REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. E043 OF 2026

REPUBLIC .....APPLICANT

VERSUS

INSURANCE REGULATORY AUTHORITY..... 1ST RESPONDENT

AND

POLICYHOLDERS COMPENSATION FUND .... 2ND RESPONDENT

TRIDENT INSURANCE CO. LIMITED .....INTERSTED PARTY

EMMANUEL ORIEDO MAKANGA &

ANDREW MAKAKU MULOGOLI .....EXPARTE APPLICANTS

RULING

1. This ruling determines the Application dated 17th March 2026 wherein the Applicants seek for following orders: -

1) Spent.

2) Leave be granted to the Exparte Applicants to apply for judicial review order of **Certiorari** to remove into this Honourable Court and quash the decision of the 1stRespondent vide letter Ref. No. IRA/01/036/01 issued 10th March 2026 appointing the 2nd Respondent as the Statutory Manager of Interested Party

with immediate effect and subsequent Public Notice issued on 10th March 2026.

3) Leave be granted to the Exparte Applicants to apply for judicial review order of ***prohibition*** estopping the 2nd Respondent from implementation and/or further implementation of the 1st Respondents decision vide the letter Ref. No. IRA/01/036/01 and issued 10th March 2026 appointing it as the Statutory Manager of Interested Party.

4) The leave so granted operate as a stay of the decision of the 1st Respondent contained in its letter Ref. No. IRA/01/036/01 and issued 10th March 2026 appointing the 2nd Respondent as the Statutory Manager of Interested Party.

5) The leave so granted operate as a stay against the 2nd Respondent from implementation and / or further implementation of the 1st Respondent's decision contained in the letter Ref. No. IRA/01/036/01 and issued 10th March 2026 appointing it as the Statutory Manager of Interested Party.

6) The leave so granted operate to maintain the status quo ante existing prior to the 1st Respondent's decision in the letter Ref. No. IRA/01/036/01 and issued 10th March 2026.

7) Costs of the Application be provided for.

2. The Applicant's case is advanced by Emmanuel Oriedo Makanga, a policy holder who has an insurance cover with the Interested Party.

3. It is the Applicants' case that on 17th May 1982 or thereabout, the Interested Party was incorporated as a body corporate duly licensed under the Insurance Act to provide insurance services.

4. It is their case that over the 40 years of the Interested Party's existence, it has conducted its insurance business having been duly so licensed by the 1st Respondent upon satisfaction that it is complaint with the Insurance Act.

5. The Applicants are aggrieved that the 1st Respondent's decision dated 10th March 2026 to place the Interested Party under statutory management irregularity, unlawfully and in disregard of due process in breach of Section 67C of the Insurance Act as no notice was ever given to the Interested Party of any non- compliance that was not addressed.

6. The Applicants are further aggrieved that the 1st Respondent has purported to appoint the 2nd Respondent as a Statutory Manager with respect to the affairs of the Interested Party, a decision which was communicated to the public.

7. This happened despite the fact that the Interested Party's compliance with the Insurance Act over the 40 years of its existence cemented and the 1st Respondent by it being licensed as recently as of 9th January 2026.

8. The Respondent's action which is intended to liquidate the Interested Party is detrimental and the same exposes the Applicants to financial ruin and the risks that are covered under insurance policies placed with the Interested Party. They are now facing unmitigated perils as the validity of their cover is doubtful due to the 1st Respondent decision.

9. They argue that the 1st Respondent has without cause impaired their legitimate expectations that an insurer licensed in January 2026, denoting full statutory compliance, would not have its business disrupted by the regulator under the guise of regulatory probity just a few weeks after passing a clean bill of health.

10. It is further their case that the impugned decision will occasion immense prejudice and irreparable loss to them.

11. The 2nd Respondent will likely mobilize to seize the affairs, assets, bank accounts, seal and other statutory instruments of the Interested Party as a consequence of the flawed, illegal and improper decision of the 1st Respondent which if allowed to continue without the Court's intervention, will cause immense prejudice to the Applicant and the general public.

12. In buttressing their case, the Applicants filed submissions and supplementary submissions to support the Application and the statutory documents that accompanied the Application.

13. They submit that the Application meets the statutory requirements for the grant of the orders sought. They hold the view that the court

should not delve deep into the merits since the matter is at the leave stage. It is their argument that they have made out a Prima facie case.

14. They submit that the 1st Respondent's argument that the matter subjudice and an appeal is misplaced, because the 1st Respondent did not tender any evidence to establish the above since it only files grounds of opposition.

15. They further submit that matter before the Tribunal is different from what is before this court and in any event, the jurisdiction of the Tribunal is different from that of this court.

16. The Applicants submit that they are policyholders with the interested party as a result of which they have the locus standi to move the court as they have done within Section 7 of The Insurance Act. They argue that they have moved the court promptly without any delay.

17. The expert Applicants filed supplementary submissions wherein they challenge the Respondents' arguments that the court lacks jurisdiction and that the suit is premature.

18. It is their case that the legal concern at hand goes beyond the scope of what the tribunal would handle because the same touches on issues which places the interested party into insolvency without the engagement of the management of the company and policy holders like the applicants.

19. The Applicants argue that they are inviting the court to go beyond and look at the propriety, the legality and the lawfulness of the notice of 10th March 2026.

20. They argued that the conduct of the Respondent manager amounts to a statutory management and beyond.

21. It is their argument that the first and second Respondent conduct seem to conclude that the interested party has been unable to pay its debt placing it in the ambit of the Insolvency Act and that issues of insolvency should be determined by the High Court.

22. They further submit that by invoking Section 67 of the Insurance Act the Respondents got it all wrong because in cases where an insurance company is unable to pay its debts fall within the scope of Section 384 of the Insolvency Act.

23. It is their case that this court needs to do a harmonious interpretation of the two statutes by way of taking evidence which can only be done before this court. They submit that Section 424 is the proper Section which should be involved in case of a company that is due for liquidation.

24. They submit that the Respondent's action without evidence of insolvency is procedurally unfair unreasonable and unlawful and contrary to Article 47 of the Constitution.

25. They submit that Article 23, Article 27 and Article 165 of the Constitution confer jurisdiction to the High Court to regulate and supervise all Tribunals, persons and quasi-judicial authorities.

26. They submit further that the Application raises both procedural, and substantive issues of law, which can only be handled and determined by the High Court.

27. They argue that in the instant case there is an overlap in the statutes, and in such a case, the substantive statute should carry the day. They argue that the Insolvency Act should be the one that should apply given that the Insurance Act simply gives procedural provisions and in particular at Section 67 which provides for the appointment of a statutory manager.

28. It is further their submission that invoking the Insurance Act to appoint a manager to control, dispose of the first Interested Parties' assets is illegal. They submit that such a process should be done under the Insolvency Act and not the Insurance Act. They submit that the unprocedural approach by the Respondent's calls for the scrutiny of this court.

The 1st Respondent's case;

29. In opposing the Application, it filed grounds of opposition advancing the argument that the Application lacks merit given that Section 173 of the Insurance Act unequivocally provides that any person aggrieved by the decisions of the 1st Respondent, may within one (1) month from the date the decision is made appeal at the Insurance Appeals Tribunal which The Exparte Applicants have not exhausted before seeking this Court's intervention.

30. It submits that Section 173 of the Insurance Act, CAP 487, Laws of Kenya elucidates that the procedure for appeals from the 1st Respondent's decisions is to the Insurance Appeals Tribunal as follows:

> *"A person aggrieved by a decision of the Commissioner under this Act may, within one month from the date on which the decision is intimated to him, appeal to the Tribunal which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary that decision."*

31. Section 9(2) of the Fair Administrative Action Act provides thus:

> *"The high court or a subordinate Court under subsection 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.*

32. It relies on the case of **Old Mutual General Insurance Kenya Ltd vs Insurance Regulatory Authority and Tropic Air Ltd. Judicial Review Miscellaneous Application E030 of 2024 [2025] KEHC 4570 (KLR)** where the court held as follows:

> *"The Applicant has not exhausted the redress avenues available within the above legal avenues that are at its disposal. In any event, the Applicant has not made an Application to be exempted from the doctrine of exhaustion."*

33. The Court in the aforementioned matter downed its tools in line with the principles settled in the **Supreme Court Case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR [36]** as follows:

> *"Having found as I have above, this court has to down its tool in line with the principles as settled in the Supreme Court Case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019/eKLR/36) wherein it was 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" Caltex Oil, (Kenya) Ltd [1989) KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step"*

34. The Ex-parte Applicants have not demonstrated that they made an Application to be exempted from the doctrine of exhaustion, therefore this honourable Court therefore lacks jurisdiction to entertain the same.

35. In **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR** the Court held as follows:

> *"The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."*

36. The 1st Respondent further opposes the instant Application as the prayers sought by the Ex-parte Applicants herein are similar to those sought in Insurance Appeals Tribunal Appeal No. 2 of 2026 Trident Insurance Co. Ltd. v Insurance Regulatory Authority which was filed before the Insurance Appeals Tribunal on 11th March 2026 under the remedies available under Section 173 of the Insurance Act, CAP 487, Laws of Kenya challenging the decision of the 1st Respondent of 10th March 2026 and sought the following prayers in its Notice of Motion Application dated 11th March 2026:

i. *That for reasons recorded, this Application be certified urgent, and service of this Application be dispensed with and the Application be heard ex-parte in the first instance for purposes of prayers 2,3 and 4 hereof.*

ii. *That a temporary order of the Honourable Tribunal be and is hereby issued suspending any implementing of the decision of the Respondent dated 10th March, 2026 placing the Appellant under Statutory Management pending hearing and determination of the Application, or until further Orders of the Tribunal.*

iii. *That a temporary order of the Honourable Tribunal be and is hereby issued suspending any implementing of the decision of the Respondent dated 10th March, 2026 cancelling policies by the Appellant placing the Appellant under Statutory Management pending hearing and determination of the Application, or until further Orders of the Tribunal.*

iv. *That a temporary order of the Honourable Tribunal be and is hereby issued restoring the management of the insurance business of the Applicant to the Board of Directors of, Principal Officer of the Appellant pending hearing and determination of the Application, or until further Orders of the Tribunal.*

v. *That a temporary order of the Honourable Tribunal be and is hereby issued suspending any implementation of the decision of the Respondent dated 10th March, 2026 cancelling policies by the Appellant placing the Appellant under Statutory Management pending hearing and*

determination of the Appeal, or until further Orders of the Tribunal.

vi. *That a temporary order of the Honourable Tribunal be and is hereby issued suspending any implementing of the decision of the Respondent dated 10th March, 2026 cancelling policies by the Appellant placing the Appellant under Statutory Management pending hearing and determination of the Application, or until further Orders of the Tribunal.*

vii. *That a temporary order of the Honourable Tribunal be and is hereby issued restoring the management of the insurance business of the Applicant to the Board of Directors of, Principal Officer of the Appellant pending hearing and determination of the Application, or until further Orders of the Tribunal.*

37. It submits that the instant Application offends the doctrine of *sub judice* as espoused under Section 6 of the Civil Procedure Act and is an attempt to clothe a judicial review court with appellate jurisdiction which is untenable.

38. The 1st Respondent humbly submits that an order of certiorari cannot issue in the circumstances while paying disregard to **Insurance Appeals Tribunal Appeal No. 2 of 2026 Trident Insurance Co. Ltd. v Insurance Regulatory Authority** which is pending hearing and determination in before the Insurance Appeal Tribunal.

39. The foregoing notwithstanding, the 1st Respondent submits that it appeared before the honourable Insurance Appeals Tribunal on 13th March 2026 at 9.00am for the mention of **Insurance Appeals Tribunal Appeal No. 2 of 2026 Trident Insurance Co. Ltd. v Insurance Regulatory Authority** and due to the intentional absence of the Interested Party, the 1st Respondent was directed to file its responses to the Application.

40. The 1st Respondent in compliance with the directions of the Insurance Appeals Tribunal filed its Replying Affidavit on 19th March 2026 detailing the numerous instances of the Interested Party's non-compliance with the provisions of the Insurance Act Cap 487 Laws of Kenya which triggered the regulatory actions undertaken by the 1st Respondent as elucidated in the 1st Respondent's Replying Affidavit sworn by Godfrey K. Kiptum on 19th March 2026.

41. The aforementioned correspondence aptly demonstrates that at all material times, since the Insurance (Amendment) Act 2017, which introduced issuance of perpetual (permanent) licences to insurance companies and reinsurers and replaced issuance of annual renewal of licences, the Interested Party was very much aware of its non-compliance and the regulatory action likely to be taken by the 1st Respondent.

42. The 1st Respondent in a bid to bring the Interested Party (the Insurer) to compliance, while allowing it to continue with operating its business, issued multiple directives including Notice to Show Cause,

Infringement Notices, while citing the regulatory action that would follow.

43. However, the Interested Party would submit numerous remedial action plans and make frequent commitments to ensure compliance with the provisions of the Insurance Act and all applicable regulations, which they unfortunately continuously failed to honour.

44. It is noteworthy that as of 2025, Interested Party, had gotten into the blatant habit of ignoring the directives of the 1st Respondent case in point from 20th August 2025 when the 1st Respondent required the Interested Party to submit remedial actions within 30 days, which the Interested Party, Trident Insurance Co. Ltd. blatantly ignored resulting the 1st Respondent in issued a Notice of Cancellation of License under Section 196(2) of the Insurance Act on 15th December 2025.

45. The Interested Party only responded when the 1st Respondent issued a cancellation notice on 16th December 2025 following which they again made numerous commitments to ensure that the Insurer aligns with the requirements of the Insurance Act and appealed to the Respondent to recall the cancellation notice.

46. The 1st Respondent reviewed the submissions made by the Interested Party and agreed to lift the Notice of Cancellation on 15th January 2026 on condition that the Interested Party complies with various provisions of the Insurance Act that they were still in breach of including "*Section 41 on Capital Adequacy Requirements, Section 68 on appointment of a Principal Officer, Section 32 on lien creation*

Section 47 on transfer of all company assets to the name of the insurer, Sections 54 and 61 on submission of audited financial statements and statutory returns, Section 203 on settlement of claims and submission of claims returns and resolution of all complaints lodged with the Authority, Section 29 on submission of reinsurance programs, Section 179 on submission of Policyholders Compensation Fund returns and payment of PCF levies and all accrued penalties and Section 197A on submission of premium levy returns and payment of all accrued penalties, Compliance with Section 3.5 of the Corporate Governance Guidelines in respect of an independent Board Chairman, by 31st January 2026, failure of which regulatory action under the Insurance Act without further reference..”

47. The Interested Party acknowledged the lifting of the cancellation notice and reiterated their commitment to ensure compliance with the aforementioned Respondent’s directives vide letter received 27th January 2026. However, following continued failure by the Interested Party to comply with the provisions of the Insurance Act, deterioration of the insurer’s financial position and operational stability, the 1st Respondent placed the Insurer under Statutory Management and appointed the Policyholders Compensation Fund to take over management of the insurer with effect from 10th March 2026 pursuant to Section 67C (2)(i) of the Insurance Act.

48. It invites this Court to appreciate the various engagements between the Interested Party, Trident Insurance Co. Ltd and the 1st Respondent, the Insurance Regulatory Authority for close to a decade,

which bear evident the blatant continued reluctance by the Interested Party, to comply with the requirements of the Insurance Act Cap 487 Laws of Kenya and directives issued by the 1stRespondent on *inter alia* Section 68, 32, 47, 54, 61, 203 and more so the continued breach by the Interested Party of Section 41 on Capital Adequacy Requirements, Section 203 on settlement of policyholders' claims and failure to submit levies to the Policyholders Compensation Fund under Section 179, which directly puts in jeopardy the policyholders of the Interested Party including the Ex-Parte Applicants.

49. The 1st Respondent submits that regulatory action taken on 10th March, 2026 was not sudden, it was procedural, timely and well within the knowledge and control of the Interested Party, if they complied with the law.

50. The Applicants' attempt at portraying the 1st Respondent's regulatory action as abrupt and drastic, whereas the 1st Respondent evidently accorded the Insurer with infinite chances to comply with the provisions of the Insurance Act and the directives issued by the 1st Respondent, is not only unsubstantiated but far from the truth.

51. The 1st Respondent indeed granted the Interested Party, Trident Insurance Co. Ltd. numerous opportunities to be heard, as evidenced through numerous meetings between parties and correspondence referred to above.

52. The Interested Party, nonetheless blatantly failed to rectify the non-compliance highlighted by the 1st Respondent.

53. It submits that the Application fails to meet the set threshold and basic tenets of a judicial review Application as the Ex-parte Applicants have not provided any evidence nor do they state the grounds of illegality, unreasonableness, irrationality, impropriety of procedure or improper consideration on the part of the 1st Respondent in the making of the decision to place the Interested Party under Statutory Management.

54. In **Republic -vs- Inland Revenue Commissioners exp National Federation of Self Employed and Small Businesses Ltd [1982] AC 617,** the Judge stated that the requirement that leave must be obtained before making an Application for judicial review is designed to *"Prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."*

55. Reliance is also Placed in **Republic v Land Registrar, Machakos County; Mutua (Ex parte Applicant) [2025] KEELC 4733 (KLR)**where the Court held that:

> *"Leave to apply for judicial review may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant the test being whether there is a case fit for further investigation at a full inter*

partes hearing of the substantive Application for judicial review […]

It is an exercise of the courts discretion but as always has to be exercised judicially. Has the Applicant satisfied these principles […]

The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1st Respondent."

56. The 1st Respondent submits that it is a statutory regulatory body established under the Insurance Act, CAP 487, Laws of Kenya with the mandate to supervise, regulate and promote the development of the insurance industry in Kenya. The 1st Respondent's objects and functions under Section 3A of the Insurance Act, CAP 487, Laws of Kenya include:

a) *ensure the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya;*

b) *formulate and enforce standards for the conduct of insurance and reinsurance business in Kenya;*

c) *license all persons involved in or connected with insurance business, including insurance and reinsurance companies, insurance and reinsurance intermediaries, loss adjusters and assessors, risk surveyors and valuers;*

d) protect the interests of insurance policy-holders and insurance beneficiaries in any insurance contract;

e) promote the development of the insurance sector;

f) advise the Government on the national policy to be followed in order to ensure adequate insurance protection and security for national assets and national properties;

g) issue supervisory guidelines and prudential standards from time to time, for the better administration of the insurance business of persons licensed under this Act;

h) share information with other regulatory authorities and to carry out any other related activities in furtherance of its supervisory role; (i) undertake such other functions as may be conferred on it by this Act or by any other written law.

57. The 1st Respondent placed the Interested Party under Statutory Management in accordance with **Section 67C(2)(i) of the Insurance Act, CAP 487, Laws of Kenya** as was elucidated in the Public Notice dated 10th March, 2026.

58. Section 67C (1) of the Insurance Act, grants the Commissioner of Insurance power to intervene in the management of companies, with the approval of the Board in the following circumstances:

a) If the insurer is found to have failed to meet the capital adequacy ratios required under section 41 of the Act;

b) If the insurer has failed to submit any of the accounts, returns, statements, actuarial valuations or other reports under Part VI for over six months after the end of the financial year to which they relate;

c) If the insurer having failed to comply with any requirement of this Act, has continued that failure, or having contravened any provision of this Act, has continued that contravention for a period of six months after notice of such failure or contravention has been given to him by the Commissioner;

d) Where, having regard to the financial circumstances of the person licensed, the Commissioner is satisfied that the person cannot carry on the business, or any part of the business, for which he is licensed, as the case may be, in a satisfactory and efficient manner;

e) If an amount due by the insurer under a judgement entered into in an action in Kenya arising out of a policy of insurance issued by the insurer or a contract of reinsurance entered into by a reinsurer, has remained unpaid for three months after the date of the final adjudication in that action;

f) If the business of the insurer is wholly or is unproportionately reinsured with another person;

g) If an insurer is unable to pay its debts within the meaning of section 384 of the Insolvency Act (Cap. 53)

h) If the insurer is found to have made adequate reserves or to have understated the level of his liabilities;

i) If the insurer is discovered to have submitted or provided any accounts, returns, statements, books, records, correspondence, documents or other information relating to his business which is false or misleading; or

j) If the Commissioner discovers, whether on an inspection or otherwise, or becomes aware of any fact or circumstance which, in his opinion, warrants the exercise of the relevant power in the interests of the insurer, its shareholders, policy-holders, or reinsurer or in the public interest.

59. It submits that the 1st Respondent reiterates its earlier submission that for close to a decade the Interested Party, Trident Insurance Co. Ltd. blatantly continued to fail to comply with the requirements of the Insurance Act Cap 487 Laws of Kenya and directives issued by the 1st Respondent *inter alia* Section 41 on Capital Adequacy Requirements, Section 68 on appointment of a Principal Officer, Section 32 on lien creation Section 47 on transfer of all company assets to the name of the insurer, Sections 54 and 61 on submission of audited financial statements and statutory returns, Section 203 on settlement of claims and submission of claims returns and resolution of all complaints lodged with the Authority, Section 29 on submission of reinsurance programs, Section 179 on submission of Policyholders Compensation Fund returns and payment of PCF levies and all accrued penalties and

Section 197A on submission of premium levy returns and payment of all accrued penalties, and Corporate Governance Guidelines.

60. The 1st Respondent submits that regulatory action taken on 10th March, 2026 was not sudden, it was procedural, timely and well within the knowledge and control of the Interested Party, if they complied with the law.

61. The 1st Respondent's evidently accorded the Insurer with infinite chances to comply with the provisions of the Insurance Act and the directives issued by the 1st Respondent, is not only unsubstantiated but far from the truth.

62. In the case of **Paul Kiplagat Birgen & 25 Others V Interim Independent Electoral Commission & 2 others [2011] eKLR:**

> *"Certiorari issues to quash a decision which is ultra vires. Certiorari is also concerned with the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed.... Judicial review must be accurately focused upon the actual exercise of a legal power and not upon mere preliminaries. The concern of certiorari is about a decision whether or not made under a legal power or a legal authority*."

63. The 1st Respondent submits that its decision passes the test that it was made under a legal power with legal authority under Section 67C of the Insurance Act, CAP 487, Laws of Kenya as was elucidated in the Public Notice dated 10thMarch, 2026 and more so that the decision

was not in any way, with the Interested Party having been evidently accorded with infinite chances to comply with the provisions of the Insurance Act.

64. It is incumbent upon the Applicants to demonstrate the allegations against the decision-making organ, the 1st Respondent, to justify intervention by this Honourable Court at this preliminary stage yet the Ex-parte Applicants have not furnished this Honourable Court with any evidence to show that the 1st Respondent acted outside its mandate or violated any laws by placing the Interested Party under Statutory Management nor have they demonstrated that the Interested Party was in compliance with the law over the years of its existence as they so claim.

65. It is the 1st Respondent's humble submission that Section 67 C of Insurance Act CAP 487 was in fact intended to *inter alia* protect the interests of insurance policyholders and insurance beneficiaries and promote a fair and stable insurance industry as mandated by the law, and not to feter with the rights or interests of the Ex-Party Applicants as alleged.

66. It is absurd that the very policyholders, such as the Ex-Parte Applicants, that the 1st Respondent intended to protect through its decision of 10th March 2026, would wish to retain an insurer that has blatantly refused to comply with the Insurance Act under which it is licensed and worse still, one has continuously demonstrated that it is unable to honour its insurance contracts by failing to settle policyholders' claims.

67. The Interested Party's blatant breach of the Insurance Act Section 68, 32, 47, 54, 61, 203 and Section 41 on Capital Adequacy Requirements, Section 203 on settlement of policyholders' claims and the failure to submit levies to the Policyholders Compensation Fund under Section 179, directly puts in jeopardy the interests of the policyholders of the Interested Party, including the Exparte Applicants as well as those of the insurance beneficiaries.

68. Reliance is placed in the case of **Commissioner of Lands vs Kunste Hotel Limited (1997) eKLR (E & L) 1 at page 249, the Court of Appeal** stated that:

> *"But it must be remembered that Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected".*

69. The Ex-Parte Applicants intention in the Application is clearly aimed at securing a determination on the merits of the decision rather than the process, as they have failed to demonstrate that that the decision-making process that they challenge was flawed and they also lack any evidence to adduce as they were not party to the process.

70. The Courts have held that such Parties should ventilate such disputes in ordinary civil suits as was held in the case of **Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & another (2014) eKLR** as follows:

"Where an Applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."

71. It also relies in the **Halsbury's Laws of England 4th Edition Volume 2 Page 508** where it is stated that;

"Certiorari is a discretionary remedy which the Court may refuse to grant even when the requisite grounds for its grant exist. The Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The judicial discretion of the Court being a judicial one, must be exercised on the basis of evidence and sound legal principles".

72. It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of the 1st Respondent as was elucidated by the Court of Appeal in the case of **Municipal Council of Mombasa v Republic & another** (supra), held: -

"...judicial review is concerned with the decision-making process, not with the merits of the decision itself... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the

decision have the power, i.e. the jurisdiction to make it? Were the personsaffected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review…"

73. In the case of **Republic v Public Procurement Administrative Review Board & 2 others Exparte - Sanitam Services (E.A) Limited**

"That the purpose of the remedies availed to a party under the judicial review regime is to ensure that the individual is given fair treatment by the authority to which he has been subjected. The purpose is not to substitute the opinion of the court for that of the administrative body in which is vested statutory authority to determine the matter in question."

74. The Exparte Applicants' Verifying Affidavit sworn by Emmanuel Oriedo Makanga dated 17th March, 2026 is marred with untruths and grave misrepresentation of facts at Paragraph 8, of the Affidavit sworn by Emmanuel Oriedo Makanga the Ex-Parte Applicants' allege that the Interested Party was placed under Statutory Management

despite its compliance with the Insurance Act over 40 years of its existence and that its licence was issued by the 1st Respondent on 9th January 2026. This is not only false but also a grave misunderstanding of the licensing regime under the Insurance Act as the Interested Party 's licence was actually issued on 22nd December 2017 pursuant to the Insurance (Amendment) Act 2017 which was legislated to *inter alia* introduce the Risk-Based Capital regime and issuance of perpetual licenses to insurers which was a regulatory shift from annual renewals to perpetual licensing aligned with the provisions of the Risk- Based Capital regime. This in essence means that all insurers, including the Interested Party herein holds a licence that does not require periodic renewal, until surrendered, suspended, or cancelled by the 1st Respondent as provided for under the Insurance Act.

75. The 1st Respondent has also in this submissions detailed how it issued multiple directives on the Interested Party (the Insurer) due to non-compliance since as far back as 2017 and we invite this honourable Court to take cognizance of the various engagements between the Interested Party, Trident Insurance Co. Ltd. and the 1st Respondent, for close to a decade, evidencing the blatant continued reluctance by the Interested Party, to comply with the requirements of the Insurance Act Cap 487 Laws of Kenya and directives issued by the 1st Respondent.

76. At Paragraph 9 of the Affidavit sworn by Emmanuel Oriedo Makanga, the Ex-Parte Applicants' allege that the 1st Respondents decision to place the Interested Party under Statutory Management is intended to

liquidate the insurer and has placed the Ex-Parte Applicants in financial ruin.

77. It submits that this allegation is not only unsubstantiated but also a poor understanding of the concept of Statutory Management under the Insurance Act and the concept of liquidation the Insolvency Act, which are two different regimes.

78. At Paragraph 10 of the Affidavit sworn by Emmanuel Oriedo Makanga, the Ex-Parte Applicants' allege that 1st Respondent impaired the legitimate expectations of the insurer licensed in January 2026 whereas the 1st Respondent has demonstrated that the not only was the Interested Party's license not issued in January 2026 but that the Interested Party had not been issued with a clean bill of health by the 1st Respondent rather the opposite.

79. It is therefore the 1st Respondent's submission that the legitimate expectation cited by the Interested Party does not exist, whether in reality or in imagination. The validity of the Licence issued was subject to cancellation, suspension or revocation by the 1st Respondent.

80. At Paragraph 11 of the Affidavit sworn by Emmanuel Oriedo Makanga, the Ex-Parte Applicants' allege that they have relied on the published financial statements of the Interested Party and that there was no public communication of challenges with the financial well-being of the Insurer whereas the 1st Respondent through its numerous publications such as the **Annual Insurance Industry Statistics of 2024** demonstrate that there were no submitted financial statements by the Interested Party for the year ending 31.12.2024

while the previous years demonstrated troubling financial positions of the Insurer.

81. The 1st Respondent not only communicated the Interested Party's financial position therefore the accuracy of the allegations by the Ex-Parte Applicants' is not only questionable but untrue.

82. It submits that it is trite law that perjury is a grave offence, striking at the very heart of the administration of justice and swearing a false affidavit is not a trivial procedural lapse; it is a criminally culpable act by the Ex-Parte Applicants that undermines judicial integrity, pollutes the evidentiary record, and constitutes an abuse of the judicial process. He who comes to equity must come with clean hands which the Ex-Parte Applicants have flagrantly failed to satisfy. Litigants who come to court with unclean hands, especially by way of sworn untruths, are not entitled to equitable or discretionary relief.

83. The order of prohibition cannot be issued by this honourable Court to correct the course, practice or procedure of an administrative body or a wrong decision on the merits of the proceedings rather only for excess of jurisdiction or departure from the rules of natural justice.

84. Reliance is placed in the case of **Kenya National Examination Council versus Republic ex part Geoffrey Gathenji Njoroge & 9 other [1997] eKL**R, as follows;

> "*What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to*

continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.

Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision."

85. The Application is incurably defective, fatally compromised, and cannot be sustained and unworthy of this honourable Court's judicial time. Litigation built on dishonest averments cannot withstand judicial scrutiny nor stand as a credible claim.

86. The Ex-parte Applicants joinder of the Interested Party in the instant Application in its own name and capacity notwithstanding the appointment of the Statutory Manager, Policyholders Compensation Fund, the 2nd Respondent herein, whose effect is that the management

and control of the Interested Party now vests in the appointed Statutory Manager is in breach with Section 67C of the Insurance Act.

87. The purported Replying Affidavit filed by the firm of Kaveke Mwania & Co. Advocates on behalf of the Interested Party, Trident Insurance Co. Ltd Sworn by Diamond Hasham Lalji as Chairman and on behalf of the Board of the Interested Party, is incompetent the said Deponent has no capacity to swear Affidavits on behalf of the Interested Party as the management and control of the Interested Party now vests in the appointed Statutory Manager, the 2nd Respondent.

88. The 1st Respondent submits that by appointing the Policyholders Compensation Fund as the Statutory Manager of the Interested Party, the proper party that can act on its behalf is the Statutory Manager as was discussed in the case of **Mombasa ELC (OS) No. 136 of 2022 Mwalimu Kassim & Others -vs- Blueshield Insurance Company Limited (under Statutory Management) & Others.**

89. The 1st Respondent submits that the application is incurably defective, fatally compromised, marred with untruths and is unworthy of this honourable Court's judicial time. Litigation built on dishonest averments cannot withstand judicial scrutiny nor stand as a credible claim.

90. Granting the orders sought will only allow the Interested Party to continue to operate despite its incapability to conduct business, but it will also encourage the non-compliance of regulated entities, thereby harming the stability of the insurance sector.

91. There is an imminent risk that the Interested Party's assets may be diverted to the prejudice of policyholders and insurance beneficiaries, which will scuttle the very essence of the 1st Respondent's decision of 10th March 2026.

92. The 2nd Respondent's in its part argues that Section 173 of the Insurance Act unequivocally provides that any person aggrieved by the decisions of the 1st Respondent, may within one (1) month from the date the decision is made appeal at the Insurance Appeals Tribunal.

93. It argues that the Exparte Applicants have neither exhausted this remedy nor have they furnished this Honourable Court with any evidence to show that they have exhausted all the available remedies before seeking this Honourable Court's intervention.

94. Reliance is placed in the case of **Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR** where it was held that:

> "*It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex*

Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

The 2nd Respondent's Submissions;

95. The 2nd Respondent submits that the purpose of leave is to enable Courts to weed out frivolous, vexatious or unmeritorious Applications that are designed to impede or interfere with the lawful execution of administrative functions.

96. The grant of leave is a discretionary power vested in the Courts, which must be exercised judiciously, fairly, objectively and with restraint.

97. In the case of **Republic -vs- County Council of Kwale & another Ex-parte Kondo & 57others (1998) 1 KLR (E&L),** where the Honourable Court held as follows: -

"The purpose of the Application for leave to apply for judicial review is firstly to eliminate at an early stage any Applications for judicial review which are either frivolous, vexatious or hopeless and secondly, to ensure that the Applicant is only allowed to proceed to the substantive hearing if the court is satisfied that there is a case fit for further consideration.

Leave may only be granted, therefore, if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant, the test being whether there is a case fit for further investigation at a full inter partes hearing of the

substantive Application for Judicial Review. It is an exercise of the court's discretion but as always it has to be exercised judicially."

98. It submits that the Exparte Applicants have failed to discharge the burden of demonstrating an arguable case.

99. It submits that the impugned decision was lawfully made pursuant to **Section 67C(2)(i) of the Insurance Act**, which empowers the Commissioner of Insurance to place an insurer under statutory management.

"Section 67C (2) – Insurance Act, Cap 487

The Commissioner may, with the approval of the Board—

(i) appoint a competent person familiar with the business of the insurer (in this Act referred to as a "manager") to assume the management, control and conduct of the affairs and business of an insurer to exercise all the powers of the insurer to the exclusion of its Board of Directors, including the use of its corporate seal;

(ii) remove any officer or employee of an insurer who, in the opinion of the Commissioner, has caused or contributed to any contravention of any provisions of this Act, or any regulations or directions made thereunder or to any deterioration in the financial stability of the insurer or has been guilty of conduct detrimental to the interests of policy-holders or other creditors of the insurer;

(iii) appoint three competent persons familiar with the business of insurers to its Board of Directors to hold office as directors who shall not be removed from office without the approval of the Commissioner;

(iv) by notice in the Gazette, revoke or cancel any existing power of attorney, mandate, appointment or other authority by the insurer in favour of any officer, employee or any other person."

100. The Ex parte Applicants have failed to discharge this onus, as they have not satisfied the threshold for the grant of leave to apply for judicial review.

101. Reliance is placed on the case of **Festo Ogeda Acutu v Richard Odumbe & another [2022] eKLR**, where the Honourable Court held as follows:

> *"It is trite law that he who alleges must prove. Section 107(1) of the Evidence Act provides that:*
>
> *'Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove."*

102. The Application is therefore devoid of merit and does not meet the threshold for the grant of leave since no prima facie case disclosed to warrant the grant of leave. On another front it submits that;

"Section 173 of the Insurance Act, Cap 487

1) A person aggrieved by a decision of the Commissioner under this Act may, within one month from the date on which the decision is intimated to him, appeal to the Tribunal which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary that decision.

2) Except as provided in this section the decision of the Tribunal on an appeal made to it under subsection (1) shall be final and conclusive.

3) A person aggrieved by a decision of the Tribunal made under subsection (1) may, if it involves a question of law, within one month from the date on which the decision is intimated to him, appeal therefrom to the court.

4) A reference in this section to a question of law does not include a reference to a question whether there is sufficient evidence to justify a finding.

5) The Chief Justice may make rules for regulating the practice and procedure in connection with an appeal under subsection (3) and for the better carrying into effect the provisions of that subsection."

103. The Exparte Applicants have neither exhausted this remedy nor have they furnished this Honourable Court with any evidence to show that they have exhausted all the available remedies before seeking this Honourable Court's intervention or proven to this Honourable Court that the existing remedies are flawed.

104. Section 9(2) of the Fair Administrative Action Act, 2015, provides that;

> *"The High Court or a subordinate court under subsection (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."*

105. The Court of Appeal in **Krystalline Salt Ltd v Kenya Revenue Authority [2019] eKLR**, where it was stated:

> *"The doctrine of exhaustion of remedies is a long-standing common law principle which serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This is in line with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."*

106. Further in the case of **Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR**, the court held with firmness:

> *"It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of*

last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."

107. It is submitted that The Exparte Applicants filed their Application on 17th March 2026, a mere seven (7) days after the decision was made, and within the one-month appeal period prescribed by Section 173, Insurance Act and without exhausting the remedies laid bare within the said provision.

108. They submit that the Applicants have not demonstrated that the Tribunal is ineffective, biased, or incapable of granting them redress.

109. On the issue of costs of it submits that Section 27(1) of the Civil Procedure Act, Cap 21, provides that Courts have discretion to determine who to award costs and to what extent and give directions as the same.

110. It submits that the costs of the Application herein should be awarded to the 2nd Respondent.

111. They submit that the Application herein is frivolous, vexatious and an abuse of the court process.

The Interested Parties Case;

112. It is its case that the 1st Respondent has illegality, unfairly, irregularly and irrationally purported to place the Interested Party under statutory management.

113. It is its case that the consequence of this action is that the insuring public that had placed risks with the Interested Party for cover is now placed in a situation that exposes them to the perils.

114. It further argues that the irrationality of the Respondent's action is exemplified when consideration is given to the fact that the action has imperiled -.

a) The hard-earned reputation and goodwill of the Interested Parties which has been an insurer for over 40 years. For all these years including 2026 it has been duly licensed and is not subject of any outstanding regulatory query. It is instructive that for the statutory requirements to render quarterly reports to the 1st Respondent, for the quota ending 31st March 2026, the 1st Respondent as recent as 25th February 2026 wrote to the Interested Party approving the proposed external auditors for audit purposes. This audit, which would inform the 1st Respondent of the status of the Interested Party is ongoing and was to be rendered to the 1st Respondent by 31st March 2026.

b) At the end of 2025 the Interested Party had issued a total of 672,000 policies, with the underwritten value of Kshs.2.36 billion. This number has increased with the policies issued for

the year 2026 as 90,000 policies already issued in January and February.

c) The insured public that has covered substantial risk with the Interested Party.

d) The employees of the Interested Party. The Interested Party is a responsible corporate citizen with a staff compliment of over 150 employees drawing salaries and other remuneration exceeding Kshs.16Million.

e) Bilateral stakeholders of the Interested Party. As a business, the Interested Party enjoys Banking facilities worth Kshs.175 Million from Habib Bank, Kshs.150 Million from Oriental Bank, Kshs.103 Million from Middle East Bank & Kshs. 100 Million from Kenya Commercial Bank. Repayment of these has now been frustrated.

f) Compliance with Court Orders. The Interested Party is currently servicing a consent Court Order of Kshs.50 Million. It risks defaulting thereby exposing its directors to risks being cited for contempt of court.

115. Any party affected by the Respondent's action has recourse to safeguard its interest as provided by law. It is its case that in so far as the impugned action is anchored on alleged solvency challenges of the Interested Party, the High Court has jurisdiction to adjudicate any claim by any affected party because the architecture of insolvency

regulation in Kenya is underpinned by preservation of businesses for the best outcome of all stakeholders with court oversight.

116. Any challenge raised by the Interested Party to the Respondents action in any other forum cannot therefore limit or impair the actions of any other party affected by the actions of the Respondent as affected interests and claims are not similar.

117. The interested party's submissions support the Replying Affidavit. It submits that the prejudice it is likely to suffer is real. It submits that the issues raised in this matter fall within the insolvency Law and that this court has jurisdiction.

Analysis and Determination;

The issue for determination is whether or not the Applicants have made out a case for the grant of the orders sought.

118. Order 53 Rule 1 of the Civil Procedure Rules, provides that no Application for judicial review orders should be made unless leave of the court was sought and granted.

119. In the case of **Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** the court held as follows:

> *"The purpose of Application for leave to apply for judicial review is firstly to eliminate at an early stage any Applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the Applicant is only*

allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an Application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived…Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the Applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive Application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

120. In determining an Application for leave, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an Applicant's case is sufficiently meritorious to justify leave.

121. All that an Applicant is expected to demonstrate at the leave stage is to demonstrate that the Application will not ultimately open a door for an outcome at the substantive stage that will lead to an abuse of the court.

122. The Applicants have a duty to demonstrate that their case is not frivolous.

123. In determining the Application this court is guided by the case of **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others [2015] eKLR** where the Court of Appeal stated that:

> *"It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be of last resort and not the first port of call the moment a storm brew… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts…These accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."*

124. It is well settled that jurisdiction is the cornerstone of any judicial proceedings (Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1) - "…jurisdiction is everything…without it, a court must down its tools." This Court must therefore first determine whether it has jurisdiction to entertain the present Application.

125. A court's jurisdiction flows from either the Constitution or legislation or both. A court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law (see Samuel Kamau Macharia &

Another vs Kenya Commercial Bank Limited & 2 others (2012) KESC 8 (KLR).

126. Section 173 of the Insurance Act stipulates that only decisions of the Insurance Appeals Tribunal, arising from appeals against decisions of the Commissioner, are subject to appeal before the High Court, thus:

A person aggrieved by a decision of the Commissioner under this Act may, within one month from the date on which the decision is intimated to him, appeal to the Tribunal which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary that decision.

Except as provided in this section the decision of the Tribunal on an Appeal made to it under Subsection (1) shall be final and conclusive.

A person aggrieved by a decision of the Tribunal made under subsection (1) may, if it involves a question of law, within one month from the date on which the decision is intimated to him, appeal therefrom to the Court.

127. Justice Mativo in **Republic v Kenyatta University Ex parte Ochieng Orwa Domnick & 7 others [2018] eKLR** held as follows:

> *"Section 9 (2) of the Fair Administrative action Act provides that the High Court or a subordinate court under subsection (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. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that Applicant shall first exhaust such remedy before instituting proceedings under sub-section (1). The use of the word shall in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

It is the duty of Courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must

govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory. A proper construction of section 9 (2) & (3) above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by 9 (4) which provides that: -"Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on Application by the Applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

Two requirements flow from the above sub-section. First, the Applicant must demonstrate exceptional circumstances. Second, on Application by the Applicant, the Court may exempt the person from the obligation. The ex parte Applicants counsel made a statement that there are exceptional circumstances in this case after the Court drew his attention to the above

sections. He however did not provide specific cases that bring this case under the exceptions, except stating that the Applicants are young which to me does not fit into the definition of "exceptional circumstances" discussed below.

All internal remedies, if available, must be exhausted prior to Judicial Review, unless the appellant can show exceptional circumstances to exempt him from this requirement.

What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue.

Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and our law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint.

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

any virgin argument touching on Constitutional interpretation.

The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the Court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it."

128. Section 173 of the Insurance Act gives room to all persons aggrieved by a decision of the Commissioner under this Act to within one month from the date on which the decision is intimated to him, appeal to the Tribunal. From the Verifying Affidavit, it is clear to this court that the Applicants are aggrieved.

129. Unfortunately, the Applicants have not tendered any evidence to demonstrate that they made any efforts to invoke Section 173 of the Insurance Act. The Applicants cannot argue that they did not have access to the Tribunal.

130. Section 9(4)of The Fair Administrative Actions Act provides that notwithstanding the provisions of Section 9(2) and (3) of the Fair Administrative Actions Act on exhaustion of available alternative

remedies, the High Court or the Subordinate Court may in exceptional circumstances and on Application by the Applicant exempt such a person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

131. The Act uses the word "and" which means there are two conditions that an Applicant for exemption of the Application of the doctrine of exhaustion must fulfill.

132. This Section is very clear that a party who seeks to be exempted must make an Application to the court. It is categorical that the High Court may in exceptional circumstances and on Application by such an Applicant exempt such a person from the application of the doctrine of exemption. The Applicants did not make an Application for exemption and Section 9(4) of The Fair Administrative Action Act.

133. The rationale behind this requirement is for purposes of ensuring that Article 159 of the constitution is promoted . To hold otherwise would amount to rendering statutory Tribunals otiose. It is not for parties to determine or to decide that they have exhausted alternative these resolution mechanisms. It is the Court that decides.

134. In the Supreme Court Case of **Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019/ eKLR 36)** the court 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" Caltex Oil, (Kenya) Ltd [1989) KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".

135. This court shall down its tools which I hereby do.

136. This has a ripple effect on all other Applications or proceedings that were anchored on the exparte Applicants' Application which must fall by the wayside.

Costs;

137. The Supreme Court in the case of **Jashir Singh Rai & Others vs. Tarlochan Rai & Others** observed that;

"In the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs..."

138. The Applicants have not made out a prima facie case so as to justify the grant of the prayers sought and they shall bear the costs.

Determination:

139. The court lacks the jurisdiction to hear and determine the suit that would be filed if the leave is granted as sought by the Applicants. The Application does not meet the legal threshold for leave under Order 53 Rule 1 of the Civil Procedure Rules.

Order:

The Application is dismissed with costs.

Dated, Signed and Delivered at Nairobi this 9th Day of April 2026

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J. CHIGITI (SC)

JUDGE