



**Republic v Chief Magistrate Court Machakos & another; Paul Kasema t/  
a Royal Insurance Broke & 3 others (Interested Parties); Mwangaza General  
Supplies & Contractor Ltd (Exparte Applicant) (Judicial Review Application  
E003 of 2023) [2025] KEHC 2199 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 2199 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
JUDICIAL REVIEW APPLICATION E003 OF 2023**

**FR OLEL, J**

**JANUARY 31, 2025**

**IN THE MATTER OF APPLICATION FOR JUDICIAL  
REVIEW FOR ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES  
2,3,10,19,20,21,22,27,28,41,47,48,55 AND 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTION 4 OF THE FAIR  
ADMINISTRATIVE ACTION ACT, NO 11 OF 2015**

**AND**

**IN THE MATTER OF: ARTICLE 159 OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF: INTEREST INSURED  
MWANGAZA GENERAL CONTRACTORS LTD**

**AND**

**IN THE MATTER OF MACHAKOS CHIEF MAGISTRATE COURT CMCC 408 OF 2019, 277  
OF 2022, 429 OF 2019 & MACHAKOS INTERLOCUTORY CIVIL APPEAL NO. E53 OF 2023.**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**CHIEF MAGISTRATE COURT MACHAKOS ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



AND

PAUL KASEMA T/A ROYAL INSURANCE BROKE ..... INTERESTED PARTY  
FIDELITY INSURANCE COMPANY LIMITED ..... INTERESTED PARTY  
JEFFERSON KIMONYI NDAMBUKI ..... INTERESTED PARTY  
INSURANCE REGULATORY AUTHORITY ..... INTERESTED PARTY

AND

MWANGAZA GENENRAL SUPPLIES & CONTRACTOR LTD .... EXPARTE  
APPLICANT

## JUDGMENT

### A. Introduction

1. The Application for determination before court is the Ex-parte Applicant's Notice of Motion Application dated 6<sup>th</sup> July 2023 filed pursuant to provisions of Order 53 Rule 3 of the Civil Procedure Rules 2010, Sections 8 and 9 of the *Law Reform Act*, and all other enabling of law. The Ex parte Applicant seeks for orders that;
  - a. That a writ or order of certiorari to remove to this Honourable court to quash proceedings and subsequent Ruling and Judgment in Machakos CMCC No 408 of 2019.
  - b. That a writ or order of certiorari to remove to this court to quash the proceedings and consequent ruling and judgment in Machakos CMCC 429 of 2019.
  - c. That a writ or order of certiorari to remove to this court to quash the Ruling delivered on 25<sup>th</sup> May, 2023 on the interlocutory Appeal No E53 of 2023, Machakos.
  - d. That a writ or order of mandamus be and hereby issued directing the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to honour the contract and indemnify the 3<sup>rd</sup> Interested party's injuries and damages that might have been occasioned by the Exparte applicant's motor vehicle KCA 100J Toyota Land cruiser.
  - e. A declaration be and hereby issued that the exparte applicant had a valid comprehensive insurance policy No 503/0910/17 issued by the 2<sup>nd</sup> Interested party and that the said 2<sup>nd</sup> Interested party, Fidelity Insurance company has a duty to honour and compensate the injuries, caused by the Exparte's insured motor vehicle KCA 100J Toyota Land Cruiser.
  - f. That this honourable court be pleased to make further orders as it may deem just and fit.
  - g. That costs of the application be provided for
2. The Application is supported by the grounds stated on the face of the said Application, statutory statement of fact, verifying and supporting Affidavit of Peter Mbiu Mutunga both sworn on 6<sup>th</sup> July 2023 respectively.
3. The said Application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent through their grounds of opposition dated 17<sup>th</sup> July 2023, the 1<sup>st</sup> interested party through their grounds of opposition & Replying Affidavit,



both dated 14<sup>th</sup> December 2023, the 2<sup>nd</sup> Interested party grounds of opposition dated 28<sup>th</sup> July 2024 and the 3<sup>rd</sup> interested party Replying Affidavit dated 18<sup>th</sup> July 2023.

## **(B) The Pleadings**

### **i. The Ex Parte Applicant's Pleadings**

4. The Ex parte applicant avers that on or about 20<sup>th</sup> September 2017, he entered into an agreement with the 1<sup>st</sup> interested party, who runs an insurance brokerage firm to take out a comprehensive insurance cover for his motor vehicle, Toyota Land Cruiser Registration Number KCA 100J ( hereinafter referred to as the 1st suit Motor vehicle), paid all the premiums as required and was issued with comprehensive insurance [\*Policy No.503/0910/17\*](#) valid until 20<sup>th</sup> September 2018.
5. On or about 7<sup>th</sup> August 2018, while driving the 1<sup>st</sup> suit motor vehicle, it was involved in an accident with motor vehicle registration number KBU 583J (hereinafter referred to as the 2<sup>nd</sup> suit motor vehicle), and as a result one Jefferson Kimonyi (the 3<sup>rd</sup> Interested party herein) sustained bodily injuries. As a result, the 3<sup>rd</sup> party interested party filed Machakos Civil Suit No. 408 of 2019, seeking damages for injuries sustained, and later also filed Machakos CMCC No 429 of 2019 seeking compensation for material damage to his Motor vehicle .
6. Upon being served with summons and pleadings filed, he did forward the same to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties herein, who assured him that they would take up the matter under the insurance principle of subrogation. The suit filed by the 3rd interested party (Machakos Civil Suit No 408 of 2019) was heard on merit, and eventually, judgment was delivered in favour of the 3<sup>rd</sup> Interested party.
7. Once again, he did forward the obtaining judgment to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties for settlement, but they inexplicably refused to pay the said claim and/or to indemnify him as expected. This prompted him to file a declaratory suit (Machakos CMCC No 277 of 2022) and concurrently sought orders of stay of execution of the primary suit decree pending determination of the declaratory suit filed.
8. The said application for stay of execution was dismissed prompting him to further file Machakos HCCA No E053 OF 2023, appealing against the said ruling/decision. Again, due to constant threats of pending execution, he once again sought orders of stay of execution of the primary suit decree pending hearing and determination of the Appeal. This application too was heard and dismissed vide a ruling dated 25<sup>th</sup> May 2023.
9. Undeterred the Ex parte Applicant resorted to filing this Judicial review Application to quash the primary suit decree and the two subsequent rulings delivered in the declaratory suit and the Appeal as the said decisions were irrational, unfair, and locked him out from the seat of justice, yet his grievances had not been heard on merit.
10. Further, the Ex parte Applicant averred that he was also seeking an order of mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to honour their obligation under the comprehensive insurance policy taken out to cover the 1<sup>st</sup> suit motor vehicle.
11. The Ex parte Applicant urged the court to note that the primary suit substantially proceeded in his absence, and it was important for the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties to be held liable to curtail the bad precedent they were setting of not indemnifying their clients, yet he had comprehensively insured the 1<sup>st</sup> suit motor vehicle and paid its premium in full.
12. He urged the court to find that his application had merit and that the same be allowed with costs.



**ii. The Responses filed by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and the 1<sup>st</sup> to 4<sup>th</sup> Interested Party.**

13. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed this Application through their grounds of opposition dated 17<sup>th</sup> July 2023. It was averred that the Application under consideration was fatally defective, incompetent, frivolous, and untenable both in form and substance. The Ex parte Applicant had made sweeping false allegations and misrepresented facts tailored to win the court's sympathy but critically failed to demonstrate the actions, if any, of the respondents which were laced with illegality procedural impropriety, and/or irrationality as alleged
14. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further pointed out that the application was pre-maturely filed, as the action complained of revolved around the merits of the court decision in Machakos CMCC NO. 408 of 2019, Machakos CMCC No 429 of 2019, and Machakos HCC Appeal No E53 of 2023. This court lacked jurisdiction to interfere with the said proceedings, and/or rulings already delivered and the cause of action available for the Ex parte applicant if dissatisfied was to Appeal. The orders sought, thus fell short of the meaning of “an administrative decision” as defined under Section 2 of the *Fair Administrative Action Act*, and were not ripe for this court’s intervention.
15. To that extent, the 1<sup>st</sup> and 2<sup>nd</sup> respondents reiterated that the said Application was misconceived, incompetent a non-starter and prayed that the same be dismissed with costs.
16. The 1<sup>st</sup> to 3<sup>rd</sup> Interested parties also opposed this Application vide the 1<sup>st</sup> Interested party grounds of opposition and Replying Affidavit dated 14<sup>th</sup> December 2023 respectively, the 2<sup>nd</sup> Interested party grounds of opposition dated 28<sup>th</sup> July 2024, and the 3<sup>rd</sup> Interested party replying Affidavit dated 18<sup>th</sup> July 2023.
17. They all deponed that the Ex parte Applicant was a vexatious litigant, who kept on moving from court to court trying to shop for favourable orders aimed at frustrating the 3<sup>rd</sup> interested party, by denying him access to the fruits of his judgment. To that extent, the said application under consideration was frivolous, scandalous, and constituted an abuse of the court process.
18. The 3<sup>rd</sup> interested party had filed two suits to wit; Machakos CMCC No 408 of 2019 (hereinafter referred to as the primary suit) seeking compensation for injuries suffered and Machakos CMCC No 429 of 2019 seeking compensation for material damage caused to the 2<sup>nd</sup> suit motor vehicle, resulting from its collision with the 1<sup>st</sup> suit motor vehicle.
19. In the primary suit the Ex parte Applicant had enjoined the 1<sup>st</sup> and 2<sup>nd</sup> interested parties as third parties/ interested parties to the suit and the question of liability had been determined with the participation of all the said parties. Liability in the said suit was determined at 30:70 in favour of the 3<sup>rd</sup> interested party herein. It was noted that the Ex-parte Applicant was represented by counsel in all the suits filed and never challenged the decree issued in the primary suit on Appeal.
20. The Ex parte Applicant, then opted to file a declaratory suit, Machakos CMCC No E277 of 2002, and simultaneously applied for an order of stay of execution of the primary decree. This Application was dismissed on 16<sup>th</sup> March 2023, prompting him to file an Appeal, being; Machakos HCCA No E503 of 2023. The Ex parte Applicant once again filed a second application for stay of execution of the primary decree, and his application was once again dismissed by the High Court on 25<sup>th</sup> May 2023.
21. The declaratory suit and the Appeal filed, were yet to be determined on merit and no judgment had been passed in either of the two suits, which were being handled by courts of competent jurisdiction and therefore could not be subject to orders of “certiorari” as pleaded.



22. The 1<sup>st</sup> to 3<sup>rd</sup> interested party thus urged this court to find that the Ex parte Applicant was a vexatious litigant and prayed that his Application be dismissed with costs.
23. The 4<sup>th</sup> Interested party did not enter an Appearance nor did they file any pleadings in this Matter.
24. The Application was disposed of by way of written submissions.

### **C. Submissions**

#### **a. Ex parte Applicant's Submissions**

25. The Ex-Parte Applicant filed submissions dated 18<sup>th</sup> March 2024 wherein he reiterated the contents of all the pleadings filed in support of his Application. He relied on the case of Patoli Vrs Kabale District Local Government canal & others(2008) 2EA, 300-304, which was cited with approval in the case of R vs Chief Magistrate Milimani law courts & 5 others; Ex parte Google Kenya Limited(2018) eklr, where it was emphasized that to succeed in an application for judicial review, the applicant had to show that the decision challenged or act complained of was tainted with illegality, irrationality and procedural impropriety.
26. The Ex parte Applicant further submitted that he had been unfairly treated and had been condemned unheard, yet he had comprehensively insured the 1<sup>st</sup> suit motor vehicle through the 1<sup>st</sup> and 2<sup>nd</sup> interested party and had a legitimate expectation to be indemnified. Principles of natural justice guided administrative decision-making and dictated that a person must be accorded adequate opportunity to present his/her case and have the same determined in a fair and unbiased manner.
27. It was not in dispute that Machakos CMCC No 408 of 2019, Machakos CMCC No 429 of 2019, and Machakos CMCC No 277 of 2022 were all heard and determined in his absence and he was within his rights to have the unfair proceedings “quashed”. Reliance was placed in the case of Kenya National Examination Council Vrs Republic; Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 (1997)eKLR and Associated Provincial Picture Houses Vrs Wednesbury Corporation (1948) 1KB, 223
28. On whether the orders of “Mandamus” should issue against the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties to compel them to fulfil their obligations under the principle of subrogation, It was submitted that under Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, it was statutorily provided that the 2<sup>nd</sup> interested party was responsible for indemnifying their insured and since he had a valid insurance cover as at the time of the accident, they should have indemnified him.
29. The 2<sup>nd</sup> interested party had not filed a suit to repudiate the insurance cover issued, and therefore could not run away from their contractual obligation under the insurance policy . Reliance was placed in the case of Commission of Administrative Justice vs Kenya Vision 2020 Delivery Board & 2 others (2019), & Civil suit No 2 of 2019 John Njogu Vrs Invesco Assurance Co ltd; Joseph Ouma Nyachoko (Interested party) 2022, Eklr, where it was held that the insurance company had an obligation under Section 10(1) of the Insurance (Motor vehicle Third Party Risks) Act, to settle the liability arising from the insurance contract.
30. The Ex parte Applicant thus urged the court to find that his Application had merit and the court be pleased to grant the same.



**b. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions.**

31. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their submissions dated 7<sup>th</sup> June 2024, where they reiterated the fact that the Judicial review application filed lacked legal basis, was untenable, and did not meet the threshold of the meaning of an administrative decision as defined under Section 2 of the *Fair Administrative Action Act*, 2012.
32. The two suits filed by the Ex parte Applicant namely Machakos CMCC No 429 of 2019 and Machakos HCCA No E053 of 2023 were still pending determination, while the Ex parte Applicant had opted not to Appeal against the decree passed in the primary suit, made in favour of the 3<sup>rd</sup> Interested party.
33. The orders sought for “certiorari” and “mandamus” were therefore untenable and could not be granted as this suit challenged the merits of various decisions reached by courts of competent jurisdiction. Reliance was placed on the case of Republic vs Public Procurement Administrative Review Board and 2 others Exparte; Sanitam Services (E.A) Limited (2013), to emphasize the fact that judicial review applications were concerned with the review of the decision-making process, rather than the merits of the decision reached.
34. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further submitted that what the ex-parte applicant was seeking to do was to substitute a valid decision of the tribunal, through the back door, instead of Appealing against the said decision in the normal manner.
35. Section 7(2) of the Fair Administrative Act only allowed this court to review administrative decisions where the administrator had acted without jurisdiction, exceeded their jurisdiction, delegated power, where the statute did not allow for the same, and where such decisions were unreasonable, disproportionate and made in violation legitimate expectation of the Applicant.
36. The Ex parte Applicant had not provided evidence to prove his case based on the above parameters but had instead made sweeping unsubstantiated allegations, which the court could not rely on. Reliance was placed on the case of the Council of Civil Service Union versus Minister for Civil Service (1985) and Sanghani Investment Limited vs Officer in charge of Nairobi Remand and Allocation Prison (2007). Where issues relating to the scope and jurisdiction of Judicial review proceedings were discussed.
37. The respondents submitted that the ex-parte’s applicant had not proved nor did he lay a basis and/or demonstrated that the decisions being challenged were irrational, unreasonable, or tainted with illegality, and therefore the orders of “certiorari” could not be issued.
38. Similarly, the Ex parte Applicant prayer for “Mandamus”, was misplaced as the Ex parte Applicant had sought to compel the performance of duty in a particular way, and with a purpose to achieve a particular outcome. That was untenable in law as this court could not usurp the mandate of the trial court and pre-emptively determine the cause of action still pending determination before courts of competent jurisdiction. Reliance was placed in the case of Maritime Electric Co Ltd versus General Diaries Ltd QB 227, Republic versus Judicial Service Commission ex parte Pareno (2004), Republic vs Minister of Agriculture & 2 others Exparte Equatorial Nuts Processors Limited & 3 Others (2013), and Republic Vrs Marshland and Fen District Commissioners (1910) 1KB where the parameters of granting “writ orders” were discussed.
39. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent thus urged this court to dismiss the application under determination with costs.



### c. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties Submissions.

40. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties vide their submissions dated 14<sup>th</sup> June 2024 and 28<sup>th</sup> July 2024 respectively stated that the Ex parte applicant had not fulfilled the prerequisites provided for under order 53 of the Civil Procedure Rules 2010 as read with Section 9(2) of the law reform Act, Cap 26, and therefore was improperly and prematurely before the court.
41. The 1<sup>st</sup> interested party did give a brief synopsis of all the pending claims before the Magistrate/High court and observed as follow;
- a. Machakos CMCC No 408 of 2019;  
Liability was determined at 30% against the 3<sup>rd</sup> interested party and 70% against the Ex parte Applicant. An award of Kshs 1,351,060/= was issued, less 30% liability plus costs and Interest. The decree issued was not challenged on Appeal.
  - b. Macahkos CMCC No 429 of 2019;  
The 3<sup>rd</sup> Interested party filed this suit seeking material damage against the Ex parte Applicant, who subsequently enjoined the 1<sup>st</sup> and 2<sup>nd</sup> interested parties as 3<sup>rd</sup> parties therein. The suit was not proved on a balance of probability and was dismissed.
  - (c) Machakos CMCC No E277 of 2022;  
This suit was filed by the Ex parte Applicant seeking to compel the 1<sup>st</sup> and 2<sup>nd</sup> interested party to indemnify him and settle the decree issued in the “primary suit”. The suit was heard on merit and dismissed with costs. The Ex parte Applicant sought for stay of the “primary decree” pending appeal and his application was declined. The suit was still pending determination.
  - (d) Machakos HCCA No E053 of 2023  
The Ex parte Applicant filed this Appeal against the ruling delivered in the declaratory suit, refusing to grant him orders of stay of the “primary decree”. His application was once again dismissed, hence this Judicial Review Application.
42. It was clear that the Ex parte Applicant had not proved that they had acted in an illegal, irrational, and/or committed procedural impropriety. Secondly, they were not “public officers” and/or a “public body”, and could not attract the “writ of Mandamus”, to compel them to act in a particular manner. Reliance was placed in the case of Republic Vrs Kenya Vision 2030 Delivery Board & Another, Ex parte Eng. Judah Abekah (2015) eklr.
43. The Ex parte Applicant therefore had not established grounds to warrant granting of any of the “writ orders” sought. Reliance was placed in the case of Municipal council of Mombasa Vrs Republic, Umoja Consultants, Nairobi Appeal No. 185 of 2007(2002)eklr & Republic Vrs Town clerk, Kisumu Municipality, Ex parte East African Engineering Consultants, (2007) 2EA, 441.
44. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties thus urged the court to dismiss this application under consideration with costs.

### c. The 3<sup>rd</sup> Interest Party Submissions.

45. The 3<sup>rd</sup> Interested party also filed and relied on his submissions dated 4<sup>th</sup> June 2024. He reiterated the background of this dispute and outlined the history of all the suits filed before the Machakos Magistrate’s Court and the High Court.



46. The 3<sup>rd</sup> interested party urged the court to note that the “primary suit” was determined in his favour and no Appeal had been filed to challenge the said decree. He later filed Machakos CMCC No 429 of 2019, claiming material damage, which suit was still pending.
47. The Ex parte Applicant had also filed a declaratory suit, to wit Machakos CMCC No 277 of 2023, which was yet to be determined on merit and Machakos HCCA No E053 of 2023, which had been abandoned after the said court had refused to grant him orders of stay of execution, which he had sought for.
48. Order 53, Rule 2 of the Civil Procedure Rules, provided that leave would not be granted to any party to apply for an order of certiorari to challenge any judgment, order, decree, conviction, or other proceedings unless it was filed within six months after the date of the proceedings or such shorter time as may be prescribed by the Act.
49. The judgement sought to be “quashed” was delivered in the “primary suit” on 20<sup>th</sup> June 2022, while the Ex parte Applicant had filed this Application on 10<sup>th</sup> July 2023, after time statutorily allowed had lapsed. To that extent, the application filed was incompetent for being filed out of time and without leave of court.
50. The 3<sup>rd</sup> Interested party, also urged the court to note that, what the Ex parte Applicant was seeking indirectly through the back door, were orders of stay of execution of the “primary decree”, which issue had been determined, by other courts of competent jurisdiction. To that extent, the issues raised herein offended the provisions of Section 7 of the Civil Procedure Act and were Res judicata.
51. The 3<sup>rd</sup> Interested Party further urged the court to find that, in judicial review proceedings, the role of the court was “supervisory”, however, where the process followed by the decision maker was proper and the decision arrived at within the confines of the law, the “supervising court” would not interfere with such decision.
52. All the decisions challenged were made in the right forum, were not illegal, or irrational, nor were they made based on procedural impropriety. The application before the court was therefore incompetent and had to fail. Reliance was placed in the case of; Republic Vrs Ethics & Anti-Corruption Commission; Ex parte Nairobi City County Assembly & 13 others (2019) eklr.
53. The 3<sup>rd</sup> Interested party urged the court to find that the ex-parte Applicant had failed to establish cogent grounds to support his Application as established in the Uganda case of ( Pastoli- supra) and urged the court to dismiss the said Application with attended costs.

### **C. Determination**

54. I have considered the application, the grounds made in support, its verifying and supporting affidavit. I have also considered the various grounds of opposition, Replying affidavits filed in opposing this Application, and submissions filed by both parties.
55. The issues, which arise for determination are;
  - a. Whether a declaration should be issued that the Ex parte Applicant had a valid and comprehensive insurance policy No 503/0910/17 issued by the 2<sup>nd</sup> Interested party and that they be compelled to indemnify him against any claim arising from the accident involving the 1<sup>st</sup> suit Motor vehicle.



- b. Whether the court should issue the “writs of “certiorari” to quash the various rulings and Judgement issued in Machakos CMCC No 408 of 2019, Machakos CMCC No 429 of 2019, and Machakos High Court Appeal No E053 of 2023.
- c. Whether the court should issue the “writ of Mandamus” to compel the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to honour the insurance contract and indemnify the 3<sup>rd</sup> Interested Parties for injuries sustained and damages suffered to the 2<sup>ns</sup> suit Motor vehicle.
- d. Who should bear the costs of this suit?

**Issue 1; Declaratory Orders in Judicial Review Proceedings.**

- 56. In our legal parlance and jurisprudence, judicial review is founded under the provisions of Order 53 Rules 1 to 7 of the Civil Procedures Rules 2010 where the prerogative orders are issued. Primarily, it is anchored on the provisions of Sections 8 and 9 of the *Law Reform Act* Cap 26 of the Laws of Kenya where the Provisions of Order 53 of the Civil Procedure Rules 2010 were borrowed from. See *Farmers Bus Services – Versus - Transport Licensing Appeals Tribunal (1975) E.A. 523*.
- 57. Upon the promulgation of *the Constitution* of Kenya in 2010 Article 47 of *the Constitution* of Kenya introduced the provisions of Fair Administration of justice and later on the legislation of “the Fair Administration of Action Act of 2012” which is the statutory framework governing judicial review and the Administrative law in Kenya currently.
- 58. The court, when handling judicial review Applications filed under provisions of Order 53 of the Civil procedure rules, is only concerned with reviewing, not the merits of the decision in respect of which the application had been filed, but the decision-making process itself. This was to ensure that the applicant was fairly treated by those in authority and decisions complained of not tainted with illegality, irrationality, and procedural impropriety.
- 59. It is therefore my finding that under these special proceedings, the court does not have the jurisdiction to determine commercial disputes between private individuals and such matters are best left under the preview of the civil courts for determination. See *Pastoli Vrs Kabale District Local Government council & others (2008) 2EA 300 &in SGS Kenya Limited v Energy Regulatory Commission & 2 others SC Petition No 2 of 2019 [2020] eKLR*
- 60. The declaratory orders sought herein is therefore misplaced and are best litigated in the pending declaratory suit file by the Ex parte Applicant, to wit; Machakos CMCC No E277 of 2022.

**Issue II “Whether the court should issue “writ of certiorari” .**

- 61. The prerogative writs of “Certiorari” derive from the Latin word “Certiorari” which means to be certified, informed, appraised or shown. It requires that the proceedings of an inferior tribunal be transferred to the High Court and examined for validity and if illegal or unmerited, the same be quashed. From the Provisions of Order 53 of the Civil Procedure Rules the Applicant ought to move court within a period of six (6) months from the time the order, decree, judgment, conviction or other proceeding was made.



62. Further, circumstances under which orders of Judicial Review can be issued were elaborated by Justice Kasule in the Uganda case of *Pastoli v Kabale District Local Government Canal & others* (2008) 2EA 300 at pages 300-304.

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety.

- i. Illegality, is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----
- ii. Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.
- iii. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of making a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to decide. (*Al-Mehidswi...v...Secretary of State for the Housing Department* (1990) AC 876”.

63. The judgment in *Machakos CMCC No 408 of 2019* was delivered on 30<sup>th</sup> June 2022. This was more than one year before these proceedings were instituted. By virtue of Order 53 Rule 2 of the Civil Procedure Rules, the prayers challenging the proceedings and the said judgment issued in *Machakos CMCC No 408 of 2019* are time-barred. Furthermore, it has been alleged but not proved that all the proceedings in the Magistrate Court and High Court are tainted with illegality, irrationality, or procedural impropriety.

64. Secondly, the Ex parte Applicant has all along been represented by counsel in all the matters concluded and/or pending before the Magistrate Court and High Court. He cannot be heard to allege that he was condemned unheard and where there might have been a procedural lapse, the appropriate cause of action would have been to seek an order of review in the said concern file and/or to Appeal against the decision made to the Appellate court.

65. The central question in dispute herein arises from the alleged failure on the part of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties to uphold contractual obligations and indemnify the Ex parte Applicant. That issue is best determined in the declaratory suit filed which is still pending determination, to wit, *Machakos CMCC No 277 of 2022*.

66. The prayers to quash proceedings in *Machakos CMCC No 429 of 2019* and *Machakos HCCA No E053 of 2023*, therefore fails as it has not been proved that there has been any impropriety in the said proceedings, especially with regards to the “decision-making process”.



### Issue III Whether the court should issue the “writ of Mandamus”

67. In the case of Republic vs Principal Secretary, Ministry of Internal Security & Another ex parte Schon Noorani & Another [2018] e KLR Mativo J. espoused the principles of an order of mandamus and stated as follows;

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
  - a. The Applicants have satisfied all conditions precedent; and
  - b. There must have been:
    - i. A prior demand for performance;
    - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
    - iii. An express refusal, or an implied refusal through unreasonable delay;
    - iv. No other adequate remedy is available to the Applicants;
    - v. The Order sought must be of some practical value or effect;
    - vi. There is no equitable bar to the relief sought;
    - vii. On a balance of convenience, mandamus should lie

68. The court of Appeal in the case of in Republic vs Kenya National Examinations Council Ex parte Gathenji and 9 Others, [1997] e KLR, also had this to say as they reflected on this issue:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”



At paragraph 90 headed “the mandate” it is stated:

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

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”

69. The “writ of Mandamus” as discussed above compels the performance of a public duty, imposed on a person, or inferior tribunal by virtue of statutory obligation. It is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties are not “public officials/ public body”.
70. The Ex parte applicant is therefore misguided in seeking this “writ of Mandamus” as it is inapplicable to the circumstances herein. What he seeks to enforce are “private contractual rights”, and he must be sent back to litigate at the right court.

#### **Issue iv Costs**

71. Costs follow the event. The respondents and interested parties have filed pleadings and submissions in this suit. Their counsels have also attended court and thus are deserving of costs as approved by Section 27 of the [Civil Procedure Act](#).
72. Be that as it may, the court notes from the pleading filed that the genesis of the Ex parte Applicant problems has been caused by the 1<sup>st</sup> Interested party, who received premiums on behalf of the 2<sup>nd</sup> interested party, but failed to remit the same, resulting in the 2<sup>nd</sup> interested party “repudiating” the said policy and leaving the Ex parte Applicant high and dry when in need.
73. The 1<sup>st</sup> Interested party is therefore before this court with unclean hands in equity and cannot under the circumstances benefit from the order of costs granted to the other parties.

#### **C. Determination**

74. The upshot is that the Ex parte applicants' Notice of Motion dated 6<sup>th</sup> July 2023 lacks merit and the same is dismissed with costs. Specifically awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested party respectively.
75. The 4<sup>th</sup> Interested party did not actively participate in these proceedings and is not awarded costs.
76. It is so Ordered.

**JUDGEMENT WRITTEN, DATED, AND SIGNED AT MARSABIT THIS 31<sup>ST</sup> DAY OF JANUARY 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**



Delivered on the virtual platform, Teams this 31<sup>st</sup> day of January, 2025.

In the presence of;

No appearance for Petitioner

No appearance for 1<sup>st</sup> & 2<sup>nd</sup> Respondents

No appearance for 1<sup>st</sup> Interested Party

No appearance for 2<sup>nd</sup> Interested Party

No appearance for 3<sup>rd</sup> Interested Party

No appearance for 4<sup>th</sup> Interested Party

Jabo Court Assistant

