



Odago & 13 others v Registeretd Trustees of the Anglican Church of Kenya, Diocese of Maseno East Parish & another; Oyare & 15 others (Interested Parties) (Judicial Review Application 44 of 2023) [2024] KEHC 15270 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW APPLICATION 44 OF 2023
RE ABURILI, J
NOVEMBER 28, 2024**

BETWEEN

- TOM ODAGO 1ST APPLICANT**
- MESHACK JAMASAI ONYANGO 2ND APPLICANT**
- ERICK OKEYO 3RD APPLICANT**
- CHARLES DICKENS OKOTH 4TH APPLICANT**
- NEHEMIAH ANYANGE ONYANGO 5TH APPLICANT**
- SIMEON ONYANGO 6TH APPLICANT**
- JOHN AGO 7TH APPLICANT**
- LEONARD AMOYO 8TH APPLICANT**
- GEORGE ODHIAMBO 9TH APPLICANT**
- CAROLYNE JUMA 10TH APPLICANT**
- GORDON NGESO 11TH APPLICANT**
- CAROLYNE OPIYO 12TH APPLICANT**
- WASHINGTON OROWO 13TH APPLICANT**
- ABSOLOM AORO 14TH APPLICANT**

AND

- THE REGISTERETD TRUSTEES OF THE ANGLICAN CHURCH OF KENYA,
DIOCESE OF MASENO EAST PARISH 1ST RESPONDENT**
- RT REV BISHOP JOSHUA OWITI OUMA 2ND RESPONDENT**



AND

THE VEN NICHOLAS OTIENO OYARE	INTERESTED PARTY
LAY CANON REUBEN K ODHIAMBO	INTERESTED PARTY
THE REV BEENARD OTIENO OWUOR	INTERESTED PARTY
LAY CANON GORDON NJANYONG'	INTERESTED PARTY
THE REV APOLLO OKATCH KIRIKO	INTERESTED PARTY
THE REV MALACHI O NYAWARA	INTERESTED PARTY
THE REV ZEPHANIAH OKELLO	INTERESTED PARTY
THE REV NICHOLAS OMONDI ODIEMBO	INTERESTED PARTY
THE REV EVELYNE OBIMBO	INTERESTED PARTY
THE REV LEONARD ODHIAMBO OJWANG	INTERESTED PARTY
ELIZABETH OTIENO	INTERESTED PARTY
DOROTHY ONYANGO BONYO	INTERESTED PARTY
FREDRICK AKELLO OWITI	INTERESTED PARTY
MARGARET NYAMUOK	INTERESTED PARTY
JOSEPH OTIENO MUGA	INTERESTED PARTY
WILLIAM OPIYO ONDORO	INTERESTED PARTY

JUDGMENT

Introduction

1. This Judgment determines the substantive Notice of Motion application dated 27th November 2023 in which the applicants sought the following orders:
 - a. That orders of declaration that the respondent's unilateral and arbitrary decision through the 2nd respondent to proceed with the elections of the Standing Committee of the Synod Members on 24th August 2023 in the 3rd ordinary session of the Synod is unlawful, illegal, unreasonable, biased, violates natural justice, the rule of law, the right to fair administrative action, Section 5 of the *Judicature Act* and Articles 38 (2) & 38 (3) (b) & (c), 47 and 81(e) of *the Constitution* of Kenya.
 - b. That orders of certiorari to call, remove, deliver up to this honourable court and quash the outcome of elections of the Standing Committee of the Synod Members held on the 24th August 2023 by show of hands voting during the 3rd ordinary session of the synod.
 - c. That orders of prohibition to restrain the 1st to 16th interested parties from dealing with matters of the church and making decisions by virtue of the elections held on the 24th August 2023 by show of hands voting during the 3rd ordinary session of the synod.
 - d. That order of mandamus directing the respondents to conduct fresh elections of the standing committee of the synod members by secret ballot.



- e. That this honourable court do grant any other or further relief that it may deem fit to grant including but not limited to exemption under section 9 (4) of the Fair Administrative Actions Act.
 - f. That the costs of this application be provided for.
2. The application was based on the grounds set out in the statutory statement as well as the Verifying Affidavit of Eric Okeyo dated 24th November 2023.
 3. It was the applicants' case that on the 23rd and 24th August 2023 the respondent convened its 3rd ordinary session of the Diocesan Synod Meeting whereof on 24th August 2023, the 1st respondent through the 2nd respondent superintended the election of the Standing Committee of the Synod members by Show of Hands Voting instead of Secret Ballot which the Ex-Parte Applicants had legitimate expectation would be used in line with good corporate governance and the principles of free and fair elections.
 4. The applicants averred that the 2nd respondent's decision was made on the floor and as such was unilateral, arbitral, irrational and unreasonable and further that the 2nd respondent abused his discretion in the process and failed to observe rules of fairness as he openly exercised coercion, improper influence, open intimidation, corruption, favouritism and manipulation with a view of disadvantaging some contestants in order to attain a predetermined outcome of ensuring that those he supported were elected thus the election was illegal as it promoted his personal interests.
 5. The applicants averred that they and other members of the Synod protested the 2nd respondent's decision to conduct election by Show of Hands but the interested party was adamant and refused to follow the legitimately expected procedure of voting by secret ballot.
 6. The applicants further averred that the Provincial Director of the Mission had made legal proposals on the best method to conduct church elections due to the complaints of manipulation among which included voting by secret ballot.
 7. The Respondents vide a Replying Affidavit dated 20th September, 2024 denied and controverted the allegations by the Applicants in the suit and stated that due process and procedures of conduct of Synod elections were followed in accordance with the provisions of Anglican Church Maseno East Constitution and as reflected in the Minutes recorded in the Minutes 3rd Ordinary Session of the Diocesan Synod Meeting at St Peters Cathedral from 23rd to 24th August, 2023.
 8. The substantive Motion was canvassed by way of written submissions.

The Applicants' Submissions

9. The Applicants submitted that the decision to proceed in Voting by Show of Hands was not notified to the members prior and neither were they notified that they will be a choice between the two voting methods during the voting day but was only decided arbitrarily and unilaterally by the 2nd Respondent, the then bishop of the 1st Respondent.
10. It was submitted that the decision was not as a result of agreement by or choice of parties but the arbitral and unilateral decision of one person, the 2nd Respondent and that there was no good reason in the current times for elections to be conducted by Show of Hands when it can be done via secret ballot. Reliance was placed on the case of [*Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006*](#), where it was held that in the absence of a rational explanation, one must conclude that the decision challenged can



- only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.
11. The Applicants submitted that 2nd Respondent abused his discretion and powers as the head of the 1st Respondent and the fact that he did not inform the members earlier that there was a choice and given them an opportunity to choose to avoid the adverse action being made without their participation of knowledge resulted in the said decision being contrary to Article 47 of the Constitution thus procedurally unfair. The applicants relied on the case of *Mutiva v County Government of Nyeri* (Judicial Review E002 of 2023) [2024] KEHC 10104 (KLR) (8 August 2024) (Judgment) where it was held that in a case where a person's rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action”
 12. The Applicants denied that there was any vote before the decision to proceed by way of Show Hands or that they were told beforehand of such a decision to be made, therefore their right under Article 47 of the Constitution and Section 4 of the Fair Administrative Action Act was violated and should be corrected by this Court by allowing the orders sought.
 13. The applicants submitted that they had a legitimate expectation that the Respondents will apply voting by secret ballot in order to protect the integrity of the process in line with good corporate governance which applies to all self-respecting bodies and pursuant to Article 38(3)(b) and 81(e) of the Constitution which guides all elections in Kenya including by private bodies since what is stated in the foregoing constitutional provisions is the bare minimum that will guarantee free and fair elections. As such the decision suffered from irrationality and thus subject to judicial review-it was a decision that was in defiance of logic and acceptable moral standards.
 14. It was submitted that while the Respondents argue that judicial review does not deal with merits, the Constitution has expanded the scope of judicial review as was held in the case of *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board* [2016] eKLR, *Saisi & 7 others v Director of Public Prosecutions & 2 others* (Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment).
 15. The Applicants submitted that Voting by Show of Hands is not only archaic but backward and cannot be allowed to stand as a voting method as it is open to abuse and manipulation which is averse to a just and fair society and further that it does not promote good governance of the church nor its growth in line with good practices in elections especially in view of the Concept and Proposals prepared by Rev John Mark Owuor which admits that the method of Voting Show of Hands has been problematic to the church to the point where disputes are referred to Court and instead proposes that voting be done by Secret Ballot.
 16. The Applicants submitted that the 2nd Respondent abused his powers and discretion out of malice and improper motives and that members-Charles Dickens Okoth, Hezborn Odongo and Charles Odida Owuor among others protested the decision as it was illegal, unlawful and meant to influence the outcome of the election as members were afraid to be seen voting against the 2nd Respondent's candidate.
 17. It was submitted that the Respondents impugned actions violated the Applicants right to administrative action that is fair, reasonable, lawful, legal and justified based on human dignity, equality, freedom and compliant with the Fair Administrative Action Act and the Constitution of Kenya and the Anglican Church of Kenya Diocese of Maseno East Constitution (adopted on 9th April 2018) and Anglican Church of Kenya (adopted on 14.12.2022) for the reason that the unilateral and



arbitrary decision by the 2nd Respondent caused schism and brought the church to disrepute contrary to CANON XIV(1)(b) and (k) of the Anglican Church of Kenya Diocese of Maseno East Constitution (adopted on 9th April 2018).

18. The applicants submitted that since the Synod was elected illegally and unlawfully, it is fair and just that an order of prohibition be issued to stop the Synod from discharging any duty on behalf of the church and further that the orders sought herein be granted.
19. It was submitted that the Respondents have argued that the 1st Respondent's decisions cannot be questioned and corrected by way of judicial review by this Court because it is a private body but this is against Section 3 (1) of the Fair Administrative Action Act, Article 3, 38(3)(b) and 81(e) of the Constitution.
20. It was submitted that the issue of the exhaustion doctrine or rather exhaustion of internal remedies is res judicata having been raised in their preliminary objection dated 28.03.2024 and the same dismissed vide the ruling of the Court of 14th June 2024 and as such the argument cannot be raised again at this juncture and should be rejected by the Court.
21. It was submitted that the purported internal dispute resolution mechanism are unavailable, ineffective and inadequate as regards the resolution of the dispute herein as brought by the church members against their bishop thus making this suit within the confines exceptional circumstance that will exempt the Applicants from exhausting the purported internal dispute resolution mechanisms as detailed in the case of Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura [2019] eKLR.

The Respondents' Submissions

22. It was submitted that on prima facie analysis of the Applicant's pleadings, the subject matter of the suit does not relate to any political rights as it relates to the internal elections within the Anglican Church Maseno East Diocese and not the leadership or administration of government or a public office that are covered under Article 38 of the Constitution as read with Article 81.
23. The respondents submitted that Articles 38(2) and 38, (3)(b) and 81(e) only relate to elections on political parties and for political parties and cannot be used to refer to the elections of an organized religious society as in this case the Anglican Church Maseno East Diocese. It is therefore without a doubt that the Applicants have invoked the wrong provisions of the law.
24. It was further submitted that it is not enough to invoke and quote constitutional provisions and allege violation without substantiating the alleged violation as was held in the case of East Africa Pentecostal Churches Registered Trustees & 1754 others vs Samwel Muguna Henry & 4 Others [2015] eKLR. The respondents thus submitted that that parties are bound by their pleadings and the provisions of the Statute as quoted in their pleadings.
25. It was further submitted that Section 9 of the Fair Administrative Actions Act prohibits the High Court or a Subordinate Court from review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted unless exceptional circumstances are demonstrated. Reliance was placed in the Court of Appeal case of Capital Markets Authority vs Ciano & Another (Civil Appeal 314 of 2018) [2023] KECA 581 (KLR) (26 May 2023) (Judgment).
26. It was submitted that the Anglican Church Maseno East Diocese a registered society, a private institution that has its internal regulations and rules envisaged in its own Constitution and as such the suit herein is misconceived and ought to be dismissed.



27. The respondents submitted that the Judicial Review process focuses on the process of decision making as opposed to merits of the outcome of a decision by an administrative process as was held in the case of *Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001*.
28. It was submitted that the applicants' allusion to the unilateral and arbitral decision on the method of voting employed and chosen by the Respondents were mere allegations that have not been proven or substantiated and to which no evidence has been tabled before this Honourable Court whereas on the Contrary, the Respondents had demonstrated in their Replying Affidavit that the decision on the voting method was indubitable truth and that members of the Synod Committee did propose two alternative methods of voting namely; secret ballot and a show of hands during the said meeting.
29. The respondents further submitted that they tabled evidence through its minutes that one the Mr. Patrick Olango proposed the voting by a secret ballot and was seconded by Mr. Charles Odida while Rev. Apolo Kiriko proposed the voting by a show of hands and was seconded by Lay Canon Judith Ogoto after which members of the Synod were invited to vote on the two modes of voting and 52 members supported the proposal of voting by a show of hands while 38 of the members supported the voting by secret ballot.
30. It was submitted that the 2nd Respondent was barred from participating in any of the votes unless there was a tie and would therefore only vote as a tie breaker and as such the Applicants allegations as against the 2nd Respondent of coercion, improper influence, open intimidation, corruption and manipulation to attain predetermined outcomes to disadvantaging some contestants were unsubstantiated and do not reflect an accurate record of the conduct of the 3rd Ordinary Session of the Synod Meeting.
31. It was submitted that all disputes arising from the meeting were properly captured in the Minutes, including that of one Lay Canon Erick Okeyo who stepped down from the election and vowed to challenge the election in the court process.
32. It was submitted that the conduct of the Elections of Members of the Synod at the 3rd Ordinary Session of the Synod Meeting was procedural and in accordance with *the Constitution* of the Anglican Church of Kenya Maseno East Diocese and as reflected in the Minutes recorded in the Minutes 3rd Ordinary Session of the Diocesan Synod Meeting at St Peters Cathedral from 23rd to 24th August 2023.
33. The respondent submitted that the Anglican Church of Kenya Maseno East Diocese Constitution contemplates situations where a dispute arises within the Church and provides for ways of ventilating and addressing disputes internally before the same can be escalated to the courts to which the Applicants herein blatantly ignored and or refused to take up. Reliance was placed in the case of the case of *Nzioki v Machakos Regional Church Council- AIC Kenya & 4 Others* (Constitutional Petition E001 of 2023) [2023] KEHC 25651 (KLR) where the courts keen eye and in its impeccable wisdom separated the wheat from chaff and uncovered what constituted internal wrangles in a church and legitimate cause of action in judicial review.
34. It was submitted that the suit lacks merit for reasons that it failed to meet the threshold for judicial review proceedings as was set out in the case of *Republic vs Law Society of Kenya Disciplinary Tribunal and Another Exparte Muema Kituli* [2018] eKLR, and secondly for the lack of exhaustion of local remedies as was upheld in the case of *Republic vs Law Society of Kenya Disciplinary Tribunal and Another Exparte Muema Kituli* [2018] eKLR The respondent further submitted that no evidence was presented explaining any illegality, irrationality or procedural impropriety that arose in the election of Synod Members in the 3rd Ordinary Session of the Synod Meeting held on the 23rd & 24th August 2023 and thus the Application fails to meet the set standards of proof. Reliance was placed in the case of *Seventh Day Adventist Church (East Africa) Limited vs Permanent Secretary, Ministry of*



Nairobi Metropolitan Development & Another [2014] eKLR where it was held inter alia that where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply.

Analysis & Determination

35. I have considered this application, together with the submissions of the parties.
36. The first issue for determination and which borders on jurisdiction of this Court is whether the applicants case offends the doctrine of exhaustion. The applicants submitted that that the issue of the exhaustion doctrine or rather exhaustion of internal remedies is res judicata having been raised in their preliminary objection dated 28.03.2024 and the same dismissed vide the ruling of the Court of 14th June 2024 and as such the argument cannot be raised again at this juncture and should be rejected by the Court.
37. In rebuttal, the respondents submitted that Anglican Church of Kenya Maseno East Diocese Constitution contemplates situations where a dispute arises within the Church and provides for ways of ventilating and addressing disputes internally before the same can be escalated to the courts.
38. The substantive law on Res Judicata is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
39. The Black’s law Dictionary 10th Edition defines “res judicata” as
- “An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
40. It is true that the respondents herein filed a preliminary objection dated 28th March 2024 against the instant suit raising two grounds, that: -
- a. The issues raised by the plaintiffs are of a civil nature and are not subjects of Judicial Review, as they do not raise constitutional questions.
 - b. The plaintiffs are yet to exhaust all available local remedies thus the suit is premature, wrongly instituted and fatally defective.
41. Consequently, this Court rendered a ruling on the 28th June 2024 disallowing and dismissing the preliminary objection and proceeding to set out the application for hearing.
42. My understanding of the aforementioned ruling is that this court did not delve into the substance of the grounds raised but whether the aforementioned grounds consisted of distinct points of law that had the effect of disposing of the suit without the ascertainment of any fact as set out in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696.



43. To that end then, the issue of exhaustion was not substantively dealt with by this Court to trigger the application of the doctrine of *res judicata*. I shall thus proceed to address myself to it.
44. The issue that arises is whether the judicial review proceedings before the High Court offended the doctrine of exhaustion of remedies. Put differently, the question is whether the High Court was divested of jurisdiction by the said doctrine. Section 9 of the Fair Administration Act provides as follows:
9. Procedure for judicial review
 1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a Subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
 2. The High Court or a Subordinate Court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 3. The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 4. Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
 5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
45. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.
46. I observe that the Anglican Church of Kenya Maseno East Diocese Constitution establishes a Tribunal under Canon XIII whose mandate is to provide for dispute resolution mechanism within the church. Additionally, Canon XIV provides for offences that may be presented before the Tribunal, lastly Canon XIX provides for an appeal mechanism if one is dissatisfied the decision or judgement or sentence delivered by the Tribunal.
47. From the above provisions, it is patently clear that the Anglican Church of Kenya Maseno East Diocese Constitution establishes a clear dispute resolution mechanism, including an appellate process.
48. The doctrine of exhaustion of remedies has consistently been appreciated by our superior courts to the extent that it is correct to state that the doctrine is now of esteemed juridical lineage in Kenya. (See the High Court in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* (2017) eKLR). The doctrine was fittingly



explained by the Court of Appeal in *Speaker of National Assembly v Karume* (1992) KLR 21, a pre-2010 decision in the following words:

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

49. Many post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution. For example, the Court of Appeal provided the constitutional justification for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* (2015) eKLR as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

50. Similarly, the High Court added its voice on the subject in the *Matter of the Mui Coal Basin Local Community* (2015) eKLR thus: -

“The reasoning is based on the sound Constitutional policy embodied in Article 159 of *the Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” *The Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, *the Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases...”

51. Section 9(2) of the FAA Act reproduced earlier provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that “the High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).”

52. Section 9(2) & (3) of the FAA Act is couched in mandatory terms. The only way out is the exception provided by subsection (4), which provides that: -

“Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the



interest of justice. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances. Second, on an application by the applicant, the court may grant an exemption. Our reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under Section 9(4) of the FAA Act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. Section 9(4) of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.”

53. The applicants herein submitted that there was an exceptional circumstance that barred them from approaching the dispute mechanism provided for in the Anglican Church of Kenya Maseno East Diocese Constitution specifically, Canon XVII (1) that provides that bringing up charges against a bishop, like the 1st Respondent can only be done by members of the clergy thus barring members of the church such as the applicants. The applicants also sought for exemption from resorting to such internal dispute resolution mechanism as provided for under section 9(4) of the *Fair Administrative Action Act*.
54. I have perused the said Church Constitution and note that Canon XVI (1) provides as such:
- “Any charge against a priest or deacon of this church must be preferred by a Priest licensed in the Church or by the Church Wardens of the Parish in which he is licensed or by Ten or more communicants of Twenty-Four (24) years of age or upwards, all of the Parish in which the accused is licensed or resides.
- The Bishop may also himself, if he shall see fit, order proceedings to be commenced against any clergyman whose conduct he believes to have given just cause for scandal or offence, and in such a case it shall be sufficient for one presenter appointed by the Bishop to deliver the Articles of Presentment.”
55. Canon XVII referred to by the applicants then proceeds to provide as follows;
- “The provisions of Canon XVI (of the Trial of Priests and Deacons) hereof shall apply mutatis mutandis, to the case of any member of the Laity against whom any charge is brought with such modifications thereto only as are necessary to meet the circumstances of the case.”
56. Accordingly, it is clear that the applicants are not barred from bringing proceedings before the Church Tribunal and that they only need to organize themselves to meet the conditions set forth in the Church constitution.
57. The impugned decision herein constitutes an administrative action as defined in Section 2 of the FAA Act. Therefore, an internal remedy must be exhausted prior to judicial review, unless the applicants can show exceptional circumstances to exempt them from this requirement. No such exceptional circumstances have been demonstrated in this case to warrant an exemption under section 9(4) of the *Fair Administrative Action Act*.
58. For the foregoing reasons, I find no difficulty in concluding that the judicial review proceedings before this Court offend the doctrine of exhaustion.
59. Having found as such, it is my holding that this court lacks jurisdiction to entertain the instant application and I proceed to dismiss it. Each party to bear their own costs of the application for leave



and of the substantive motion, as the parties are congregants and faithfuls of the same faith and Church.
This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

