



**Kenya National Highways Authority v Tangerine Investments Limited (Civil Appeal 84 of 2018) [2023] KECA 79 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 79 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CIVIL APPEAL 84 OF 2018**  
**HM OKWENGU, JM MATIVO & PM GACHOKA, JJA**  
**FEBRUARY 3, 2023**

**BETWEEN**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPELLANT**

**AND**

**TANGERINE INVESTMENTS LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and orders at Milimani Law Courts (Odunga, J.) dated 24th October, 2017 in High Court JR Application No.348 of 2016)*

**Granting judicial review orders to an applicant who has violated the law is an improper exercise of judicial discretion.**

*The instant appeal arose from a decision of the High Court to grant prerogative orders against the Kenya National Highway Authority for the removal and confiscation of the fabric and supporting structure of a billboard. The High Court granted the prerogative orders on grounds that the removal and confiscation of the equipment was un-procedural. Aggrieved, the appellant filed the instant appeal on grounds that the respondent had violated the law and was not eligible for grant of judicial review orders. The Court of Appeal held that granting judicial review orders to an applicant who had violated the law an improper exercise of judicial discretion.*

Reported by John Ribia

**Administrative Law** - judicial review – prerogative orders – circumstances in which courts could issue prerogative orders – where it was alleged a party who sought prerogative orders against a decision of an administrative body was in breach of the law - what were the circumstances in which a judicial review court may exercise its discretion to decline to set aside an invalid administrative act - whether the High Court had the judicial discretion to issue judicial review orders to an applicant who had violated the law - whether the High Court had the judicial discretion to issue judicial review orders to an applicant who had violated the law – .

**Statutes** – interpretation of statutes – section 49(1) of the – import of the words ‘shall’ and ‘may’ as used in the provision - whether the words ‘shall’ and ‘may’ as used in section 49 of the that sought to prohibit erection of structures and other works on, over, and below roads without the permission of the Kenya National Highways Authority created a mandatory or optional obligation to seek permission from the Authority.



**Statutes** – interpretation of statutes – rules of interpretation – ascertaining the intention of the legislature – what rules of interpretation should courts utilize in interpreting statutes – what should courts consider to ascertain the intention of parliament in drafting a provision when interpreting statutes.

**Statues** – interpretation of statues – use of the words ‘shall’ in statutory provisions – use of the word may in statutory provisions – import - obligatory vis-à-vis optional provisions - what was the import of the use of the word ‘shall’ in statutory provisions – what was the import of the word ‘may’ in statutory provisions.

**Words and Phrases** – except – definition of - not including; other than; conjunction used before a statement that forms an exception to one just made - Concise Oxford English Dictionary.

### **Brief facts**

The Kenya National Highways Authority (the appellant) removed sign boards erected on both sides of the Southern Bypass interchange bridge along Mombasa Road, Nairobi which it deemed to be anonymous and illegal. After the removal, no one claimed ownership of the same. However, on July 27, 2016 the appellant’s road asset protection officers discovered that the same structure had been restored in contravention of section 48(1)(a) of the and section 91 of the . There being no one on site and no visible address on the sign board, its officers dismantled and confiscated the fabric from the supporting structures.

Upset by the removal of the billboard, the respondent challenged the action in High Court via judicial review on grounds that the actions of the appellant were not procedural as the respondent claimed to have complied with the law, followed the requisite procedures and paid the requisite fees obtained. The High Court issued the respondent orders of certiorari, prohibition and mandamus.

Aggrieved, the appellant filed the instant appeal. The appellant’s case was that it removed the billboards pursuant to its statutory mandate because the structures were unauthorized. The appellant argued that the billboards had no address disclosing the owner so it could not immediately ascertain the owner to issue a notice as the law required nor did any person complain after the removal. Instead, the respondent re-installed the billboard without seeking the appellant’s approval prompting the appellant to remove it again. The appellant sought for the High Court orders to be vacated.

### **Issues**

- i. What was the import of the word ‘may’ and ‘shall’ in statutory provisions?
- ii. Whether the words ‘shall’ and ‘may’ as used in section 49 of the that sought to prohibit erection of structures and other works on, over, and below roads without the permission of the Kenya National Highways Authority created a mandatory or optional obligation to seek permission from the Authority.
- iii. What was the meaning of the words “shall” and “may” as used in section 49 of the ?
- iv. What were the circumstances in which a judicial review court could exercise its discretion to decline to set aside an invalid administrative act?
- v. Whether the High Court had the judicial discretion to issue judicial review orders to an applicant who had violated the law.

### **Relevant provisions of the Law**

#### **Section 49(1)**

**49. Structures and other works on, over, and below roads or certain other land**



1. *Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission—*
  - a. *erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;*
  - b. *make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or*
  - c. *give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.*

## **Held**

1. The respondent never obtained permission from the appellant in accordance with section 49 of the . Section 49(1) provided limitations on what may be done without the permission of the responsible authority.
2. The word 'may' and 'shall' were contentious in various enactments and legal documents. In some circumstances the word 'may' was treated as mandatory like 'shall'. Whereas in some circumstances, the word 'shall' had not been used as mandatory and has been treated like the use of the word 'may.' While interpreting the question whether a provision of law that contained the word 'may' or 'shall' was mandatory or directory, the prime rule that should be followed for such interpretation was ascertaining the true intention of the legislature by considering the entire statute.
3. An interpretation of the statutory provision which defeated the intent and purpose for which the statute was enacted should be avoided. Expressions used therein should ordinary be understood in a sense in which they best harmonize with the object of the statute and which effectuate the object of the legislature. Therefore, when two constructions were feasible, the court would prefer that which advanced the remedy and suppressed the mischief as the legislature envisioned. It was the duty of the court to try to get at the real intention of the legislature by carefully analyzing the whole scope of the statute or section or a phrase under consideration.
4. The word, 'except' meant not including; other than; conjunction used before a statement that forms an exception to one just made. Where Parliament explicitly enumerated certain exceptions to a general prohibition, additional exceptions were not to be implied, in the absence of a contrary legislative intent.
5. The use of the word 'may' in section 49(1) was obligatory. Therefore, the respondent was obligated under the said provision to seek and obtain permission from the appellant before erecting the billboards.
6. Courts could issue prerogative orders in all appropriate cases and in appropriate manner provided that the courts adhere to the broad and fundamental principles that regulated the exercise of such jurisdiction in granting such orders. The job of the court in judicial review proceedings was first to assess whether the public authority acted as alleged in the case; and secondly, to determine what, if any, remedy should result.
7. The discretionary nature of public law remedies distinguished judicial review remedies from private law remedies in general. It encompassed both the court's discretion to determine what remedy should result and the discretion to decline a remedy in the face of failings by the public authority. The broad discretion of the court in judicial review proceedings to grant remedies included the discretion to decline relief. Just because a claimant established that a public body had erred in law, he was not automatically entitled to the remedy he sought, or any remedy at all. The court had considerable leeway when assessing whether or not relief should be given to the claimant.
8. A court that was asked to set aside an invalid administrative act in proceedings for judicial review had a discretion whether to grant or to withhold the remedy. It was that discretion that accorded to judicial review its essential and pivotal role in administrative law, for it constituted the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. The



discretionary nature of the judicial review remedies meant that even if a court found a public body had acted wrongly, it did not have to grant any remedy. Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not.

9. A court that was asked to set aside an invalid administrative act in proceedings for judicial review had a discretion to determine whether to grant or to withhold the remedy. Discretion could be exercised against an applicant where the applicant's own conduct had been unmeritorious or unreasonable, where the applicant has unreasonably delayed in applying for judicial review, where the applicant had not acted in good faith, or where an applicant had violated the law or committed a criminal offence or where a remedy would impede the authority's ability to perform its functions, or where the judge considers that an alternative remedy could have been pursued.
10. The respondent never complied with sections 49 of the , a statutory edict which prohibited erection of structures and other works on, over, and below roads or certain other land except as provided under section 49(2) which vested the appellant with the discretion, to give or refuse to give permission under the said section. The respondent erected the billboard in total violation of the law. So serious was the failure to obtain such permission, such that Parliament section 49(6) and 91 of the created an offence of encroachment and damage to roads.
11. Despite having failed to adhere to the law at the risk of facing criminal sanctions, the respondent approached the court and obtained equitable reliefs. The High Court erred in finding that the appellant's decision was tainted with procedural impropriety. Without any indication on the advert as to who had put up the adverts, the appellant could not serve any notice before taking action. The respondent approached the court with unclean hands because he did not comply with the law in erecting the Billboards. He could not claim that his fundamental rights were violated, his rights to a notice was anchored on his right to erect the billboards. He had no right because he did not obtain the necessary authority. He was not entitled to an equitable relief, or the exercise of the court's discretion in his favour.
12. Even though the jurisdiction of the High Court to grant judicial review orders as provided under article 23 of could not be circumscribed by the provisions of any enactment, the court must always have due regard to the legislative intent evidenced by the provisions of the governing statute. Declining the reliefs sought would have been a proper exercise of judicial discretion. Granting judicial review orders to an applicant who had violated the law an improper exercise of judicial discretion.

*Appeal allowed.*

### **Orders**

- i. *Judgment of the High Court delivered on October 24, 2017 was set aside and substituted with an order dismissing the suit.*
- ii. *The respondent was to pay costs for the instant appeal and for the High Court proceedings.*

### **Citations**

#### **Cases**

1. County Government of Nyeri & another v Cecilia Wangechi Ndungu (Civil Appeal 2 of 2015) — Explained
2. Judicial Service Commission and Another v Cape Bar Council and another ((818/2011) [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) (14 September 2012)) — Mentioned
3. Republic v Judicial Service Commission ex parte Pareno ({2004} 1 KLR 203) — Explained
4. Mohan Singh and Ors. v International Airport Authority of India and Ors (1997 (9) SCC 132) — Explained
5. Credit Suisse v Allerdale Borough Council ([1997] QB 306) — Explained
6. Salmond, Statutory Interpretation ((1966) 3 All ER 961)



## Statutes

1. Constitution of Kenya, 2010 (Const2010) — article 23,47; 258(1) — Interpreted
2. Court of Appeal Rules, 2022 (cap 9 Sub Leg) — rule 31(1) — Interpreted
3. Fair Administrative Action Act (No. 4 of 2015) — section 4(3) — Interpreted
4. Kenya Roads Act (No. 2 of 2007) — section 3,4(1); 48(1)(a); 49(1)(4)(6); 67 — Interpreted
5. Traffic Act (CAP. 403) — section 91 — Interpreted

## Texts

1. Crawford, ET.,(Ed) (1940), Crawford on the Construction of Statutes (Thomas Law Book Company pg 516)
2. Forsyth, C.,Wade, W.,(Eds) (2014), Wade and Forsyth Administrative Law (11th Edn pg 597)
3. Patrick S. Hodge, (2021), he Scope of Judicial Law-making in Constitutional Law and Public Law, (Judicial Review, 26:2, 146-177)

## Advocates

None mentioned

## JUDGMENT

1. In order to contextualize the issues raised in this appeal, it is necessary to rehash, albeit briefly, the factual background which triggered the litigation between the parties in the High Court. Essentially, the background as we glean it from the record is mainly uncontested. To begin with, the Kenya National Highways Authority (the appellant) is a body corporate established under section 3 of the *Kenya Roads Authority*, Act No 2 of 2007 (the Act). Pursuant to section 4(1) of the said Act, its functions include managing, developing, rehabilitating and maintaining National roads. To discharge its statutory mandate, section 4(2) of the Act mandates it to inter alia control National roads and road reserves and access to roadside developments, oversee the management of traffic and road safety on National roads and perform such other functions related to the implementation of the Act as may be directed by the Minister.
2. On March 10, 2016, the appellant's road assets protection unit removed sign boards erected on both sides of the Southern bypass interchange bridge along Mombasa Road, Nairobi which it deemed to be anonymous and illegal. After the removal, no one claimed ownership of the same. However, on July 27, 2016 the appellant's road asset protection officers discovered that the same structure had been restored in contravention of section 48(1) of the Act and section 91 of the *Traffic* Act. There being no one on site and no visible address on the sign board, its officers dismantled and confiscated the fabric from the supporting structures.
3. Upset by the removal of the bill board, the respondent challenged the action in High Court Judicial Review Application No 348 of 2016 dated August 4, 2016 contending that it diligently complied with all the statutory and regulatory requirements including payment of all requisite charges to the Nairobi City County which granted it permission to carry out street poles and billboards advertisement along various roads in Nairobi. It faulted the appellant for failing to issue it with a notice of its intention to remove the bill boards or written reasons for its action in blatant disregard of article 47 of the *Constitution*. It also argued that it was condemned unheard and as a result it suffered immense prejudice, irreparable harm to its reputation and incurred costs as its clients had paid for a service which it was no longer capable of providing due to the appellant's unlawful action. It contended that its efforts to get an explanation from the appellant vide a letter dated August 1, 2016 were disregarded leaving it with no option except obtaining orders of *certiorari*, prohibition and *mandamus*.



4. The appellant's case was that any person who wishes to erect a structure on a road or a road reserve is required to apply to its Director General attaching designs prepared by a registered engineering consultant and that the Nairobi City County's role is merely to license advertising and not to authorize the erection of billboards or structures on road reserves. It maintained that it acted within its statutory mandate by removing unpermitted structures, so by filing the judicial review application, the respondent sought to circumvent statutory requirements. It was also the appellant's case that the respondent did not demonstrate to the court what action it took to involve the appellant in requesting or demanding for information necessary to facilitate its inquiry, appeal or review of the decision. Further, the appellant maintained that the respondent failed to comply with section 67 of the Act which provides that legal proceedings shall not be commenced against the appellant until at least one month after a written notice containing the particulars of the claim and intention to commence the action or legal proceedings, has been served upon the Director General.
5. In the impugned judgment dated October 24, 2017, Odunga J (as he then was) was satisfied that the application for judicial review was properly before him since the actions complained of had the potential of infringing upon the rights of an individual, and that article 258(1) of the Constitution entitled an individual to invoke the supervisory powers of the court before the threatened action is taken. The learned Judge rejected the argument that the respondent ought to have waited until lapse of one month as provided under section 67 of the Act holding that to do so would defeat the letter and spirit of the Constitution. Further, the word "shall" in section 67 of the Act is merely directory and it cannot be relied upon to defeat mandatory provisions of the Constitution. Further, the learned Judge stated:

48. "From the only evidence on record, it is clear that the decision to dismantle or remove the billboards erected by the applicant was tainted with procedural impropriety and ought not to stand. As was held by Emukule, J in *Republic v Kombo & 3 others ex parte Waweru* Nairobi HCMCA No 1648 of 2005 [2008] 3 KLR (EP) 478:."
6. It was the learned Judge's finding that the appellant erred by failing to comply with section 49(4) of the Act which specifically requires it to serve a notice of not less than 30 days where a person without permission under the Act or contrary to the permission granted erects an unauthorized structure on a road reserve.
7. In a nut shell, the learned Judge allowed the judicial review application and issued the following orders:
  - a. certiorari for the purposes of quashing the decision/order of the appellant removing the respondent's billboards located on the Southern bypass bridge overpass situate on Mombasa road and street pole advertising boards at various locations along Thika Road within Nairobi City County;
  - b. an order prohibiting the appellant and its agents, county officers or whosoever from enforcing the decision/order of the appellant for the removal, defacing, dismantling, or interfering in any way with the respondent's billboards located on the Southern Bypass bridge overpass situate on Mombasa road and street pole advertising boards at various locations along Thika Road within Nairobi City County unless otherwise lawfully undertaken;
  - c. mandamus compelling the appellant to unconditionally re-install any panels, equipment or advertisement belonging to the respondent that the appellant had removed to its initial state and position.



8. The appellant seeks to overturn the said decision citing, twelve grounds which can be condensed into three:
  - a. the Judge erred in failing to find that the permission of the appellant is a statutory requirement before any person can erect any structure on a road reserve of a National road;
  - b. the Judge erred in failing to find that the appellant has discretion pursuant to section 49(4) of the Act to issue or not to issue a notice depending on the circumstances; and
  - c. that the Judge erred in granting judicial review remedies.
9. In his submissions, the appellant’s counsel argued that pursuant to section 49(1)(a) of the Act, the appellant is mandated to issue permission to anyone intending to erect, construct or lay, or establish any structure or thing on or over or below the surface of a road reserve and that the Nairobi City County is not charged with such responsibility. That the learned Judge erred in failing to hold that the appellant’s permission was mandatory, and that it was uncontroverted that the appellant was not in a position to establish the owner of the encroaching billboards at the time of removal and indeed the first time the appellant became aware of the respondent was on August 2, 2016, which was a week after July 27, 2016 when the encroaching billboards were removed having been unlawfully restored on March 10, 2016.
10. Counsel submitted that the appellant did not violate the fundamental rule of natural justice because at the time of removal, there was no one on sight claiming ownership of the billboard and no visible address was on the billboard making it impossible for the respondent to be issued with a notice, so it was unreasonable for the learned Judge to hold that the respondent ought to have been afforded an opportunity to be heard at all costs. He relied on *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR where this court held that appropriateness or necessity is not arbitrariness or whimsical.
11. On the grant of judicial review orders, counsel submitted that pursuant to Section 4 of the Act, the appellant is mandated to manage, develop, rehabilitate and maintain National roads. Further, pursuant to section 49(2) of the Act, the appellant has the discretion to grant or refuse to grant permission for the erection or placement of any structure on a road reserve under its control, so, the order of mandamus was not the appropriate order to grant in the circumstances as there was no statutory/legal/public duty imposed on the appellant to erect the billboard on behalf of the respondent. He argued that the learned judge directed the appellant to commit an act which is prima facie unlawful and against public policy by compelling it to erect a billboard on a road reserve which it is required to control and protect. Furthermore, counsel submitted that enforcing the order of mandamus would be offensive to tax payers on whose behalf the appellant exercised its powers under section 49 of the Act and section 91(1)(a) of the *Traffic* Act which provides that:
 

91. Encroachment on and damage to roads(1) Every person who, without the written permission of the highway authority— (a) encroaches on a road or on any land reserved therefore at the side or sides thereof by making or erecting any building, fence, ditch, advertisement sign or other obstacle, or by digging thereon or by planting or sowing any tree, shrub or seeds thereon shall be guilty of an offence.
12. The respondent did not file any submissions nor did it participate in this appeal despite being served.
13. We have considered the appeal and the submissions. This being a first appeal, we have re-appraised the entire record in accordance with our mandate under rule 31(1) of the *Court of Appeal Rules*, 2022 and as explicated in *Selle v Associated Motorboat Company Limited* [1968] EA 123 with a view to drawing our own conclusions.



14. The gravamen of the respondent's case in the High Court was that in blatant disregard of its right to a fair administrative action guaranteed under article 47 of the *Constitution*; and in breach of the basic tenants of principles of natural justice, and section 4(3) of the *Fair Administrative Action Act*, the appellant removed its billboards without giving it any prior notice of the intended removal contrary to section 49(4) of the *Kenya Roads Act*. Further, the respondent argued that it had obtained permission from the Nairobi City County Government and it paid the requisite charges for erecting the advertisements bill boards to the County Government.
15. On the other hand, the appellant's argument before the High Court was that the Nairobi City County Government has no mandate to grant approval for such structures, that the respondent erected the bill boards without seeking and obtaining its permission as provided under section 49 of the act which provides as follows:

49. Structures and other works on, over, and below roads or certain other land

1. Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission—
  - a. erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;
  - b. make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or
  - c. give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.
2. An Authority may, in its discretion, give or refuse to give permission under this section. (3) When giving permission the Authority may prescribe—
  - a. the specifications with which the structure, other thing, alteration or addition for which permission is requested must comply;
  - b. the manner and circumstances in which, the place where, the conditions on which the structure, other thing, alteration or addition may be erected, constructed, laid, established or made; and
  - c. the obligations to be fulfilled by the owner in respect of the land on which the structure, other thing, alteration or addition is to be erected, constructed, laid, established or made.
4. Where a person, without the permission required by subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct



that person to remove the unauthorized structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice.

5. If the person to whom a notice has been issued in terms of subsection (4) fails to remove the structure, other thing, alteration or addition mentioned in the notice, within the period stated therein, such item may be removed by the Authority itself which may recover the cost of the removal from that person.
  6. A person who contravenes any of the provisions of subsection (1) commits an offence and is liable on conviction to a term of imprisonment not exceeding one year or to a fine not exceeding one hundred thousand shillings, or to both.
16. Secondly, the appellant contended, the bill board had no address, so it was not possible to issue any notice and in any event, the respondent only emerged after the bill board was removed for the second time.
17. In allowing the judicial review application, the learned Judge held inter alia that the impugned decision was tainted with procedural impropriety because:
- a. the appellant failed to issue the respondent with a notice prior to the removal as prescribed by section 49(4) of the act;
  - b. failure to accord the respondent a hearing before demolishing the bill board, and
  - c. failure to provide reasons for its decision.
18. One thing is clear from the record. The respondent never obtained permission from the appellant in accordance with section 49 of the Act. The language deployed in section 49(1) reproduced above is worth noting. It reads: “except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority’s written permission or contrary to such permission...” It is important to understand the meaning of the words “except” and “may” in the context within which they appear in the above provision.
19. The word ‘may’ and ‘shall’ have always been contentious issues in various enactments and legal documents. This is because in some circumstances the word ‘may’ have been treated as mandatory like ‘shall’. Whereas in some circumstances even the word ‘shall’ has not been used as mandatory and has been treated like the use of the word ‘may.’ While interpreting the question whether a provision of law that contains the word ‘may’ or ‘shall’ is mandatory or directory, the prime rule that should be followed for such interpretation is ascertaining the true intention of the legislature by considering the entire statute. According to *Salmond, Statutory Interpretation* (1966) 3 All ER 961:
- “The essence of the law lies in the spirit, not in its letter, but letters are the only way in which intentions are expressed. The words are an external manifestation of intention that it involves. When there is the possibility of one or more interpretations of statute, courts have to adopt that interpretation which reflects the ‘true intention of the legislature’ which can also be considered legal meaning statutory provisions.”
20. The conventional way of interpreting a statute is to seek the intention of its makers, and apply that to the facts of the case at hand. An interpretation of the statutory provision which defeats the intent and



purpose for which the statute was enacted should be avoided. It is a recognized rule of interpretation of statutes that expressions used therein should ordinary be understood in a sense in which they best harmonize with the object of the statute and which effectuate the object of the legislature. Therefore, when two constructions are feasible, the court will prefer that which advances the remedy and suppress the mischief as the legislature envisioned. It is the duty of the court to try to get at the real intention of the legislature by carefully analyzing the whole scope of the statute or section or a phrase under consideration.

21. The other key word in the provision under consideration is “except” which is defined in the *Concise Oxford English Dictionary* to mean “not including; other than; conjunction used before a statement that forms an exception to one just made.” Where Parliament explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.
22. The use of the word ‘may’ in section 49(1) leave us with no doubt that the provision is obligatory. Therefore, the respondent was obligated under the said provision to seek and obtain permission from the appellant before erecting the bill boards. To support a view, we refer to [Crawford on the Construction of Statutes](#) at page 516 thus:

“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 the one way or the other....”
23. The Supreme Court of India in [Mohan Singh & others v International Airport Authority of India & others](#). 1997 (9) SCC 132 had the following to say:

“17. The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect. The distinction reflected in the use of the word ‘shall’ or ‘may’ depends on the conferment of power. In the present context, ‘may’ does not always mean ‘may’. ‘May’ is a must for enabling compliance of provision but there are cases in which, for various reasons, as soon as a person who is within the statute is entrusted with the power, it becomes a duty to exercise. Where the language of the statute creates a duty, the special remedy is prescribed for non- performance of the duty.”
24. The appellant’s case was that it removed the bill boards pursuant to its statutory mandate because the structures were unauthorized. This mandate was not challenged before the High Court or in this appeal. Further, the appellant before the High Court and before this court argued that the bill boards had no address disclosing the owner so it could not immediately ascertain the owner to issue a notice as the law requires nor did any person complain after the removal. Instead, the respondent re-installed the bill board without seeking the appellant’s approval prompting the appellant to remove it again triggering the litigation in the High Court. It is against the said backdrop that the learned judge found that the appellant’s decision was tainted with procedural impropriety and issued the writs of certiorari, mandamus and probation. Nothing was said about the respondent’s manifest breach of the law and whether the said transgression disentitled it from being granted equitable reliefs from the court.
25. Undeniably, courts can issue prerogative orders in all appropriate cases and in appropriate manner provided that the courts adhere to the broad and fundamental principles that regulate the exercise of



such jurisdiction in granting such orders. We may profitably cite Patrick S Hodge, (2021), *The Scope of Judicial Law-making in Constitutional Law and Public Law*, *Judicial Review*, 26:2, 146-177 thus:

“Judging is not simply the application of purely deductive reasoning. It involves what Professor MacCormick called “practical reasoning”, recognizing that legal norms are open-ended and open to interpretation. He acknowledged that universalistic rules were defeasible because unforeseen circumstances occur for which a carefully crafted prior ruling and justification provide no answer. Unforeseen circumstances may call for a rephrasing of the original legal statement or the creation of an exception. Wisdom, humanity and common sense have a role to play in judicial reasoning...”

26. The job of the court in judicial review proceedings is first to assess whether the public authority acted as alleged in the case; and secondly, to determine what, if any, remedy should result. The discretionary nature of public law remedies is an important feature which distinguishes judicial review remedies from private law remedies in general. It encompasses both the court’s discretion to determine what remedy should result and the discretion to decline a remedy in the face of failings by the public authority. The broad discretion of the court in judicial review proceedings to grant remedies includes the discretion to decline relief. This means that just because a claimant establishes that a public body has erred in law, he is not automatically entitled to the remedy he seeks, or indeed, any remedy at all. The court has considerable leeway when assessing whether or not relief should be given to the claimant.
27. A court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. The discretionary nature of the judicial review remedies means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not. As the Supreme Court of Appeal of South Africa held in *Service Commission & another v Cape Bar Council and another* (818/2011) [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) (14 September 2012) “even if an administrative decision is challenged and found wanting, courts still have a residual discretion to refuse to set that decision aside.”
28. In the context of English law, *Wade and Forsyth Administrative Law*, 11<sup>th</sup> Edition, 2014, 597, state that while the rule of law would insist on granting such an order, ‘the denial of a remedy sometimes serves the public interest,’ and they give as examples instances where such a refusal is necessary to avoid administrative chaos or to protect the interests of innocent third parties. The authors of *De Smith’s Judicial Review*, 7<sup>th</sup> Edition, 2013, 979 echo the principled position that granting the order must be the default position, but note that fairness and justice may dictate a refusal in a given case.
29. Further, *Wade and Forsyth in Administrative Law* 7<sup>th</sup> Edition at pages 342-4 state that:

“The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff’s lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the ‘void’ order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another... ‘Void’ is



therefore meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation."

30. In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. Lord Justice Hobhouse in *Credit Suisse v Allerdale Borough Council* [1997] QB 306 at 355D said:

"The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act."

31. Emphasizing the discretionary nature of judicial review remedies, the High Court (Nyamu J as he then was) in *Republic v Judicial Service Commission ex parte Pareno* {2004} 1 KLR 203-209 held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles.

32. Decided cases are in agreement that a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion to determine whether to grant or to withhold the remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where an applicant has violated the law or committed a criminal offence or where a remedy would impede the authority's ability to perform its functions, or where the judge considers that an alternative remedy could have been pursued.

33. The respondent before us never complied with sections 49 of the Act, a statutory edict which prohibits erection of structures and other works on, over, and below roads or certain other land except as provided under sub-section (2) of the said provision which vests the appellant with the discretion, to give or refuse to give permission under the said section. Simply put, the respondent erected the bill board in total violation of the law. So serious is the failure to obtain such permission, such that Parliament section 49 (6) of the act created an offence. It reads:

(6) A person who contravenes any of the provisions of sub section (1) commits an offence and is liable on conviction to a term of imprisonment not exceeding one year or to a fine not exceeding one hundred thousand shillings, or to both.

34. Also, under section 91 of the *Traffic Act* such conduct also constitutes an offence. It reads:

91. Encroachment on and damage to roads (1) Every person who, without the written permission of the highway authority— (a) encroaches on a road or on any land reserved therefore at the side or sides thereof by making or erecting any building, fence, ditch, advertisement sign or other obstacle, or by digging thereon or by planting or sowing any tree, shrub or seeds thereon; or... shall be guilty of an offence.

35. So serious is the omission such that Parliament in two different enactments creates an offence arising from the same set of facts and circumstances. This is the background upon which the respondent approached the court and obtained equitable reliefs which are discretionary in nature.



- 36. Despite having failed to adhere to the law at the risk of facing criminal sanctions under the above provisions, the respondent approached the court and obtained equitable reliefs. In our view, the learned Judge erred in finding that the appellant’s decision was tainted with procedural impropriety. Without any indication on the advert as to who had put up the adverts, how could the appellant serve any notice before taking action? The respondent approached the court with unclean hands because he did not comply with the law in erecting the Billboards. He cannot claim that his fundamental rights were violated, his rights to a notice was anchored on his right to erect the bill boards. He had no right because he did not obtain the necessary authority. Therefore, he was not entitled to an equitable relief, or the exercise of the court’s discretion in his favour.
- 37. Even though the jurisdiction of the High Court to grant judicial review orders as provided under article 23 of the *Constitution* cannot be circumscribed by the provisions of any enactment, the court must always have due regard to the legislative intent evidenced by the provisions of the governing statute. Declining the reliefs sought in the circumstances of this case would have in our view been a proper exercise of judicial discretion. Granting judicial review orders to an applicant who had violated the law was in our view an improper exercise of judicial discretion. This was a proper case for the court to hoist high the rule of law and decline to grant the equitable reliefs sought on account of the respondent’s blatant breach of the law. For the reasons stated herein above, we find and hold that this appeal succeeds.
- 38. In conclusion, for the reasons stated herein above, we find and hold that this appeal is merited. We therefore allow the appeal, set aside the judgment of the High Court delivered on October 24, 2017 in its entirety and substitute it with an order dismissing the said suit. We also order that the respondent shall pay costs of this appeal and the lower court to the appellant.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

