 1st and 5th interested parties is therefore overruled and dismissed.

65. The other question raised by the 1st interested and 5th interested parties is that the applicant mixed the procedures by bringing the application both under Order 53 of the Civil procedure Rules, sections 8 and 9 of the Law Reform Act as well as the Fair Administrative Action Act and Rules, 2024. Further, that the judicial review remedy having been elevated to a constitutional remedy as stated in Article 23 of the Constitution, parties cannot invoke the Law reform Act and Order 53 of the Civil procedure Rules, and apply for leave. Instead, that

parties ought to apply by way of Originating Motion as contemplated in the Fair Administrative Action Act and Rules.

66. To answer this question, it is important to examine the pleadings filed before court. The chamber summons dated 23rd September, 2025 was brought under the cited provisions of Article 165(7) of the Constitution, thereby invoking the supervisory jurisdiction of the Court, Sections 8 and 9 of the Law Reform Act, Order 53 Rule 1(1), 2 of the Civil Procedure Rules and Part I-III of the Fair Administrative Action Act No.17 of 2015.

67. In the citation, the chamber summons application reads inter alia….***IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION…"***

68. It is common knowledge that the requirement for leave to apply for judicial review orders of certiorari and prohibition as well as mandamus is a procedural requirement under Order 53 of the Civil Procedure Rules, which implements sections 8 and 9 of the Law Reform Act. Specifically, section 9 of the Law Reform Act provides as follows:

> **9. *Rules of court***
>
> ***(1) Any power to make rules of court to provide for any matters relating to the procedure of civil courts shall include power to make rules of court—***

> ***(a) prescribing the procedure and the fees payable on documents filed or issued in cases where an order of mandamus, prohibition or certiorari is sought;***
>
> ***<u>(b) requiring, except in such cases as may be specified in the rules, that leave shall be obtained before an application is made for any such order;</u>***
>
> ***<u>(c) requiring that, where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.</u>***
>
> ***(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe those applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.***

69. The rules implementing the above statutory provision is under Order 53 Rule 1 of the Civil procedure Rules which provide that:

> ***ORDER 53 - APPLICATIONS FOR JUDICIAL REVIEW***

(1) Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1]

1.<u>No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.</u>

<u>(2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by</u>-

(a) a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and

(b) affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application

70. Examining the chamber summons dated 23rd September, 2025, I find that it fully complies with the provisions of section 9 of the Law Reform Act and Order 53 Rule 1 of the Civil Procedure Rules, 2010.

71. It is also common knowledge that judicial review remedy has been elevated to the Constitutional pedestal and that therefore, one does not require leave of Court to apply for the remedies. However, this is the case, only where a party applying wholly invokes the provisions of the Fair Administrative Action Act and Rules made thereunder.

72. That said, Section 12 of the Fair Administrative Action Act is clear that the Act is in addition to the principles of common law and rules of natural justice. The Act does not repeal the Law Reform Act and Order 53 of the Civil Procedure Rules, which are grounded on the principles of common law. It is for that reason that Korir J in the cited case of Matagei v Atttorney General;Law Society of Kenya (amicus curie) Petition 337 of 2018[2021] KEHC 460 (KLR) JR 21/5/2021 Ruling, did propose for harmonization of the law on judicial review remedies, acknowledging that nonetheless, only Parliament could do that, not the court purporting to dismiss one legal regime in favour of the other and in my view, as long as the spirit and letter of Articles 47, 50(1), 22 and other Constitutional dictates is infused into every administrative action and followed , there can be no fatal error in proceedings being commenced and concluded under the procedure established in Order 53 of the Civil Procedure Rules, which Rule implements Section 9 of the Law Reform Act. It is therefore not correct as submitted by Mr. Kinyanjui Harrison that the Civil procedure

Rules are not applicable to judicial review proceedings and that unless such proceedings are brought under the fair Administrative Action Act and Rules, then they are fatally and incurably defective.

73. That being the case, it is my finding that a party who elects to seek leave under order 53 of the Civil Procedure Rules and section 9 of the Law Reform Act cannot be faulted for using that procedure in seeking judicial review reliefs.

74. Similarly, a party who elects to use the procedure set out under the Fair Administrative Action Act and Rules, which do not require leave, can do so, and cannot be faulted for failing to seek leave to apply. The procedure under Rule 11 (1) of the Fair Administrative Action Rules, 2024 is clear that a party simply files an originating motion supported by an affidavit.

75. It follows therefore that in this case, the ex parte applicants' choice to proceed under **Order 53 of the Civil Procedure Rules** as dictated by section 9 of the Law Reform Act was lawful and procedurally sound. I further find that the filing of the application in the name of the Republic and the use of a chamber summons for leave, as opposed to an originating motion was consistent with long-established practice under Order 53 of the Civil procedure Rules.

76. Accordingly, the alleged procedural defect raised by the 1st and 5th interested parties cannot form the basis for setting aside the orders of 25th September 2025.

77. Before I conclude on this matter of alleged procedural flaws, it is important for the court to clarify that the operationalization of Rules 5,6,7 and 11 (4),27(3) and 33 of the Fair Administrative Action Rules, 2024 were stayed by Mwamuye J on 28th March, 2025 vide High Court **Constitutional Petition No. E168 Of 2025 Between Katiba Institute vs. State Law Office and The Commission on Administrative Justice (Office of The Ombudsman) And 1 Other** where the learned Judge ordered as follows:

> ***"…. upon a preliminary consideration of the matter, IT IS HEREBY ORDERED AND DIRECTED THAT:***
>
> ***1.Pending the inter partes hearing and determination of the Petitioner/Applicant's Notice of Motion Application dated 28/03/2025, a conservatory order be and is hereby issued staying the implementation of Rules 5, 6, 7, 11(4), 27(3), and 33 of the Fair Administrative Action Rules 2024.***
>
> ***2.…."***

Whether the Court had power to issue ex parte orders of leave to apply and stay at the leave stage

78. The 1st Interested Party, in its application, contends that this Court erred in granting ex parte orders on 25th September 2025 without affording the Interested Parties an opportunity to be heard, thereby contravening Articles

25(c) and 50(1) of the Constitution. Mr. Harrison Kinyanjui, learned counsel for the 1st Interested Party zealously submitted that the said orders were issued in breach of the cardinal principles of natural justice and the right to a fair hearing.

79. The 1st Interested Party maintains that the High Court assumed a jurisdiction on merit which judicial review courts do not have, citing the case of **Resolution Insurance Ltd v HIV & Aids Tribunal & Others (HCJR No. 89 of 2018).**

80. It was further contended that the matter before the High Court was already before the Transport Licensing Appeals Board, which had scheduled a hearing for the same day, hence the High Court's intervention undermined the authority of the tribunal and enabled forum shopping.

81. The 5th Interested Party similarly supported the 1st interested party and submitted, in equal measure, fervently, that the High Court contravened Articles 10 and 159(1) of the Constitution and Sections 6 and 11 of the Civil Procedure Act, by intervening in a matter that was *sub judice* before the Transport Licensing Appeals Board. It maintained that by granting ex parte stay orders, the court interfered with the Tribunal's mandate, thereby undermining the statutory dispute resolution process envisaged under Section 38 of the National Transport and Safety Authority Act.

82. In response, the 1st ex parte applicant asserted that the court has express power under Order 53 Rule 1(4) of the Civil Procedure Rules to direct that leave

granted operates as a stay of the impugned decision and that such orders may be issued ex parte and in chambers. It was contended that the ex parte nature of the leave stage is expressly contemplated by law, and does not violate fair hearing rights.

83. The 1st ex parte applicant emphasized that the TLAB's decision had already curtailed its operations without a hearing, and that the High Court's intervention was necessary to prevent further prejudice.

84. As earlier stated, and it is worth repeating it here that this Court derives its jurisdiction from the Constitution and statutory enactments including the High Court Organization and Administration Act. The High Court is established under Article 165(1) of the Constitution and the same Article confers the Court with jurisdiction, under sub Article (3) and (6).

85. Supervisory jurisdiction is derived from Article 165(6) and (7) of the Constitution which provides that:

> ***165(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
>
> ***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any***

direction it considers appropriate to ensure the fair administration of justice.

86. The High Court (Organization) and Administration Act, 2015 at Section 5provides that the Court shall exercise—(a)the jurisdiction conferred to it by Article 165(3) and (6) of the Constitution; and(b)any other jurisdiction, original or appellate, conferred to it by an Act of Parliament.

87. Article 165(5(b) of the Constitution on the other hand expressly warns the High Court that jurisdiction of the Supreme Court and of the Courts of equal status established under Article 162(2) of the Constitution is a no go zone for the High Court.

88. This Court is empowered by several Articles of the Constitution including Articles 22 and 23 and Article 47 of the Constitution, the latter being implemented by the Fair Administrative Action Act and Rules, as well as sections 8 and 9 of the Law reform Act and Order 53 of the Civil Procedure Rules to exercise various forms of jurisdiction

89. Order 53 of the Civil procedure Rules empowers the court to entertain an application for leave to commence judicial review proceedings ***ex parte and in chambers***. The provision states:

"1. Applications for mandamus, prohibition and certiorari to be made only with leave [Order 53, rule 1]

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —

(a)……

(b)……

4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days."

90. The position under order 53 rule 1 vesting in this Court judicial discretion to hear an application for leave *ex parte* and to direct whether or not the application for leave or leave to operate as a stay ought to be heard *inter partes*

has been restated by the courts in cases such as **Njagi v Muchiri & another [2024] KEELC 1812 (KLR)** where the court observed thus:

> ***"It is common ground that the grant of leave is an exercise in judicial discretion. An application for leave ordinarily ought to be heard ex-parte but according to the proviso to Rule 1 of Order 53 of the Civil Procedure Rules, the Judge hearing the matter has the discretion to direct that the application be heard inter partes.'***

91. The reasons for the filing the chamber summons for leave under Order 53 are closely tied to the requirement that such applications be made ex parte and in chambers. This procedure has a historical perspective to it. First, is that Judicial review, from time immemorial, is a special jurisdiction, designed to control the exercise of public power and the grant of leave ensures that only those applications which disclose a *prima facie* arguable case proceed to the substantive stage. At the leave stage, the court is concerned merely with whether an applicant has established an arguable case warranting further inquiry, and not with a determination on the merits. The requirement that leave be sought *ex parte* serves as a filtering mechanism to prevent the abuse of the judicial review process.

92. Secondly, the *ex parte* nature of the application for leave is intended to protect public bodies and third parties from unnecessary exposure to unmeritorious or

frivolous claims. this position has never changed, until sections 8 and 9 of the Law reform Act and Order 53 of the Civil procedure Rules are repealed, and perhaps, the real problem will be manifested in the now direct mode of filing Originating Motions for judicial review under the Fair Administrative Action Rules, 2024.

93. Thus, if every application were to be heard *inter partes* at the preliminary stage, before the substantive application is filed and again argued the same manner as the application for leave, it would defeat the very object of the leave requirement, as respondents and interested parties would be compelled to appear and defend even plainly defective, vexatious, time-barred, or otherwise an abuse of the court process or hopeless matters. Leave stage is essentially designed to prevent adverse parties from expending time and resources on frivolous or unmeritorious claims. This however, is ot the case with the Fair Administration Rules where no leave to apply is required.

94. Thirdly, the rule reflects the origin of judicial review in prerogative writs, where the applicant first approached the court to seek the court's permission (leave) before any respondent was notified. Only upon grant of leave does the matter mature into a substantive motion, which is then served upon all parties and heard *inter partes* on the merits thereof.

95. Thus, Order 53 Rule 1(2) contemplates an *ex parte* application in chambers to enable the court to perform a *"gatekeeping"* function, ensuring that the supervisory jurisdiction of the High Court is invoked judiciously, efficiently and without undue harassment of public authorities.

96. The case of **Republic v County Council of Kwale & Another; Ex parte Kondo & 57 Others (Mombasa HCMC No. 384 of 1996)** is one of the oldest precedents which is frequently cited in later jurisprudence in Kenya. in this case, the Court emphasized that the leave requirement in Order 53 is designed to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless … and … to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further investigation at a full inter partes hearing of the substantive application.

97. The yardstick for the grant of leave was later pronounced by the Court of Appeal in **Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** as follows:

> ***"It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a***

failure of public duty, the Court would be in error if it granted leave. <u>The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers</u>… In this appeal, the issue is whether the appellant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. <u>Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of the Act was brought into question.</u> <u>Without a rebuttal to these allegations, the appellant certainly disclosed a prima facie case. For that, he should have been granted leave to apply for the orders sought.</u>" [emphasis added]

98. Order 53 rule 1 (4) of the Civil Procedure Rules authorizes the court, where leave is granted, to direct that such leave do operate as a stay of the impugned decision pending the hearing of the substantive motion. This framework has been consistently upheld by the courts as serving an important gatekeeping function, enabling the court to weed out unmeritorious claims at the preliminary stage while preserving the status quo to prevent futility.

99. The decision whether or not to grant a stay pursuant to leave granted is thus an exercise of judicial discretion, and that discretion must be exercised judiciously, as was held in ***Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991*** **[1990-1994] EA 156; [1992] KLR 8** that:

> ***"The decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judiciously. The circumstances under which the Court may grant an order that the grant of leave do operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise is now settled. Where the decision sought to be quashed has been implemented leave ought not to operate as a stay, as was held in George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.In Nicodemus Kebaso v Chairman of the Board of Governors Matongo Lutheran Theological College [2000] eKLR the court held that: "Applying the principles of the three cases to the facts of this application it is clear that it has not been stated that the college is going to close down, it has not been stated that there is not going to be any more graduation ceremonies and neither has it been stated that the***

Plaintiff/Applicant cannot join any other graduation group in future after his affairs have been sorted out by this Court. Definitely third parties are involved, innocent parties too are involved and it is not fair and just that these other third parties and innocent parties be inconvenienced and be treated as sacrificial lambs, in a matter they are not involved. I am sure they would have liked to be together with the Plaintiff/Applicant had it not been for the unfortunate situation that the Plaintiff/Applicant finds himself in."

100. It is important to note that even where leave is granted on the ground that an arguable *prima facie* case is established, whether the chamber summons is heard exparte or inter partes, there is no guarantee that the merit determination will be in favour of the exparte applicant. This is because, the court at the leave stage does not delve deep into the merits of the matter before it as that would prejudice the outcome of the substantive motion.

101. W. Musyoka J had the opportunity to deal with this very issue in an elaborate judgment rendered in **Republic v Chief Magistrate, Busia; Haroon Yuasa Limited (Exparte); Amukoya (Interested Party) (Miscellaneous Civil Application E035 of 2021) [2023] KEHC 23437 (KLR) (13 October 2023) (Judgment)-** I will quote the learned judge in extenso and verbatim as

follows as stated in paragraphs 15 and 16 of the judgment, after reading the entire judgment:

> ***"15. It may, perhaps, be argued that the court, on 27th May 2021, granted leave, despite the shortcomings stated above, and thereby legitimized the otherwise incompetent proceedings, and that the same court should and cannot later on, while considering the matter on the merits, revisit the issue of the competence or legitimacy of the suit, for that would amount to questioning the leave granted earlier. That may very well be so. However, at the leave stage, the court decides on whether to grant leave without hearing the parties, and, very often, on a cursory look at the file of papers before it. In the current constitutional dispensation, there is a tendency, driven by Article 159 of the Constitution of Kenya, of the courts avoiding making determinations on matters at the preliminary stage, in ways that are considered drastic, in the sense of driving the parties away from the seat of justice before affording them an opportunity to be heard. This liberal approach has facilitated the clearance of suits, for hearing, that are incompetent or weak. I do not see anything wrong with a court, while considering the matter on its merits, at the hearing stage, to determine that the suit ought not to have been***

cleared for hearing in the first place, for lacking merit or competence. The same does not amount to undoing what the court, perhaps constituted differently, had done earlier, at the leave or preliminary stage. The mantra appears to be that, at the preliminary stage, clear everything for hearing, and sort out the merits of the matter later at the final determination.

16. My point is that leave herein would not have been granted if the competence of the suit were to be considered at the preliminary stage, for the suit had no foundation, to the extent that it lacked an originating pleading. The ex parte chamber summons could not originate the suit, and leave, under Order 53 rule 1, was not available in the circumstances. The ex parte chamber summons is transient. It is ex parte. It is not available for inter partes canvassing. Its sole purpose is grant of leave, and once leave is granted, the ex parte chamber summons would be spent. It would have no life in it thereafter. The ex parte chamber summons is what the ex parte applicant used to initiate these proceedings. One may even argue that it was meant to be the pleading that the ex parte applicant used to originate the cause. Once leave was granted, the ex parte chamber summons died or was spent, and, naturally, the

> ***suit or cause that it originated, if at all, died with it. That took away with it everything that was filed with the ex parte chamber summons.*** ***Pleadings are the mainstay of suits. They originate them, and sustain them. The lifeline of a suit is the pleading. Without it, there is no suit. If a pleading is spent, for some reason, before the suit is finally heard and determined, the suit would be unsustainable. The Motion filed herein, after the exhaustion of the ex parte chamber summons, does not help the situation. Motions, by their very nature, are interlocutory. For the instant one, it is not supported by any evidence, for it was not filed simultaneously with a supporting affidavit. Without a statement and a verifying affidavit, deposing to the facts, there would be no basis or foundation for the Motion, if one were to treat it as the pleading in the matter."***

102. For the foregoing reasons, this court is satisfied beyond doubt that it had the necessary jurisdiction and judicial discretion to consider the chamber summons for leave to apply for substantive orders, *ex parte* and that it also had jurisdiction to order that the leave so granted do operate as stay of the proceedings pending before the Transport Licensing Appeals Board.

103. On the claim by the 1st and 5th interested parties that their right to be heard was violated by the court's decision to entertain the application for leave and

stay *ex parte,* it is the finding of this court that the claim is unfounded in the sense that the *ex parte* nature of leave applications under Order 53 of the Civil procedure Rules does not amount to denial of the right to be heard, as the process is provisional and subject to challenge by an aggrieved party. See Musyoka J in the above cited case of **Republic v Chief Magistrate's Court at Busia.**

104. Thus, once leave is granted, the affected parties are accorded an opportunity to contest both the leave and any interim orders through an application to set them aside, or by responding to the substantive motion. This approach balances the need for judicial efficiency with the right to a fair hearing, ensuring that no party is ultimately shut out from presenting its case before the court.

105. This Court therefore finds that the High Court was properly vested with jurisdiction under Order 53 of the Civil Procedure Rules to entertain the application for leave *ex parte* and in chambers. The decision to grant leave and interim stay orders on 25th September 2025 fell squarely within this court's statutory discretion as contemplated under Rule 1(4) of Order 53.

106. The only issue therefore is whether this Court should set aside the orders for leave and stay as sought by the 1st interested party on the grounds that the ex parte applicants were guilty of material non-disclosure and misrepresentation warranting the setting aside of the ex parte orders.

107. The 1st interested party accuses the 1st ex parte applicant of concealment and perjury for falsely claiming to hold a Public Service Vehicle-PSV licence issued on 18th March 2024 when none existed. It further alleges that the letter that the 1st exparte applicant relied on, dated 13th October 2023, predated the company's incorporation and was therefore fraudulent. It also faults the 1st exparte applicant's affidavits for containing blank or unsealed exhibits contrary to the Oaths and Statutory Declarations Act, contending that the impugned orders were procured through misrepresentation and non-disclosure.

108. The 5th interested party supports this position, asserting that the 1st ex parte applicant concealed material facts, including that it had already filed an application before the Transport Licensing Appeals Board contesting the same orders. It argues that the application before this Court in this matter seeking leave and stay was premature, amounted to forum shopping and that the order enabled the applicant to continue operating under a contested licence, causing the 5th interested party financial losses as the financier and manager of the vehicles in question.

109. The 1st ex parte applicant denies the allegations, maintaining that it acted in good faith and disclosed all material facts in its application for leave to apply for substantive judicial review orders. It contends that no prejudice was suffered by the interested parties, and that on the contrary, the Transport Licensing

Appeals Board's earlier orders had crippled its lawful operations. The 1st exparte applicant dismisses the 1st interested party's complaint as stemming from commercial rivalry rather than a legitimate grievance.

110. I will first determine the first part of the question of whether this Court can set aside the exparte orders made on 25th September, 2025.

111. As to whether this court can revisit its own order made exparte granting leave to apply and stay and therefore whether that would not amount to sitting on appeal of its own decision, Onyancha J (as he then was) had occasion to deal with a similar question and in his determination, the learned Judge stated as follows in **Isaac Wetosi v Commissioner of Cooperative Development Bungoma HC Misc Civil Appl No. 72 of 2001:**

> ***"How then, will the same or similar court find it easy later to set aside the leave so granted without trampling on the principle of jurisdiction in that the later court will appear to be sitting on appeal on the earlier court that granted the leave? In the earlier cited case of Shah v Midco Holdings Ltd (2000) 1 EA, 208 (CAK), the High Court Judge who had granted such leave purported to undo the granting of the leave without a formal application to that end and without giving reasons for purporting to exercise such discretion. The Court of Appeal ruled that:-***

“Her decision thereafter to send the file and the very same application for leave, for hearing by another Judge of co-ordinate jurisdiction, was without foundation in as much as the order granting leave to the applicants could not be set aside by the Learned Judge without an application for that purpose”.

The court further, expressed doubt over the point whether the same Judge or the co-ordinate Judge had propriety to embark on the further hearing of the application to probably end up either granting or refusing the leave which had earlier been granted.

The case also asserted that <u>a formal application will be required to invoke</u> the jurisdiction and discretion of the court that intends to question or review the leave earlier granted. In Njuguna v Minister for Agriculture (2000) 1 EA, 184 (CAK) the court, though per curiam, also state that:-

“<u>The appropriate procedure for the challenging of leave which has already been granted is to apply under the inherent jurisdiction of the court, to the Judge who granted the leave, to set it aside”.</u>

It was further explained in Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Kilach (2003) KLR 262 that the main basic

reason why the court that granted leave to apply for a judicial review order has jurisdiction to revisit it to review or set it aside, is because the order is ex parte by its nature. Some of such orders are ex parte due to the urgency under which they are granted while others, like the one granted under Order 53, is ex parte because the statute makes it so. The practice, however, is that while the former can usually only be revisited for reviewing it because it was granted ex parte, the latter can be revisited both for review, as well as appealing against it by virtue of the provisions of the Law Reform Act which created judicial review orders.

It will once more be stressed however, that power and jurisdiction to revisit to review, a leave earlier granted, is not only rare but is discretion that is to be exercised sparingly and in very clear-cut cases. It was further stated by the Court of Appeal, in Aga Khan Education Service Kenya v Republic and Others (2004) 1EA 1 (CAK) at page 5 as follows:-

"…we would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and in very clear-cut cases, unless it be contended that Judges of the superior court grant leave as a matter of course……".

In the case before me the Judge who granted the leave, in my view did so on some prima facie merit. This court has no reason, and none has been given by the respondent, to revisit the same to review it or set it aside, considering the limited jurisdiction that is available to this court in such cases.

The general conclusion I come to therefore, is that the leave granted by this court under the Chamber Summons dated 1.3.2006 to file the Notice of Motion that followed, which is now before this court was competent. It also follows accordingly that the Notice of Motion aforestated is competent and fit to go into hearing. The grounds of preliminary objection have no merit accordingly. They are hereby rejected."

112. From the above decision, though persuasive, it is clear that this court has power to entertain an application seeking to set aside its own exparte orders without being seen to be sitting on its own appeal. That power is inherent in the Court as donated by Order 53 Rule 1(4) of the Civil procedure Rules, as well as section 3 and 3A of the Civil procedure Act.

113. Therefore, onto the second limb of this issue, of whether there is sufficient material to set aside the orders of 25th September, 2025, it is now established that an applicant who seeks *ex parte* relief bears a duty of utmost good faith and must disclose all material facts that could influence the Court's decision to

grant leave or interim orders. Concealment of material information, whether deliberate or not, constitutes an abuse of the court process and is sufficient ground, upon discovery, to set aside any orders obtained exparte

114. In this case, the ex parte applicants did not disclose in their application for leave that they had filed an application dated 19th September 2025 before the Transport Licensing Appeals Board seeking review or variation of interim orders issued on 16th September 2025, which Orders they simultaneously challenged in this Court and sought stay of enforcement. This omission no doubt created the impression to this court that the Tribunal proceedings had been concluded or that the Tribunal offered no recourse to the exparte applicant. In the view of this court, the non-disclosure was material as it deprived the Court of the opportunity to determine whether the application for leave to apply and for stay was premature or duplicative, amounting to forum shopping.

115. While the Court's jurisdiction to grant leave and interim relief *ex parte* under Order 53 of the Civil Procedure Rules is not in doubt, such discretion must be exercised on the basis of full and candid disclosure. The ex parte applicants' omission misled this Court regarding the status of proceedings before the Transport Licensing Appeals Board and undermined the integrity of the *ex parte* proceedings. The concealment of the review application pending

before the Transport Licensing Appeals Board therefore justifies the setting aside of the *ex parte* orders issued on 25th September 2025.

116. In doing so, this Court would not be sitting on appeal over its own decision or orders but would be properly exercising its inherent jurisdiction to vacate orders obtained through material non-disclosure, akin to fraud. A court retains power to vary or discharge its orders where it is shown that material facts were withheld or that the orders were procured in abuse of process.

117. The Court of Appeal sitting at Nyeri in the case of **Mary Wairimu Gikunju v Republic & 3 others [2014] KECA 666 (KLR)** observed thus, concerning material non-disclosure:

> ***"[14] It is trite law that whenever a litigant seeks an exparte order such as the one which was sought by the appellant, leave to institute Judicial Review proceedings, he/she is required to disclose to the court all material facts relevant to such an application. In Uhuru Highway Development Ltd -vs- CBK & 2 others - Civil Appeal No. 140 of 1995, Omolo, J.A expressed himself as follows:-***
>
> > ***"I also agree. The applicant went before Githinji J. on 6th January 1995 pleading urgency. It obtained an ex-parte injunction. Order 39 rule 3 (1) of the Civil Procedure Rules (Revised), permits the granting ex-parte injunction but it must clearly be understood***

that a party who goes to a judge in the absence of another side assumes a heavy burden and must put before the judge all relevant materials including material which is against him."

In Andria (Vasso) (1984) 1 QB 477 at page 491, Letter Gili Robert Golf L.F (as he then was) observed that-

"It is axiomatic that in exparte proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that the failure to make such disclosure may result in the discharge of any order made upon the exparte application, even though the facts were such that, with full disclosure, an order would have been justified." See also the decision in Llyods Bowmaker Ltd -vs- Britannia Arrow Holdings p/c (larens third party) (1988) 3 ALL ER 178, wherein Balcombe LJ held:

"On any exparte application, the fact that the court is asked to grant relief without the person against whom the relief sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all the facts known to him..."

118. Similarly, in the case of **Abraham Mutai & 5 others v Paul M. Mutwii & 34 others [2015] KEHC 5188 (KLR)** the High Court, cited with approval the

case of **Bahadurali Ebrahim Shamji v. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal observed that in *ex parte* applications, the applicant is under a strict duty to make full and frank disclosure of all material facts necessary for the court to exercise its discretion. That this duty extends to facts known or reasonably discoverable by the applicant. Further, that material non-disclosure, whether deliberate or inadvertent, may justify the setting aside or modification of any order obtained *ex parte.* However, the court also observed that not every omission automatically invalidates the order; and that the court retains discretion to consider whether the non-disclosure was innocent, the materiality of the facts omitted, the urgency of the matter and the potential prejudice to affected parties, while ensuring that justice is done and irreparable harm is avoided.

119. I reiterate that in the instant matter, the *ex parte* applicants did not disclose to this Court that they had simultaneously filed an application before the Transport Licensing Appeals Board seeking to vary or discharge the interim orders of 16th September 2025. This omission was material, as it misled this Court regarding the status of Tribunal/ TLAB proceedings and whether the judicial review application was premature or amounted to forum shopping.

120. While this Court had and still retains jurisdiction under Order 53 of the Civil procedure Rules to entertain the application for leave *ex parte,* in chambers as it

did, the failure by the *ex parte* applicants to make full disclosure undermined the propriety of the orders of 25th September 2025. This constitutes sufficient ground for setting aside those orders, including the grant of leave operating as stay. I would therefore find that the prayer for setting aside exparte leave and stay are not farfetched, base don the ground of material non-disclosure.

121. For completeness, this Court notes that the question of whether the applicant's PSV licence was lawfully issued is a substantive issue pending before the Transport Licensing Appeals Board's and shall not be determined herein to avoid prejudicing those proceedings.

122. The 1st and 5th interested parties have also raised several other objections to the *ex parte* application and the orders of 25th September 2025 including, allegations that the orders are illegal. For avoidance of doubt, an order issued by a Court of law cannot be an illegal order and neither do courts issue orders to advance illegalities or for illegal purposes. It is parties who approach the courts that use the lawful orders to advance illegalities. An order issued in error, out of good faith on the part of the court or based on material non-disclosure by parties does not become an illegal order. It remains a legitimate order enforceable until it is challenged and set aside. Accordingly, I find that this court did not issue any illegal order or an order without jurisdiction, having

demonstrated above that there was jurisdiction and discretion to make the orders that it did issue.

123. The 1st interested party has also raised concerns regarding the affidavit supporting the ex parte chamber summons, asserting that the annexures were blank or unsealed and that they therefore lacked evidentiary value. This Court notes, however, that the affidavit itself was properly sworn and commissioned, satisfying the requirements of the Oaths and Statutory Declarations Act.

124. In my view, while the defects in the annexures may be irregular, such procedural imperfections do not render the entire application fatally defective. Annexures serve as supporting evidence, and any irregularity therein can be addressed through correction or supplementation without nullifying the properly sworn affidavit.

125. The central question for the Court remains whether the material facts were disclosed to enable a proper exercise of judicial discretion at the *ex parte* stage. Consequently, the technical defects in the annexures, while relevant to the assessment of propriety, are not fatal to the validity of the ex parte application or the orders issued thereunder.

126. The 1st interested party counsel also heatedly argued that this Court improperly assumed jurisdiction on the merits. Judicial review courts focus on procedural fairness and legality rather than the substantive outcome, except in

specific cases where even the supreme Court has pronounced itself that a judicial review court ought to carry out a merit review of a case when a party approaches it under the provisions of the Constitution. See the case of **Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment). Neutral citation: [2023] KESC 40 (KLR)**.

127. However, and as earlier stated in this judgment, at the leave stage, this Court's intervention was limited to assessing whether a prima facie case existed especially where a party alleges that they were not given the opportunity to be heard before the administrative decision was reached by the Tribunal, and whether interim relief was warranted to prevent imminent harm.

128. Onyancha J in the matter of **Republic v Chief Magistrates' Court at Busia** (supra) stated as follows concerning establishment of a prima facie arguable case:

> ***"…Having considered the material before me, I am satisfied that the Applicant has disclosed a prima facie arguable case. The issues raised—particularly concerning [e.g., alleged procedural impropriety and lack of jurisdiction]—are not idle and deserve to be heard on merit at the substantive motion stage.***

However, at the leave stage, the Court must refrain from making any conclusive findings. A prima facie arguable case is not necessarily one that must succeed. The Court must remain alive to the fact that the Respondent who has not appeared at this preliminary stage may later place before the Court evidence or legal argument that could displace the arguability of the Applicant's claim.

129. That is exactly what transpired in this case at the exparte stage and therefore this Court cannot be faulted for assessing the arguability by mentioning what the applicant lamented about and which this court never determined on merit. The orders issued by this court, on the face of it, did not constitute a determination on the merits, and therefore no excess of jurisdiction arises. I find the contention by the 1st and 5th interested parties' contentions on this issue of merit determination to be an unnecessary vicious attack on the court and quite unwarranted. For avoidance of doubt, this court handled the exparte chamber summons under certificate of urgency and stated as follows in the impugned ruling of 24th September, 2025 but uploaded on the CTS on 25th September, 2025 as the matter was placed before me late hence the reference to the 25th September, 2025:

"I have considered the chamber summons dated 23rd September, 2025, the statutory statement, verifying affidavit and the annextures thereto.

The Application is brought under certificate of urgency under Order 53 of the Civil Procedure Rules. I am satisfied that the application is urgent in view of the injunctive order granted by the respondent which has the effect of barring the applicants from operating as PSV which has an adverse effect on many livelihoods.

I therefore certify the application as urgent.

On the prayer for leave to apply, the purpose of applying for leave in a judicial review application is to filter out unmeritorious or trivial cases at an early stage. It is a preliminary stage to ensure the applicant has a case with sufficient merit to proceed to a substantive hearing.

Having perused the pleadings and accompanying documents, Iam satisfied that the application is not frivolous and that the applicant has established a prima facie case for in depth consideration on its merit. Without delving into the merits of the intended application,

the applicant claims that the orders that were issued without any decision having been made by the NTSA capable of being appealed from hence the question of whether the said orders were made with jurisdiction and that the injunctive orders were made to last beyond the 14 days contrary to the law. These are some of the issues that the Court will investigate at the substantive stage.

I therefore grant leave to the applicant to apply for judicial review orders sought in prayer No.2 and 3 of the Chamber Summons.

The substantive motion to be filed and served within seven days of today in a separate and fresh substantive Judicial Review file.

On the prayer that the leave so granted do operate as stay of enforcement of the impugned order made by the respondent on 16th September, 2025, I am satisfied that unless a stay is granted, the applicant will suffer irreparable loss and that other third parties who are employed by the applicant will suffer irreparably.

Accordingly, I hereby order that the leave so granted herein shall operate as a stay of enforcement or implementation of the orders issued by the respondent on 16th September, 2025.

Each party bears their own costs of this application.

This file is closed.

…….24/9/2025”

130. No merit determination was reached in the above orders. The Court pronounced itself on the yardstick for the grant of leave and avoided merit review.

131. On the part of the exparte applicants, it was submitted that the application seeking to set aside the exparte leave and stay has been overtaken by events since the substantive notice of motion HCJR/E310/2025 has been filed and directions issued.

132. This Court’s view on this submission is that while the filing of the substantive motion progresses the case, it does not excuse or cure any material non-disclosure at the *ex parte* stage, which remains a relevant factor in assessing the propriety of the exparte leave and the interim stay orders granted by the Court.

133. This court must also state that contrary to the fervid position held by counsel for the 1st and 5th interested parties’ counsel, courts do not exist to make illegal orders they make legal orders. The fact that a party feels aggrieved by an order

made by the court does not make the order illegal. If aggrieved by the said orders a party is at liberty to challenge the same by way of review or an appeal.

134. Consequently, this Court finds the application for review and setting aside of the exparte orders for leave and stay made on 24th September 2025 but uploaded on the CTS on 25th September, 2025 to be merited, for the reasons contained in the body of this ruling which is, material non-disclosure that the 1st exparte applicant had in fact applied for review of the interim orders made by the Tribunal and that the matter was slated for hearing before the Tribunal that very morning of 25th September, 2025 when the impugned orders were uploaded on the CTS. That non-disclosure rendered the exparte orders of this court both for leave to apply and for stay, illegitimate.

135. Accordingly, the ex parte orders of 24th September 2025 as uploaded on the CTS on 25th September, 2025 are hereby set aside, vacated and discharged.

136. On the consequences of setting aside the orders uploaded on 25th September, 2025, since leave for instituting judicial review proceedings is a mandatory requirement and prerequisite under Order 53 Rule 1 of the Civil Procedure Rules, which provisions implement section 9 of the Law Reform Act, the leave and stay having been vacated, the subsequent notice of motion and all consequential pleadings anchored on that leave as filed in HC JR E 310 of 2025

are rendered incompetent and must equally collapse. This court will proceed to make appropriate orders in the said matter, effectively closing that file.

137. The dispute between the parties hereto shall remain within the jurisdiction of the Transport Licensing Appeals Board for determination in accordance with the law

138. On costs, they follow the event and are in the discretion of the court. However, as the main dispute is still pending before the TLAB and as most of the arguments by the 1st and 5th interested parties challenging exparte orders of this Court were leveled against the Court, which this court has dismissed as being far-fetched, I order that each party shall bear its own costs.

139. This file is therefore closed.

140. It is so ordered.

Dated, Signed & Delivered virtually at Nairobi this 11th Day of November, 2025

R.E. ABURILI
JUDGE