Mboroki v Local Authorities Pension Trust (Miscellaneous Application E022 of 2025) [2026] KEHC 3884 (KLR) (Judicial Review) (24 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3884 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E022 OF 2025

JM CHIGITI, J

MARCH 24, 2026

BETWEEN

STEPHEN MUTEITHIA MBOROKI ..... APPLICANT

AND

THE LOCAL AUTHORITIES PENSION TRUST ..... RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 25/02/2025. In objecting the Application, the Respondent filed a Notice of Preliminary Objection dated 11.7.25 raising the following Objections:

    1. The Motion improperly invokes this Honourable Court's execution jurisdiction because the subject Judgment dated 27/07/2011 ("the Judgment"), the resulting Decree dated 27/07/2011 ("the Decree"), and the Order interpreting the Judgment dated 21/11/2012 ("the interpretative order") were not transferred by the Retirement Benefits Appeals Tribunal ("the RBAT") to this Honourable Court for execution under Section 31 of the *Civil Procedure Act* ("the CPA") as read with Order 22 Rule 6 of the Civil Procedure Rules ("the Rules").

    2. Section 4 (4) of the *Limitation of Actions Act* statutory bars the enforcement of judgments, decrees, and /or orders that are over 12 years old.

    3. Order 53 Rule 1 of the Rules bars the Applicant from seeking prayers 1 and 2 of the Motion without leave.

    4. Section 52 of the *Retirement Benefits Act* and Rule 12 of the Retirement Benefits (Tribunal) Rules permit the RBAT to adopt the CPA and the Rules to enforce its own decrees or orders. Consequently, the Applicant is barred by the doctrine of (see Speaker of the National Assembly v Karume [1992] KECA 42 (KLR).

5. Given the preceding, the Motion is—

    a. Is premised on an incurable jurisdictional defect (see the Supreme Court's holding in Application No. 2 of 2011: Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 Others);

    b. Is premature and defective and

    c. And an outright abuse of the process of this Honourable Court and should be dismissed with costs to the Respondent.

The Respondent's Submissions;

2. Jurisdiction is the lifeblood of judicial authority.

3. It is derived solely from *the Constitution* or legislation, or both, and never assumed, conferred or expanded through judicial innovation or craft (Macharia & another v Kenya Commercial Bank Limited & 2 others [2012) KESC 8 (KLRJ).' Indeed, even the oft-invoked panacea of Article 159 (2)(d) of *the Constitution* yields where jurisdiction or imitation of time arises as set out in Republic v Cabinet Secretary, Ministry of Land & Physical Planning & 3 others: Mugo (Exparte Applicant): Kamumo & another (Interested Parties/ (2023) KEELC 19057/KLRJ.

4. The Motion impermissibly demands execution and/or enforcement of the Judgment and Order through on order of Mandamus, a narrow remedy reserved exclusively for decrees and/or orders against government entities.

5. The Respondent submits that it is not a government entity. The Applicant has not invoked a statutory remedy under the *Civil Procedure Act*.

6. A perusal of the Motion the Response reveals that there are questions arising between parties regarding execution, discharge, or satisfaction of the RBA judgment and Order relevant

7. The legal issue for determination is whether this Honourable Court has jurisdiction over the Motion. It does not.

8. It submits that Article 165 (3) (a) of *the Constitution* does not give this Honourable Court original jurisdiction to enforce or execute decisions or orders from the RBA. Furthermore, no legislation under Article 165 (1)(e) of *the Constitution* grants the High Court such jurisdiction.

9. Sections 30 and 31 of the CPA, and Order 22, rule 4 of the Civil Procedure Rule are decisive that an order or decree may only be executed by the court that issued it or by another court to which it has been lawfully transferred.

10. Without a transfer of the RBAT's Orders to this Honourable Court jurisdiction is absent (Mwaura v Njuguna & 3 others |2023) KEEL 16220/KLR) 5 and Ndunda v Independent Electoral & Boundaries Commission & 2 others |2025] KEHC 14710 (KLR|4) according to the Respondent.

11. Section 34 [1] of the CPA further mandates that all questions arising between parties and/or representatives to an order or decree regarding execution, discharge, or satisfaction of the same must be resolved solely by the executing court.

12. This Honourable Court lacks jurisdiction to enforce the Judgment and Order because the RBAT is a subordinate court within the meaning of Article 169 (I)[d) of *the Constitution* as read with section 2 of the CPA and section 2 of the *interpretation and General Provisions Act*. Under sections 28 and 30 of the CPA and Order 22, rule 6 of the CPR, a decree and/or order can only be executed by a court

that passed it, or a court to which it has been lawfully transferred for execution upon Application by the decree-holder.

13. It submits that the RBAT Judgment and Order are more than 12 years old. As such, no enforcement and/or execution can ensue given that Sections 4(1)(c) and 4(4) of the *Limitation of Actions Act*, rendering the Motion statute-bared and incompetent. The RBAT Judgment was delivered on 27th July, 2011 and the interpretive RBAT Order was issued on 12th November, 2012.

14. No execution proceedings have ever been undertaken in accordance with the law, despite there being no orders of stay of execution issued against the RBAT Judgment or Order.

15. It submits that the issue of limitation goes to the root of jurisdiction as enunciated in Thuranira Karauri v Agnes Ncheche (1997) KECA 77 [KLR) " The instant Motion, was filed over 12 years later and it is thus time-bared.

16. It submits that this Honourable Court lacks jurisdiction to entertain a statute-barred Motion as guided by the case M'iara M'rinkanya & another v Gilbert Kobeere M'mbywe (2007] KECA 115 [KLR) ond WalDka v Waitika; Waifuko 82 others (Third party) [2024) KEELC 1505 (KLR])."

17. Section 52 of the *Retirement Benefits Act* ["the RBA Act") and Rule 12 of the Retirement Benefits (Tribunal) Rules ("the RBAT Rules", which unequivocally permit RBAT to adopt the CPA and the CPR in matters of procedure not encapsulated in the RBAT Rules or RBA Act:

18. Section 30 of the CPA and Order 22, rule & of the CPR, which allow him to comply with RBAT for enforcement, or to have the decree or order transferred or sent for execution to another court of competent jurisdiction.

19. The Court of Appeal's binding precedent in Speaker of the National Assembly v Karume [1992] KECA 42 (KLR]" is decisive that redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament should be strictly followed even in the existence of practical difficulties.

20. It submits that the orders of mandamus in prayers 1 and 2 of the Motion are sought in clear violation of Order 53, rule 1 of the CPR, to the extent that no leave has been sought or obtained prior to filing the Motion.

21. He submits that any prayer styled as mandamus is void ab initio for failure to comply with the mandatory provisions.

The Exparte Applicant's Submissions;

22. In challenging the Notice of Preliminary Objection, it is his submission that the Retirement Benefits Appeals Tribunal (hereinafter "RBAT") issued a judgment that was delivered on 27th July 2011 and interpreted through its Order of 21stNovember 2012.

23. The Applicant filed the instant Application seeking an order of Mandamus to compel the Respondent to comply with the binding judgment.

24. In response to the Application, The Respondent filed a Preliminary Objection seeking to block the Applicant's Notice of Motion dated 25th February 2025 on five grounds:

    a. The Court’s lack of jurisdiction for want of transfer of RBAT orders to the High Court;

    b. Inapplicability of mandamus against a private entity;

    c. Failure to seek leave under Order 53 Rule 1 of the Civil Procedure Rules;

d. Limitation under Section 4(4) of the *Limitation of Actions Act*; and

e. The doctrine of statutory exhaustion and alleged abuse of court process.

25. On 27 July 2011, the Retirement Benefits Appeals Tribunal rendered its judgment, ordering the Respondent to:

a. Provide a true, full, and proper account of the Applicant's pension benefits; and

b. Settle the said benefits accordingly.

c. The Tribunal, issued a further Order on 21st November 2012.

26. Rather than comply, the Respondent embarked on a series of legal challenges, all of which were unsuccessful:

a. Judicial Review Misc. Civil Application No. 403 of 2012 - Application dismissed.

b. Civil Appeal No. 284 of 2013 - Dismissed by the Court of Appeal on 10 May 2019.

c. Judicial Review Application No. E048 of 2022 - Only quashed a subsequent ruling but upheld the Tribunal's core findings.

d. Review Applications filed at the Tribunal on 10 September 2019 and 22 January 2024 - Both dismissed.

27. The Respondent has refused to comply with the Tribunal's judgment, leaving the Applicant, now elderly and financially strained, without access to funds he lawfully contributed during his working life.

28. In answering whether this Honourable Court possesses jurisdiction to enforce the judgment and orders of the Retirement Benefits Appeals Tribunal (RBAT),The Respondent contends that this Honourable Court lacks jurisdiction to enforce RBAT orders as they have not been transferred to the High Court under Section 31 of the *Civil Procedure Act*.

29. Section 7 of the Fair Administrative Actions Act provides that: -

> " 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."

30. Section 3A of the *Civil Procedure act* preserves the inherent powers of the Court, stipulating that:

> " 3A. saving of inherent powers of court.
>
> Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

31. Section 10 of the Fair Administrative Actions Act provides that;

> " 10. Rules

(1) An Application for judicial review shall be heard and determined without undue regard to procedural technicalities."

32. The High Court retains a residual jurisdiction to intervene in exceptional circumstances to prevent injustice, and guarantee that lawful orders are not rendered nugatory.

33. This jurisdiction is not ousted by procedural technicalities, particularly where the Respondent has persistently refused to comply with a valid judgment of the Tribunal for over 14 years.

34. In the case of Rev. Madara Evans OkangaDondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 Of 2005, Kimaru, J on the issues of the court's inherent jurisdiction held:

> " The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law...The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

35. In Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA (as he then was) emphasised on the court's residual jurisdiction under Section 3A of the *Civil Procedure Act*, by holding that such residual jurisdiction should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice. In the instant Application, a retiree has been denied his pension benefits for nearly two decades despite multiple judicial pronouncements in his favour.

36. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that orders issued are not issued in vain.

37. This was recognised by the Court of Appeal in Nicholas Mahihu vs. Ndima Tea Factory Ltd & another Civil Application No. Nai. 101 of 2009 where it was held that: -

> " Although we have restated the two main principles which this Court considers in this type of Application, the Court has a duty to ensure that its orders are at all times effective."

38. The present matter discloses exceptional circumstances warranting the Court's intervention.

39. The Applicant, a retiree who left service in June 2009, has been denied access to his pension benefits for over fifteen years despite a clear judgment of the Retirement Benefits Appeals Tribunal and an interpretative order.

40. The Respondent has persistently refused to comply, engaging instead in prolonged litigation that has never set aside or varied the Tribunal's findings. This continued refusal amounts to an arbitrary administrative decision that has left the Applicant in financial hardship and distress.

41. In these circumstances, the Court's inherent jurisdiction under Section 3A of the *Civil Procedure Act* is properly invoked to prevent injustice.

42. Without prejudice to the foregoing, the Applicant respectfully submits that the RBAT is a quasi-judicial body established under Section 47 of the *Retirement Benefits Act*.

43. The Tribunal's decisions, once rendered, carry the force of law and are binding upon the parties unless varied, set aside, or stayed by a competent court.

44. While the Act provides a clear mechanism for lodging appeals before the Tribunal, it is notably silent on the procedure for enforcing its decisions.

45. This statutory lacuna mirrors the enforcement dilemma faced under the *Work Injury Benefits Act* (WIBA), where courts were called upon to bridge the legislative gap and uphold substantive justice in enforcing orders issued by the Director.

46. In this regard, the reasoning of the court in Lagat v Kenya Ordinance Factories Corporation (Miscellaneous Cause E038 of 2023) [2024] KEELRC 1118 (KLR) (25 April 2024) is instructive. The court held:

> "...until the *Work Injury Benefits Act* is reviewed and a provision made on the manner in which the Director's awards are to be executed, the courts must do substantive justice and give effect to the very clear and unambiguous intentions of the Act by enforcing the decisions of the Director. Both Article 159(2) of *the Constitution* and section 20(1) of this court's Act require that the court does substantive justice and acts without undue regard to technicalities..."

47. This court has jurisdiction to enforce the judgment and orders of the RBAT.

48. The Respondent argues that mandamus cannot issue against it as it is a private pension trust. Respectfully, this argument is outdated as it fails to appreciate the evolution of judicial review remedies under the *Fair Administrative Action Act*, 2015.

49. Section 11(1)(f) of the *Fair Administrative Action Act*, 2015 provides that;

> "11. Orders in proceedings for judicial review
>
> (1) In proceedings for judicial review under section 8(1), the court may grant any order that is just and equitable, including an order–
>
> (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the Applicant has a legally enforceable right."

50. The Act defines an "administrator" under Section 2 as "a person who takes an administrative action or who makes an administrative decision." The Respondent, in administering pension benefits, falls squarely within this definition.

51. Its role in determining and paying retirement benefits is an administrative function, and its refusal to comply with the Tribunal's judgment constitutes administrative action subject to judicial review.

52. Section 2 of the Act further defines "administrative action" to include:

> "(a) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates"

53. The Respondent's refusal to pay the Applicant's pension benefits is an omission that directly affects the Applicant's legal rights.

54. It therefore carries a public element and is amenable to judicial review remedies, including mandamus.

55. In Republic v Jomo Kenyatta University of Agriculture and Technology Ex parteElijah Kamau Mwangi [2021] eKLR, the Court cited with approval the decision in Republic v Commissioner of Lands & Another Ex-Parte Kithinji MuruguM'agere, Nairobi High Court Misc. Application No. 395 of 2012, where it was held that Mandamus is designed to enforce the performance of a public duty that is neither optional nor discretionary. Further, the duty enforceable by Mandamus need not necessarily be a statutory one, it may be one that carries a public element, expressed in any form.

56. In Republic v Principal Secretary, Ministry of Internal Security & Another Exparte Schon Noorani [2018] eKLR, where the Court summarised the requirements for the grant of Mandamus as follows:

a. There must be a public legal duty to act;

b. The duty must be owed to the Applicant;

c. There must be a clear right to the performance of that duty, evidenced by: Satisfaction of all condition's precedent;

d. A prior demand for performance;

e. Either a refusal or unreasonable delay;

f. There must be no other adequate remedy;

g. The order sought must be of practical value or effect;

h. There must be no equitable bar to the relief;

i. On a balance of convenience, the order should be granted

57. The Applicant submits that the requirements have been fully met in that;

a. The Respondent owes a public legal duty to administer and pay pension benefits.

b. That duty is owed directly to the Applicant.

c. The Tribunal's judgment and interpretative order established the Applicant's clear right to performance.

d. The Respondent has refused and unreasonably delayed compliance for over fourteen years.

e. No other adequate remedy exists, as repeated litigation has failed to secure compliance. # The order sought will have practical value by ensuring the Applicant's constitutional right to social security under Article 43(1)(e) is realised.

58. An order of mandamus, as prayed for, is not confined exclusively to government entities but extends to anybody or authority whose administrative action affects the legal rights or interests of any person to whom such action relates.

59. In answering whether failure to seek leave under Order 53 Rule 1 renders the Application incompetent, the Respondent contends that the Applicant's failure to seek leave under Order 53 Rule 1 of the Civil Procedure Rules renders the Application fatally defective. The Applicant respectfully submits that this contention is based on a misconception of the applicable law.

60. The present Application is not anchored on Order 53 of the Civil Procedure Rules but on the *Fair Administrative Action Act*, 2015, which provides a self-standing statutory framework for judicial review that operates independently of Order 53.

61. Section 7 of the Act expressly grants an aggrieved person the right to apply for review of administrative action, while Section 9(1) provides that such an Application may be made directly to the High Court without unreasonable delay.

62. In Bhojwani & another v Director of Public Prosecutions & another (Judicial Review Miscellaneous Application E114 of 2025) [2025] KEHC 16305 (KLR) (Judicial Review) (13 November 2025) (Ruling) this Honourable Court recognized that;

> " It is further important to observe that with the enactment of the Fair Administrative Action (Judicial Review Procedure) Rules, 2024, a new legal regime now exists giving full effect to Article 47 of *the Constitution* and the *Fair Administrative Action Act*, 2015. Under this framework, an Applicant alleging that their right to fair administrative action has been violated, denied, or threatened may directly institute judicial review proceedings without the necessity of first seeking leave of the Court. It therefore follows that a party may properly approach this Court under the *Fair Administrative Action Act* and the 2024 Rules, as promulgated in October 2024."

63. In Matagei v Attorney General; Law Society of Kenya (Amicus Curiae) (Petition 337 of 2018) [2021] KEHC 460 (KLR) (Constitutional and Human Rights) (13 May 2021) (Judgment), this court was tasked with the responsibility to determine whether there's need for Parliament to repeal sections 8 and 9 of the *Law Reform Act* and order 53 of the Civil Procedure Rules to avoid confusion as to the manner in which judicial review actions should be instituted, the court observed that:

> " A perusal of the FAA Act clearly shows that Parliament intended to substitute the judicial review under the common law with statutory judicial review, and this explains why Part III (sections 7 to 11) of the Act is clearly titled "Judicial Review". One cannot therefore understand why Parliament did not go to the whole hog by repealing sections 8 and 9 of the LR Act. The failure to repeal the impugned provisions of the LR Act has led to the continuing confusion as regards the procedure for institution of judicial review proceedings. It is noted that rules have not been made as provided by section 10(2) and regulations have also not been enacted under section 13 of the FAA Act even though the law is already operational...It is observed that the FAA Act does not make any reference to the requirement for leave before commencement of judicial review proceedings and in fact disdains undue regard to procedural technicalities in judicial review Applications...The FAA Act appears to have created a new legal regime for review of administrative action. This regime is more aligned to articles 23 and 47 of *the Constitution* and should be the sole foundation of judicial review in this country...
>
> As already stated, all law must conform to the provisions of *the Constitution* and it therefore follows that the provisions of sections 8 and 9 of the LR Act and order 53 CPR must conform to *the Constitution* or be construed with such adaptations, alterations and

modifications so as to conform with *the Constitution*...Nevertheless, as I have already stated, sections 8 and 9 of the LR Act and order 53 of the CPR have been rendered otiose and their continued retention in our statute books will only serve to promote the wrong notion that Kenya has a two-tracked system for seeking judicial review against administrative action."

64. The Applicant therefore humbly submits that the requirement for leave under Order 53 Rule 1 has been rendered otiose by the statutory right to apply for review under Section 7 of the *Fair Administrative Action Act*.

65. To hold otherwise would elevate technical form over substantive justice, contrary to Article 159(2)(d) of *the Constitution*.

66. On the issue of limitation of action, the Respondent argues that enforcement of the 2011 judgment is barred by Section 4(4) of the *Limitation of Actions Act*, which prescribes a 12-year limitation period for enforcement of judgments.

67. The Applicant respectfully submits that this argument is misconceived and ignores the factual matrix of this case.

68. The Applicant could not institute execution proceedings while the Respondent's multiple appeals and review Applications seeking to set aside the Tribunal's orders were pending.

69. The Court of Appeal's judgment, delivered on 10th May 2019, finally affirmed the Applicant's entitlement.

70. The Respondent cannot benefit from its own delays. The Respondent has, since 2011, engaged in:

    a. Judicial Review Misc. Civil Application No. 403 of 2012 - Application dismissed.

    b. Civil Appeal No. 284 of 2013 - Dismissed by the Court of Appeal on 10 May 2019.

    c. Judicial Review Application No. E048 of 2022 - Only quashed a subsequent ruling but upheld the Tribunal's core findings.

    d. Review Applications filed at the Tribunal on 10 September 2019 and 22 January 2024 - Both dismissed.

71. These proceedings, all initiated by the Respondent, have consumed over 12 years.

72. The Respondent cannot now turn around and argue that the Applicant is time-barred due to delays the Respondent itself occasioned.

73. The Applicant submits that the present Application, filed in 2025, is well within time as the right to enforce crystallised only after the Court of Appeal's dismissal of the Respondent's appeal in 2019.

74. The Applicant's Application is not statute-barred and that the Respondent's reliance on limitation is both inequitable and legally untenable.

75. The Respondent argues that the Applicant ought to have invoked enforcement mechanisms before the Tribunal under Section 52 of the *Retirement Benefits Act*.

76. Section 9(4) of the *Fair Administrative Action Act*, 2015 provides an express exemption from the exhaustion requirement:

> "(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."

77. In Republic v Nairobi City County; Ibrahim (Exparte Applicant) (Environment and Land Judicial Review Case 4 of 2023) [2025] KEELC 48 (KLR) (16 January 2025) (Judgment), the court held that:

> "Though Section 9, of the Fair Administrative Actions Act requires an Applicant for purposes of judicial review to first exhaust the mechanisms, including internal mechanisms for appeal and review and all remedies available under any written law, Sub-section (4) allows the court in exceptional circumstances and on an Application by the Applicant to exempt a person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice... The Applicant had no other choice but to seek relief from this court. It was in the interest of justice that he be exempted from the obligation to exhaust the statutory remedy of going to the liaison committee first. The Applicant's case does not therefore violate the doctrine of exhaustion, and this court has the jurisdiction to entertain and determine this matter. The preliminary objection by the Respondent is therefore unmerited and is hereby dismissed."

78. In the case of Kenya Bureau of Standards and 4 others; Exparte United Millers Limited; Department of Health Services, Nakuru County (interested party), Mativo J (as he then was), stated that,

> "What constitutes exceptional circumstances depends on the facts of each case and it is not possible to have a closed list. Article 4 of *the Constitution* is heavily borrowed from the South African Constitution.
>
> In addition, the FAA Act is heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may be useful guidance."

79. The judge proceeded to cite with approval the decision in the South African case of MV AisMamas Seatrans Maritime – vs- Owner MV Ais Mamas & ano 2002(6) SA at 156H, where the court stated as follows;

i. What is ordinarily contemplated by the words 'exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different...

ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a Judicial discretion; their existence or otherwise is a matter of fact which the court must decide accordingly.

iv. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning; the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will generally be speaking, best be given to the intention of the legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any

circumstances relied on as allegedly being exceptional. In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

80. The present matter discloses exceptional circumstances warranting exemption from the exhaustion requirement in that:

a. The Applicant is an elderly retiree who has been denied his pension for over 15 years, despite having faithfully made monthly pension contributions to the Respondent during the entirety of his tenure;

b. The Respondent has demonstrated a pattern of defiance and non-compliance with Tribunal orders;

c. Multiple appeals and Applications by the Respondent have already delayed justice;

d. Returning to the Tribunal would occasion further delay and injustice;

e. The Tribunal's orders are clear and require no further interpretation, having already been interpreted by the Tribunal;

f. The Respondent's refusal to comply amounts to a violation of the Applicant's constitutional rights under Article 43 on economic and social rights.

81. In these circumstances, the Applicant respectfully urges this Honourable Court to exercise its discretion under Section 9(4) of the *Fair Administrative Action Act* and exempt the Applicant from the exhaustion requirement.

82. The Court's intervention is necessary to ensure that justice is not defeated by technical reliance on procedural bars, and that the Applicant's rights are protected without further delay.

83. In Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR), the Court held that;

> " The situations that may give rise to an abuse of court process are indeed in exhaustive, they involve situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations: -
>
> (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
>
> (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
>
> (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and Respondent notice.
>
> (d) Where an Application for adjournment is sought by a party to an action to bring another Application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action…"

84. The Applicant's motion is a legitimate invocation of this Honourable Court's jurisdiction to ensure that a successful litigant enjoys the fruits of his judgment.

85. The Application seeks no more than compliance with clear and final orders of the Tribunal, which have been affirmed at every judicial level.

86. The Application is a legitimate invocation of this Honourable Court's jurisdiction to compel compliance with orders that have long been finalized.

Analysis and determination;

The issues that crystalize for determination are;

Whether or not the Notice of preliminary objection has merit.

87. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 at page 700 paragraphs D-F Law JA, as he then was, had this to say on what a preliminary objection entail:

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a 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."
>
> At page 701 paragraph B-C Sir Charles Newbold, P. stated:
>
> "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion…" (Emphasis added).

88. The Preliminary Objection revolves around the jurisdiction of the court. The court is satisfied, the points raised in the Notice of Preliminary are clear points of law.

89. Whether or not the same will succeed, depends on the determination that flow from the analysis lacks locus standi.

Whether the prerogative order of mandamus is confined exclusively to public bodies and government entities;

90. The Respondent argues that mandamus cannot issue against it as it is a private pension trust. I disagree with the Respondent.

91. Section 2 of the Act further defines "administrative action" to include:

> "(a) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
>
> (b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates"

92. Section 11(1)(f) of the *Fair Administrative Action Act*, 2015 provides that;

> " 11. Orders in proceedings for judicial review
>
> (1) In proceedings for judicial review under section 8(1), the court may grant any order that is just and equitable, including an order–
>
> (f) compelling the performance by an administrator of a public duty owed in law and in respect of which the Applicant has a legally enforceable right;"

93. The Act defines an "administrator" under Section 2 as "a person who takes an administrative action or who makes an administrative decision." The Respondent, in administering pension benefits, fits into the definition.

94. The refusal to comply with the Tribunal's judgment constitutes administrative action subject to judicial review.

Whether failure to seek leave under Order 53 Rule 1 renders the Application incompetent

95. The Respondent contends that the Applicant's failure to seek leave under Order 53 Rule 1 of the Civil Procedure Rules renders the Application fatally defective.

96. The Applicant respectfully submits that this contention is based on a misconception of the applicable law. The present Application is initiated through a Notice of a motion. A litigant who is moving the court under the *Fair Administrative Action Act*, 2015, should file an Originating Motion.

97. Section 7 of the Act expressly grants an aggrieved person the right to apply for review of administrative action, while Section 9(1) provides that such an Application may be made directly to the High Court without unreasonable delay.

98. In Bhojwani & another v Director of Public Prosecutions & another (Judicial Review Miscellaneous Application E114 of 2025) [2025] KEHC 16305 (KLR) (Judicial Review) (13 November 2025) (Ruling) this Honourable Court recognized that;

> " It is further important to observe that with the enactment of the Fair Administrative Action (Judicial Review Procedure) Rules, 2024, a new legal regime now exists giving full effect to Article 47 of *the Constitution* and the *Fair Administrative Action Act*, 2015. Under this framework, an Applicant alleging that their right to fair administrative action has been violated, denied, or threatened may directly institute judicial review proceedings without the necessity of first seeking leave of the Court. It therefore follows that a party may properly approach this Court under the *Fair Administrative Action Act* and the 2024 Rules, as promulgated in October 2024."

99. I am in full agreement with this finding. However, in the instant suit the Applicant moved the court under the *Fair Administrative Action Act*, 2015 but through a Notice of Motion. This places the Application under the Procedures of Order 53 of the Civil Procedure Rules where leave is a mandatory requirement.

100. In the Notice of Motion dated 25.2.25 the Applicant invoked Under Articles 159(2)(d) of *the Constitution* of Kenya, 2010, Sections 1A, 1B, & 3A of the *Civil Procedure Act* CAP 21 Laws of Kenya & Order 51 Rule 1 of the Civil Procedure Rules 2010).

101. He did not invoke the provisions of The *Fair Administrative Action Act*.

Whether this court has jurisdiction:

102. This court has supervisory jurisdiction under Article 165 of *the Constitution* over the Tribunal.

103. In answering this question, the court has addressed its mind to the doctrine of exhaustion:

104. The Supreme Court in the case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR, [36] observed that;

> "Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".
>
> It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by *the Constitution* or statute. It cannot be conferred by judicial craft. See Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others, SC Application No. 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have."

105. Section 9(2) and (4) of Fair Administrative Actions Act stipulates that:

> "(2) The High Court or a subordinate court under Sub section (I) 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.
>
> (4) Notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on Application by the Applicant, exempt such person from obligation to exhaust any remedy if the court considers such exemption to being the interest of justice."

106. In the case of Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, the court held:

> "...that the question of jurisdiction is a "pure question of law," and should be resolved on a priority basis."

107. Section 9 (3) The *Fair Administrative Action Act* 2015 states that:

> "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 subsection (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."

108. In Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR it was held thus: -

> "We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule.
>
> [106] The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR held:-[256].The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis."

109. Section 9 (4) of Fair Administrative Actions Act stipulates that:

> (4) Notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on Application by the Applicant, exempt such person from obligation to exhaust any remedy if the court considers such exemption to being the interest of justice."

110. The Applicant did not seek leave to be exempted from the Application of the doctrine of exhaustion.

111. As the Court of Appeal acknowledged in the Shikara Limited Case, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. That is not the Applicant's case.

112. This court's Jurisdiction can also be gleaned from a Section 4(4) of the *Limitation of Actions Act* lens which prescribes a 12-year limitation period for enforcement of judgments.

113. The Applicant argued that he could not institute execution proceedings while the Respondent's multiple appeals and review Applications seeking to set aside the Tribunal's orders were pending.

114. The Court of Appeal's judgment, delivered on 10th May 2019, finally affirmed the Applicant's entitlement.

115. The proceedings before this court, have been initiated after 12 years after the Tribunals determination.

116. In the case of Shah v Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543: -

> "Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. The Dictionary Of English Law by Earl Jowitt tells us that mandamus "is a prerogative order issued in certain cases to compel the performance of a duty" and that it was substituted for the writ of mandamus by the Administration of Justice (Miscellaneous Provisions) Act, 1938. It issues from the Queen's Bench division of the English High Court where "the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the Respondent. Thus, it is used to compel public officers to perform duties imposed upon them by common law or by statute...

it is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual."

117. The Court of Appeal in Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & Others [1977] eKLR held: -

> " The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus.Once again, we turn to Halsbury's Law Of England,4th Edition Volume 1 at page 111 From Paragraph89. That learned treatise says: -
>
> The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual".

118. At paragraph 90 headed "the mandate" it is stated:

> " The order must command no more that the party against whom the Application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

119. That the Application has been caught up by the provisions of Section 4 (4) of the *Limitation of Actions Act*.

120. Section 4 (4) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provides:

> " 4 (4). An action may not be brought upon a judgment after the end of twelve years from the date of which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."

121. The Applicant cannot seek to enforce a judgment after twelve years from the date on which it was passed.

122. In the case of Willis Onditi Odhiambo v Gateway Insurance Co. Ltd [(2014] eKLR, the Court of Appeal held: -

> " Given the record of this matter which record we summarized at the beginning of this judgment, we do not see how the learned Judge's decision can be faulted. For the avoidance of doubt, we state that the appellant was not seeking to file suit out of time for damages in negligence. The suit which the appellant filed against Mr. and Mrs. Aoko, i.e. Kisumu CMCC No. 55 of 1994, did not contravene the provisions of the *Limitation of Actions Act*. The appellant therefore required no leave to extend time to file the same. The leave he sought

was to file the declaratory suit out of time to compel the Respondent to satisfy the decree he had obtained on 26th August, 1996 in Kisumu CMCC No. 55 of 1994. In Other words, the appellant wanted to execute the said decree against the Respondent out of time. Execution of judgments and/or decrees is governed by Section 4 (4) of the `*Limitation of Actions Act* which is in the following terms: -

"4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered."

The judgment which the appellant sought to execute was passed on 26th August, 1996. The judgment should therefore have been executed on or before 27th August, 2008. The suit which was first filed by the appellant i.e. Kisumu CMCC No. 12 of 2009 and the second one, being Winam Principal Magistrate's Court Civil Case No. 53 of 2012, were both plainly filed out of time."

123. The law has given a time from within which the rights that tenure as a result of a judgment or order have to be enforced. The Limitation Act, provides for no room for extension of time for execution or enforcement of a judgment or decree of a Court.

124. The provisions that give extension of time in Sections 27 and 28 of that Act, in my view, will not apply to a decree or judgment which has been issued in one's favour.

125. The Application is time barred.

The issue of costs:

126. The *Civil Procedure Act* (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):

> " Subject to such conditions and limitations' as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order" [emphases supplied].

127. The Applicant shall shoulder costs.

Disposition

128. The notice of preliminary objection is meritorious.

Order;

1. The Notice of preliminary objection is upheld.
2. Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2026.

.....

J. CHIGITI (SC)

JUDGE