



**Republic v Registrar of Societies & 2 others; Shah (Exparte Applicant) (Judicial Review Application E012 of 2022) [2023] KEHC 18517 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18517 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
JUDICIAL REVIEW APPLICATION E012 OF 2022**

**OA SEWE, J**

**MAY 25, 2023**

**IN THE MATTER OF: AN APPLICATION BY ASHOK SHAH  
FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF: THE REPORT AND FINDINGS OF  
THE REGISTRAR OF SOCIETIES  
DATED 25TH OCTOBER 2021**

**AND**

**IN THE MATTER OF: THE APPEAL DECISION OF THE AG  
REGISTRAR GENERAL OF  
SOCIETIES DATED 18TH JANUARY**

**2022**

**AND**

**IN THE MATTER OF: SECTION 7 OF THE FAIR  
ADMINISTRATIVE ACT**

**AND**

**IN THE MATTER OF: ORDER 53(1) OF THE CIVIL  
PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE REGISTRAR OF SOCIETIES ..... 1<sup>ST</sup> RESPONDENT**



**THE AG REGISTRAR GENERAL OF SOCIETIES ..... 2<sup>ND</sup> RESPONDENT**  
**COAST GYMKHANA ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ASHOK SHAH ..... EXPARTE APPLICANT**

### **JUDGMENT**

1. Upon being granted leave to file a substantive judicial review application, the Ex Parte applicant, Ashok Shah (hereinafter, “the applicant) filed the Notice of Motion dated 25<sup>th</sup> April 2022 under Sections 8 and 9 of the *Law Reform Act*, Chapter 26 of the Laws of Kenya and Order 53 Rule 1 of the Civil Procedure Rules, 2010 for orders that:
  - (a) An order of Certiorari do issue to bring into this Court for purposes of quashing the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s report and finding and the decisions made on the 25<sup>th</sup> October 2021 and 18<sup>th</sup> January 2022, respectively.
  - (b) An order of Certiorari do issue to bring into this Court for purposes of quashing the 3<sup>rd</sup> respondent’s letter dated 11<sup>th</sup> July 2021.
  - (c) That such further and other reliefs that the Court may deem fit and just to issue be granted.
2. The application was premised on the grounds that the applicant was longstanding member of the 3<sup>rd</sup> respondent; and that vide a letter dated the 11<sup>th</sup> July, 2021 the 3<sup>rd</sup> respondent informed him of its decision not to review his subscription; which implied that he was, in effect, expelled from being a member of the 3<sup>rd</sup> respondent. Being aggrieved of the decision, the applicant filed a complaint before the Registrar of Societies, the 1<sup>st</sup> respondent herein. The complaint was heard and a finding made on 25<sup>th</sup> October 2021 upholding the decision of the 3<sup>rd</sup> respondent to expel the applicant from its membership.
3. The applicant thereafter filed preferred an appeal to the acting Registrar General of Societies, the 2<sup>nd</sup> respondent, which appeal was likewise dismissed on 18<sup>th</sup> January 2022. Convinced that he was condemned unheard, the applicant filed this application for redress. The applicant relied on his Supporting Affidavit and the documents annexed thereto, as well as the Statutory Statement dated 6<sup>th</sup> April 2022. The documents relied on include the 3<sup>rd</sup> respondent’s letter dated 11<sup>th</sup> July 2021, the report and findings of the 1<sup>st</sup> respondent and the decision of the 2<sup>nd</sup> respondent on appeal, among other documents.
4. In response to the application, the 1<sup>st</sup> and 2<sup>nd</sup> respondent relied on the affidavit sworn on 23<sup>rd</sup> May 2022 by the Registrar of Societies, Ms. Mary Goretti Nyariki. She averred that the applicant was not altogether honest in his averment that he was never given an opportunity to be heard. According to her, the applicant admitted at paragraph 7 of the Verifying Affidavit that indeed the 1<sup>st</sup> respondent convened a mediation hearing on 14<sup>th</sup> October 2021 and heard both parties before compiling the report dated 25<sup>th</sup> October 2021; and that thereafter an appeal was preferred to the 2<sup>nd</sup> respondent in which he was also heard before a determination was made.
5. In response to paragraphs 5, 6 and 7 of the Verifying Affidavit, Ms. Nyariki averred that the 1<sup>st</sup> respondent carefully examined and considered the contents of the letter dated 11<sup>th</sup> July 2021 addressed to the applicant by the 3<sup>rd</sup> respondent and noted that the applicant did not challenge his



- disqualification on the basis of being a defaulter during the mediation session held on 14<sup>th</sup> October 2021. Thus, Ms. Nyariki concluded her affidavit by asserting that the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents vide the reports dated 25<sup>th</sup> October 2021 and the appeal verdict dated 18<sup>th</sup> January 2022 are in all aspects correct, fair and just; and were arrived at after according the applicant ample time to be heard in compliance with the principles of natural justice. She therefore averred that the instant application is a mere abuse of the court process and a waste of precious judicial time; and should therefore be dismissed with costs.
6. On behalf of the 3<sup>rd</sup> respondent, a Replying Affidavit was sworn by Bhavin Panchal, the Secretary of the Committee elected to run the affairs of the 3<sup>rd</sup> respondent. He averred, at paragraph 4 of the 3<sup>rd</sup> respondent's Replying Affidavit that the entire Judicial Review Application is fatally and incurably defective for want of an application for leave to commence Judicial Application as per Order 53 Rule 2 of the Civil Procedure Rules. It was further the averment of Mr. Panchal that the grounds upon which the substantive application is based is not in concert with the reliefs sought and the annexures in support.
  7. It was further the contention of the 3<sup>rd</sup> respondent that the decision to expel the applicant from its membership was an internal matter over which the Registrar of Societies had no jurisdiction. Thus Mr. Panchal averred that the application is totally misconceived as it seeks a review on the basis of the merits of the case and not on the process employed by the respondents in arriving at their respective decisions. He averred further, at paragraph 18 of the Replying Affidavit that the Court would in effect by acting as an appellate court in determining whether or not there was sufficient evidence to support the respondents' respective decisions.
  8. The application was disposed of by way of written submissions pursuant to the directions given herein on 27<sup>th</sup> May 2022. Accordingly, Mr. Ajigo for the applicant relied on his written submissions filed on 22<sup>nd</sup> September 2022 and contended that the application is competently before the Court in so far as it seeks the quashing of decisions made by quasi-judicial bodies; which can only be done by way of judicial review. He relied on Article 47 of *the Constitution*, *Municipal Council of Mombasa v Republic* [2002] eKLR; *Republic v Nyali Golf & Country Club Limited, Ex Parte Simon Maina Mwangi* [2020] eKLR and *Patel and Others v Dhanji and Others* [1975] EA as to the purpose of judicial review. He reiterated the assertion by the applicant that he was not given an opportunity to be heard before the decision to terminate his membership was taken by the 3<sup>rd</sup> respondent; and therefore that the subsequent decisions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents are likewise flawed and ought to be quashed.
  9. On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, Mr. Njoroge filed written submissions dated 11<sup>th</sup> November 2022 contending that the application is a mere abuse of the process of the Court and a waste of precious judicial time. He pointed out that whereas the applicant averred at paragraph 4 of his Verifying Affidavit that he was not given a hearing, he at the same time conceded at paragraph 7 thereof that the 1<sup>st</sup> and 2<sup>nd</sup> respondent convened a mediation hearing on the 14<sup>th</sup> October 2021 and heard both parties before compiling the report dated 25<sup>th</sup> October 2021.
  10. Mr. Njoroge further pointed out that the parties are in agreement that an appeal was filed by the applicant to the 2<sup>nd</sup> respondent which was similarly heard and a decision made on 18<sup>th</sup> January 2022; and therefore that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted justly and observed the principles of natural justice in handling the applicant's complaint. He accordingly urged the Court to dismiss the application against the 1<sup>st</sup> and 2<sup>nd</sup> respondents with costs.
  11. On behalf of the 3<sup>rd</sup> respondent, Mr. Maithya filed written submissions on 27<sup>th</sup> February 2023 and thereby proposed the following issues for determination:



- (a) Whether the application before the court is competent;
  - (b) Whether the Ex Parte applicant was given a fair hearing;
  - (c) What is the function of a judicial review court?
12. Mr. Maithya pointed out that leave was indeed granted pursuant to Order 53 Rule 1 on 6<sup>th</sup> April 2022. He submitted therefore that no orders of Certiorari, other than the one for which leave was sought, can be granted; and therefore Prayers 2 and 3 of the applicant’s substantive application dated 25<sup>th</sup> April 2022 cannot be granted. He pointed out that in the application for leave, no prayer was made in connection with the 3<sup>rd</sup> respondent’s letter dated 11<sup>th</sup> July 2021 and therefore no leave was obtained for such a prayer. He also submitted that, in any event, since the letter was issued more than 6 months before the application for leave was made, it was not amenable to the order of Certiorari in view of the mandatory provisions of Order 53 Rule 2 of the Civil Procedure Rules.
13. On whether the applicant was given a fair hearing, Mr. Maithya drew the attention of the Court to paragraphs 7 and 8 of the applicant’s Verifying Affidavit to demonstrate that, in his own admission, the applicant was given a hearing at two levels; and therefore that he has no cause for complaint. Counsel placed reliance on *Zachariah Wagunza & Another v Office of the Registrar, Academic Kenyatta University & 2 Others* [2013] eKLR and *Municipal Council of Mombasa v Republic* (supra) to demonstrate the proper grounds for judicial review, namely, illegality, irrationality and procedural impropriety. He, consequently, prayed for the dismissal of the application with costs.
14. Having given careful consideration to the substantive judicial review application dated 25<sup>th</sup> April 2022 and the responses filed thereto by the respondents, including the written submissions put in by learned counsel, I am in agreement with Mr. Maithya for the 3<sup>rd</sup> defendant that the issues for consideration are:
- (a) Whether the application before the court is competent;
  - (b) What is the function of a judicial review court?
  - (c) Whether the applicant was given a fair hearing.

**(a) On whether the application dated 25<sup>th</sup> April 2022 is competent:**

15. Order 53 Rule 1 of the Civil Procedure Rules, one of the enabling provisions cited by the applicant, provides that:

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

16. The purpose of such leave was aptly captured in *Mombasa HCMCA No. 384 of 1996: Republic v County Council of Kwale & Another, Ex Parte Kondo and 57 others* it was held that:

“The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any applications for Judicial Review which are either 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 the



administrative action while proceedings for Judicial Review of it were actually pending even though misconceived...Leave may only be granted therefore if on the material available before the court the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised Judicially”.

17. Needless to say that since judicial review reliefs are now anchored in *the Constitution* it is no longer necessary, where an approach is made under the *Fair Administrative Action Act*, to apply for leave. It is nevertheless equally true that Sections 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules are yet to be repealed. Hence, in Independent Electoral and Boundaries Commission (IEBC) vs National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, a 5-judge bench of the Court of Appeal pronounced itself thus:

“In our considered view presently, judicial review in Kenya has Constitutional underpinning in articles 22 and 23 as read with article 47 of *the Constitution* and as operationalized through the provisions of the *Fair Administrative Action Act*. The common law judicial review is now embodied and enshrined into constitutional and statutory judicial review. Order 53 of the *Civil Procedure Act* and rules is a procedure for applying for remedies under the common law and the *Law Reform Act*. These common law remedies are now part of the constitutional remedies that the High Court can grant under article 23(3)(c) and (f) of *the Constitution*. The fusion of common law judicial review remedies into the constitutional and statutory review remedies imply that Kenya has one and not two mutually exclusive systems for judicial review. A party is at liberty to choose the common law order 53 or constitutional and statutory review procedure. It is not fatal to adopt either or both...We hold that Kenya has one and not two mutually exclusive systems for judicial review. The common law and statutory judicial review are complementary and mutually non-exclusive judicial review approaches.”

18. To my mind therefore, where parties opt to approach the Court under Sections 8 and 9 of the *Law Reform Act* and Order 53 of the Civil Procedure Rules, it is still permissible for them to seek leave of the Court. Where that is the case, the Court would be at liberty to consider the application in accordance with the procedural rules set out in Order 53 in so far as those provisions are yet to be repealed.
19. A perusal of the court record does show that an application for leave was made by the applicant, vide his Chamber Summons dated 6<sup>th</sup> April 2022; and that leave was indeed granted on 13<sup>th</sup> April 2022. It is noteworthy however that the said application, the Statutory Statement filed therewith and the ensuing orders did not impugn the decision of the 3<sup>rd</sup> respondent vide the letter dated 11<sup>th</sup> July 2021 and therefore leave to apply did not include the letter dated 11<sup>th</sup> July 2021. Consequently, I am of the view that whereas the substantive application is competent in respect of prayer 1, prayers 2 and 3 of the applicant's application dated 25<sup>th</sup> April 2022 are untenable. Untenable because Order 53 Rule 4(1) of the Civil Procedure Rules is explicit that:

“Copies of the statement accompanying the application for leave shall be served with 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.”



**(b) On the function of a judicial review court:**

20. It is now trite that Judicial Review does not concern itself with the merits of the decision. It is focused on the process through which decision was made. The Court of Appeal in the case of *Municipal Council of Mombasa v Republic & another* (supra), held: -

“...judicial review is concerned with the decision-making process, not with the merits of the decision itself... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review...”

21. Further, in the case of *Zachariah Wagonza & Another v Office of the Registrar Academic Kenyatta University & 2 others* [2013] eKLR, it was held: -

“...The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300. In that case the Court cited with approval *Council of Civil Unions vs. Minister for the Civil Service* [1985] AC 2 and *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision...”



**(c) Whether the Ex Parte applicant was given a fair hearing:**

22. In this case, it is evident that the applicant filed a complaint with the 1<sup>st</sup> Respondent, which complaint was heard by way of a mediation hearing. A report was prepared dated 25<sup>th</sup> October, 2021 which upheld the applicant's suspension. Being dissatisfied therewith, the applicant appealed to the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent heard him before rendering the decision dated 18<sup>th</sup> January, 2022, upholding the decisions of the 3<sup>rd</sup> respondent and the 2<sup>nd</sup> respondent, respectively.
23. The applicant has not shown the court in what respect the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to adhere to the rules and procedures pertaining to fair hearing in arriving at their decisions dated 25<sup>th</sup> October, 2021 and 18<sup>th</sup> January, 2022. To the contrary, the applicant's allegations appear to target the merits of those decisions. For instance, at paragraph 7 of the Statutory Statement, the applicant averred that:
- “The expulsion of the Ex-Parte Applicant was discriminatory because the ground being that he was a defaulter was without basis as even some of the officials were themselves defaulters.”
24. In the premises, it is my finding that the applicant has utterly failed to make out a good case to warrant the issuance of the orders sought. Accordingly, his Notice of Motion dated 25<sup>th</sup> April, 2022 being devoid of merit, is hereby dismissed. Granted the circumstances of this case, I would award costs the 3<sup>rd</sup> Respondent only, for having been included in the substantive application without leave. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to bear their own costs of the application.

It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25<sup>TH</sup> DAY OF MAY 2023**

**OLGA SEWE**

**JUDGE**

