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From Prerogative Writs to Constitutional Safeguards: The Evolution of Judicial Review in Kenya

INTRODUCTION

Judicial review in Kenya exists at the intersection of its colonial roots and the transformative imperatives of the 2010 Constitution. Initially a restrained mechanism rooted in prerogative writs, Judicial Review has evolved into a constitutional safeguard under Article 47, ensuring fair administrative action. The Fair Administrative Action Act (FAAA) of 2015 and the Koome Rules of 2024 have advanced this transition by enhancing access to justice, yet traditional constraints—such as the requirement for leave and adherence to statutory remedies—persist. This paper examines the evolution of Judicial Review in Kenya, analysing the tension between established procedural norms and emerging constitutional principles. This paper explores whether this trajectory constitutes a definitive departure from historical practice or a complex interplay of continuity and change.

On 2nd December 2024, the High Court of Kenya dismissed Gichuhi & 2 others v Data Protection Commissioner at a preliminary stage. The applicants sought a mandamus order to compel the Data Protection Commissioner (DPC) to reconsider a dismissed data breach complaint, only to encounter a procedural barrier: the absence of leave to file and the improper choice of judicial review (JR) over a statutory appeal. Justice Ngaah deemed the application misconceived, upholding traditional procedural requirements over claims under Articles 47 and 50 of the Constitution. By contrast, on 28th January 2025, in Hassan alias Geeley v National Police Service & 2 others, Justice Aburili dismissed a leave-seeking application, citing the Fair Administrative Action Rules, 2024 (Koome Rules), which eliminate such a requirement, signalling a shift toward procedural reform.

Historical Context: The Colonial Foundations of Judicial Review

Judicial Review in Kenya originated as a colonial inheritance. Under the British legal system, courts employed prerogative writs—mandamus, certiorari, and prohibition—to oversee administrative actions, albeit with restraint. These instruments, characterized as rare jewels within an imperial framework, prioritized order over individual empowerment. Following independence in 1963, Kenya adopted this system through Order 53 of the Civil Procedure Rules, underpinned by the Law Reform Act (Cap. 26). While the terminology shifted from writs to orders, the underlying philosophy remained unchanged: judicial review was a limited supervisory tool rather than a robust mechanism for redress.

Sections 8 and 9 of the Law Reform Act formalized this approach. Section 8 bestowed the High Court with the Jurisdiction to issue judicial review orders, reflecting reforms in England under the Administration of Justice (Miscellaneous Provisions) Act, 1938, while section 9 imposed a mandatory leave requirement, to be issued within six months of the impugned action. This procedural threshold aimed to filter out unmeritorious claims, protecting judicial resources and administrative autonomy. In its early post-independence form, judicial review in Kenya acted as a gatekeeping mechanism—effective when invoked but often inaccessible for challenging executive overreach.

Constitutional Transformation: The 2010 Framework and Statutory Reforms

The promulgation of the Constitution of Kenya in 2010 marked a transformative

shift regarding institution of judicial review proceedings. Article 47 provided for the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair, changing judicial review from a discretionary remedy into a constitutional entitlement. Article 165(3)(d) conferred supervisory jurisdiction on the High Court over administrative bodies, while Article 23(3)(f) recognized judicial review as a remedy for violations of fundamental rights. This constitutional framework elevated judicial review to a vital pillar of accountability, moving away from its colonial constraints.

The Fair Administrative Action Act of 2015 operationalized this constitutional mandate. Enacted to give effect to Article 47, the FAAA broadened the scope of judicial review, allowing courts to assess the substantive reasonableness of administrative decisions, beyond mere procedural compliance. While section 9 required applications to be filed without unreasonable delay and after exhausting alternative remedies, it remained silent on the leave requirement. Section 12 as read with the provisions of Order 53 of the Civil Procedure Rules, preserved the common law principles, indicating a synthesis of tradition and reform rather than a complete rejection of previous practices.

Out with the Old in with the New: Fair Administrative Action Rules 2024(Martha Koome Rules)

The Fair Administrative Action Rules of 2024, dubbed as the Martha Koome Rules, have introduced more decisive reforms regarding Judicial Review in Kenya. While there is ongoing debate as to whether these Rules replace Order 53, there is still some scepticism as to the good these Rules intend to bring under the Judicial Review regime in Kenya. Championed by Chief Justice Martha Koome, the spirit behind the enactment of the Rules was for them to align with and operationalize the provisions of Article 47 imperative for accessible justice, representing a marked departure from historical gatekeeping. Nevertheless, as seen in judicial decisions from 2024 and 2025, the transition remains contested, with traditional norms continuing alongside reformist advances.

The New Order

The enactment of the Martha Koome Rules has brought with it some key procedural provisions to govern judicial review applications in Kenya. These include:

a) Notice of Intention to sue

Under the new FAA Rules 2024, an applicant seeking an order for Mandamus under Rule 5 must first issue a 7 days' Notice of Intention to sue to the Administrative body whose action the Applicant wants to compel. This notice, however, must be issued after the period upon which the administrative body is supposed to act but fails to do so.

b) Time Frame For Commencing Judicial Review Proceedings

Under Rule 6 of the FAA Rules 2024, an applicant seeking orders of Certiorari to quash administrative actions must commence the proceedings for review of the administrative action within six weeks from the date of the action. However, the Courts may extend this time here it is proved to the Court's satisfaction that the applicant was prevented, through fraud or misrepresentation, from getting to know of the administrative action or decision or could not, despite exercise of diligence, have known of the administrative action or decision sought to be quashed.

c) Jurisdiction

One of the key provisions of the FAA Rules 2024 is the requirement for any judicial review application to be instituted in the first instance in the court of the lowest grade competent to hear and determine the

application. This marks a clear shift from the provisions of Order 53 which only provided for institution of Judicial Review proceedings at the High Court or Courts of equal status.

d) Specific Forms and Pleadings

Rule 11 of FAA Rules 2024 provides that an application for judicial review shall be by way of an originating motion accompanied by a supporting affidavit. The claim shall: -

(a) set out the name and description of the applicant.

(b) state the relief sought and the grounds on which it is sought.

(c) contain a statement that internal mechanisms for appeal or review and any remedy available under any other written law have been exhausted.

(d) state the administrative action or decision complained of or the date it was taken.

(e) state the person who took the administrative action or decision.

(f) state the reason for the administrative action or decision, if any; and

(g) state the reason the applicant thinks the administrative action or decision was not in accordance with the Act.

Furthermore, the Rule provides that any claim for damages must be specifically pleaded in the Originating Summon.

e) Case Management and Alternative Dispute Resolution

Rule 19 provides that the courts shall set down the application for judicial review for case management conference with a view to determine all preliminary issues in the application within seven days of the filing of the replying affidavit. This is aimed at streamlining the judicial proceedings while minimizing delays to ensure efficient and quick resolution of the proceedings.

Additionally Rule 20 implores the Courts to make use of alternative dispute resolution mechanisms, albeit with the leave of the court and taking into account the circumstances of each case. This is meant to ensure efficient and cost-effective disposal of judicial review applications.

Case Studies: Judicial Review in Transition

1. Gichuhi: The Persistence of Traditional Constraints

In **Gichuhi & 2 others v Data Protection Commissioner [2024] KEHC 15107 (eKLR),** the High Court in deciding an application for judicial review upheld traditional procedural standards. The applicants, Allen Waiyaki Gichuhi, Charles Wambugu Wamae, and their firm, Wamae & Allen Advocates, sought judicial review to challenge the DPC's dismissal of a July 2023 complaint regarding the unauthorized disclosure of firm documents by former employees. Invoking Articles 47 (fair administrative action) and 50 (fair hearing), they filed a motion on 30 November 2023 without seeking leave, requesting an order of mandamus. Justice Ngaah dismissed the application as misconceived, citing the failure to obtain leave under Order 53 and the availability of an appeal mechanism under Section 64 of the Data Protection Act, 2019. The substantive issue regarding whether the DPC erred in deeming the firm's documents outside the scope of "personal data" under DPA section 2 remained unaddressed. As the filing predated the Koome Rules, traditional gatekeeping prevailed, with costs awarded against the applicants and their constitutional claims left unresolved.

2. Geeley and Amugune: The Ascendance of Reform

The judicial landscape has shifted remarkably in 2025, coinciding with the implementation of the Koome Rules. **In Hassan alias Geeley v National Police Service & 2 others (Judicial Review Application E015 of 2025) [2025] KEHC 457 (eKLR),** the Applicant, Abdi Hassan challenged a passport stop order imposed by the Department of Immigration Services at the direction of the Directorate of Criminal Investigations (DCI), with the National Police Service (NPS) also named as a respondent. Filing a Chamber Summons on 27 January 2025 under a certificate of urgency, he sought leave to apply for certiorari, mandamus, and prohibition, alleging a violation of Article 47. Justice Aburili dismissed the application, stating: "Pursuant to the 2024 Fair Administrative Action Rules…the requirement for leave…is inapplicable." The Koome Rules require filing an originating motion, with requests for interim relief included in the originating motion and filed alongside a certificate of urgency where necessary. The applicant was directed to refile appropriately, with no costs awarded. Although the substantive issue remained unresolved, the ruling highlighted the elimination of traditional procedural barriers under the new framework.

Similarly, in **Amugune v Advocates Disciplinary Tribunal & another (Judicial Review E220 of 2024) [2025] KEHC 805 (eKLR),** the ascent of reform is further illustrated with procedural nuances. Billy Amendi Amugune sought judicial review against the Advocates Disciplinary Tribunal and the Chief Officer, Finance, Nairobi County Government, likely contesting a disciplinary sanction related to county financial dealings. On 29 January 2025, he amended a Notice of Motion and subsequently withdrew it orally, seeking a stay and leave to proceed under the FAAA and Koome Rules. Justice Aburili ruled: "No leave…is necessary…applicant to study the provisions of the Fair Administrative Action Act and Rules." With the motion withdrawn, no proceedings supported the stay request, resulting in the closure of the file, with each party bearing its costs. While the Koome Rules facilitated access to the court, the applicant's failure to adhere to the prescribed procedure prevented a hearing on the merits, underscoring the necessity of procedural compliance within the new system.

Analysis of the Tension: Gatekeeping versus Accessibility

The requirement for leave represents a core point of contention. In *Gichuhi*, the courts upheld Order 53's gatekeeping function, with Justice Ngaah invoking the need to filter out busybodies. In contrast, Geeley and Amugune reflect the Koome Rules' abolition of the leave requirement, with Justice Aburili emphasizing accessibility: "the requirement for leave…is inapplicable" and "no leave…is necessary." The directive in Amugune to refile introduces a caveat—while access is enhanced, adherence to the Rules' procedural framework remains essential.

The Koome Rules symbolize a significant advancement in the judicial review landscape. Geeley's dismissal of the leave requirement on 28 January 2025 and Amugune's procedural guidance on 3 February 2025 underscore the momentum of reform—eliminating traditional barriers and prioritizing access to justice. However, Amugune's requirement for refiling illustrates a persistent need for procedural rigor within the new framework.

CONCLUSION

Judicial review in Kenya reflects a dual heritage—a colonial framework overlaid with constitutional imperatives. The dismissal in *Gichuhi* of 2024 upheld traditional gatekeeping, while Geeley and Amugune in 2025 signify the ascendancy of reform, driven by the Koome Rules' elimination of leave and emphasis on accessibility. While gatekeeping serves to preserve judicial efficiency, reform fulfils the constitutional promise of justice (Article 48)—both principles remain relevant. The current balance favours reform, yet procedural discipline endures as a prerequisite. Kenya's judicial review process navigates a dynamic path—neither a complete rupture from its past nor a static compromise, but an evolving synthesis responsive to contemporary demands.

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