REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E101 OF 2025

TOLUWALASE AMONDI……...APPLICANT

VERSUS

AIRTEL NETWORKS KENYA LIMITED……...1ST RESPONDENT ERICK NJURI, REGULATORY MANAGER,

AIRTEL NETWORKS KENYA…….2ND RESPONDENT

DIRECTOR GENERAL,

COMMUNICATIONS AUTHORITY OF KENYA.....3RD RESPONDENT

DATA PROTECTION COMMISSIONER……...4TH RESPONDENT

SHARON KINYA KITHINJI…….5TH RESPONDENT

AND

CENTRAL BANK OF KENYA……INTERESTED PARTY

RULING

1. As I write this ruling, I am mindful of the solemn duty that rests upon the shoulders of every Judge or Judicial Officer. Even in matters that may appear

straightforward on their face, the task of adjudication is rarely without difficulty, for every ruling inevitably appears to favor one side over the other and may bring disappointment to a party who, in good faith or out of ignorance, believed in the merit of their case.

2. In line with the above statement, this Court is confronted with a peculiar turn of events. A party, having filed pleadings that were incomprehensible and devoid of clarity, had those pleadings struck out by the Court with directions issued for the filing of proper and coherent pleadings. Rather than complying with the Court's directive, the party has responded with an unusual and wholly unmerited request: that the Court first set aside its order striking out the initial incomprehensible pleadings and thereafter recuse itself from the matter altogether.
3. Such conduct borders on the astonishing. The Court must emphasize that its jurisdiction cannot be invoked whimsically, nor can judicial orders be set aside merely at the displeasure of a litigant who fails or refuses to adhere to procedural propriety. The administration of justice demands both respect for the process and responsibility in its engagement.
4. The applicant herein filed the Notice of Motion dated 9th May, 2025 seeking, orders that the Court reverses and sets aside the ruling delivered ex parte on 30th April 2025 by this court, which declined leave to commence judicial review

proceedings; That the applicant's earlier application dated 24th April, 2025 be reinstated and heard afresh before another judge; That interim injunctive reliefs be issued restraining the 1st ,2nd,3rd and 5th respondents, any of their agents, staff or representatives, from taking any adverse actions, and restoring the applicant's SIM card access and mobile money account pending hearing; That costs be awarded against the 1st and 2nd respondents who have failed to enter court appearance despite electronic service.

5. The application is brought under a broad range of constitutional and statutory provisions, including Articles 47 and 50 of the Constitution, Sections 4, 9, 10 and 11 of the Fair Administrative Action Act, the High Court (Organization and Administration) Act, and Order 10 Rule 11 of the Civil Procedure Rules.
6. The applicant contends that the ruling of 30th April 2025 was irregular, unconstitutional and procedurally unfair. He avers that the ruling was rendered without due notice to him and without affording him an opportunity to be heard. He alleges that the Judge made unsubstantiated findings including that his pleadings were jumbled and lacked a clear cause of action without the benefit of hearing from the parties.
7. He invokes various principles of fair hearing, judicial impartiality and the constitutional imperative that justice shall be administered without undue regard to technicalities. He further cites the decision in **Dande & 3 others v Inspector**

General, National Police Service & 5 others [2023] KESC 40 (KLR) to support his view that judicial review is a constitutional remedy warranting a substantive and merits-based hearing.

8. The 1st respondent raised a preliminary objection dated 11th June 2025, challenging the competence of the application. They argue, first, that the application is fatally defective for not being supported by an affidavit and for also being premised on the wrong provisions of law. The 1st respondent also argues that once the Court declined leave to apply for judicial review, it became functus officio and therefore lacks jurisdiction to entertain a fresh application seeking to revisit that decision.
9. The preliminary objection also raises other grounds that the application is an omnibus application that lacks clarity, cohesion and shall only cause confusion which is against public policy and established principles of law. Further, that in any case the application dated 24th April 2025, is irredeemably defective noting that the affidavit verifying the facts does not comply with the provisions of Section 5 (Particulars to be Stated in Jurat or Attestation Clause) of the Oaths and Statutory Declarations Act Cap. 15 because it has been sworn in Nairobi yet commissioned in Lagos, Nigeria.
10. The application was canvassed by way of oral highlights made before the court on 12th June 2025.

11. During the oral hearing Mr. Toluwalase, the applicant submitted that the 1st respondent's preliminary objection ought to be dismissed as it did not disclose an accompanying affidavit neither did it have any annexures. It was also his submission that the said preliminary objection was filed late and that it does not have a witness statement accompanying it or any authority challenging his judicial authorities. Further, that the preliminary objection does not disclose any points of law. He relied on the case of **Kabuthia & 10 others vs. Karanja CA 370/2019 [2025] eKLR**.

12. In her submissions Ms. Omamo, advocate for the 1st respondent stated that they were served with the application on 30th May 2025. She also urged that the prayers sought in the application are disjointed as on the one part they seek recusal of the court from the matter while on the other hand the applicant seeks setting aside of the ex parte orders striking out the jumbled-up application.

13. In his rejoinder, the applicant submitted that it was his right to request for an independent review because it is the same Judge that heard and dismissed his application.

Analysis and Determination

14. I have considered the application, preliminary objection and oral submissions by counsel and the issue for determination is whether or not the applicant has made a case for the grant of the orders sought.

15. Under Order 51 Rule 14(1) of the Civil Procedure Rules, a party who wishes to oppose an application may do so by filing a notice of preliminary objection, a replying affidavit, grounds of opposition, or any combination thereof. In this case, the 1st respondent opted to respond solely through a preliminary objection, which is a well-established legal mechanism for raising pure points of law. As affirmed in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696,** a preliminary objection is properly taken when it raises a point of law capable of disposing of the application without recourse to evidence or the exercise of discretion.

16. Contrary to suggestions made by the applicant, there is no requirement under the law that a preliminary objection must be accompanied by an affidavit, witness statement, legal authorities or any form of evidential material**.** A preliminary objection stands on its own, precisely because it must raise a pure point of law**,** which is to be determined without reference to disputed facts or extraneous materials**.**

17. As reiterated in **Mukisa Biscuit** case and followed consistently in Kenyan jurisprudence, the moment a court is called upon to evaluate facts or exercise discretion, the matter ceases to be a preliminary objection. The 1st respondent is therefore well within its legal right to raise the objection without filing any affidavit or supporting documents.

18. The principles governing preliminary objections were restated in the landmark case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, where Law JA held that:

> ***"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***
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> ***Sir Charles Newbold P added that:***
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> ***"The first matter that a court has to consider is whether what is before it is a preliminary objection as understood in law. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

19. A valid preliminary objection must therefore raise a pure point of law, not require resolution of contested facts, and must be capable of disposing of the matter if upheld.

20. In applying these principles to the present case, the Court finds that three of the grounds raised by the 1st respondent meet the threshold of a valid preliminary objection and these are that the application is premised on the wrong provisions of law, namely Order 10 Rule 11, which applies to setting aside of judgments that have been entered as a consequence of non-appearance, default of defence and failure to serve; that the Court became functus officio upon declining leave on 30th April 2025, and therefore cannot revisit that decision absent a proper application for review and finally that the application is not supported by a sworn affidavit, despite raising factual allegations, in contravention of Order 51 Rule 4 of the Civil Procedure Rules.

21. All three are pure points of law which can be determined without recourse to evidence and are capable of disposing of the application in limine. The remaining objections such as form, clarity, and omnibus prayers do not meet the threshold and are best addressed in a substantive response, if necessary.

22. The doctrine of functus officio is well established. A court becomes functus officio when it has rendered a final decision and has no further jurisdiction over the matter except as expressly permitted by law. In judicial review proceedings, the process is two-tiered: leave must first be granted before a substantive motion can be filed. Where the court declines to grant leave, there is no pending

suit and the matter concludes at that stage unless a valid application for review is brought.

23. A perusal of the present application confirms that it is not brought under the correct legal framework governing review. The applicant does not invoke Section 80 of the Civil Procedure Act or Order 45 Rule 1 of the Civil Procedure Rules. Further, the application does not satisfy the threshold for review namely, discovery of new and important evidence, or an error apparent on the face of the record. Instead, the applicant reargues the merits of the leave application and alleges bias, irregularity, and procedural unfairness. These are issues more appropriately raised on appeal**,** not on review.

24. Again, the application is not supported by a sworn affidavit as required by Order 51 Rule 4 of the Civil Procedure Rules. To the extent that it makes factual assertions including the alleged denial of notice, irregular service, and judicial impropriety, those allegations must be deposed on oath. The absence of a supporting affidavit renders the application further incompetent.

25. The upshot is that the Court agrees with the 1st respondent that the application dated 9th May 2025 is incompetent and misconceived**.** In addition, indeed, this e Court became functus officio upon delivery of the ruling on 30th April 2025, and the present application, which is improperly framed and grounded on inapplicable provisions of the law, cannot revive or re-open that decision.

26. I will therefore not bother to discuss the affidavit which was notarized in Lagos Nigeria and said to be sworn in Nairobi as that is another issue altogether that touches on the application for leave and its competence which this court already pronounced itself on, to be incomprehensible.

27. This Court reiterates that the doors of justice are never closed to those who genuinely seek it. The striking out of the application dated 24th April, 2025 does not amount to a denial of justice, but rather serves as a procedural safeguard, intended to preserve the integrity of the Court's processes. It affords the applicant an opportunity to return to the drawing board, reflect, conduct proper legal research and present an application that complies with the requirements of the law.

28. This principle is well grounded in judicial precedent, which recognizes that striking out is not necessarily fatal to a party's case, particularly where the defect is procedural and capable of being cured through due diligence and proper presentation. (See the principle espoused in **Microsoft Corp. v. Mitsumi Computer Garage Ltd [2001] 2 EA 460 and PETER KIPYEGON KIRUI v AGRICULTURAL DEV. CO-OPERATION & 2 OTHERS [2007] eKLR, CHRISTOPHER MICHAEL STRONG VS. MWANGI MWANIKI GITONGA, ELDORET HCCC NO. 259 OF 2000 (unreported); and JOVENNA EAST AFRICA LTD VS. SYLVESTER ONYANGO & 4**

OTHERS, MILIMANI, HCCC NO. 1086 OF 2002, in which the court did allow the plaintiff to file a fresh verifying affidavit, to replace those that were defective. In other words, where an application is struck out for being incompetent, nothing prevents the applicant from filing a competent application for consideration on merit.

29. Furthermore, leave to commence judicial review proceedings is a procedural and jurisdictional threshold. The purpose is to filter out frivolous, hopeless or unmeritorious claims before respondents are burdened with defending full judicial review proceedings.

30. As emphasized in **Republic v Chief Magistrate's Court Nairobi & Another Ex Parte Jorum Mwenda [2005] eKLR,** the leave stage is not merely a formality. The application for leave is a substantive step intended to weed out unmeritorious claims and if the judge is not satisfied that a prima facie case exists, he is entitled to refuse leave.

31. The requirement for leave exists to prevent abuse of court process and unnecessary proceedings. The Court, upon examining the pleadings and material presented by the Applicant, formed the view that the application was incoherent and did not disclose an arguable case and properly exercised its discretion to strike it out.

32. The Applicant has not placed before this Court any material to suggest that the order striking out the application for leave to apply was made per incuriam, irregularly, or in abuse of discretion. Rather, what the Applicant seeks is an invitation to reconsider the same material, which this Court is not permitted to do in the guise of a setting-aside application.

33. The exercise of discretion to grant or deny leave under Order 53 of the Civil procedure Rules is final at the leave stage and unless appealed or raised during the hearing of the substantive motion, the proper avenue is not review or setting aside. Where leave is declined due to want of procedural propriety, the remedy lies in bringing a fresh properly framed application where the limitation period permits, rather than in setting aside or review.

34. I a m fortified by not only Kenyan decisions on this point but world over, the purpose for leave to apply in judicial review proceedings has been discussed. The reasons underlying the need for leave were well-explained in **Republic Versus County Council of Kwale & Another Ex-parte Kondo & 57 others, Mombasa HCMCA No. 384 of 1996**, as cited in **Republic Versus Anti-corruption Commission & Another; Mike Mbuvi Sonko & another (Interested Parties) Ex parte Paul Ndonye Musyimi (2020) eKLR,** as follows:

"The purpose of application for leave to apply judicial review is firstly to eliminate at an early stage any applications for JR which are frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial review of it were actually pending even though misconceived."

35. The Court upon hearing an application for leave will determine whether there exists an arguable case or not and will proceed to deny leave where an arguable case has not been demonstrated. The requirement that leave be sought was intended to act as a sieve to ensure undeserving cases were not brought to Court and as it were to ensure the court process is not abused by parties filing frivolous suits thus impeding instead of enhancing access to justice.

36. For avoidance of doubt, whereas leave is not a requirement where an application is brought strictly under the Fair Administrative Action Act, where leave is sought as was in this case under Order 53 of the Civil Procedure Rules,

then in addition, the application must be coherent and arguable in terms of what the applicant is seeking before the court should such leave be granted.

37. In the dicta of Lord Diplock in **R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd [1982] AC 617, 642-643,** the purpose for leave was stated as follows:

> ***"Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."***

38. The same position was stated in the dicta of Lord Donaldson MR in **R v Secretary of State for the Home Department, ex parte Cheblak [1991] 1 WLR 890, 898** to the effect that:

> ***"The requirement that leave be obtained before a substantive application can be made for relief by way of judicial review is designed to operate as a filter to exclude cases which are unarguable."***

39. The Purpose of the leave stage for a party who elects to approach the Court under order 53 and not the Fair Administrative Action Act where leave is not necessary, is thus to effectively provide a mechanism for weeding out claims which are frivolous, vexatious or of no arguable substance at an early and generally ex parte stage of the proceedings.

40. In **G v Director of Public Prosecutions [1994] 1 IR 374, 382,** Denham J spoke about the aim of the leave stage as being ***"to effect a screening process of litigation against public authorities and officers" and "to prevent an abuse of the process, trivial or unstateable cases proceeding and thus impeding public authorities unnecessarily".***

41. A similar point was made by Kelly J in **O'Leary v Minister for Transport, Energy and Communications [2000] 1 ILRM 391, 397** where he stated that: ***"the judicial review procedure is designed so as to ensure that cases which are frivolous, vexatious or of no substance cannot be begun, hence the necessity for judicial screening at the stage when leave is sought".***

42. This Court finds that the original decision was a proper exercise of judicial discretion based on the material before it and that no grounds have been established to warrant review or setting it aside.

43. The path forward lies with the applicant. He may persist in motions that yield little or no progress, noting that this court is not a party to his oscillations and

will not be moved into the arena of the dispute or choose instead to meaningfully engage the judicial process by presenting a competent application for consideration on its merit, with or without leave of court, noting that the Fair administrative Action Act, 2015 and the 2024 Rules made under the Act now freely provides for filing of originating motions directly without first seeking leave to apply for judicial review applications. Justice remains accessible to all who approach this Court with diligence, respect for procedure and a genuine intent to be heard.

44. Accordingly, the application dated 9th May 2025 is found to be without merit and competence and the same is hereby dismissed.

45. Each party to bear their own costs of these proceedings.

46. It is so ordered.

Dated, Signed and Delivered virtually at Nairobi this 11th Day of August 2025

R.E ABURILI
JUDGE