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Review of Administrative Decisions of Government by Administrative Courts and Tribunals

Paper presented by

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1. JURISDICTION OR COMPETENCE

1.1 WHICH CATEGORIES OF ADMINISTRATIVE DECISIONS ARE ELIGIBLE FOR REVIEW (ADMINISTRATIVE REGULATIONS/INDIVIDUAL DECISIONS)?

Judicial review is the procedure used by the courts to supervise the exercise of public power. It is a means by which improper exercise of such power can be remedied and it is therefore an important component of good public administration.¹

The court in Republic v Permanent Secretary/Secretary to the Cabinet and Head Of Public Service Office of The President & 2 Others ex-parte Stanley Kamanga Nganga² took the view that the purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large.

In R v Judicial Service Commission³ the court stated as follows:

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or the individual judges for that of the authority constituted by law to decide the matter in question.”

The courts take into account various factors in determining whether a person or a body is amenable to review. Judicial review is only available against a public body in a public law matter. In essence, two requirements need to be satisfied. First, the body under challenge must be a public body whose activities can be controlled by judicial review.

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² [2006] eKLR
³ Misc. Civil Application No. 1025 of 2003
Secondly, the subject matter of the challenge must involve claims based on public law principles not the enforcement of private law rights.\textsuperscript{4}

However, in between these two generalities, other factors such as the nature of the function the public body performs, the extent to which there is any statutory recognition or underpinning of the body or the function in question and the extent to which the body has interwoven into a system of governmental regulation, may indicate that the body performs public functions and therefore subject to judicial review.

The traditional test for determining whether a body of persons is subject to judicial review is the source of power. Judicial review is concerned with the activities of bodies deriving their authority from statute. If the duty is a public duty then the body in question will be subject to public law and judicial review as a public law remedy will only be invoked if the person challenging was performing a public duty.

Statutory powers may be conferred or duties imposed, on bodies, which are, in origin non-statutory, private bodies. In relation to the exercise of its statutory powers, judicial review will be available. Universities and schools obtain charters or licences from government thus in the case of \textit{Elizabeth Wainaina and others v The Board of Governors of Pangani Girls High School} \textsuperscript{5} where the High Court quashed the decision of the Board of Governors of Pangani Girls’ School indefinitely suspending the three applicants. The court found that the school was not a private club and therefore the court had jurisdiction to entertain the application where it was alleged breach of natural justice and the Education Act.

In subsequent cases the High Court has held that it has jurisdiction to entertain decisions of administrative bodies. In the case of \textit{Michael Omole Oharo and others v The Council for Legal Education},\textsuperscript{6} the applicants were holders of law degrees from universities

\textsuperscript{5} Miscellaneous civil case number 818 of 1992
\textsuperscript{6} Miscellaneous application number 917 of 1996
in India. They applied to be admitted to the Kenya School of Law but the respondent institution refused to admit them to the school. The applicants went to court seeking orders that the respondent’s decision denying them admission to the Kenya School of Law be quashed and that the respondent had failed to give them a hearing before denying them admission. The Court, while conceeding that the respondent had been in breach of the rules of natural justice, nevertheless declined to order their admission, but directed that the respondents reconsider their applications.

The applicants in the Ocharo case relied heavily on an earlier case of Rita Biwott v The Council of Legal Education7 where the court was called upon to decide the applicant’s fate under similar circumstances. The applicant’s application to be admitted to the Kenya School of Law was rejected on the ground that the Council did not approve her two year degree at the University of Edinburgh under Section 13(1) of the Advocates Act. In finding for the applicant, the High Court ruled that she had not been given a hearing before her application was rejected and thus there was a breach of the rules of natural justice. The decision of the Council was quashed and the principal of the Kenya School of Law ordered to admit her into the school.

An additional test for determining whether a particular body is susceptible to judicial review is by looking into the nature of its function. Bodies performing public duties or exercising power that could be characterized as ‘public’ may be subject to judicial review even though the powers are not statutory.

Two approaches have been laid down to understanding the definition of ‘public’ in respect of public law and nature of function. First, there is the extent to which the body operates under the authority of government or was established by the government, or by some other recognized public authority.8 Secondly, there is the extent to which a

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7 Miscellaneous civil case number 1122 of 1994
8 Supra note 3 at page 40
particular function is performed against a background of statutory powers even though there is no specific statutory authority for the power, which is the subject of review.\textsuperscript{9}

Not every act of a statutory body necessarily involves an exercise of statutory power. Statute may impose a duty on a public body only, but that duty may still create private rights in favour of individuals; enforceable by way of ordinary claim as well as imposing public law obligations enforceable by way of judicial review. The fact that one of the parties to the dispute happens to be a public authority is incidental to the nature of the dispute. It is possible for questions of public law and private law to arise in relation to one dispute; it is also possible for situations to arise where the courts will superimpose on a private law question an obligation to observe principles derived from public law. There is no universal test which will be applicable to all circumstances which will indicate clearly when judicial review is or is not available.

In \textit{Zakhem Construction (Kenya) Ltd v Permanent Secretary, Ministry of Roads and Public Works and another},\textsuperscript{10} the court stated that if parties to a contract want to have the process of judicial review applicable to their contract, there is nothing to stop them from expressly providing in the written contract.

The public element gauge equally extends to private bodies, clubs, and societies that perform functions which are important to the public. The justification for this is premised on the fact that the individual person or members of the public who deal with these bodies legitimately expect that the rules of good administration will apply.

In \textit{Patel and others v Dhanji and others},\textsuperscript{11} the Court of Appeal observed that the courts will entertain suits by members of societies or clubs for improper expulsion or violation of the principles of natural justice, based on the members’ rights in property, but that the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{9} \textit{Ibid}
\item \textsuperscript{10} Civil appeal number 244 of 2006
\item \textsuperscript{11} [1975] EA 301
\end{enumerate}
\end{footnotesize}
courts should be slow to interfere in the running of club affairs, the remedy being in the hands of the members.

In *Gathuna v African Orthodox Church of Kenya*\(^{12}\), the Court of Appeal held a Church to be subject to the Court’s jurisdiction by virtue of its registration under the Societies Act (Cap 108) Laws of Kenya. Similarly in the case of *R v Bishop Silas Yego and the Registrar of Societies ex parte David Mulei Mbuvi and others,\(^{13}\) the applicants were granted leave to apply for prohibition to stop the Registrar of Societies from registering a new constitution introduced by the church administration without prior consultations with church members. It was held that provided a matter is justiciable and constitutes a cause of action, the court can exercise its judicial review jurisdiction especially where there is a breach of the rules of natural justice, or where there is an issue concerning the proprietary and or contractual rights of individuals.

Although reasonable efforts should be made to uphold the private liberty of administrative officials, more so in using the powers they posses as private individuals, the exercise of private powers may nevertheless be subject to judicial review where there is legitimate expectation on the part of those affected that the power will be exercised fairly, on reasonable grounds and relevant considerations.

In the case of *David Onyango Oloo v A.G.*,\(^{14}\) David was convicted and sentenced to serve a five-year imprisonment sentence and was entitled under section 46(2) of the Prisons Act to be credited with full amount of remission to which he would be entitled at the end of sentence if he losses no remission of sentence. One year into his sentence, the Commissioner of Prisons wrote to the Officer in Charge of the Prison where David was imprisoned informing the In-Charge that he (the Commissioner) considered that it was in the interest of reformation and rehabilitation of David that he be deprived of

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\(^{12}\) [1982] KLR 356  
\(^{13}\) Miscellaneous application No. 155 of 2006  
\(^{14}\) Civil Appeal No. 152 of 1986 (Ur)
remission. David challenged the legality of the Commissioner’s decision and contended that it was arbitrary, in breach of the rules of natural justice, ultra vires section 46 of the Prisons Act. The Court of Appeal ruled that the Commissioner’s act in depriving David of remission was ultra vires, illegal, null and void, and proceeded to quash it.

In *R v Chief Justice of Kenya and others ex parte Lady Justice Roselyn Naliaka Nambuye*,¹⁵ the question arose as to whether judicial review can be used to challenge constitutional powers. The applicant had challenged the powers of the President and the Chief Justice in respect of section 62 of the Constitution. The court held in the negative, per Nyamu J:

“...the exercise of presidential powers under the Constitution cannot be challenged by way of Judicial Review at all because Judicial Review jurisdiction is derived from an Act of Parliament and is not entrenched in the Constitution unlike India and the United States where Judicial Review jurisdiction has been specifically conferred under the respective constitutions. In Kenya the jurisdiction is statutory.”

**1.2 ACCORDING TO WHICH CRITERIA IS THE JURISDICTIONAL COMPETENCE OF THE COURT OR TRIBUNAL (hereinafter “court”) DETERMINED? ARE THERE CERTAIN DECISIONS OF THE EXECUTIVE OR PUBLIC AUTHORITIES WHICH CANNOT BE SUBMITTED TO REVIEW, BY REASON OF THE NATURE OR SUBSTANCE OF SUCH DECISION?**

Judicial Review matters are heard in the High Court of Kenya which jurisdiction is conferred by statute. Section 8(2) of the Law Reform Act¹⁶ provides that:

“(2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the

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¹⁵ Miscellaneous civil case number 764 of 2004
¹⁶ Chapter 26 of the laws of Kenya
United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.”

In addition Section 65 (2) of the Constitution provides:

“(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.”

Finally, Section 123 (8) of the Constitution also provides:

“(8) No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.”

The Harmonized Draft Constitution of Kenya further provides for the enforcement of the bill of rights through judicial review.17

Section 8(1) of the Law Reform Act prohibits the High Court from issuing prerogative writs of mandamus, prohibition, and certiorari in its exercise of civil and criminal proceedings. In Commissioner of Lands v Kunste Hotel Ltd (2006) KLR 249, the Court of Appeal held that judicial review is a jurisdiction that is sui generis (neither criminal nor civil).

The court in the case of Republic v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati18 stated:

“It has been held severally by the Kenyan Courts that judicial review proceedings are neither civil nor criminal proceedings. Judicial review proceedings are some sort of

17 Article 32 (3) (f)
18 [2008] eKLR
special proceedings conferred by the Law Reform Act (Cap 26) section 8 and 9. Under section 8 of the Law Reform Act the jurisdiction to grant orders of mandamus, prohibition and certiorari is conferred upon the High Court.”

**Justiciability**

Not all cases brought before courts are accepted for their review. Before agreeing to hear a case, a court first examines its justiciability. This preliminary review does not address the actual merits of the case, but instead applies a number of tests based on judicial doctrines. At their simplest, the tests concern (1) the plaintiff, (2) the adversity between the parties, (3) the substance of the issues in the case, and (4) the timing of the case. For a case to be heard, it must survive this review. In practice, courts have broad powers to apply their tests: they commonly emphasize whichever factors they deem important.

The term ‘non-justiciable’ is commonly used in a number of different senses. In its primary sense, the term signifies that an issue is not appropriate or fit for judicial determination. Non-justiciability in its administrative law sense signifies that a matter is not capable of, or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant appropriate relief.

The general issue of “non-justiciability”, as an issue of jurisprudential principle, arises in at least three different but closely related guises, to wit, firstly as a question of the jurisdiction of the court on an application for judicial review of Executive action; and secondly, in relation to the principle underpinning the established doctrine of “act of state” in a claim for damages against the State. Finally, in the wider sense of matters which the courts, even when in exercise of their jurisdictions, have chosen to categorise as “political” and thereby non-justiciable. The court can therefore refrain from adjudicating a matter it deems non-justiciable.
There are certain areas which the court is reluctant to delve into. These include: (1) matters of policy and political questions; (2) matters of defence and security of the State.

The applicants in *Patrick Ouma Onyango v Attorney General and 2 others*¹⁹ sought an injunction to stop the referendum that had been scheduled on the Proposed New Constitution of Kenya. The respondents’ main argument was that constitution making is a political process. Accordingly, the dispute before the court was predominantly political and, in those premises, it was imprudent for the court to intervene. The court declined to stop the referendum on the premise that the constitution making process fell under the ambit of political question doctrine and therefore was non-justiciable. The Court was of the view that the process of generating and assembling constitutional proposals and the giving of consent to them was a political one. However, it opined that it was the sole preserve of the court to delineate, define and make a finding on these outer limits of its jurisdiction and that no other arm of Government has the powers to do so.

The court in *Republic v Registrar of Societies & 5 Others Ex Parte Kenyatta & 6 Others*²⁰ opined that the Executive and Parliament have monopoly on issues of policy except where they are reviewable under the court’s judicial review powers. The applicants in the case had instituted judicial review proceedings against the decision of Registrar of Political Parties to register and the Electoral Commission of Kenya (now replaced by a new entity) to recognise new party officials. The applicants in support of their motion referred to a ruling delivered by the Speaker of the National Assembly in which he had described the registration of new party officials as inconsequential and disregarded it. The court went on to quash the registration of the new officials.

**Exclusion of Judicial Review**

¹⁹ [2005] eKLR
²⁰ (2008) 3 KLR (EP) 521
Under Kenyan Law, an enabling Statute may expressly or by implication exclude Judicial Review of administrative decisions. The process of excluding Judicial Review is invariably effected through ouster clauses. In practice, however, the mere fact that a Statute expresses a particular decision to be final does not mean that the court cannot inquire into the decision. The judicial position is that to refuse review on the basis of exclusion would undermine natural justice and therefore unless a statute expressly provides that there shall be no recourse to certiorari, mandamus or prohibition, the courts normally proceed to review a decision if it is necessary to do so.

Ouster Clauses

It is has become an increasingly common trend for legislature to confer decision making powers on tribunals and seek to limit or exclude courts to scrutinize those decisions. Statutes use various variants of phrases to express an intention to oust judicial intervention in actions taken under them.

Some examples are that the decision ‘shall not be subject to review in any court’ or that the decision of a specified body or tribunal made under the Act ‘shall be final and conclusive for the purposes of this Act’, or that the award, decision or proceedings of the court or tribunal ‘shall not be questioned or reviewed and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise’. These ouster clauses represent the intention of the legislature to exclude judicial scrutiny of actions undertaken or falling under the prescriptions.

Kenyan Courts have never conceded the proposition that an ouster clause can oust the courts’ judicial review jurisdiction in toto. In the case of Mike J C Mills and another v The

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22 Ibid
23 Section 88, Income Tax Act (Cap 470)
24 Section 17 of the Trade Disputes Act (Repealed)
Post and Telecommunications, the court stated that judicial review could not be held to have been excluded by Acts of Parliament that purport to say decisions of statutory bodies cannot be questioned in any court or are final.’

The Court of Appeal in Nyakinyua & Kang’ei Farmers Co. Ltd v Kariuki & Gathecha Resources Ltd stated as follows regarding finality clauses:

‘It is submitted to us by Mr. Gautama who appeared for the appellant on this appeal, that even if the Land Control Board was wrong, its decision cannot now be challenged because section 8 of the Act provides “the decision of the land control board shall be final and shall not be questioned in any court”. Mr. Lakha, who appeared for the respondent provided us with answers to these submission. He referred us to the English cases of Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208 and Pearlman v Keepers & Governors of Harrow School, 1 All ER 365. I agree with Mr. Lakha that the effect of those cases, which I consider to represent the law in Kenya also, is that the formulae of words designed to protect a tribunal from interference with its “final”...are not effective to protect a decision which the tribunal had no jurisdiction to make.’

Alternative Remedy

The question as to whether the existence of an alternative legal remedy can oust the court’s judicial review jurisdiction is long settled. Although it is an important factor to consider in deciding whether or not to grant relief, the utility of judicial review is open notwithstanding the availability of alternative remedies.

In Shah Vershi Devshi & Co. Ltd v The Transport Licensing Board it was held that certiorari will issue notwithstanding the existence of an alternative legal remedy.

25 Misc application no. 1013 of 1996
26 Civil Appeal No. 16 of 1979 (Ur). See R thro’ Olum v Angungo & 5 others [1988] KLR 529
27 Law Reform (Miscellaneous Provisions (Amendment) Ordinance No. 16 of 1960
28 (1970) EA 631
Finally, judicial review does not lie against proceedings or decisions of the Judges of the High Court and the Court of Appeal.

**Judicial Review and Parliament**

Kenyan courts have no jurisdiction to inquire into the internal proceedings of Parliament. The courts, however, have jurisdiction to question whether some event or circumstance which is a condition precedent to the validity of a statute has been met and to ascertain whether a law passed by Parliament is in conformity with the Constitution.

Courts enjoy the power to annul or strike down Acts of Parliament that are inconsistent with the Constitution. This can be done by way of judicial review or through constitutional applications. As explained by the High Court in the case of *R v Kenya Roads Board ex parte John Harun Mwau*:

“The remedy of judicial review is available as a procedure through which the applicant can come to court for the determination of any constitutional issue including striking down of legislation which may be unconstitutional...In countries with written Constitutions the Rule of Law implies certain limitations on legislative power and all other organs of State. Parliament can only exercise its power within certain parameters for acts of parliament to be constitutional. The limitation which the law imposes upon the Executive and the legislature can only be meaningful where there is a procedure to interpret the law and examine Executive actions or decisions with finality...This unique power to test the acts of the three arms of the State for consistency is vested in the Judiciary. These are what is called Judicial Review Powers. The Judiciary in such exercise is also subject to the rule of law.”

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29 *Kiraitu Murungi and others v Musalia Mudavadi and another*, High Court Civil Case No. 1542 of 1997; *Samuel Muchiri W’Njuguna and others v Minister of Agriculture*, Misc. Application No. 621 of 2000; *Samuel Muchiri W’Njuguna and others v Minister for Agriculture*, Civil Appeal No. 144 of 2000

30 Miscellaneous Civil Application No. 1372 of 2000
The court in Republic v Judicial Commission Of Inquiry Into The Goldenberg Affair, Justice Of Appeal S.O. Bosire & Peter Le Pelley S.C Ex-Parte George Saitoti 31 held that the fact that the National Assembly (Powers and Privileges) Act stems directly from section 57 of the Constitution, sections 432 and 1233 of the said Act have constitutional underpinnings. The court found that the two sections reinforce the principle of separation of powers and that any finding which purports to encroach on a decision of Parliament which is made within its constitutional territory or mandate would also be unconstitutional and therefore courts and other judicial bodies should be in the forefront of avoiding any possible constitutional conflicts in all their undertakings.

**Judicial Review and Employment**

It should be noted that the mere fact that a person is employed “by a public authority does not *per se* inject any element of public law into the relationship.”34 The courts have developed a classification to assist in determining whether a claim raises public law issues while recognizing that that the dividing line between public law and private law issues is often difficult and needs to be developed on a case by case basis.35

The first category concerns public sector employees who have a contract of employment. Disputes arising out of the employment relationship will be private law disputes. The fact that the employer is a public body, or that there is a degree of public interest in the activities performed by the individual is not sufficient to make the matter a public one. In Republic v Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President, Permanent Secretary, Ministry of Gender, Culture and Social Services & Kenya National Library Services Board Ex-Parte Stanley Kamanga Ng’ang’a the

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31 [2006]eKLR
32 It states that no criminal or civil proceedings shall be instituted against any member for words spoken before, or written in a report to the Assembly or a Committee, or by reason of any matter or thing brought by him therein by petition, bill resolution, motion or otherwise
33 It states that no proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with the Act shall be questioned in any court.
34 Kadamas v Municipality of Kisumu [1985] KLR 954
35 Supra note 3 at page 45
court held that the relationship between the Chief Executive Officer and the Kenya National Library Services was a private contract of employment and therefore not amenable to judicial review.

The second category is where there is a disciplinary body created by statute to which the employer or employee is required to refer disputes. Similarly, where there is a statutory aspect to the dispute i.e. where aspects of the employment relationship are governed directly by statute. In such situations where the employee holds an office of public service, the remedy of judicial review may be applied.\(^{36}\) In the case of *Republic v Municipal Council of Nakuru ex-parte Samuel Thuo Kangea*\(^ {37}\) the applicant was serving as the Town Treasurer of the Municipal Council until he was arrested, charged and subsequently acquitted of obtaining money by false pretences. The Council undertook disciplinary measures which ultimately led to his retirement in the public interest. The applicant was never afforded an opportunity to make representations as provide by the Local Government Act and regulations therein. The court opined that this matter did not amount to a dispute concerning contract of employment but rather whether due process was followed in the decision making process. It held that judicial review was applicable and proceeded to quash the decision of the Council.

**Scope of Judicial Review**

In the past it was believed that only powers conferred by statutes and exercisable by public authorities were the subject of courts’ judicial review jurisdiction. This position has changed and the position today is that it is not the source of power or the kind of authority that matters; instead it is the nature of the function that is today considered by the courts as the principal gauge for the reviewability or otherwise of functions. The guiding principle is that so long as an individual’s right stands to be affected by the

\(^{36}\) *Kadamas v Municipality of Kisumu* supra

\(^{37}\) [2006] eKLR
decision or action of an authority, the action of such an authority will be subject to judicial control.

The Court of Appeal of Kenya has stated that:\textsuperscript{38}

“The law relating to judicial review had not yet reached the furthest or the last frontier and that courts must endeavor to expand the grounds of intervention depending on the circumstances before them.”

In addition the court of appeal further observed in other cases:\textsuperscript{39}

“Courts are loath to interfere with decisions of domestic bodies and tribunals including college bodies. However courts will interfere and quash decisions of any bodies when moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.”

2. PROCEDURE

2.1 GENERAL DESCRIPTION OF APPLICABLE PROCEDURAL RULES:

Under section 8 (1) of the Law Reform Act, the High Court has inherent powers to issue the orders of prohibition and certiorari. The application for Judicial Review must therefore be made to the High Court.

Application for leave

The first step is to apply to the High Court for leave to apply for Judicial Review. Application for leave is \textit{ex parte} by way of Chamber Summons. The Chamber Summons contains the following particulars:

\textsuperscript{38} Republic \textit{v} Attorney General and Registrar of Societies Miscellaneous Application 769 of 2004

\textsuperscript{39} Nyongesa and others \textit{v} Egerton University College [1990] KLR 693; Onyango \textit{v} Attorney General [1987] KLR 711 and Kenya Hotels and Allied Workers Union \textit{v} Registrar of Trade Unions [2005] eKLR
- A statement setting out the name and description of the applicant;
- The relief sought;
- The orders sought; and
- Grounds on which the orders are sought.

The application must be accompanied by an affidavit verifying the facts relied upon. This is provided for under the Civil Procedure Rules Order LIII rule 1 which states that:

“1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

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(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.40”

Notice to the Registrar

The law requires the applicant to give a notice of the application for leave to the Registrar not later than the preceding day. This is under sub section 3 of rule 1 which provides that:

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(3) The applicant shall give notice of the application for leave not later than the preceding day to the registrar and shall at the same time lodge with the registrar copies of the statement and affidavits:

Provided the court may extend this period or excuse the failure to file the notice of the application for good cause shown41.

The notice is to be given to the registrar of the High Court. This notice is very important but failure to notify the Registrar does not render the application incompetent and

40 Civil Procedure Rules, Order LIII rule 1
41 Civil Procedure Rules, Order LIII rule 1(3)
fatally defective as had been previously held in *Lawrence Nginyo Kariuki v County Council of Kiambu and another*\(^{42}\). In *R v Isaac Theuri Githae*\(^{43}\) the Court of Appeal in explaining the rationale for the requirement of the notice to the registrar stated that perhaps the object the rules making authority had in mind with that provision was to enable the Registrar organize for a judge to hear the application because of the urgency of such applications. The Court held that:

“……Whatever the object of the provision, we are unable to hold that it is mandatory. In our view, a failure to comply with that sub rule is only an irregularity which is curable. The rule is merely directory. That would explain why the rule has a proviso empowering the court either to extend the time within which to comply with the sub rule or excuse the failure to comply with it.”

Time limitation is crucial. Order 53 provides for time limits within which a person can apply for leave. The law is very strict where it comes to certiorari which has to be done within 6 months of the date of the decision to be quashed. The court cannot grant an extension if the application is filed after the six month limitation period. Time limitation is not stipulated for mandamus or prohibition but one is required to file the application within a reasonable time.

Upon hearing the application, the judge issues an order either denying or granting the application. Where leave is granted, the grant of leave may operate as a stay of the proceedings.

**Substantive application for Judicial Review**

**Motion for Judicial Review**

Where leave to apply for Judicial Review is granted, the applicant is required to file the substantive motion for judicial review and apply for the orders for which leave has

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\(^{42}\) Misc Application No. 1446 of 1994

\(^{43}\) Civil Appeal No. 11 of 2002
been granted within 21 days from the date leave is granted. The application is by way of a Notice of Motion and it comprises of:

- the Notice of Motion itself;
- a supporting affidavit and
- the order seeking to be quashed in certiorari

**Service of Motion, Statement and Affidavits**

The motion must be served on all persons directly affected by the application so that they may have an opportunity to be heard. All persons affected by the application must be duly notified of the date set for hearing. Copies of the statement accompanying the application for leave must be served together with the motion and copies of the affidavits used in the application for leave should be supplied to all parties to the proceedings. The service should be done within eight days of the hearing date. This is provided under rule 4 which states:

“4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.
Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.  

**Affidavit of service**

In order to ensure that all affected parties are actually served with the application, the rules require that an affidavit of service be filed before the notice is set down for hearing. The affidavit should give full details regarding the names, place, and date of service on all persons who have been served with the motion. If any person who ought to be served has not been served, the affidavit must state the fact and the reason for the failure of service.

**Hearing**

On the date of the hearing, the applicant has the right to begin, the other party then replies. Thereafter, the applicant has a right to cross-examine if there is need to. The provisions for the hearing of the parties are under rule 6 and 7 which provide:

5. On the hearing of any such motion as aforesaid, the applicant shall have the right to begin.

6. On the hearing of any such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made.

After hearing the case, the judge may then give a judgment granting an order of certiorari, prohibition, and mandamus. This is as provided under rule 7 which states:

7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of

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44 Civil Procedure Rules, Order LIII rule 4  
45 Civil Procedure Rules, Order LIII rule 6 & 7
any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the High Court. 

(2) Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal to the High Court.46

RULES OF PROCEDURE: WHICH STATUTE OR REGULATION GOVERNS THE RULES OF PROCEDURE?

The High Court is granted supervisory jurisdiction under Section 65 of the Constitution. Under this section, the High Court is required to supervise the proceedings of the subordinate courts and tribunals to ensure that they do not exceed the jurisdiction which they are required to exercise. This jurisdiction is the basis of the Judicial Review proceedings under Order 53.

The provisions of the law applicable in Judicial Review are confined to sections 8 and 9 of the Law Reform Act and order LIII of the Civil Procedure Rules, cap 21 Laws of Kenya.

ARE THE VARIOUS PROCEDURAL STEPS IN THE HANDS OF THE PARTIES AND OR COURTS AND WHICH ROLE DO THEY RESPECTIVELY PLAY?

Role of the Parties

Making an application for leave to the High Court is the first role of the applicant. The applicant makes an ex parte application to the judge in chambers.

The applicant further has to give notice for the application of leave to the High Court Registrar.

46 Civil Procedure Rules, Order LIII rule 7
The applicant has to serve the motion, statement, and affidavits on all persons directly affected by the application so that they may have an opportunity to be heard. This is under order LIII rule 3 which provides that:

3. (1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

(2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

(3) An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

(4) If on the hearing of the motion the High Court is of the opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the High Court may adjourn the hearing, in order that the notice may be served on that person, upon such terms (if any) as the court may direct.

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47 Civil Procedure Rules, Order LIII rule 3
The parties’ served with the application for judicial review, have the right to appear either in person or through advocates. Every party who so intends may file such responses or affidavits prior to the day fixed for hearing.

**Role of the Court**

The Judicial Review court is tasked with the role of ensuring all procedural and legal requirements have been followed by the party. These include:

- Ensuring that the applicant has a prima facie case meriting the filing of an action for judicial review against the respondent
- Ensuring the applicant has *locus standi* to institute and maintain the application for judicial review
- Ensuring that that the application is not time barred

The final role of the court in judicial review applications is to determine the matter by evaluating the evidence and submissions by the parties.

**IS THERE A PROSECUTOR, IF SO WHICH ROLE DOES THE PROSECUTOR PLAY?**

Judicial Review applications are *sui generis* in nature which means that the judicial review jurisdiction is neither civil nor criminal. Judicial Review orders issue in the name of the republic and applications for the order are made in the name of the republic at the instance of the person affected by the action or omission in question. Therefore, because Judicial Review proceedings are neither civil nor criminal, there is no prosecutor; the aggrieved party is usually the plaintiff/applicant while the Attorney General or his representative appears on behalf of the public body.
ARE THE PROCEEDINGS MAINLY WRITTEN OR ORAL I.E. DO THE PARTIES COMMUNICATE BY EXCHANGING WRITTEN PRESENTATIONS OR IN THE FORM OF AN ORAL DEBATE BEFORE THE COURT?

Adducing evidence

In applications for judicial review, evidence is usually adduced by way of affidavit. The basis of the applicant’s case will be set out in the affidavits sworn in support of the application for leave. The respondent’s case will also be set out in the affidavits or other court papers filed in response to the motion for judicial review.

In judicial review applications, affidavit evidence is usually the only form of evidence before the court. However the fact that evidence is adduced by way of affidavits does not inhibit the court from resolving factual disputes that may arise.

Whenever there is contradiction or irreconcilable conflict of evidence on the affidavits, the courts have power and may order the attendance of a party and invite oral evidence by ordering cross examination of the deponent on the contents of his affidavit. Any party ordered to appear for cross examination should appear as non appearance may affect the weight to be given to the evidence presented through his affidavit.

Proceedings during the hearing

At the hearing of the application for judicial review, the court may be moved either by the parties in person or through their advocate. The applicant has the right to begin and the respondent is heard in response. This is done orally.

IS THE CASE DETERMINED BY A SINGLE JUDGE OR A PANEL OF JUDGES?

In Kenya, applications for judicial review are in practice listed for hearing before one Judge of the High Court. Depending on the nature of an application and the complexities of the issues involved, the application may be directed to proceed for
hearing before two or more judges. Where such directions issue, the court file is placed before the Chief Justice to nominate the Judges to hear and determine the matter, in which case the matter will be listed for hearing before the bench of judges nominated to hear the motion.

2.2 WHAT CONDITIONS MUST BE FULFILLED IN ORDER TO CONFER A RIGHT TO MAKE A CLAIM FOR REVIEW? MUST THE PLAINTIFF SHOW SOME FORM OF PERSONAL INTEREST? IF SO, IS IT DEFINED IN A BROAD OR NARROW MANNER?

To be entitled to apply for judicial review of a decision, in principle a person must have a "sufficient interest" (or standing). The court should be satisfied that the party has locus standi to institute and maintain the application for judicial review.

In the absence of a statutory definition of what constitutes sufficient interest, courts have been left to interpret it, depending on the circumstances of each case. In so doing, the courts would fairly balance the need to allow access to justice for those genuinely concerned or aggrieved and the call to guard against exposing their precious time to waste by busybodies on unfounded, misconceived, trivial and frivolous complaints. The courts will normally consider the matter to which the application relates in determining the sufficiency of the applicant’s interest.

The old rule of standing is that an application for judicial review could be made only by an aggrieved person. This approach proceeded on the assumption that remedies and rights are correlative and that, therefore, only the person whose own right is violated or threatened with violation is entitled to seek a remedy.

This is a narrow approach which gives rise to the proposition that only a person whose own rights are directly and substantially injured or threatened with injury can take recourse to the jurisdiction of the court, that when a person suffers administrative injustice along with other members of the public, he cannot challenge the question unless he can show some special or peculiar injury to himself over and above the general public and that where a person challenging an administrative action is a stranger, the courts will ordinarily refuse to entertain the application.

In *Maathai v Kenya Times Media Trust Ltd*49 Dugdale J spelt out the law on locus standi in Kenya at the time as follows:

“There is no allegation of damage or anticipated damage or injury. In particular it is not alleged that the defendant company is in breach of any rights, public or private in relation to the plaintiff nor has the company caused damage to her nor does she anticipate any damage or injury. It is well established that only the Attorney General can sue on behalf of the public.....The plaintiff has views that it would be preferable if the building of the complex never took place in the interests of many people who had not been directly consulted. ......Her personal views are immaterial. The Court finds that the plaintiff has no right of action against the defendant company and hence she has no locus standi.”

This narrow interpretation of the standing requirement leads to several consequences. One is that there may not be anyone having standing to challenge an administrative action and thus the concerned administrative authority would merrily continue its wrongful action with impunity and without fear of anyone rising up against actions in court of law. Thus public injury resulting in mass suffering may remain unredressed because nobody has standing to seek judicial remedy.

Realising the adverse implications of the narrow approach to standing Kenyan Courts have in the recent past moved progressively in the direction of liberalizing the law.

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49 [1989] KLR 267
relating to standing. In so doing the courts have taken recourse to the following two strategies: 1) The expression aggrieved person has been interpreted in a flexible manner and in most times replaced by sufficient interest in the matter to which the application relates and 2) at times, even a stranger has been permitted to invoke the jurisdiction of the courts as long as he is acting in good faith and is intent on securing general public interest and preventing breach of the law. The position of the courts, thus, has been that where an application is made by an individual who is personally affected by the matter to which the application relates, locus standi vests ex debito justitae (as a matter of justice); but when a person other than the party who is directly affected applies for remedy, the vesting of legal right to bring action is purely discretionary\(^50\).

Sufficiency of interest depends on the totality of the circumstances of each individual. The court in determining the existence of standing has to take into account the nature of the application, the extent of the applicant’s interests in the issues raised, and the nature of the relief sought.

The right to sue, or locus standi, is based on the fact that a party is a legal person under Kenyan law and has a sufficient interest in this suit. In \(R\) \(v\) Minister of Information and Broadcasting and Ahmed Jibril ex parte East African Television Network Limited (EATN)\(^51\), Khamoni J stated that:

> “Each legal person is capable of being sued in a court of law... under Order LIII of the Civil Procedure Rules therefore all that a legal person needs in his involvement in proceedings is sufficient interest.”

Justice Nyamu in Mureithi & 2 others \(v\) Attorney General & 4 others\(^52\) advocated for a broad minded approach to the issue of standing and stated that:

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\(^50\) Peter Kaluma, Judicial Review, Law Procedure and Practice, 2009 at page 187

\(^51\) Misc. Civil Application No. 403 of 1998

\(^52\) KLR (E&L 1)707
“Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law.

The other reason is that although initially it was feared that the relaxation of standing would open the floodgates of litigation and overwhelm the courts this has not in fact happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the supporting jurisprudence on the issue of standing reveals a well trodden path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue.”

A class of persons affected by administrative actions may also bring their grievances to court under a society, association or even a trade union. Courts in Kenya have accepted the standing of such a body to seek judicial redress for the grievances of its members. In *Kenya Bankers Association v Minister for Finance and another (No 4)*[^53], Kenya Bankers Association filed a constitutional application seeking a declaration that the Central Bank of Kenya (Amendment) Act, 2000 was unconstitutional and a nullity for having been intended to operate retrospectively. The court upheld the legal right of the Association to bring and maintain this action and held that the Association, which was for all practical purposes a trade union, had locus standi to bring and maintain the action. The court, with regard to locus of the Association, stated:

“So both on broad principles and in the particular circumstances of the case, the Kenya Bankers Association has the necessary locus standi in this litigation to enable the court to determine once and for all an issue affecting the members of the association and thereby avert an avalanche of litigation over the same thing. Moreover, they are seeking, in good faith, to uphold the supremacy of the Constitution of Kenya. And for the general economic questions raised, this is public interest litigation and the applicants are public

[^53]: [2002] 1KLR 61
spirited persons taking out bona fide litigation for the public good. It is a proper class action.”

2.3 DOES THE PLAINTIFF HAVE DIRECT ACCESS TO THE COURT, OR IS HE/SHE OBLIGED TO SUBMIT HIS/HER DEMAND THROUGH COUNSEL/ATTORNEY?

Any person who is aggrieved by the actions of a public body has the right to seek redress in a court of law. The plaintiffs have direct access to the court. The procedure for judicial review is however so technical and cumbersome that it remains out of reach of lay persons. The service of an advocate is an indispensable component of all judicial review proceedings in Kenya.

2.4 CAN A LEGAL DEMAND BE SUBMITTED TO AN ADMINISTRATIVE COURT USING ELECTRONIC TECHNOLOGIES (INTERNET)?

No, Kenya has not reached the “electronic age” yet.

2.5 IS THERE SOME FORM OF PUBLIC PRIVATE LEGAL AID SYSTEM AIMED AT PROVIDING ASSISTANCE TO A PERSON WHO CANNOT AFFORD AN ATTORNEY?

Legal aid refers to the legal assistance provided, as by a specially established organization, for those unable to afford the services of an advocate. In Kenya, there are a number of organizations that carry/ conduct legal aid clinics. These include organisations like Kituo cha Sheria, CRADLE, CLARION, FIDA and CLAN.
Some jurisdictions offer public legal assistance to persons who may not be able to afford legal representation. This is not the case in Kenya unless the charge is a capital offence which requires the accused to have legal representation. The Harmonized Draft Constitution of Kenya under article 195 establishes the office of the Public Defender to provide legal advice and representation to persons unable to afford legal services.

However, the Kenya government is in collaboration with development partners, implementing on a pilot basis, a National Legal Aid and Awareness Programme (NALEAP) under the Ministry of Justice, National Cohesion, and Constitutional Affairs. Its broad objective is to improve access to justice in Kenya, especially among the poor, the marginalized, and the vulnerable in society. NALEAP seeks to advance its mandate of enhancing access to justice through creating legal awareness in the country and promoting the use of Alternative Dispute Resolution (ADR) methods, among other strategies. The pilot programme is set up in the Nairobi Children’s Court, Nairobi Family Division of the High Court, Mombasa Capital Offenders Pilot Project, Madiany Paralegal Advice Office in Kisumu, Nakuru Children’s Court and Eldoret Moi University Legal Aid.

2.6 WHEN A CLAIM IS MADE TO THE COURT, IS THE RIGHT OF THE RELEVANT PUBLIC AUTHORITY TO IMPLEMENT THE DECISION STAYED OR SUSPENDED UNTIL THE COURT HAS DETERMINED THE CASE?

Under order LIII rule 1(4) of the Civil Procedure Rules, the grant of leave to apply for an order of prohibition or certiorari may, if the judge so directs, operate as a ‘stay of the proceedings’ in question pending the hearing and determination the substantive application for judicial review or until the judge orders otherwise. The jurisdiction of the High Court to order leave to operate as a stay is inherent and is meant to safeguard the interests of justice by ensuring that matters are complained about are held in abeyance pending meritorious determination of the application for judicial review. This
ensures that a person does not suffer irreparable injury if the Court were to ultimately grant him the relief sought after hearing the case on merits.

Stay of proceedings is not limited to judicial or quasi-judicial proceedings before court but encompasses the process by which the impugned decision is reached and the decision itself.

In *Oil Com Kenya Ltd v Permanent Secretary, Ministry of Roads and Public Works and Another*[^54^], the appellant filed an application in the High Court seeking leave to apply for an order of certiorari to quash the decision of the respondents to demolish his petrol station. The appellant also applied for leave to apply for orders of prohibition to prohibit the respondents from demolishing the petrol station and further applied that the grant of leave be ordered as stay of the threatened demolition. Upon hearing the matter, the Court granted the appellant leave to apply for orders of certiorari and prohibition but declined to order that the leave granted operate as a stay to the threatened demolition stating that:

“…..Having considered all the above I do find that the applicant has demonstrated that they have an arguable case as they have a title to the land they have purchased. The court will grant leave to the applicant to bring Judicial Review Proceedings in terms of prayers 1, 2 of the chamber summons dated 23rd November 2006

However, in view of the fact that it cannot be said with certainty that L.R. 17645/2 is not part of 1504/7, the issue that will be considered later at the hearing and the fact that the public interest of construction of a road will highly be prejudiced and the fact that the applicant can be compensated in damages, the court declines to grant an order of stay at this stage.”

Aggrieved by the decision, the appellant lodged an appeal contending inter alia that the judge did not apply the correct test in declining to grant stay and that what was at stake

[^54^]: Civil Appeal 10 of 2007
was the need to maintain the status quo since the High Court had accepted the existence of a prima facie case and granted leave. The Court of Appeal, upon hearing the rival submissions reversed the decision of the High Court and ordered the leave granted to operate as stay and stated:

“….As the Rule itself provides, the application for leave is supposed to proceed ex-parte and in our view the Judge has no discretion to conduct this application on inter-parties basis. The order of stay is not automatic upon an order for leave to file judicial review proceedings being made. The Judge has to give specific direction on it. However, the learned Judge having found that the appellants had an arguable case, they being the registered proprietors of the parcel in dispute; that the developments made thereon run into several millions of shillings, we are convinced this is an appropriate case where an order of stay should have been granted along with that for leave. In effect the learned Judge’s own comment……..went a long way to support the appellants that they had an arguable case.”

Leave to operate as a stay can however not be granted when seeking orders of mandamus as mandamus issues to compel action on the part of an authority which has omitted to act or discharge its lawful duties. It logically follows that there is no action to be stayed pending hearing and determination of the application for mandamus.

2.7 CAN THE COURT DELIVER AN INJUNCTION ORDERING THE EXECUTIVE OR A PUBLIC AUTHORITY TO PRODUCE A DOCUMENT TO WHICH THE OTHER PARTY COULD NOT PREVIOUSLY HAVE ACCESS?

The courts may order discovery upon application and to the extent that the justice of the case demands. Where made, the order for discovery should be limited to documents relevant to the issue which emerges from the affidavits. The order for discovery is limited in judicial review applications because of the nature of the jurisdiction and will not be ordered to aid a mere fishing expedition
In *Inland Revenue Commissioners’ v National Federation of Self Employed and Small Businesses Ltd*\(^{55}\) it was held that:

“...It is, however, of great importance when discovery is sought by an applicant, as happened in this case. Upon general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty: and it should be limited strictly to documents relevant to the issue which emerges from the affidavits. The revenue in any event will have the right in respect of certain classes of document to plead "public interest immunity," of which in a proper case the court will be the arbiter: Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England [1980] A.C. 1090. In the present case, had the federation shown a sufficient interest, I doubt whether any legitimate objection could have been taken to discovery of documents relevant to the making of the special arrangement. Such documents would be unlikely to contain any information about the affairs of any Fleet Street casual who had succeeded by various devices in avoiding his identity being discovered by the searches of the revenue. But, be that as it may, discovery can safely be left to the discretion of the court guided by the law as I believe it to be.”

2.8 ARE THERE EMERGENCY OR INTERIM PROCEDURES? ARE THEY SIMPLY AIMED AT DELIVERING PRELIMINARY INJUNCTIONS (SUCH AS TEMPORARY RESTRAINING ORDER) OR AT TAKING PROVISIONAL

\(^{55}\) [1981] 2 WLR. 722
MEASURES OR CAN THEY ALSO RESOLVE A FUNDAMENTAL QUESTION?

In Kenya, Judicial Review remains exercisable only through the orders of mandamus, prohibition and certiorari. The only interim procedures available are seeking leave to act as a stay of the proceedings which is a discretionary order given by the court depending on the circumstances of the case. Civil remedies such as injunctions are not available in judicial review and a party seeking compensation for wrongs occasioned by a public body has to bring civil proceedings independent of the proceedings for judicial review.

3. THE POWERS OF THE ADMINISTRATIVE JUDGE

3.1 WHAT IS THE HIERARCHY OF LEGAL STANDARDS (CONSTITUTION, INTERNATIONAL LAW, STATUTES) THAT THE COURT TAKES INTO ACCOUNT WHEN CARRYING OUT REVIEW?

The sources of the Laws of Kenya are contained in section 3 of the Judicature Act (Chapter 8 Laws of Kenya) which provides as follows:

“(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—

(a) The Constitution;

(b) Subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the Statutes of general
application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date,

but the common law, doctrines of equity and Statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

The Constitution of the Republic of Kenya is the supreme law of the land. The Constitution takes precedence over all other forms of law, written and unwritten, Section 3 of the Constitution provides that if any other law is inconsistent with it, the constitution prevails, and the other law, to the extent of its inconsistency, is void. Many Acts of Parliament are made pursuant to particular provisions in the Constitution.

The doctrine of stare decisis as part of common law is applicable in Kenya. The superior courts of record are the High Court and Court of Appeal whose decisions are therefore binding on lower courts.

Though not listed in the Judicature Act, international law is a source of Kenyan law. The government is party to a number of international legal instruments and Kenyans can use these as an additional tool for the advancement of their rights. Previously, the position was that it only becomes enforceable in Kenya after it has been incorporated into our domestic legal system by implementing legislation.
However, recent Court of Appeal decisions have moved away from the above school of thought. In *Rono v Rono & another*\(^56\) the court examined the applicability of international laws in the domestic context and made the following and rendered itself thus:

“There has of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law. However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by State Courts where there is no conflict with existing state law, even in the absence of implementing legislation.”

3.2 WHEN THE EXECUTIVE OR A PUBLIC AUTHORITY GIVES ITS INTERPRETATION OF A STATUTE, CAN THE LAWFULNESS OF SUCH INTERPRETATION BE CHALLENGED IN COURT? IF SO ACCORDING TO WHICH CRITERIA? IS THE COURT BOUND BY POLICY DECISIONS OF THE EXECUTIVE OR PUBLIC AUTHORITY?

The Executive is the body in the State which is entrusted with the administrative functions of the government in accordance with the laws of the state. It initiates and frames public policies of governance, development, and security. It is charged with executing these policies in conformity with the laws and the Constitution.

The Judiciary is the organ of the Government which interprets, applies, and maintains the rule of law in the name of the Republic. The role of the judiciary is to interpret the law and apply it to the facts of each case. The lawfulness of interpretation of a statute

\(^{56}\) [2005] KLR 538, See also Kenya Airways Corporation Limited v Tobias Oganya Ouma & 5 others [2007] eKLR
can therefore be challenged in court under the court’s judicial review powers aforementioned.

In terms of policy decisions by the State, it was well elucidated by the court in *Republic v Registrar of Societies & 5 others ex parte Kenyatta & 6 others*\(^{57}\) where it was held that:

“The Executive and Parliament do have monopoly on issues of policy and a respectable interplay is encouraged in view of Parliament’s role in terms of acting as a check on any excess of the Executive and also in its watchdog role. Except where they are reviewable under the Court’s Judicial Review powers, Executive decisions and policies are within the province of the Executive and Parliament and not the province of the Courts, Commissions or Tribunals.”

In *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-parte George Saitoti*\(^{58}\) the court stated:

“We find that the fact that s 4 and s 12 of the National Assembly (Powers & Privileges Act) were made pursuant to s 57 of the Constitution is significant in that, it gives the two sections constitutional underpinnings in that the two sections reinforce the principle of separation of powers and therefore any finding which purports to encroach on a decision of Parliament which is made within its constitutional territory or mandate would also be unconstitutional and the courts and other judicial bodies should be, in the forefront of avoiding any possible constitutional conflicts in all their undertakings. Both the Executive and Parliament do have a monopoly on issues of Policy and a respectable interplay is encouraged in view of Parliament’s role in terms of acting as a check on any excess of the Executive and also in its watchdog role. Our view is that executive decisions and policies except where they are reviewable under the Judicial Review jurisdiction of the Court are in the province of the Executive and Parliament and not the province of the courts, not to mention the Commissions and tribunals.”

\(^{57}\) (2008) 3 KLR (EP)

\(^{58}\) Misc Civil Application 102 of 2006
3.3 IF THE EXECUTIVE GIVES ITS INTERPRETATION OF TREATY LAW, IS THE COURT BOUND BY SUCH INTERPRETATION?

According to the doctrine of separation of powers which has been incorporated in the Constitution, the court is responsible for the interpretation of the law. Therefore it is not subject to the interpretation by any other organ of government.

In the case of Peter Anyang’ Nyong’o & 10 Others Vs Attorney General & Another [2007] eKLR the East African Court of Justice was asked to rule whether the nomination of Kenyan members by the Executive to the East African Legislative Assembly was in accordance with the Treaty for the Establishment of the East African Community. It was held on applicants’ contention that bringing into force the amendments of EAC Treaty was contravening sections of the Constitution, that such a view would be against the grain of Article 27 of the Vienna Convention on the Law of Treaties which sets out a general principle of International Law that a State may not invoke a provision of its internal law as a justification for its failure to carry out an international obligation or responsibility. It held that Treaties are not stricto sensu “laws” in terms of the Constitutional and legislative process set out in the Constitution.

3.4 INsofar as discretionary measures are concerned, which type of review does the court exercise? Provide if possible, relevant case law to show how the court verifies the reasonableness of a decision of the executive or a public authority and checks whether the reasons are consistent with the substance of the decision.

Discretion is a right to act in certain circumstances and within given limits and principles on the basis of one’s judgment and conscience. 59 Judges are inclined to use

their discretion when a plea of breach of natural justice is used as the last resort of a claimant. The remedies that are available in judicial review cases – *certiorari*, prohibition, and *mandamus* – are discretionary. The court has power to withhold them as it thinks fit. An application for judicial review may be refused for waiver of or acquiescence in an excess of jurisdiction or breach of the rules of natural justice; or because the applicant has delayed unreasonably before instituting the proceedings; or where awarding the orders sought would serve no useful purpose.

The bulk of the actions that administrative authorities are empowered to do involve the exercise of discretion; decisions have to be made in the public interest based on policy.

The rules about judicial control of discretion fall into two classes. First, the discretion given by Parliament must be protected. It must be exercised by the proper authority only and not by an agent or delegate; it must be exercised without restraint and as the public interest may from time to time require. Secondly, discretion must not be abused.

In *Kenya National Examination Council v R ex parte G G Njoroge and others*60, the Court of Appeal held that Courts cannot issue orders to limit discretion, or to specify how the discretion is to be used.

*Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-parte George Saitoti*61 cited the English cases of *Edwards v Barstow* [1956] AC 14 and *R v Inland Revenue Commissioners exp. Preston* [1985] AC 835, 862F where it was held that “the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational. The Court is also entitled to intervene for error of law including absence of any material on which the decision could reasonably be reached.”

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60 Civil appeal number 266 of 1996
61 Misc Civil Application 102 of 2006
In *Republic v Judicial Service Commission* ex parte *Pareno* [2004] 1 KLR 203, the Judicial Service Commission notified the applicant, who then served as a resident magistrate, of a charge against him alleging the doctoring and alteration of court judgments. The applicant was given 14 days within which to show cause why disciplinary action should not be taken against him for gross misconduct. In his replying letter, the applicant conceded that he had acted mistakenly and that the incident to which the charge related had been occasioned by human error on his part.

The applicant’s response was forwarded to the Commission which, in its meeting made the decision to dismiss him from service for gross misconduct. The decision was communicated to him and he was advised that he had a right of appeal. The applicant then brought an application seeking an order of certiorari to remove the decision to dismiss him to the High Court and to quash it. The Court held that under the Wednesbury principle decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.

**3.5 IS THE COURT SIMPLY EMPOWERED TO QUASH (TO DECLARE NULL AND VOID) THE DECISION OR TO DISMISS THE LEGAL DEMAND? INSTEAD OF QUASHING THE DECISION, IS IT WITHIN THE AUTHORITY OF THE COURT TO AMEND OR MODIFY THE DECISION? CAN THE COURT SUBSTITUTE AN ENTIRELY NEW AND DIFFERENT DECISION? CAN THE COURT RECONSIDER THE MERITS OF THE DECISION?**

Judicial review is not an appeal from a decision, but an appraisal of the manner in which a decision is made. The court’s exclusive concern is with the legality of the
administrative action or decision in question. Thus, instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the court in an application for judicial review is concerned only with the question as to whether or not the action under attack is lawful and should be allowed to stand or be quashed.

In the previously cited case of *Rita Biwott v The Council for Legal Education*\(^{62}\) while appreciating the scope of the court’s jurisdiction in applications for judicial review, the judge stated as follows:

> “My power is not like that of an appellate authority to override the decision of the Council for Legal Education. Mine is that of directing my mind to the issue as to whether or not the Council for Legal Education has acted on the principles of natural justice and fairness in this particular matter, on the facts before it and in the circumstances prevailing at the material times.”

The reluctance of courts to intervene in the exercise of administrative discretion on merits is further affirmed in the decision of the Court of Appeal in the case of *Commissioner of Lands v Kunste Hotel Limited*\(^{63}\) in which the court stated:

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

In *R v Board of Post Graduate Studies, Kenyatta University ex parte Amarjit Singh*\(^{64}\), The High Court stressed that ‘an application by way of judicial review before the High Court is not intended to turn into an appellate one to deal with the merits of the issues before the inferior tribunal.’

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\(^{62}\) HCCC misc. application number 1122 of 1994

\(^{63}\) Civil appeal no. 234 of 1995

\(^{64}\) Misc. civil case 1400 of 1995
In *R v Chief Justice of Kenya and others ex parte Lady Justice Roselyn Naliaka Nambuye*⁶⁵, the applicant, a judge, filed a judicial review application to challenge the competence of a tribunal appointed under section 62 of the Kenyan Constitution to consider the question of her removal from office. She alleged the breach of her constitutional rights and challenged the decision of the tribunal on merits. The Court held inter alia:

“This cannot be a cause of action under judicial review because the judicial review jurisdiction does not avail to attack a decision given on merit by a tribunal. The remedy lies on appeal. The Court while exercising its judicial review jurisdiction does not sit on appeal...”

### 3.6 WHEN THE COURT QUASHES A DECISION TAKEN BY A PUBLIC AUTHORITY, DOES THIS TAKE EFFECT RETROACTIVELY WHEN THE ORIGINAL DECISION WAS MADE OR SIMPLY WHEN THE COURT RULES? DOES THE JUDGE HAVE POWER TO FIX THE TIME FROM WHICH THE ANNULMENT OPERATES? ON WHAT PRINCIPLES IS A DATE CHOSEN?

When issued, certiorari quashes a past decision or action. The order is thus issued when the body in question has disposed the matter and rendered a decision or taken action on the matter in issue. An application for certiorari is thus a challenge to the manner in which a decision has been arrived at. The nature of certiorari has been summarized in the case of *Captain Geoffrey Kujoga Murungi v Attorney General*⁶⁶ as follows:

Certiorari deals with decisions already made….Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice, or contrary to law. Thus an order of certiorari is not a restraining order.

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⁶⁵ Miscellaneous civil case number 764 of 2004
⁶⁶ Misc Civil Application No. 293 of 1993
The effect of the order of certiorari is to restore the status quo ante. Accordingly, when issued, an order certiorari restores the situation that existed before the decision quashed was made. The Court of Appeal expressed itself on this position in the case of *Central Organisations of Trade Unions (K) v Benjamin K Nzioka and others*\(^ {67}\) thus:

“….The quashing of the Registrar’s decision meant as we have already stated that the status quo that existed before the bad decision of the Registrar was made is revived and if there is any formal act that is required on the part of the registrar to bring this about, he should have done so at once, if he has not, then he must do so now or risk the censure of this court for contemptuous behavior.”

In other instances, the court may decline to issue an order of certiorari as the decision to be quashed would have already taken place. In *Salim Juma Onditi v Minister for Local Government & Others*\(^ {68}\) the court in declining to grant an order of certiorari stated:

“There is no doubt that this application has been overtaken by events in that the term of 5 years was served and lapsed in 2007 when general elections were held on 27\(^ {th} \) December 2007. There are now new councilors in office. The impugned decision contained in the gazette notice of 19\(^ {th} \) July 2006 numbers 5386 and 5381 would be quashed by certiorari for having been made ultravires the Local Government Act and the Minister having acted arbitrarily and in violation of rules of natural justice......... courts do not act in vain and if the court were to quash the said decisions it would be acting in vain. Judicial Review remedies are discretionary and the court may, decline to grant them even if deserved if they are not the most efficacious in the circumstances.”

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\(^ {67}\) Civil Appeal No 166 of 1993

\(^ {68}\) Misc. Appli. 422 of 2006
3.7 WHAT MEANS ARE AVAILABLE TO A JUDGE TO COMPEL THE ADMINISTRATION TO ENFORCE A DECISION WHICH THE EXECUTIVE DOES NOT WISH TO CARRY OUT?

After the court issues judicial review orders, it is usually difficult to ensure enforcement of the said orders against public bodies. This was noted in the case of Republic v Permanent Secretary Ministry of Water Resources Management & Development Ex-parte Akamba Timber & Hardware Ltd\(^\text{69}\) where Justice Onyancha stated:

“In my view this position has made the Government departments adopt an attitude of carelessness in the manner they conduct themselves particularly where they are defendants. What is more unsatisfactory, however, is the conduct of the Attorney-General’s office in relation to civil cases brought against the Government. More often than not, the Attorney-General’s office will not file appearance or defence. Where by “good luck” such appearance if filed, defence will rarely be filed. Where even by great good luck the defence is filed, there will be no appearance or representation during the hearing of the suit. The result is that a judgement will be entered against the Government. The battle will however be only starting since the government will ignore requests to settle the resultant decree. That is why I believe, decree holders have recently resorted to the use of the superior order of Mandamus to secure a settlement from the Government. This is a very unsatisfactory state of affairs in respect to the Attorney General’s office and may be a strong stand from the Attorney-General against the aforementioned negligence by his civil section officers may be necessary strongly called for. A different approach would be to remove protection against the government so that direct execution can proceed against it as it does against any other ordinary citizens.”

The Court can issue summons, notice to show cause or even a warrant of arrest for the alleged contemnor to be brought to court to answer contempt charges. It matters not that the contemnor is a senior government official or the lowest litigant, and it matters

\(^{69}\) Civil Misc Application 173 of 2004
not that the person is not a party to the present proceedings if his conduct or statement is likely to affect the due administration of justice generally.

In a recent case (HCCC NO. 1278 of 2004); the Chief Justice of Kenya summoned the Attorney-General to appear personally before him to explain why he had not attended court on a previous occasion whether by himself or representative despite having been served with a mention notice. The Attorney-General duly appeared in person together with counsel who should have appeared in court and the head of litigation department of the Attorney-General's Office and the issue of non-attendance was sorted out after the necessary purging of the contempt by profuse apology.

Alnashir Visram  
Judge of Appeal  
Court of Appeal  
Kenya  

12th January 2010

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70 Hon. Mr. Justice J E Gicheru, Independence of the Judiciary, Accountability and Contempt of Court