



**Republic v Speaker of the County Assembly of Wajir & 4 others;
Abdirahman (Exparte Applicant); Aden (Applicant) (Judicial Review
E005 of 2025) [2025] KEHC 5220 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
JUDICIAL REVIEW E005 OF 2025
JN ONYIEGO, J
APRIL 29, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

SPEAKER OF THE COUNTY ASSEMBLY OF WAJIR 1ST RESPONDENT

**CLERK OF THE COUNTY ASSEMBLY WAJIR COUNTY
ASSEMBLY 2ND RESPONDENT**

**ALI MOHAMED OMAR DEPUTY MAJORITY LEADER WAJIR COUNTY
ASSEMBLY 3RD RESPONDENT**

**ADEN ADOW, MAJORITY WHIP, WAJIR COUNTY ASSEMBLY 4TH
RESPONDENT**

**THE COMMITTEE ON SELECTION WAJIR COUNTY
ASSEMBLY 5TH RESPONDENT**

AND

ALI MOHAMED ABDIRAHMAN EXPARTE APPLICANT

AND

ABDIRASHID ADEN APPLICANT

JUDGMENT

1. The matter for determination before this court is a notice of motion dated 26.02.2025 seeking for orders:



- i. That the Honourable Court be pleased to issue an order of certiorari to move into this Honourable Court to quash the decision of the 1st, 2nd, 3rd and 4th respondents approving the members of the Wajir County Finance, Budget and Appropriations Committee through the Notice of Motion serialized no. (005) Tuesday, 18.02.2025 at 2.30 pm.
 - ii. That the Honourable Court be pleased to issue an order of mandamus to move into this Honourable Court to compel the 1st, 2nd, 3rd and 4th respondents to immediately recall the approval of the members 'approved' to serve in the County Finance, Budget and Appropriations Committee.
 - iii. That the Honourable Court be pleased to issue an order of mandamus to move into this Honourable Court to compel the 5th respondent to immediately nominate members to serve in the County Finance, Budget and Appropriations Committee in adherence to the constitution and Wajir County Assembly Standing Orders.
 - iv. That the Honourable Court be pleased to issue an order of prohibition to move into this Honourable Court to prohibit any/further operations of the impugned County Finance, Budget and Appropriations Committee.
 - v. The costs of this application be in the cause.
2. The applicants' case is based on the particulars set out on the face of it and further amplified by averments contained in the affidavit in support sworn by Ali Mohamed Abdirahman deposing that he is a member of the County Assembly of Danaba Ward and a member of the Committee of Selection of the County Assembly of Wajir and therefore well apprised with the matter at hand.
 3. Basically, it was averred that in total disregard of the constitution and the Wajir County Assembly Standing Order No. 170, the County Assembly approved an illegally constituted County Finance, Budget and Appropriations Committee which was irregularly constituted without involving the committee on Selection pursuant to standing order number 170 and also failure to observe gender parity in compliance with standing order number 171.
 4. The applicants' case further revolves around the fact that the court at Wajir vide Petition No. E001 /2025 25.02.2025, and issued interim orders compelling the 1st, 2nd, 3rd and 4th respondents to adhere to the provisions of the County Assembly Standing Orders in the nomination of members of the Wajir County Finance, Budget and Appropriations Committee but the same was not complied with.
 5. That the 1st, 2nd, 3rd and 4th respondents presided, supervised and superintended an illegal, irrational and unprocedural list of nominated members, processed, considered and in fact approved the list of proposed/nominated members of the Wajir County Finance, Budget and Appropriations Committee.
 6. In response, Abdille Yussuf Mohamed, the speaker of the County Assembly of Wajir (1st respondent) on his behalf and that of the 2nd respondent filed a replying affidavit sworn on 04.03.2025 deposing that they were served with copies of Wajir Magistrates Court Miscellaneous Application, Certificate of Urgency, Notice of Motion, Supporting affidavit of Ali Mohamed Abdirahman and Petition No. E001 of 2025. That their counsel on record filed a notice of preliminary objection against the suit at the Magistrate's Court that the magistrate lacked the requisite jurisdiction to entertain the same.
 7. It was averred that the foregoing notwithstanding, the court order and the pleadings in Wajir Magistrates Court Petition No. E001 /2025 was effected upon them after the nomination and approval



of the Wajir County Finance, Budget and Appropriations Committee had been lawfully conducted in accordance with the Standing Orders of the Assembly.

8. That proof of service of the applicant's pleadings in Wajir Petition No. E001 /2025 was through the filing of an affidavit of service in the same Magistrates Court that issued the order and not the High Court. It was urged that while Judicial Review under the Law Reform Act is a process based review rather than a merit based review, it was clear that the applicants' contest revolved around the process of nomination and approval of the committee members thus the merit of the composition of the membership is not contested.
9. It was averred that the speaker could not dictate to the Azimio Coalition on which member to propose or opt out of the committee. Further, that the applicants ought to have exhausted the internal dispute resolution mechanisms within their respective coalitions prior to filing the suit in court. That the suit at Wajir Magistrates Court Misc. Application No. E001 of 2025 had not yet been withdrawn in as much as there was intention. In conclusion, this court was urged to dismiss the suit herein.
10. Despite service of the application upon the 3rd, 4th and 5th respondents, they did not file any response.
11. The court directed that the suit be canvassed by way of written submissions.
12. The 1st and 2nd ex parte applicants in their submissions dated 10.03.2025 urged that the main issue for determination is whether the nomination and approval of the impugned members of the Wajir County Finance, Budget and Appropriations Committee meets the test of legality, rationality and procedural fairness. That the proviso to Standing Order 170 of the Wajir County Assembly Standing Orders, provides that the committee on selection shall nominate members to serve in the County Assembly Committees, save for the County Assembly Business Committee and Committee on appointments.
13. It was contended that the 1st, 2nd, 3rd and 4th respondents caused to be considered for approval a list of members of the Wajir County Finance, Budget and Appropriations Committee without the participation of the committee on selection. It was urged that the nomination was done in a manner that is unconstitutional being 'mlolongo' and in a meeting secretly called informally. It was further contended that the impugned nomination list of Wajir County Finance, Budget and Appropriations Committee did not meet the required gender representation threshold as envisaged in the Standing Orders.
14. In urging this court that the Wajir County Finance, Budget and Appropriations Committee failed to comply with the constitution on transparency, accountability, rule of law and good governance, reliance was placed on the case of Republic vs Speaker, County Assembly of Elgeyo Marakwet & 2 Others; ex parte applicants Lawi Kibire & Another [2020] eKLR. This court was therefore urged to allow the prayers as particularized in the application.
15. The respondents in their submissions dated 24.03.2025 submitted that the applicants herein did not demonstrate that indeed, the 1st, 2nd, 3rd and 4th respondents were served with the pleadings before the magistrate's court.
16. That the 1st and 2nd respondents through their advocate filed a preliminary objection on a point of law urging that a matter pending in the lower court cannot be subject of a judicial review in the High Court. It was submitted that a decision of the lower court can only be challenged by way of an appeal and if at all it is an issue of contempt, then the party can only file the same before the very court that issued the orders.
17. It was submitted that the role of the court in a judicial review application is to make a determination on procedural aspect and not the merits aspect. To buttress that position, counsel referred the court



- to the holding in the case of *Praxidis Namani Saisi & 7 Others vs DPP & 2 Others* SC Petition No. 39 of 2019, where it was held that the scope of judicial review orders has been widened under the new constitution from process based judicial review to merit based judicial review.
18. However, counsel was quick to add that a proceeding cannot be brought under the *Law Reform Act*, the Fair Administrative Actions Act and under *the constitution* at the same time. That the foregoing is against the law and procedure as each proceeding has its own laid down procedure. That under the *Law Reform Act*, the procedure is well expressed in Order 53 of the Civil Procedure Rules while the procedure under the *Fair Administrative Action Act* is stipulated in the Fair Administrative Action Rules 2024. As such, the 1st and 2nd respondents' urged that the pleadings herein are defective.
 19. Additionally, it was submitted that the judicial review under the *Law Reform Act* is only concerned with the decision making process. To support the foregoing, reliance was placed on the case of *Municipal Council of Mombasa vs R & Umoja Consultants Ltd* [2002] eKLR where the Court of Appeal reiterated that Judicial Review is concerned with the decision making process not the merit itself. It was urged that in as much as the applicant urged this court to grant the writ order of certiorari, no grounds for such prayer were demonstrated save for the allegation of non-compliance of a court order in *Wajir Magistrates Court Miscellaneous Application E001 of 2025*.
 20. That non-compliance of court orders is not a subject of a judicial review. Additionally, it was contended that the object of the writ of certiorari is to keep inferior courts and quasi-judicial authorities within the limits of their jurisdictions and if they act in excess of their powers, their decisions can be quashed by the High Court. That in the instant case, the applicant did not demonstrate the evidentiary burden under section 107 of the *Evidence Act* to prove ultra vires on the action of nomination and approval of the subject committee.
 21. That it is imperative to note that candidates were nominated by their respective parties and the applicants being members of their respective parties, nominated the very candidates and forwarded their names to the speaker who by way of motion had them approved in the assembly. That the applicants did not demonstrate by way of evidence that they protested to their respective parties on the manner of the nomination of members to the subject committee.
 22. It was submitted that the order of mandamus cannot issue for the reason that the Wajir County Finance, Budget and Appropriations Committee was lawfully constituted as per the Standing Orders 55 – 57, 170 and 204 and all applicable laws. That there was no objection received by the speaker of the Assembly touching on the status of the candidates. To the contrary, their names were duly submitted by their respective parties and then approved by the assembly motion. It was reiterated that members of the Wajir County Finance, Budget and Appropriations Committee were nominated and approved by both sides of the coalition and passed by the assembly plenary in conformity to article 10 of *the constitution*.
 23. It was further contended that an order of prohibition is preventive in nature as the same seeks to prevent an authority or office from usurping or exercising powers vested on them. In other words, the object of prohibition is to prevent encroachment of jurisdiction. Thus the applicants herein cannot be heard to purport to seek for orders of certiorari, mandamus and prohibition against the parties herein on the same subject issue at the same time. This court was therefore urged to find the application herein to be in want of merit and thus deserving to be dismissed with costs.
 24. I have considered the notice of motion herein together with the response and the submissions by both parties. The only issue which arises for determination is whether the applicants have met the threshold for grant of judicial review orders.



25. The applicants urged that despite the Honourable Court sitting at Wajir issuing interim orders on 18.02.2024 restraining the 1st, 2nd, 3rd and 4th respondents from receiving, processing, considering, approving or otherwise dealing with the list of proposed/nominated members of the Wajir County Finance, Budget and Appropriations Committee, the same was in vain as the said orders were not complied with.
26. The respondents on the other hand submitted that the court order and the pleadings in Wajir Magistrates Court Petition No. E001 /2025 were effected upon them after the nomination and approval of the Wajir County Finance, Budget and Appropriations Committee had been lawfully conducted in accordance with the Standing Orders of the Assembly. Of importance to note is the fact that the process server clearly indicated the time at which he served the pleadings upon the respondents.
27. Having noted that the applicants stated that the impugned nomination and approval of the Wajir County Finance, Budget and Appropriations Committee took place on Tuesday, 18.02.2025 at 2.30 pm, the time specified of 2.30 p.m. was not controverted by the respondents save for the blanket denial that service was done after the nomination and approval of members had already happened. It is my view that indeed service was effected upon the respondents in time before the process of nomination and approval was commenced.
28. Having found that service of the court order was proper, the next question that I must answer is whether the trial court was possessed of the requisite jurisdiction to issue the orders dated 18.02.2025 which were served upon the respondents?
29. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. It therefore follows that jurisdiction flows from either *the Constitution*, legislation or both. The foregoing was laid out by the Supreme Court in the case of Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (Unreported).
30. It is important to point out that jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. I must add that the lower court proceedings were a nullity as the court had no capacity to issue judicial review orders in the nature of Mandamus, certiorari nor prohibition. In the same vein, this court's jurisdiction cannot be ousted by the mere fact that a related suit was filed before an incompetent court. Those orders were incapable of enforcement hence not of significance in these proceedings which should be determined on its own merits.
31. In regards to the nature of orders sought herein, article 23 (f) of *the constitution* provides that the High Court is possessed of authority to enforce the bill of rights including an order of judicial review.
32. On whether the prayers sought before this court can issue, it is trite that judicial review proceedings have historically been concerned with the process leading to the making of the decision and not the merits of the decision. The purpose of the remedy of judicial review is therefore to ensure that an individual is given fair treatment by the authority to which he or she has been subjected. The court in the case of Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited, (2008) eKLR, held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. (See also the case of Municipal Council of Mombasa vs Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR).
33. The broad grounds on which the court exercises its judicial review jurisdiction were restated in the Uganda case of Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300 where the court cited with approval the decision in Council of Civil Unions vs Minister for the Civil



Service [1985] AC 2 and an application by Bukoba Gymkhana Club [1963] EA 478 at 479 thereby holding that: -

“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 ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...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...Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

34. Therefore, judicial review proceedings ought not to be modified into a vehicle through which matters which ought to be ventilated in other forums are to be determined. [See John Fitzgerald Kennedy Omanga vs The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003].
35. Although the pre-2010 judicial review decisions were rigid in terms of interpretation and application in the manner and scope in which judicial review strictly addressed the issue of process rather than merit, the post -2010 constitution decisions are more flexible in so as they address both procedural and merit based prayers. In other words, unmeritorious decisions can be challenged through judicial review proceedings. See Suchan Investment Limited vs Ministry of National Heritage & culture & 3 others (2016) eKLR where it was stated that the law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of Article 47 of *the constitution* as read with the fair administrative Act of 2015. The court concluded at paragraph 101 of its judgment that the right to fair administrative action is no longer just a judicial review remedy but a constitutional one as well.
36. Similar position was held in the south African case of Manufacturers Association of south Africa in re exparte president of the republic of south Africa & others 2000(2)SA674(cc)at 33 where it was held that;

“[t]he common law principles that previously provided the grounds for judicial review of public power have been subsumed under *the Constitution* and, insofar as they might continue to be relevant to judicial review, they gain their force from *the Constitution*. In the judicial review of public power, the two are intertwined and do not constitute separate concepts”.
37. The Court went further to state that; “there are no two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by *the Constitution* which is the supreme law, and all law, including the common law, derives its force from *the Constitution* and is subject to constitutional control”.



38. In the instant case, the only issue in contention is the alleged flawed process through which the impugned Finance, Budget and appropriation committee was nominated and finally approved without following the requisite process. To that extent, the issue in contestation is non-compliance with the due process of constitution of the said committee contrary to the dictates provided under Wajir County Assembly standing order number 170 which provides that;

Committee on selection

“170.

- (1) There shall be a select committee, to be designated committee on selection, consisting the Leader of the Majority party who shall be the chairperson, the Leader of Minority party, and not less than (7) and not more than (9) other members, who shall be nominated by County Assembly parties and approved by the County Assembly; -
- (2) The Committee on selection shall nominate members to serve in Committees, save for the membership of the County Assembly Business Committee and Committee on Appointments.
- (3) The Committee on Selection shall be appointed within ten days on assembly of a new County Assembly”.

39. It was incumbent upon the applicants to show and prove that standing order number 170 was not complied with hence establish the three grounds of illegality, irrationality and procedural impropriety as enumerated in *Pastoli vs Kabale District Local Government Council and Others* (supra). It is trite that speakers are elected by their respective Assemblies to assist the Assemblies conduct their businesses in an orderly and lawful manner. Their responsibilities include managing House business and facilitating the operations of the Assemblies in a seamless manner.

40. Was standing order number 170 complied with? It is clear from the said standing order that the committee on selection is obligated in mandatory terms to nominate members to serve in select committees, save for the membership of the County Assembly business committee and committee on appointments. The impugned committee (finance, budget and appropriations committee) do not fall within the said exception.

41. The words used in standing order number 170 are explicit, unambiguous and clear. They are couched in mandatory terms and do not require any form of interpretation. The question is, was the impugned committee nominated by the committee on selection? From the attached minutes arising from various party meetings, none shows that the committee on selection ever sat and nominated the membership. It is not enough for individual parties to directly send the names of their preferred nominees to the Assembly for deliberation thereby by-passing the committee on selection where the leader of Majority as the chair and minority are automatic members.

42. The respondents did not satisfactorily answer or explain this critical procedural omission. There were no minutes attached by the respondents showing the committee on selection ever sat and deliberated on the nomination of this critical committee members. On account of this omission, the applicants have established a prima facie case that there was a procedural defect in the manner and style in which the subject committee was established. Rules or laws are established to serve a particular purpose in society or in an organization hence cannot be ignored whimsically or capriciously.

43. Having held that the list submitted to the County Assembly in respect of the affected committee was illegal, the subsequent deliberation and approval by the County Assembly was equally a nullity and void ab initio. See *Mcfoy vs United Africa Company Limited* (1961) 3 All ER 1169, where Lord



Denning held that, if an act was void, then it was in law a nullity. To that extent, the submission of names or nominees by the respective parties directly to the county assembly without the participation of the committee on selection pursuant to Standing order number 170 was irregular and therefore null and void.

44. As to whether the committee failed to take into account gender equality by observing 2/3 constitutional threshold, it was incumbent upon the applicant to show that the composition of the committee in terms of gender was not observed. This requirement is clearly captured under-standing order number 171 (1) of the Wajir County Assembly of Wajir. Unfortunately, the applicants did not state which member was a male or female. I am not an expert in associating a particular name to a specific gender. For instance, I do not know whether Feiza or Mahfudha is a female or male name. It is trite that he who alleges must prove. For those reasons, that ground fails.
45. Having found that the nomination process was flawed, and further having held that the respondents did not counter the applicants' averment that standing order number 170 was not followed, I am persuaded and indeed inclined to allow the application with orders as follows;
 - a. That an order of certiorari be and is hereby issued moving to this honourable court for quashing which I hereby do, the decision of the 1st, 2nd, 3rd and 4th respondents approving the members of Wajir County Finance, Budget and Appropriations committee through the notice of motion serialized No. (005) Tuesday, February 18th 2025 -2.30 pm.
 - b. That an order of Mandamus be and is hereby issued compelling the 1st, 2nd, 3rd and 4th respondents to immediately recall the approval of the members "approved" to serve in the County Finance, Budget and Appropriations committee.
 - c. That an order of Mandamus be and is hereby issued compelling the 5th respondent to immediately nominate members to serve in the County Finance, Budget, and appropriations committee in compliance with *the Constitution* and the County Assembly Standing Orders.
 - d. That an order of Prohibition be and is hereby issued prohibiting any further operations of the impugned County Finance, Budget and appropriations Committee.
 - e. That for the sake of harmony in the County Assembly, each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE

