



Republic v Retirement Benefits Appeals Tribunal & 2 others; Retirement Benefits Authority (Interested Party); Ihiga & 16 others (Ex parte Applicant) (Judicial Review Application E114 of 2025) [2025] KEHC 11892 (KLR) (Judicial Review) (8 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E114 OF 2025
RE ABURILI, J
AUGUST 8, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

RETIREMENT BENEFITS APPEALS TRIBUNAL 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

KENYA AIRPORTS AUTHORITY SUPERANNUATION SCHEME 3RD RESPONDENT

AND

RETIREMENT BENEFITS AUTHORITY INTERESTED PARTY

AND

STEPHEN WAHOME IHIGA & 16 OTHERS EX PARTE APPLICANT

RULING

1. Pursuant to leave granted by this court on 8th April 2025, in JR E191 OF 2025, the ex parte applicants were to file their substantive motion within 21 days of the date of the order for leave, however, they filed their motion dated 5th May 2025, filed on 6th May 2025, which was outside the period stipulated in the provisions of Order 53 of the Civil Procedure Rules which period the court had simply adopted in granting leave to apply in JR E191 OF 2025.



2. In its directions of 7th May 2025, this Court struck out the notice of motion dated 5th May 2025 for being incompetent and also directed that each party bear their own costs of the application as the same was in its initial file. The court marked the file as closed.
3. The applicants aggrieved by this court's directions filed the instant application dated 12th May, 2025 seeking the following prayers:
 - a. That this Honourable Court be pleased to review and/or set aside its Directions delivered by Honourable Lady Justice R.E. Aburili on 7th May,2025.
 - b. That this Honourable Court be pleased to grant extension of time to file and serve the substantive Notice of Motion dated 5th May,2025 past the 21-day period.
 - c. That the substantive Notice of Motion dated 5th May,2025 be deemed duly filed and served.
 - d. That costs of this Application be in the cause.
4. The application is supported by the affidavit of Stephen Wahome Ihiga sworn on 12th May 2025.
5. According to Mr. Ihiga, the applicants failed to file the substantive notice of motion application within the 21 days as was directed by the Court and as is required under Order 53 of the Civil Procedure Rules as the designated deponent is an elderly individual who has been grappling with deteriorating health and age-related illness.
6. He avers that at the material time, the deponent had fallen seriously ill and was admitted to hospital where he was undergoing medical treatment under close supervision. That due to his hospitalization and weakened physical condition, he was incapacitated and therefore unable to attend to the necessary legal formalities, including the swearing of the affidavit required to support the application.
7. Mr. Ihiga further deposes that it was logistically impractical to mobilise any other of the applicants to travel, engage counsel and swear the affidavit in a timely manner, especially on such short notice. It is his case that the same would have caused confusion, risked factual inaccuracies, and potentially undermined the coherence and reliability of the ex parte applicants' position.
8. It is the applicants' case that the court ought not to pay undue regard to procedural technicalities and further that it has wide discretionary powers under Order 50 Rule 6 of the Civil Procedure Rules as read with Section 9(1) of the *Law Reform Act* to extend time.
9. That even though judicial review is a special jurisdiction, it is in the nature of civil proceedings thus the procedure of handling such a matter must be akin to civil proceedings. The applicants argue that the court ought not to deny them the opportunity to ventilate their grievances as that would oust them from their constitutional right to access justice.
10. The applicants further argue that no prejudice will be visited upon any party if the application herein is allowed save that the proper dispensation of justice shall be done once and for all.

Responses

11. In response, the respondents filed grounds of opposition dated 26th May,2025. In their grounds, the respondents contend that the application is premature, misplaced and an abuse of the court process having failed to adhere and comply with the orders set out by this Honourable Court on 8th April, 2025, where they had been allowed to file their substantive motion within 21 days from the date of Ruling.



12. They also urge that the applicants have not shown any reasonable cause for non-compliance since the medical treatment notes presented before this court do not prove any history of treatment within the prescribed 21 days period granted by this court. Further, that all documentation submitted by the 1st applicant refer to treatments administered to him prior to the ruling delivered on 8th April, 2025
13. That the applicants are in violation of Order 53 Rule 3(1) of the Civil Procedure Rules as the privileges granted to them on 8th April, 2025, have been overtaken by events and their application dated 12th May, 2025 ought to be struck out with costs to the respondents.
14. The 1st interested party also filed grounds of opposition dated 28th May 2025.
15. In the grounds, the 1st interested party urges that it has not been shown that the authority to swear affidavits before this honourable court on behalf of the other 16 applicants has solely been placed on the 1st applicant.
16. Also, that the material annexed to the supporting affidavit to demonstrate that the 1st applicant was unwell is in respect of a period prior to the delivery of the honourable Court's ruling and orders of 8th April, 2025.
17. It is argued that the application does not meet the threshold for grant of orders for review or setting aside the orders of this Honourable Court. Further, that the extension of time is an equitable remedy only available to a deserving party at the discretion of the court.
18. The 1st interested party states that the party who seeks for an extension of time has the burden of laying a basis to the satisfaction of the Court on whether the Court should exercise the discretion to extend time. It is the 1st interested party's case that there is no valid or clear reason upon which this court should exercise its discretion in favour of the applicants.
19. It is also its case that the delay in filing the substantive notice of motion causes undue prejudice to it as it is entitled to expeditious and fair determination of the dispute. Also, that the litigation of this dispute has been protracted and that it is evident that the applicants have not authorized the institution of these proceedings nor are they keen on the expeditious prosecution of the matter.

Submissions

20. The application was canvassed by way of oral highlights made before the court on 11th June, 2025.
21. During the hearing, counsel for the applicants Ms. Atieno holding brief for Mr. Koceyo submitted that they had annexed documents of the 1st applicant's attendances at Nairobi West Hospital and, that the applicant a diabetic had at the time they were required to file their substantive motion injured his leg.
22. In response, Ms. Gathenya counsel for the respondents submitted that the application had been overtaken by events pursuant to Order 53 of the Civil Procedure Rules and there was no reason for the delay as the documents filed were evidence of treatment before 8th April, 2025.
23. Mr. Biko Angweny, counsel for the 1st interested party in his response submitted that the applicants had failed to demonstrate sufficient cause why there was delay. Further, that only one out of the 17 applicants was sick and that nothing had been said of the others. He also submitted that the sickness referred to was for the period of August 2024 and nothing spoke to the delay during the period of April 2025. It was his submission that the 1st interested party is prejudiced by the sustained litigation which has been in court for a very long time.



24. Ms. Kosgei, counsel for the 2nd interested party submitted that the 2nd interested party did not wish to participate in the application but that it would abide to the court's ruling.

Analysis and Determination

25. I have considered the application, the affidavit in support and the annexures therein, the responses by the respondents and the 1st interested party and the oral submissions by counsel for the respective parties.

26. The main issue is whether the applicants merit the orders sought in their application.

27. I will begin by addressing the issue of setting aside/reviewing this court's orders of 5th May, 2025, striking out the applicants' substantive notice of motion dated 5th May, 2025, and filed on 6th May, 2025.

28. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

“ Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

29. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“ 1 Any person considering himself aggrieved—

- (1) a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

30. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held that:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;



- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

31. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR John M. Mativo J (as he then was) culled out the following principles from a number of authorities: -

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Act* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”

32. In applying the above principles to the present application, it is clear that while the court has discretion under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules to review or set aside its orders, such discretion must be exercised judiciously and only where sufficient cause is shown.

33. The applicants seek, within the same application, both the setting aside of the court’s orders of 7th May 2025 and extension of time to file and serve the substantive motion outside the 21-day period.



However, this court cannot consider the prayer for extension without first being satisfied that a proper basis has been laid to vacate or vary the earlier orders. On the facts before me, I am not persuaded that such a basis has been established.

34. The 1st applicant relies on alleged hospitalisation, but the annexed medical documents relate to a period in 2024, and not to the relevant period following 8th April, 2025, when leave was granted. No evidence has been adduced to demonstrate that the 1st applicant was incapacitated during the 21-day period granted by the court and under the law. Moreover, no plausible explanation has been provided as to why the other applicants could not have stepped in to progress the matter. The 1st applicant's allegation that the 21-day period was short notice is not plausible, that being the statutory upper limit granted by the Court.
35. Order 53 Rule 3(1) of the Civil Procedure Rules is explicit: "When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court..."
36. The rule does not require or mandate the swearing of any fresh affidavit at that stage. The requirement is strictly for the filing of the substantive notice of motion within the prescribed period. The applicants' excuse that the 1st applicant was unwell and thus could not swear an affidavit collapses in light of the clear procedural requirement. This is because the obligation was simply to file the notice of motion which is a replica of the chambers summons except for the term leave being left out as the same had already been granted by the court.
37. In *Republic v Kenya Sugar Board & another; Nzoia Sugar Company Limited & 6 others (Interested Parties); Manyuru & 5 others (Ex parte)* (Miscellaneous Judicial Review E007 of 2025) [2025] KEHC 11690 (KLR) (31 July 2025) (Ruling), W. Musyoka J succinctly put it this way regarding this matter:

" 12. 5 days were adequate for the ex parte applicants to file the contemplated Motion. The Motion, under Order 53 rule 3, should be a document of not more than 1 or 2 pages, carrying only the prayers. No affidavit ought to be filed with it. The grounds, upon which it should be predicated, ought not be detailed on the face of the Motion. The case for an ex parte applicant is not supposed to be in the Motion, but in the Statutory Statement, and the affidavit verifying it, as contemplated by Order 53 rule 1(2). The Motion is not the pleading, for the purpose of the Judicial Review proceedings, for the pleading is the Statutory Statement. The Judicial Review proceedings process is founded on the Statutory Statement and the verifying affidavit. The Statutory Statement carries the relief or prayers sought, and the grounds, while the verifying affidavit verifies the facts upon which the Statutory Statement is founded. That is why Order 53 rule 4(1) requires service of the Motion together or simultaneously with the Statutory Statement and the verifying affidavit.

13. The Judicial Review cause or suit is practically commenced when the Statutory Statement and the verifying affidavit are filed. The chamber summons is an interlocutory application, limited to seeking leave or permission for conduct of the case set out in the Statutory Statement and the verifying affidavit. The chamber summons enables the ex parte applicant to approach the Judge for permission to prosecute the case in the Statutory Statement and the verifying affidavit. The Motion is also interlocutory. It rides on the Statutory Statement and the verifying affidavit. It enables or facilitates the ex parte applicant to



secure the audience of the Judge, once leave is granted, to argue or prosecute the case in the Statutory Statement and the verifying affidavit.

14. Leave is a grant of permission to present or prosecute the Judicial Review proceedings, in the Statutory Statement and the verifying affidavit, after the Judge assesses it to be viable. The Motion gets its legitimacy from the leave, and, without the leave, it would be incompetent. Once leave is spent, before the Motion is filed, to enable the ex parte applicant to appear before the Judge to argue his case, there would be no permission to prosecute the case, for that permission would have been lost or expired. Without that leave or permission, there would be no basis for filing the Motion to gain audience before the Judge, to argue the Judicial Review proceedings application, for there would be no permission to argue the case. A Motion, filed outside the leave period, would be a useless piece of paper, which would not entitle the ex parte applicant audience before the Judge, in the absence of leave or permission to argue the case. A case, that cannot be argued, for lack of leave, is useless. 15. The Motion does not bring into being a fresh case, for, by the time it is filed, the case would already be in existence, having been filed simultaneously with the chamber summons for leave. The Motion is a mere vehicle to enable the placing of the case before the Judge for argument. It is the vehicle for moving the Judge. Leave validates the Judicial Review proceedings, by allowing the ex parte applicant to proceed and prosecute it, by moving the Judge, by the Motion, to hear the Judicial Review proceedings. Leave is for a limited time, and the Judge ought to be moved within the time given or limited in the leave order. Once the leave period expires or lapses, before the Judge is moved, the permission to move the Judge would be lost. Leave is not merely procedural; it is also a substantive matter. It goes to the merit, for it is granted on the basis that the case, disclosed in the Statutory Statement and the verifying affidavit is, prima facie, arguable. There is a preliminary evaluation of the case, in the Statutory Statement and verifying affidavit, on its merits, before leave is granted.”

38. The applicants urge the court to apply a broad, substantive view of justice and rely on provisions such as Order 50 Rule 6 and Section 9(1) of the *Law Reform Act*. While these provisions give the court discretionary powers, and while this court has power to enlarge time for the filing of the substantive notice of motion after the initial period granted has lapsed, see the cases *Wilson Osolo vs. John Ojiambo Ochola & another* [1996] eKLR (Akiwumi, Tunoi & Shah, JJA), *Republic vs. Speaker of Nairobi City County Assembly & another Ex parte Evans Kidero* [2017] KEHC 6101 (KLR) (Aburili, J), *Mwangi vs. Attorney General & another* [2023] KEHC (KLR)(Chigiti, J) and *Republic vs. Cabinet Secretary – State Department for Lands and Physical Planning & 11 others* [2025] KEELC 3575 (KLR)(Nyagaka, J), all cited by W. Musyoka in the above cited case, such discretion must be exercised judiciously and not capriciously. It is not enough to plead ill health or logistical challenges in the abstract; the burden rests with the party seeking the court’s indulgence to lay a clear, honest and credible basis. The applicants have not discharged that burden.
39. Further, judicial review remains a special jurisdiction governed by a strict procedural law and the integrity of its timelines must be preserved to avoid abuse and prolonged litigation. The failure to comply with court directions, absent cogent reasons, undermines the authority of the court and the efficiency of the judicial process. This court is not persuaded that the applicants have met the threshold for setting aside or varying the orders of 7th May, 2025, which remain valid and binding.



40. Accordingly, the prayer for enlargement of time to file the substantive notice of motion cannot issue and the application dated 12th May, 2025, is devoid of merit and is hereby dismissed with no order as to costs.

41. This file is closed.

42. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF AUGUST 2025

R.E ABURILI

JUDGE

