Republic v Olodi (Sued as an Official of the Kenya National Federation of Sugarcane Farmers) & 3 others; Kenya National Federation of Sugarcane Farmers (Interested Party); Oyoo & 16 others (Exparte Applicants) (Judicial Review E045 of 2023) [2023] KEHC 25871 (KLR) (Judicial Review) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25871 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW E045 OF 2023

JM CHIGITI, J

NOVEMBER 28, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

EZRA OKOTH OLODI (SUED AS AN OFFICIAL OF THE KENYA NATIONAL FEDERATION OF SUGARCANE FARMERS) ..... 1ST RESPONDENT

SAMWEL ONYANGO ONG'OW ..... 2ND RESPONDENT

AGRICULTURE AND FOOD AUTHORITY ..... 3RD RESPONDENT

CABINET SECRETARY, AGRICULTURE & LIVESTOCK DEVELOPMENT .. 4TH RESPONDENT

AND

KENYA NATIONAL FEDERATION OF SUGARCANE FARMERS ..... INTERESTED PARTY

AND

JECKONIAH SAMUEL OYOO ..... EXPARTE APPLICANT

MESHACK SHATIMBA ..... EXPARTE APPLICANT

STEPHEN OLE NARUPA ..... EXPARTE APPLICANT

SIMON WESECHERE ..... EXPARTE APPLICANT

DAN OPOLO ..... EXPARTE APPLICANT

CYPRIAN MULISA ..... EXPARTE APPLICANT

LEAH CHEPKWONY ..... EXPARTE APPLICANT

PAUL OWUOR ..... EXPARTE APPLICANT

PAMELA MASITSA ..... EXPARTE APPLICANT

MICHAEL ARUM ..... EXPARTE APPLICANT

WYCLIFFE BIKETI ..... EXPARTE APPLICANT

DANIEL ONDENYI ..... EXPARTE APPLICANT

AGGREY WERE ..... EXPARTE APPLICANT

JAMES ODHIAMBO LWAL ..... EXPARTE APPLICANT

WILSON KILUSU ..... EXPARTE APPLICANT

JOSEAH LESSAN ..... EXPARTE APPLICANT

ANDREW BETT ..... EXPARTE APPLICANT

JUDGMENT

1. The Application before this Court is the one dated 13th April,2023 seeking the following prayers;
    1. The Honourable Court be pleased to issue judicial review orders of certiorari to bring to this Court and quash the gazettement and appointment of the 2nd Respondent as a member of the Board of Directors of the Agriculture and Food Authority vide Gazette Notice No.3667.
    2. Costs of the application be provided for.
2. The Application is supported by a Statutory Statement dated 30th March,2023 and the affidavit of Jeckoniah Samuel Oyoo sworn on even date.
3. The Application is vehemently opposed. Parties exchanged and highlighted their submissions.

The Applicants case:

4. The Applicants contend that the appointment of the 2nd Respondent as a board member to Agriculture and Food Authority was a skewed nomination process thus illegal and should therefore be quashed.
5. It is the Applicants' case that, the nomination of the 2nd Respondent breached Article 10 of *the Constitution* on public participation by excluding the Federation's Officials and members of the Federation in the nomination process. They also argue that the 2nd Respondent's nomination violated Section 5(1) (i) of the *Agriculture and Food Authority Act*, 2013 whose intent is to ensure that members of a farmer's organization are nominated to the position. Lastly, assuming that the 2nd Respondent is a member, he is still not qualified to be nominated for appointment by the Federation because he is an active politician and a business partner of a miller contrary to Article 14.2.1 of the Federation's Constitution.
6. It is the Applicants case that although the Federation's Constitution provides for an internal mechanism of dispute resolution, the same is presently non-existent thus unavailable for the Applicants which fact has been admitted by the 1st and 2nd Respondents through their own annexed documents in the Replying Affidavit of Ezra Okoth.

7. It is their case that Court has the jurisdiction to adjudicate this dispute as guided by the case of The African Commission of Human and People's Rights in the case of Dawda K. Jawara V Gambia 147/95-146/96 concerning the availability of effective remedies and as such this dispenses with the need to apply for exemption and The Court of Appeal in Kenya Revenue Authority & 2 Others V Darasa Investments Limited (2018) eKLR clarified that the Court can on its own motion exempt an Applicant from exhausting an alternative remedy.

8. In another front, the Applicants contend that in nominating the 2nd Respondent, the 1st Respondent violated the law since the process was devoid of participation of the Federation's officials as well as members of the Federation.

9. The Federation's Constitution recognizes two decision-making organs within the Federation i.e. the National Executive Board and the Governing Council.

10. The National Executive Board is established under Article 10.1.3 and it is comprised of 18 elected officials, 2 ex- officio members, and 8 additional board members. The eight board members were to be appointed by the Governing Council. However, to date, their appointment has never been ratified thus making the total composition of the National Executive Board to stand at 20 members.

11. Article 10.1.3.2 provides for the functions of the National Executive Board, which is bestowed with the powers to conduct generally all the functions of the Federation including those listed under the said article.

12. Under Article 10.1.2.2, the Governing Council is bestowed with all powers of the Federation not specifically conferred upon the National Executive Board. It is their case that the nomination of members to various boards is not a function assigned to the National Executive Board and is thus subject to ratification by the Governing Council.

13. The composition of the Governing Council is given under Article 10.1.2.1.2 to comprise; i) The National Executive Board; ii) The Branch Chairman, Branch Secretary; iii) Branch Treasurer, and one other member from each branch.

14. As already established, there are a total of 20 National Executive Board members within the Federation. Further, the Federation has a total of 16 branches nationwide. Taking each Branch Chairman, Branch Secretary, Branch Treasurer and a member from each branch gives a total of 16 branch officials and members in each category thus bringing the total composition of the Governing Council for purposes of convening a meeting to 84 members.

15. In this case, the Applicants contend that the nomination of the 2nd Respondent was done by the 1st Respondent without the input of the Federation officials.

16. The Applicants have mounted an attack on the Respondents' case who argue that they invoked Article 11.3.5 of *the Constitution*, and in particular the 1st and 2nd Respondents allege that the nomination of the 2nd Respondent was a matter of urgency which necessitated the 1st Respondent to consult the National Chairperson who advised him to call the National Executive Board Members who were available. The 1st Respondent further claims that out of the 18 National Executive Board Members with voting rights, he only managed to reach 6 who confirmed their availability and passed a resolution on 13th January 2023 to nominate the 2nd Respondent for the position.

17. The Applicants are aggrieved that the rest of the 12 federation officials, 10 of whom are Applicants in this suit were sidelined in the nomination process of the 2nd Respondent.

18. Article 10.1.3.8 of the Federation's Constitution only recognizes sending of notices to members of the National Executive Board through writing/SMS/ Emails and not through calls as suggested by the 1st and 2nd Respondents.

19. The Applicants have issues with the unsigned attendance list of the people who attended the meeting of 13th January 2023 that passed the resolution to nominate the 2nd Respondent.

20. In any case, assuming that indeed the meeting took place with the six federation officials, the same would still be in breach of the Federation Constitution which requires that resolutions of the National Executive Board must be by a two-thirds majority. In this case, the two-thirds majority of 18 elected officials is 12. The resolution to nominate the 2nd Respondent by only six officials who belong to the same faction of the Federation falls way below the threshold of 12.

21. The Applicants are not in agreement with The 1st and 2nd Respondents' alternative argument to justify their lack of quorum claiming that the decision to nominate the 1st and 2nd Respondent was made under Article 11.3.5 by the Secretary-General in consultation with the National Chairperson on account of urgency around the Christmas and the Happy New Year Holidays.

22. In any event it is the Applicants' case that nomination of persons to various boards is subject to ratification by the Governing Council which consists of 84 members for purposes of constituting a Governing Council Meeting.

23. In another front, it is the Applicants' case that the 2nd Respondent is not a member of the federation and therefore he is not qualified for nomination. In the alternative, even if he were found to be a member, he is still not qualified for any leadership position under the Federation's Constitution.

24. The Respondents claim that the 2nd Respondent is a member and have attached a receipt as well as a register of members of the Chemelil branch. In response to these, the Applicants assert that these documents do not exist and have only been manufactured for this suit. That by producing manufactured documents, the 1st and 2nd Respondents only seek to create factual disputes so as to defeat these judicial review proceedings.

25. The Federation is said to have been registered on 8th January 2015, yet per the list of the members of Chemelil Branch, registration began on 1st January 2015 way before the Federation even existed. Additionally, the 2nd Respondent had initially claimed that he was from a non-existent Central Western branch but later claims he is a member from the Chemelil branch. This only shows that the documents proving his membership are fictitious.

26. The Applicants argue that the 2nd Respondent is an active politician and business partner of a miller in breach of the Federation Constitution requirements on leadership representation.

27. The 1st and 2nd Respondents raise an alternative argument that he was nominated by the Kisumu Sugar Belt Cooperative Union. Section 5(1) (i) of the *Agriculture and Food Authority Act* requires that farmers nominated for appointment to the board must be from "farmer organizations with a "national outlook".

28. According to the Applicants From its membership, and even name, it is evident that the Kisumu Sugar Belt Cooperative Union is a localized farmers union that only draws its membership from, "the Nyando Sugar Belt" as admitted by the Respondents in their letter dated 23rd January 2023. Hence, the 2nd Respondent would still not be qualified for nomination by the Kisumu Sugar Belt because the organization does not have a national outlook under the Act.

On the issue of representation of the Interested Party:

29. It is Applicants' case that Article 10.1.3.2 of *the Constitution* specifically confers upon the National Executive Board the powers to: "Institute, conduct and/or defend, settle or abandon in the name of the Federation any legal proceedings by or against the Federation. "Additionally, under Clause 8, Article 10.1.3.2, the board is further empowered to, "sign or determine who shall be entitled to sign all documents on behalf of the Federation."

30. In the annexure marked "EO011", the attendance list at page 112 of the 1st Respondent's Replying Affidavit, in respect to a meeting held on 4th April 2023 purportedly appointing Ngala Owino Advocates is an exact replica of the attendance list in the annexure marked "E0019" at page 147 as regards a meeting held on 20th January 2023 purporting to ratify the decision to nominate the 2nd Respondent to the Agriculture and Food Authority Board.

31. Further, the attendance list attached in the annexure marked "E0012" at page 116 of the 1st Respondent's Replying Affidavit regarding a meeting held on 12th April 2023 purporting to appoint the firm of Prof Tom Ojienda & Associates is exactly similar to the attendance list at annexure "E0014" at page 126 concerning a meeting held on 2nd May 2023 instructing change of advocates from Ochiel J Dudley Advocates to Prof Tom Ojienda & Associates.

32. These meetings never took place or that the 1st and 2nd Respondents only manufactured documents to cure for their omissions.

33. In any event, he submits that *the Constitution* requires that only the National Executive Board can authorize representation of the Federation in legal proceedings. The resolutions marked "E0011" and "E0012" are not resolutions of the Board, and further, do not meet the required threshold to be considered resolutions of the Board.

34. Simon Wesechere the 4th Ex parte applicant in his Affidavit dated 27th April 2023, swore that he is the National Deputy Secretary General of the Kenya National Federation of Sugarcane Farmer and that no resolution was passed by the Federation appointing either of the said firms of advocates to act on its behalf and therefore the position advanced by the firms in respect to the present suit is not the position of the federation and should be disregarded.

35. It is his case that under the Federation's Constitution, decisions can only be ratified by the Governing Council at an Extra Governing Council Meeting and that no Extra Governing Council Meeting was ever convened in relation to the 2nd Respondent's nomination to the Agriculture and Food Authority Board.

36. The Interested Party's submissions on the issue of representation through the firm of Ochiel J Dudley Advocates argues that at Paragraph 36 of his Replying Affidavit, Olodi misreads Article 11.3.5. of *the Constitution* the Secretary General's decisions are subject to the approval of the Board. Thus, he has no sole mandate to do anything for the Federation unless the Board approves.

37. Article 10.1.3.2 (7) of *the Constitution* specifically confers upon the National Executive Board the powers to: "Institute, conduct and/or defend, settle or abandon in the name of the Federation any legal proceedings by or against the Federation". Under Clause 8, the Board is further empowered to, "determine who shall be entitled to sign all documents on behalf of the Federation"

38. In this case, the National Executive Board, consisting of a majority of 12 out of 18, passed the resolution on 20th April 2023 appointing the firm of Ochiel J Dudley Advocates to represent the Federation. At

the same time, Simon Wesechere, the 1st Deputy Secretary General, was allowed to sign all documents on behalf of the Federation.

39. Therefore, their appointments are proper having been sanctioned by a total of 12 out of the 18 members of the National Executive Board (10 of whom are Applicants in this suit).

40. The annexed resolutions marked "0011" and "0012" in the 1st Respondent's Replying Affidavit purportedly appointing the firm of Ngala Owino and Prof Tom Ojienda are not resolutions of the National Executive Board.

41. Further that at any rate, the attendance lists are remarkably similar, raising doubts to their truthfulness on a balance of probabilities.

42. Equally that the list attached as annexure "E0012" at page 116 of the 1st Respondent's Replying Affidavit regarding a meeting held on 12th April 2023 to appoint the firm of Prof Tom Ojienda Associates is said to be exactly similar to the attendance list "E0014" at page 126 said to be a meeting held on 2nd May, 2023 instructing change of advocates from Ochiel J Dudley Advocates to Prof Tom Ojienda & Associates.

43. That the reproduction of attendance lists, signed in exactly the same way, with the same order of names, at different meetings, held on different days, with different agendas, makes it more likely that these meetings never occurred.

44. The 2nd Respondent's and Interested Party's case per Prof. Ojienda opposed the Application through the Affidavit of Samwel Onyango who believes that the Ex parte Applicants have no issue whatsoever with the processes of the public body of Agriculture and Food Authority Board.

45. He argues that he is aware that all the Ex parte Applicants as listed in the Applicant's Application are members of the Interested Party- Kenya National Federation of Sugarcane Farmers.

46. It is his case that the Applicants did not comply with Article 14:14 of the Federation's Constitution which provides that all disputes must be settled internally in the first instance and if it fails they should be settled through the Sugar Industry Arbitration Tribunal in the second instance.

47. It is his case that Section 9(2) of the *Fair Administrative Action Act* provides that: '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.'

48. Section 9(3) of the *Fair Administrative Action Act* provides that: '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).'

49. H also argues that the Ex parte Applicants have not taken any steps whatsoever to have this dispute settled through the internal dispute resolution committee in the first instance as a result of which this Judicial Review Application is prematurely before Court and that the Court does not have jurisdiction to hear and determine it.

50. He argues that he is a paid up member of the Federation having paid the membership fee of Kshs. 50 as required by *the Constitution* having joined the Federation through the Chemelil branch way back in the year 2015 and denies being a politician or am a business partner at Kibos Sugar as alleged.

51. It is his case that sometime on 10th January 2023 there was an advertisement placed on both the Nation and Star Newspapers calling for nominations by the respective sugar organizations. The names had to be submitted to the Ministry by the 24th of January 2023.

52. Article 11.3.5 of the Federation's Constitution provides that: "in case of urgent matters where the National Executive Board cannot be consulted, he shall consult the National Chairperson or if not available, 1st Deputy national Chairperson. The decision reached shall be subjected or otherwise at the next National Executive Board meeting".

53. In line with Article 11.3.5 of the Federation's Constitution the 1st respondent consulted the National Chairman Mr. Ibrahim Juma on the way forward. The Chairman advised that the Secretary General convenes an urgent meeting of the National Executive Board Members who were available on short notice by calling them.

54. The 1st Respondent called several members of the National Executive Board inviting them for an urgent meeting to discuss the said advert and the possible nominees. Six members confirmed availability. They subsequently held a meeting on 13th January 2023 that led to the nomination of three individuals being Mr. Samwel Onyango Ong'ow, Dr. Iscar Atieno Oluoch and Mr. Peter Lumumba Lukoye. The 1st Respondent then convened another urgent meeting of the National Executive Board on 20th January 2023 to ratify the decision. On 20th January 2023, the members of the National Executive Board ratified the decision.

55. The Ex parte Applicants contend that the 2nd Respondent was nominated unilaterally by the 1st Respondent without the involvement of any other official of the Federation. It is apparent that this is an outright lie.

56. The 2nd Respondent together with the other two nominees were nominated pursuant to two separate meetings by different members of the National Executive Board. It is instructive to note that there were serious time constraints that would not enable the Secretary General to issue a twenty-one days' notice of a normal meeting. The Federation acted within the best of its ability to ensure that the nominations were conducted in accordance with the law. Indeed, it is apparent that there was public participation of not only the Board Members but of the National Executive Board at two different tiers.

57. Pursuant to Article 11.3.5 of the Federation's Constitution, where the Secretary General consults the National Chairman over a matter of urgency, there is no provision for quorum. Indeed, the Chairman's decision suffices. But in this case, the Federation went out of its way and held a meeting of the available members of the National Executive Board. Thereafter, the Federation sought as a matter of urgency to have its decision ratified by the National Executive Board. From the attendance list, there are eleven members out of the 15 members of the National Executive Board who attended the meeting thus met the test for quorum. The allegation that the said nomination was done secretly, illegally and unilaterally without quorum therefore fails.

58. It is his case that Section 5(1)(i) and Section 5(5)(a) of the *Agriculture and Food Authority Act* No. 13 of 2013 provides for the appointment of eight members being farmers representing farmer organizations in the major crop subsector to the Board through a competitive process. He was nominated in the first instance by following six members of the National Executive Board on 13th January 2023.

59. He argues that in line with Article 11:3:5 of the Federation's Constitution, he then immediately convened a meeting of the National Executive Board on 20th January 2023 to ratify the decision and that on 20th January 2023, the members of the National Executive Board ratified the decision to nominate the three nominees.

60. It is his case that eleven members of the National Executive Board who attended the meeting thus met the test for quorum. The allegation that the said nomination was done secretly, illegally and unilaterally without quorum therefore fails.

61. He argues that he was ultimately shortlisted by the Agriculture and Food Authority Board for interviews where he emerged the best from all those shortlisted candidates leading to the impugned appointment through the impugned Gazette Notice herein.

62. He believes that his appointment was made through a competitive process. He argues that he was also nominated by a completely different sugar organization, the Kenya National Federation of Sugarcane Farmers, nominated the 2nd Respondent as one of its nominees together with two other nominees being Mrs. Edina Akoth Tado and Fred Okech Jonam on the 23rd January 2023. After going through the competitive process, the 2nd Respondent emerged the best and was ultimately appointed through the Gazette Notice dated 24th March 2023.

63. The 2nd Respondent argues that he is a bona fide paid up member of the Interested Party having paid up Kshs 50.00 as membership fees. His name is also in the Register of the Members of the Federation.

64. He places reliance in the case of Republic Vs Kenya National Examination Council ex parte Gathenji and others Civil Appeal No.266 of 1996, where the Court of Appeal stated inter alia: '... In order for an applicant to succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal."

65. The 2nd Respondent is of the strong persuasion that it is not contested that he was shortlisted for interviews. It is also not contested that he attended the said interview on the 9th of March 2023. It is also not contested that he was qualified in terms of the qualifications that were set by both the Act and the 3rd Respondent. It is also not contested that he emerged the best from the said interview. There is no allegation and/or evidence of undue influence or favouritism in his emerging the best from the said interviews. The 2nd Respondent was competitively recruited by the 3rd Respondent and that there were no substantive defects or any defects in the procedures that led to his appointment.

66. He counters the contention that the nomination did not satisfy the requirements of the Advert as an outright lie as the Sugar Belt Union also nominated two other nominees being Mrs. Edina Akoth Tado and Fred Okech Jonam.

67. He argues that some of the Ex parte Applicants went ahead and formed their own sugar organization called the Small Holders Sugarcane Farmers Association to rival the Federation. In relation to this suit, some of them were nominated by other affiliate organizations. Two of them, particularly, Pamela Matsitsa and Simon Wamangwe were shortlisted and invited for the interviews. It was only after the 2nd Respondent emerged best that they purported to question his initial nomination. This means that they were okay with the processes and are just but unhappy with the outcome.

68. Further that the courts should not allow their processes to be used and abused for vindictive tendencies. In Republic v Agriculture Fisheries and Food Authority & 3 others Ex-Parte West Kenya Sugar Company Limited [2015] eKLR the court is said to have condemned the Applicant for abusing the judicial processes to cripple the operations of the Respondents.

The Interested Party's case on the issue of representation per Ochiel Dudley Advocates

69. The firm of Ochiel J Dudley Advocates strongly maintain that they are properly on record on behalf of the Federation and not the firm of Prof Tom Ojienda & Associates.

70. They anchor their argument on Article 11.3.5. of *the Constitution* of the Federation, the Secretary General's decisions are subject to the approval of the Board.

71. Article 10.1.3.2 (7) of *the Constitution* confers upon the National Executive Board the powers to: "Institute, conduct and/or defend, settle or abandon in the name of the Federation any legal proceedings by or against the Federation". Under Clause 8, the board is further empowered to, "determine who shall be entitled to sign all documents on behalf of the Federation".

72. The National Executive Board, consisting of a majority of 12 out of 18, passed the resolution on 20th April 2023 appointing the firm of Ochiel J Dudley Advocates to represent the Federation and Simon Wesechere, the 1st Deputy Secretary General, to sign all documents on behalf of the Federation.

73. The annexed resolutions marked "EOO11" and "EOO12" in the 1st Respondent's Replying Affidavit purportedly appointing the firm of Ngala Owino and Prof Tom Ojienda & Associates it is argued are not resolutions of the National Executive Board.

74. Counsel dismisses the attendance lists marked "E0011"at page 112 of the 1st Respondent's Replying Affidavit, purporting to be a meeting held on 4th April 2023 as an exact replica of the attendance list marked "E0019"at page 147 said to be a meeting held on 20th January 2023.

75. The list attached as annexure "E0012" at page 116 of the 1st Respondent's Replying Affidavit regarding a meeting held on 12th April 2023 to appoint the firm of Prof Tom Ojienda Advocates is said to be exactly similar to the attendance list "E0014" at page 126 said to be a meeting held on 2nd May 2023 instructing change of advocates from Ochiel J Dudley Advocates to Prof Tom Ojienda & Associates.

76. The reproduction of attendance lists, signed in exactly the same way, with the same order of names, at different meetings, held on different days, with different agendas, is said to make it more likely that the said meetings never occurred.

Analysis And Determination

77. The Court has taken into consideration the Parties' respective cases and it finds that 4 issues form for determination and these are as follows;

    1) Whether this court has jurisdiction?

    2) The issue of representation of the Interested Party.

    3) The Preliminary objection dated 18th April 2023.

    4) Whether the orders sought can be granted?

Whether this court has jurisdiction:

78. In the Petition 14, 14a, 14b, & 14c of 2014(consolidated) Communication of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR borrowing from the Constitutional Court of South Africa in S v Mhlungu [1995] (3) SA 867 (cc) and the Supreme Court of USA Shwander v Tennessee Valley Authority 297 US. 288, 347, (1936), The Supreme Court adopted the general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. In essence, civil disputes should be determined in civil courts, criminal matters in criminal courts and the a Court would not decide a constitutional question which was properly before it, if there are some other basis upon which the case could have been disposed of.

79. The Applicant relies on the case of Ibrahim Wakhanyanga & 2 others v. Chief Magistrate's Court Kakamega & 2 Others; Attorney General for Land Registrar Kakamega (Interested Party) [2022] eKLR, as cited in HCPT No 193 of 2022 Okiya Omtata v. the Accounting Officer KENGEN & KENGEN in which the Court stated as follows:

> "17. One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory option and decline to entertain such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition..."

80. Section 9 (1) of the *Fair Administrative Action Act* provides an avenue for a party aggrieved by an administrative action to 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*. This, is subject to exhausting all other available remedies. Thus, Section (9) (2) provides in mandatory terms that;

> "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."

81. Section 9 (3) of The Fair Administration Action Act provides that,

> "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)."

82. Section 9 of The Fair Administration Act provides for the procedure for judicial review as follows: -

> "(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.

83. The Black's Law Dictionary 10th Edition, defines the doctrine of exhaustion as follows, "The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be hardened by cases in which judicial relief is unnecessary".

84. In Jeremiah Memba Ocharo v Evangeline Njoka & 3 others [2022] eKLR the Court dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> " 59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In Republic v Independent Electoral and Boundaries Commission [IEBC] Ex Parte National Super Alliance (NASA) Kenya & 6 Others [2017] after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:
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> > " What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 others vs Aelous (K) Ltd and 9 others.)
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> 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
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> 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

85. In the case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR, The Supreme Court made a binding finding that "Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd [1989] KLR 1, "jurisdiction is everything".

86. The Respondents' case is that this Court is divested of the jurisdiction to entertain this dispute as the Applicants failed to invoke the internal dispute resolution mechanisms under Article 14.14 of the Federation Constitution.

87. At page 65-68 of the Replying Affidavit of Ezra Okoth admits on oath the, absence of a Dispute Resolution Committee as well as an operative Sugar Industry tribunal.

88. Additionally, at page 66 of the same document under paragraph 4(a), the 1st Respondent admits to, "The impracticability of strict compliance with the Federation's Constitution as it reposes on dispute resolution to say, the absence of an empaneled dispute resolution committee and the absence of an operative sugar industry arbitration tribunal".

89. This is repeated in the letter dated 20th April 2022 and marked 'SO-1' and addressed to the Registrar of Societies marked. In the Further Affidavit sworn by Jeckoniah Samuel Oyoo, the 1st Respondent admits to the non-availability of a Dispute Resolution Mechanism within the Federation and requests for assistance by the Registrar of Societies in empaneling arbitrators by the Law Society of Kenya, owing to the non-existence of a Dispute Resolution Mechanism within the Federation.

90. This Court is aware that jurisdiction cannot be conferred upon the court by parties or by craft where it did not exist at inception. Section 9 of the *Fair Administrative Action Act* places an obligation on parties to seek leave if they want to be exempted from the doctrine of exhaustion.

91. In Adero v Ulinzi Sacco Ltd [2002] 1 KLR 577, the question was whether the High Court had jurisdiction to hear a dispute that by statute was reserved for the Co-operative Tribunal. Ringera, J. (as he then was), expressed himself as follows on the issue of jurisdiction:

> " On whether the High Court could have had jurisdiction at the time the suit was instituted on the grounds that the Co-operative Tribunal had not been constituted, my view is that jurisdiction either exists or does not exist ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction. And as regards the consent order of 1.3.00, it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which resume the existence of such jurisdiction. And jurisdiction is

such an important matter that it can be raised at any stage of the proceedings and even on appeal."

92. In Lemita Ole Lemein v. Attorney General & 2 Others [2020] eKLR, Karanja, J.A. took a similar view and stated:

> " In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo motu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal. [Emphasis added]."

93. Similarly, in Kenya Commercial Bank v. Osebe [1982] KLR 296, it was held that although an appeal must be confined to the points of law raised and determined by the trial court, there were two exceptions to that rule, namely, where the trial court commits an illegality or acts without jurisdiction. The court went ahead to states as follows;

> " In our view, the basis of all these decisions is that jurisdiction flows from the often-stated truth that jurisdiction is everything and without jurisdiction, a court must down its tools (See The Owners of the Motor Vessel "Lillian S" v. Caltex Oil (K) Ltd (supra)). The question of jurisdiction has been live right from the start of the litigation giving rise to this appeal and we are satisfied that it is properly before us and no party has been taken by surprise or otherwise prejudiced."

94. The term "jurisdiction' is defined as follows in Words and Phrases Legally Defined Vol. 3, page 113:

> " By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing." (Emphasis added).

95. In the instant suit, the question of whether or not the Applicants had exhausted the alternative dispute, resolution mechanisms before approaching the court was raised and conversed by parties, the parties argued their rival position and it is this court's finding and I so hold that it has jurisdiction and the discretion to allow this suit to be heard and determined by this court.

96. It is this court's finding and I so hold that the Applicants have made out a case for the exemption under Section 9 of The *Fair Administrative Action Act*. This court has jurisdiction to hear and determine the substantive issue before it.

The 1st Respondent's letter reads in part:

97. First, in the directions of the Registrar of 6th June 2022, the Registrar inter alia directed the disputants to settle their disputes in accordance with the provisions of the Federation's Constitution, particularly Clause 14.13.4 and 14.1.4. For completion of context, Clause 14.13.4 gives a right to any member being suspended or sanctioned to be given a hearing before any adverse decision is made. Clause 14.14 obligates all disputes amongst members to be referred to a dispute resolution committee for settlement in the first instance, failing which it is be referred to arbitration by the sugar industry tribunal. For clarity of context at present, there is no operative Sugar Industry Tribunal in place and neither does *the Constitution* of the Federation allow empaneling of arbitration tribunals, or arbitration of disputes by any other body or party, the Law Society of Kenya or anybody or party.

98. In light of the circumstances above, particularly the absence of an operative Sugar Industry Arbitration Tribunal and a Dispute Resolution Committee to be able to meet the deadline by the Registrar of 90 days and for purposes of moving the critical affairs of the Federation forward including holding of elections which are long overdue, it fell upon the National Governing Council of the Federation under Clause 10.1.2.2 of the Federation's Constitution to exercise its inherent and residual power to address these emergent issues..."

99. The letter further reads at Page 66 Paragraph 4 (a)that;

> "The Council appreciated the impracticality of strict compliance with the Federation's Constitution as it reposes on dispute resolution, say the absence of an empaneled Dispute Resolution Committee, and the absence of an operative sugar industry arbitration tribunal."

100. Further, in previous correspondences on disputes concerning the leadership of the Federation, the 1st Respondent has admitted to the non-availability of a Dispute Resolution Mechanism as provided for under the Federation's Constitution.

101. In his letter dated 20th April 2022 to the Registrar of Societies, requesting for empanelment of Arbitrators by the Law Society of Kenya, he stated:

> "Clause 14.1.4 of the Federation's Constitution provides that in the event a dispute remaining unresolved internally, the same is to be determined by the Sugar Industry Arbitration Tribunal. The Federation's Constitution was drafted during the currency of the Sugar Act (2001) now repealed, which had established such Tribunal. Presently, even though Section 41 of the *Crops Act*, 2013 provides for the establishment of a Tribunal, the said law provides that the establishment and operationalization of such a Tribunal is to be done through Regulations made by the Minister. There are no regulations in place today, with the consequence that there is no Arbitral Tribunal in place. To give effect to the Federation's Constitution's intention that such disputes be determined through Arbitration, we propose to rely on practice, to commonly seek the appointment of an arbitration panel by an impartial body, such as the President of the Law Society of Kenya, or the Chairperson of the Chartered Institute of Arbitrators, Kenya Chapter. We are accordingly instructed to write to you and seek your concurrence in the determination of the subsisting dispute of the parties through arbitration as intended by the Federation's Constitution, and secondly to seek your concurrence for appointment of an arbitrator by

either the President of the Law Society of Kenya, or the Chairperson of the Chartered Institute of Arbitrators, Kenya Chapter."

102. In a meeting convened by the Registrar of Societies on 26th April 2022, both factions to the Dispute admitted to the non-availability of a Dispute Resolution Mechanism within *the Constitution*. The Registrar directed that both parties solve their dispute and provide evidence of settlement of the dispute within 90 days. Additionally, cognizant of the presence of two factions within the Federation, the Registrar directed that in the interim, all business of society must be conducted by mutual consent of both factions. The Registrar's directive is dated 6th June 2022 and marked annexure "JSO-2."

103. Based on the directive of the Registrar and considering the 1st Respondent's earlier proposal to have the matter resolved through empaneling of Arbitrators, the 3rd Applicant wrote to the 1st Respondent and his faction agreeing to the proposal to resolve the dispute through arbitration. Additionally, he proposed the option of empaneling through the President of the Law Society of Kenya. I annex a copy of the letter dated 29th June 2022 marked annexure "JSO -3"

104. The 1st Respondent, despite having first suggested the dispute be resolved through Arbitration because of the non-existence of a Dispute Resolution Mechanism, rejected the empanelment of Arbitrators claiming that *the Constitution* does not provide for it.

105. It is my finding and I so hold that the alternative dispute resolution mechanism does not exist.

The issue of representation of the Interested Party:

106. The issue of who between the firm of Prof. Tom Ojienda & Associates and the firm of Ochiel J.D. Advocates should represent the Interested Party remains unresolved.

107. The 1st Respondent claims that he has the sole mandate to convene any meeting of the Federation and further make authorizations as to representation of Advocates.

108. According to Clause 7 and 8 of Article 10.1.3.2 of *the Constitution*, the National Executive Board has been given the exclusive mandate to, institute, conduct and/or defend, settle or abandon in the name of the Federation any legal proceedings by or against the Federation and further to, sign or determine who shall be entitled to sign all documents on behalf of the Federation.

109. In this case, in a meeting held on 20th April 2023, the National Executive Board, passed a resolution appointing the firm of Ochiel J. Dudley Advocates to represent the Federation.

110. The 1st Respondent acted ultra vires when he purported to exercise a power not donated to him under the Federation's Constitution when he arrogated to himself the sole mandate to swear Affidavits on behalf of the Federation without the approval of the board, in breach of the Federation's Constitution and to solely appoint an Advocate on behalf of the Federation yet he is sued in his individual capacity in this suit.

111. It is instructive to note that the resolutions marked "E0011" and "E0012" in the 1st Respondent's Replying Affidavit purportedly appointing the firm of Ngala Owino and Prof Tom Ojienda & Associates respectively as Advocates for the Federation were filed after an objection as to the appointment of these firms of Advocates in the absence of a resolution of the Board was raised. The court draws an inference that this was a move that was tailored at curing the representation lapse.

112. It is this Court's finding that the Interested Party has a right to fair hearing under Article 50 of *the Constitution*. It has a right to be represented by counsel of its choice.

113. Clause 7 and 8 of Article 10.1.3.2 of the Federation's Constitution, gives the National Executive Board the exclusive mandate to, "institute, conduct and/or defend, settle or abandon in the name of the Federation any legal proceedings by or against the Federation" and to, "sign or determine who shall be entitled to sign all documents on behalf of the Federation."

114. In the case of Constitutional Petition E009 of 2021 Aden Ibrahim Mohammed & 6 others v County Assembly of Wajir & 6 others; Governor of Wajir County Mohammed Abdi Mohammud & 3 others (Interested Parties) [2021] eKLR stated thus;

> " 18. This Court has observed the contents of the said document and finds the same wanting for two reasons. Firstly, the rules on representation do not permit for two firms of advocates to be placed on record jointly for a party. The only known arrangement is to have one firm on record and the other firm(s) act as leading Counsel or assisting Counsel."

115. Only one Law Firm can be on record for a particular litigant at all material times. The Court further went ahead and stated that:

> " 40. There is no provision under the Rules of Court for the filing of a second Notice of Appointment of Advocates for a party once a Notice of Appointment of Advocate has already been filed by another advocate. What should be filed is a Notice of Change of Advocates or the advocate coming in for the party in addition to the one who has already filed a Notice of Appointment may come into the proceedings as a lead counsel leading the advocate on record in the prosecution of the brief for the given party. There is also no provision for the filing of a Notice of Appointment in the names of two law firms of advocates. The Notice of Appointment of Advocates signed in the joint names of the firms of MIS Ndegwa Njiru and M/S Kago Mburu dated 3rd August 2021 shall therefore be struck out and expunged from record. Mr. Ndegwa Advocate may be introduced as a lead counsel to act for the relevant party alongside the advocate on record. This clarification is important because it indicates the advocate on record who therefore has authority to file pleadings and other formal process of the court on behalf of the party.'

116. Should a litigant elect to have his Advocate led and/or joined by another counsel, that Counsel does not have authority to file any pleading. All pleadings can only be filed through the Advocate that has been on record.

117. In Constitutional Petition E009 of 2021 (supra) the court stated that:

> " 18. This Court has observed the contents of the said document and finds the same wanting for two reasons. Firstly, the rules on representation do not permit for two firms of advocates to be placed on record jointly for a party. The only known arrangement is to have one firm on record and the other firm(s) act as leading Counsel or assisting Counsel. In the circumstances where there are more than two advocates, it would be neater, for coherent proceedings, that one leads, usually the senior most, then the others assist the leader, but have only one firm on record. The firm on record would be the one responsible for filing of pleadings and documents on behalf of the mutual client. The leading Counsel would then have the duty to introduce his team and indicate to Court,

if all the Counsel would be addressing the Court, and which aspect of the case will be handled by which Counsel.'

118. On the part of Prof Ojienda, he is of the strong persuasion that the firm of a Professor Ojienda & Associates are legally appointed by the 1st Interested Party. It is his case that the Supreme Court in the case of Manchester Outfitters (Suiting Division) Limited (Now Known as King Woollen Mills Limited) & another v Standard Chartered Financial Services Limited & 2 others [2017] held as follows;

> " [50] In the instant case, two different legal-practice firms are contesting the role of representing a party – Galot Industries Limited. These firms make conflicting averments on a vital, basic fact. They present differing director-lists – each claiming its origin to be the State's designated custodial office, the office of the Attorney-General. Both advocates' firms, however, are in agreement that the representation dispute is now pending before the High Court, in Civil Cause No.430 of 2012: and thus, that the High Court will determine the valid names of directors and shareholders of the second petitioner (Galot Industries Limited).
>
> [51] In this ultimate appellate Court, the task devolves not, in the first instance and in general, to resolve trial facts and matters of evidence. It follows that the task now rests with the High Court, to ascertain the status of directorships at Galot Industries Limited. It is not for this Court to establish the names of the directors who made the two divergent board resolutions now being cited.
>
> [52] This Court must take into account such practical questions as a functional judicial edict ought to incorporate: and in this respect I would take due account of the Appellate Court decision in Kenya Commercial Bank Ltd. v. John Benjamin Wanyama, Civil Appeal No. 97 of 1999; [2007] eKLR. If the two firms were to receive conflicting instructions, what would be the effect, in terms of the due conduct of advocacy" This Court's obligation is to provide ultimate resolution to contested questions brought before it; and it is not behoved to sustain or confound open-ended claims."

119. In the case of Uhuru Highway Development Ltd & Others vs Central Bank of Kenya Ltd & Others (2) [2002] 2 EA 654, the court held that it is not the business of the Courts to tell litigants which advocate should or should not act in a particular matter as each party to a litigation has the right to choose his or her own advocate, unless it is shown to a Court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter.

120. Article 11.3.5. of *the Constitution* of the federation stipulates that the Secretary General's decisions are subject to the approval of the Board.

121. Article 10.1.3.2 (7) of *the Constitution* confers upon the National Executive Board the powers to: "Institute, conduct and/or defend, settle or abandon in the name of the Federation any legal proceedings by or against the Federation". Under Clause 8, the board is further empowered to, "determine who shall be entitled to sign all documents on behalf of the Federation".

122. The National Executive Board, consisting of a majority of 12 out of 18, passed the resolution on 20th April 2023 appointing the firm of Ochiel J Dudley Advocates to represent the Federation and Simon Wesechere, the Deputy Secretary General, to sign all documents on behalf of the Federation.

123. It is this court's finding and I so hold that the firm of Ochiel Dudley Advocates is properly on record for the Interested Party.

124. Given that Interested Party cannot be represented by two law firms at the same time, it is this court's finding that the law firm of Prof. Ojienda & Associates is not properly on record for the Interested Party.

125. The upshot is that all the documents filed by the firm of Prof. Ojienda & Associates for and on behalf of the Interested Party shall not be considered by this court in so far as they seek to advance the Interested Party's case.

126. It must be noted that attendance by some of the Applicants did not absolve the Respondents from adhering to the Federation's Constitution or to the tenets of Fair Administrative Action.

The Preliminary Objection dated 18th April 2023

127. The Ex parte Applicants had raised a Preliminary Objection dated 18th April 2023 challenging the Application by the firm of Pro. Tom Ojienda & Associates for being in violation of the sub judice doctrine as there was a subsisting application dated 12th April 2023, which was seeking similar orders and that included the same parties. The Ex parte Applicants contend that the Application dated 12th April 2023 had not been withdrawn and any final decision made by this Court on the Application had the effect of rendering the subsequent application res judicata.

128. Having established that the firm of Prof. Ojienda & Associates is not properly on record before this Court and that all the documents filed by the said for and on behalf of the Interested Party shall not be considered by this court it is this Court's finding that the Ex parte Applicants Preliminary Objection stands subsumed.

Whether the court can grant the orders sought:

129. The substantive issue that is left for determination is whether the Honorable Court can issue a judicial review order of certiorari to bring to this Court and to quash the gazettement and appointment of the 2nd Respondent as a member of the Board of Directors of the Agriculture and Food Authority vide Gazette Notice No.3667.

130. In the case of Pastoli Vs. Kabale District Local Government Council and Others [2008] 2 EA 300 it was 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."

131. It is common knowledge that judicial review jurisdiction is supervisory by nature; it is the channel through which judicial supervision over administrative action is exerted; and, generally speaking, it is meant to cast doubt on any decision that is made in violation of the law. Lord Diplock's classic dictum in Council of Civil Service Unions versus Minister for the Civil Service (1985) 1 AC 374 provides a useful guide on what an unlawful decision entails. The learned judge spoke of these grounds as follows:

> " ...I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

132. It is this court's finding that being a judicial review court this court has no powers to get into a merit analysis or into the question of determining whether or not the 2nd Respondent is a bona fide paid up member of the Interested Party, whether or not his name is also in the Register of the Members of the Federation and whether or not the 2nd Respondent is a politician nor whether or not there was no quorum.

133. The lens of judicial proceedings focuses on procedural improprieties, and illegalities of an administrative action.

134. I have perused Article 10.1.3.8 of the Federation's Constitution which provides for the sending of notices to members of the National Executive Board through writing/SMS/Emails.

135. The 1st Respondent claims that out of the 18 National Executive Board Members with voting rights, he only managed to reach 6 who confirmed their availability and passed a resolution on 13th January 2023 to nominate the 2nd Respondent for the position. This is a serious infraction of the Federation's Constitution which must not stand.

136. The nomination procedure is tainted with a procedural departure from the democratic values that the Federation's Constitution intended to uphold. The approach that the 1st Respondent adopted denied the other eligible nominees and the other members of the Federation their right to participate in the nomination process.

137. It is my finding that there were glaring admitted substantive defects in the procedure, as well as significant omissions as to render it unconstitutional. This had the effect of sidelining the Applicants. The members of the National Executive Board had a legitimate expectation that they would receive such important communication through writing/SMS/Emails and not through calls as done by the 1st and 2nd Respondents.

138. The 1st Respondent does not front any argument that he did not have the members phone numbers where he would have sent SMS or their email address where he could send the emails to. The Respondents breached and adopted a process that amounted to an infraction of the Applicants' right to a democratic process as guaranteed under Article 10 of *the Constitution*.

139. In Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR the Court of Appeal stated as follows:

> "…. procedural propriety cannot be based on mechanical compliance with procedural hoops…, the applicable general principle is that there must be a showing that there were substantive defects in that procedure, or significant omissions as to render it unconstitutional".

140. The foregoing renders the purported meeting of 13th January 2023 and the resolution to nominate the 2nd Respondent illegal.

141. The 1st and 2nd Respondents have advanced an alternative argument to justify and explain away their lack of quorum claiming that the decision to nominate the 1st and 2nd Respondent was made under Article 11.3.5 by the Secretary-General in consultation with the National Chairperson on account of urgency. The reason for the urgency given is because of the Christmas and the Happy New Year Holidays. Respectfully, this argument is an afterthought and is neither cogent nor convincing. First, Agriculture and Food Authority put out its advertisement on 10th January 2023 with a deadline of 24th February 2023. As early as 5th January 2023, the Federation was up and running because of the grassroots elections that were held on the same day, with branch elections scheduled for 12th January 2023, barely two days after the advert by Agriculture and Food Authority. Hence, claiming urgency on account of the non-availability of members because of the holidays is baseless.

142. I have keenly looked at the manner in which the notice was issued, the public participation issue and the effect it has on the appointment.

143. Sections 5(1)(i) and 5(5)(a) of the *Agriculture and Food Authority Act* provides that the 8 members coming from the farmers' organizations must be competitively recruited.

144. The procedure followed in the nomination that culminated in the impugned gazettement cannot be said to have been competitive.

145. The fact that there was no effort to send emails nor SMS text to the Applicants eroded the competition in the process.

146. The 2nd Respondents' argument that owing to the Christmas and Happy New Year Holidays the Federation had a very short time to be able to deliberate and to comply with the notice making the same an extremely urgent matter offends Sections 5(1)(i) and 5(5)(a) of the *Agriculture and Food Authority Act* that calls for a competitive recruitment.

147. This court finds that this omission amounts to a fundamental procedural lapse that offends the national values and principles of governance and in particular it takes away the Applicants right to participation as guaranteed under Article 10 of *the Constitution*.

148. The Notice requirement in *the Constitution* of the Federation meant to guarantee all the members including the Applicant of a fair administrative process under Article 47 of *The Constitution* which stands offended. The omission derogates from the democratic values that the Federation's Constitution intended to provide for. The impugned gazette notice is a culmination of a process that is laced with a procedural improprieties and illegalities and the same cannot stand.

149. In the case of Republic vs Kenya National Examination Council ex parte Gathenji and others Civil Appeal No.266 of 1996, where the Court of Appeal stated inter alia: '… In order for an applicant to

succeed in an application for Judicial Review, he must satisfy the court that a public officer has acted unprocedurally, that his decision was unreasonable and that the impugned decision was illegal."

Disposition:

150. The Applicants have proven their case within the principles set out in the Pastoli Vs. Kabale District Local Government Council and Others [2008] 2 EA 300 and I so hold.

Order:

1. The Application dated 13th April,2023 is allowed.
2. An order of certiorari is hereby issued bringing to this Court and quashing the gazettement and appointment of the 2nd Respondent as a member of the Board of Directors of the Agriculture and Food Authority vide Gazette Notice No.3667.
3. Costs to the Applicants.

   It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH NOVEMBER 2023

J. CHIGITI (SC)

JUDGE