

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**JUDICIAL REVIEW NO. E005 OF 2024**

**REPUBLIC.....**  
**..... APPLICANT**

**VERSUS**

**THE OFFICE OF THE DATA PROTECTION**  
**COMMISSIONER.....**  
**... RESPONDENT**

**AND**

**EKM..... INTERESTED**  
**PARTY**

**AND**

**BVB LOUNGE..... EX-**  
**PARTE APPLICANT**

**RULING**

**Background**

1. By an application dated 24<sup>th</sup> June 2024, the Ex parte Applicant sought the following orders;
  - a) THAT applicant be granted leave to apply for an order prohibiting the respondent from enforcing, compelling, executing and/or taking any action towards the realization, enforcement and execution of the decision in ODPC Complaint No. 341 of 2024.
  - b) THAT the applicant be granted leave to apply for an order of certiorari to remove to this court for quashing

the decision of the office of the Data Protection Commissioner dated 27<sup>th</sup> May, 2024 vide ODPC Complaint No. 341 of 2024.

- c)** THAT a declaration do issue that the enforcement notice dated 27<sup>th</sup> May 2024, violated the Applicant's right to a fair hearing and the principles of Fair Administrative Action as provided for under Articles 47 and 50 of the Constitution of Kenya 2010.
- d)** THAT a declaration do issue that the decision of the Respondent dated 27<sup>th</sup> May 2024, violated the principles of procedural fairness.
- e)** THAT costs of this Application be provided for.
- f)** THAT this Honourable Court be pleased to issue any further orders and /or directions as may be necessary to give effect to the Orders sought herein and it deems fit in the interest of justice.

2. Leave was subsequently granted to the applicant, and it filed the substantive application dated 27<sup>th</sup> June 2024 where it sought the following orders;

- a)** THAT there be stay of execution enforcement and execution of the decision in ODPC Complaint No. 341 of 2024 pending the hearing and determination of this application.
- b)** THAT an order be issued prohibiting the respondent from enforcing, compelling, executing and/or taking any action towards the realization, enforcement and

execution of the decision in ODPC Complaint No. 341 of 2024.

- c)** THAT an order of certiorari be issued to remove to this court for quashing the decision of office of the Data Protection Commissioner dated 97h May, 2024 vide ODPC Complaint No. 341 of 2024.
- d)** THAT a declaration do issue that the enforcement notice dated on 27" May 2024, violated the Applicant's right to a fair hearing and the principles of Fair Administrative Action as provided for under Articles 47 and 50 of the Constitution of Kenya 2010.
- e)** THAT a declaration do issue that the decision of the Respondent dated 27" May 2024, violated the principles of procedural fairness.
- f)** THAT Costs of this Application be provided for.
- g)** THAT this Honorable Court be pleased to issue any further orders and or directions as may be necessary to give effect to the Orders sought herein and it deems fit in the interest of justice.

3. When the application came up for directions the respondent filed a notice of preliminary objection dated 20<sup>th</sup> May 2025. The Objection is premised on the following grounds;

- a)** THAT this Honourable Court lacks jurisdiction to hear and determine this suit.
- b)** THAT the application offends the doctrine of exhaustion.

4. It is this Preliminary Objection that comes up for determination.

### **Respondent's Submissions**

5. The Respondent submitted that this Court lacks jurisdiction to hear and determine the present suit, as filed since the Respondent's determination issued on 27<sup>th</sup> May 2024 falls within the rubric of appeals under Section 64 of the Data Protection Act and not to judicial review proceedings. That judicial review only sets in if Parliament has not, by statute provided for an appeal. Cited in support of this submission was the decision in **R versus Peterkin, ex Soni (1972) Imn AR 253**, which was cited with approval by Hon. Justice Ngaah J, in **Swara Acacia Lodge v Office of the Data Protection Commisioner & another [2025] KEHC 7 (KLR)**.

6. On whether the Application violated the doctrine of exhaustion, the Respondent submitted that the Applicant is challenging the Respondent's determination issued on 27<sup>th</sup> May 2024, which it deems a nullity, not proportionate and irregular in law, in light of the timelines etched under Section 56(5) of the Data Protection Act. That Section 64 of the Act provides that a person against whom any administrative action is taken by the Data Commissioner, including any enforcement and penalty notices, may appeal to the High Court. That the Applicant has neither lodged an

appeal to the High Court, nor demonstrated that he attempted to lodge an appeal and could not do so.

7. The Respondent also referred to Section 9(2) and (4) of the Fair Administrative Actions Act that precludes the High Court or any other subordinate Court from reviewing an administrative action or decision in matters where a party does not exhaust internal remedies except where exceptional circumstances for exemption are proved to exist.
  
8. The Respondent is of the view that what the Applicant has canvassed in the present suit amounts to arguments that should have been advanced through the appeal mechanism under the Data Protection Act, which they have neither exhausted, nor advanced any cause for exemption from the said provisions, in line with both Section 64 of the Data Protection Act and Sections 9(2) and (4) of the Fair Administrative Action Act. Cited in support of this submission were the decisions in;
  - a) **Clifford Kenya v Jackline Ingutiah & 5 others; Atieno Aoko & 3 others (Interested Party) [2022] eKLR**
  - b) **Speaker of National Assembly v Karume, Civil Application No. NAI 92 of 1992**
  - c) **Ceres Tech Limited v Commissioner, Office of the Data Protection Commissioner [2024] KEHC 12833 (KLR).**

## **Ex-Parte Applicant's Submissions**

9. The Ex parte applicant submitted that the Respondent's assertion on the question of jurisdiction is contrary to the express provisions of the Constitution of Kenya and the Fair Administrative Action Act, 2015. That Article 165(3)(d) of the Constitution confers jurisdiction on the High Court to hear any question concerning the interpretation of the Constitution, including the legality of actions or decisions by public bodies. Further, that Sections 7 and 8 of the Fair Administrative Action Act expressly provide for judicial review of administrative action or decision by a court or tribunal.
  
10. It was further argued that under Section 9(1) of the same Fair Administrative Action Act, a person who is aggrieved by an administrative action or decision has the right to apply for review of the administrative action or decision. That the law therefore provides two avenues, either by judicial review before a court or an appeal to a tribunal or superior body. That the ex parte Applicant has chosen the judicial review route, which is well within its legal right and is expressly provided for under statute and the Constitution.
  
11. On the doctrine of exhaustion, the ex parte applicant submits that the doctrine is not absolute and has recognized exceptions, as set out under section 9(4) of the

Fair Administrative Action Act. That there are exceptional circumstances to warrant the filing of the suit. Cited in support of this submission were the following authorities;

**a) Republic v National Environment Management Authority Ex parte Sound Equipment Ltd [2011] eKLR,**

**b) Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR.**

12. Lastly, it is argued that section 64 of the Data Protection Act that the Respondent purports to rely on is in the alternative form and not in mandatory form.

### **Analysis and Determination**

13. The parameters of a preliminary objection are well settled. In **Mukisa Biscuits V West End Distributors Ltd (1969) E.A 696** it was held as follows:

***“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...***

***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 had to be ascertained or if what is sought is the exercise of judicial discretion”***

14. Looking at the preliminary objection, which raises the question of jurisdiction and the doctrine of exhaustion, I am of the view that the same is a valid objection and ought to be addressed as such. I will therefore address each point raised as hereafter.

#### **Jurisdiction of this Court.**

15. Jurisdiction is everything and without it, the Court has no mandate to take any further step. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. The Court cannot confer jurisdiction to itself where it has none in the first place.
16. The *locus classicus* on jurisdiction is ***Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989)KLR1***, where the Court of Appeal 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 its tools in respect of the matter before it the moment it***

***holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."***

17. The Respondent's argument on jurisdiction is two-pronged. First that the filing of the Judicial Review as opposed to an appeal renders this suit incompetent. Secondly, that the suit offends the doctrine of exhaustion.
  
18. The powers of this Court stem from Article 165 of the Constitution which states as follows;  
**(3) Subject to clause (5), the High Court shall have —**
  - (a) unlimited original jurisdiction in criminal and civil matters;**
  - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
  - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**

**(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—**

**(i) the question whether any law is inconsistent with or in**

**contravention of this Constitution;**

**(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**

**(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**

**(iv) a question relating to conflict of laws under Article 191; and**

**(e) any other jurisdiction, original or appellate, conferred on it by legislation.**

**(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.**

19. Section 7 of the Fair Administrative Action Act gives the right and the grounds upon which a party may move to this court in respect of any administrative action or decision. It provides as follows;

**Institution of proceedings**

**(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-**

- (a) a court in accordance with section 8; or**
- (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.**

**(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-**

**(a) the person who made the decision-**

- (i) was not authorized to do so by the empowering provision;**
- (ii) acted in excess of jurisdiction or power conferred under any written law;**
- (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;**

- (iv) was biased or may reasonably be suspected of bias; or**
- (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;**
- (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;**
- (c) the action or decision was procedurally unfair;**
- (d) the action or decision was materially influenced by an error of law;**
- (e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;**
- (f) the administrator failed to take into account relevant considerations;**
- (g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;**
- (h) the administrative action or decision was made in bad faith;**
- (i) the administrative action or decision is not rationally connected to-**
  - (i) the purpose for which it was taken;**

- (ii) the purpose of the empowering provision;**
- (iii) the information before the administrator; or**
- (iv) the reasons given for it by the administrator;**
- (j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;**
- (k) the administrative action or decision is unreasonable;**
- (l) the administrative action or decision is not proportionate to the interests or rights affected;**
- (m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;**
- (n) the administrative action or decision is unfair; or**
- (o) the administrative action or decision is taken or made in abuse of Power.**

20. Section 9 of the said Act then provides for the procedure for judicial review. It provides that;

**(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial**

**review of any administrative action to the High Court or to a subordinate court upon which original**

**jurisdiction is conferred pursuant to Article 22(3) of the Constitution.**

**(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

**(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section**

**(1).**

**(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.**

**(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of**

**the High Court may appeal to the Court of Appeal.**

21. If I get the ex parte applicant correctly, it had a choice to come by way of appeal or by judicial review, as provided by the law.
22. It is well settled law that previously, the jurisdiction of this court in an application for judicial review was not primarily concerned with the merit of the decision or action in question, but the process thereof. However, on the enactment of the Fair Administrative Action Act the Court is now to some extent empowered to look at the decision or action itself, in order to give breath to the spirit of Article 47 of the Constitution.
23. In **Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)**, the Supreme Court said as follows regarding Judicial Review under the new Constitutional dispensation;  
***“Judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the Law Reform Act, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court. Under that system, the High Court could issue orders of mandamus, prohibition, and certiorari. The grounds for the issuance of such orders were***

***borrowed from common law. Prior to the promulgation of the Constitution of Kenya, 2010, there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan courts found in sections 8 and 9 which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand. The entrenchment of judicial review under the Constitution of Kenya, 2010 elevated it to a substantive and justiciable right under the Constitution. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in the Constitution. Thus, Article 47 of the Constitution provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. The entrenchment of judicial review in the Constitution had led to the emergence of divergent views on the scope of judicial review. The first group postulated that judicial review was concerned with the process a statutory body employed to reach its decision and not the merits of the decision itself while***

***the second group opined that under the current constitutional dispensation, courts could delve into both procedural and merit review in resolving disputes.***

***In Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others SC Petition No 14 Consolidated with 14A, 14B, & 14C of 2014 [2014] eKLR this court in resolving the controversy stated as follows:***

***' However, notwithstanding our findings based on the common law principles of estoppel and res- judicata, we remain keenly aware that the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law. By clothing their grievance as a constitutional question, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were seeking the intervention of the High Court in the firm belief that, their fundamental right had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the appellants (respondents herein) were entitled to approach the court and have their grievance resolved on the basis of articles 22 and 23 of the Constitution.'* [emphasis added]**

***Also, this Court in SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR observed as follows:***

***' The petitioner approached the High Court by way of the prescribed procedures under Judicial Review, which revolve around the paths followed in decision-making. Such a course, as the appellate court properly held, is not concerned with the merits of the decision in question. The law in this regard, which falls under the umbrella of basic 'Administrative Law', is clear enough, and it is unnecessary to belabour the point.'***

***We have, however, observed that the appellate court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of mandamus, since the 1<sup>st</sup> respondent did not owe any delimited statutory duty to the petitioner.'***

***More recently in Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment) Praxedes Saisi case this court stated that:***

***'It is our considered opinion that the framers of the Constitution when codifying judicial review to a constitutional right, the intention was to***

***elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority.'***

***It is clear from the above decisions that when a party approaches a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of the Constitution, then the court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in SGS Kenya Ltd and not the merits of the decision per se.***

24. Looking at the matter at hand, the ex parte applicant's application is premised on the provisions of the Fair Administrative Action Act. There is an averment that the respondent proceeded on the premise that the ex parte applicant had not filed a response as required but the ex parte applicant had already done so, having sent a response dated 6<sup>th</sup> April 2024, vide an email of 7<sup>th</sup> April 2024. That the ex parte applicant ought to have been accorded an opportunity to be heard.
  
25. From a cursory look at the decision in question, rendered on 27<sup>th</sup> May 2024, it is evident that indeed, the

Respondent found that the ex parte applicant had not responded to the notification of complaint filed against it, yet there was already a response sent to it.

26. In my view, and without going to the merits of the application, an alleged denial of an opportunity to be heard is a valid ground to invoke this Court's jurisdiction, under the said Act.
27. A distinction has to be drawn between the matter herein and that in **Ceres Tech Limited case(supra)**. In the latter, the parties had been heard by the Respondent herein and a decision was rendered. The court rightly found that the aggrieved party ought to have filed an appeal as provided. In this case, the ex parte applicant was not heard at all, hence its application before this court.
28. From the foregoing, I am of the view that this court has the requisite jurisdiction to look at the matter and determine whether the ex parte applicant was denied the opportunity to be heard.
29. On the question of exhaustion, I find, for similar reasons, that the ex parte applicant could come to this court by way of judicial review as provided under section 9(4) of the Fair Administrative Action Act.

30. The applicant is required to show exceptional circumstances that would convince the court to hear it. An alleged denial of the right to be heard is one such exceptional circumstance and the court has a duty, if satisfied on that fact, to remedy the situation.

31. In conclusion, I find that the Preliminary Objection lacks any merit and it is dismissed.

32. Costs shall be in the cause.

**Dated, signed and delivered at Meru on 15<sup>th</sup> January 2026.**

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**H.M. NYAGA**  
**JUDGE**