



**Oucho v Joseph Otieno Bee , Chief Executive Officer Bandari Sacco Ltd & 12 others;
Sacco Society Regulatory Authority (SASRA) (Interested Party) (Constitutional
Petition 57 of 2021) [2022] KEHC 6 (KLR) (25 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 6 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 57 OF 2021
JM MATIVO, J
JANUARY 25, 2022**

BETWEEN

JOHN ABURA OUCHO PETITIONER

AND

**JOSEPH OTIENO BEE , CHIEF EXECUTIVE OFFICER BANDARI SACCO LTD
& 12 OTHERS RESPONDENT**

AND

**SACCO SOCIETY REGULATORY AUTHORITY (SASRA) INTERESTED
PARTY**

RULING

1. This ruling determines two Preliminary Objections, namely, the 1st Respondents' Notice of Preliminary Objection dated 13th October 2021 and the 2nd to 13th Respondents Notice of Preliminary Objection also dated 13th October 2021. The common denominator between the two objections is that each seeks to end the life of this Petition. In order to bring the two Objections into a proper perspective, it is necessary, albeit briefly, to highlight the Petitioner's case as disclosed in the Petition dated 12th October 2021. For starters, the Petitioner states that he is a shareholder of Bandari Savings and Co-operative Society Limited (the society). The Petitioner describes the 1st to the 5th Respondents as officials of the society and the 6th to 13th Respondents are directors of the society.
2. The nub of the Petitioner's case is that the society's Management Committee has deliberately mismanaged the society to the detriment of its shareholders thereby depriving him his economic and social rights. Further, that the Respondent's actions exploit him and other shareholders of their returns from their investments. He also avers that the Respondents are in office illegally since their terms have expired.



3. Also, the Petitioner claims that the Respondents constructed a wall on LR No. 817, Section 11/ MN worth Kshs. 25,000,000/= at a cost of Kshs. 207,000,000/= which he avers is outright theft of shareholders money, and the wall has remained uncompleted since 2016. He avers that the shareholders have never acquired vacant possession of the said land, so, there is no value for their money. He contends that that the Respondents have mismanaged the society's resources and complaints to the Interested Party, the Ethics and Ant-Corruption Commission and the Criminal Investigations Department have yielded nothing.
4. He contends that the Respondents' actions are unconstitutional, illegal and abuse of office and that the Interested Party failed to provide oversight, hence the need for this court to compel the Respondents to respect and uphold the law. He states that this Petition seeks to protect the shareholders' money. As a consequence of the foregoing, he prays for:- (i) a declaration that his rights and fundamental freedoms under Articles 10, 21(1), 27(1) (3) (4) (5), 28, 40, 47 (1), 50, 75(1) of the Constitution have been infringed; (ii) a declaration that his rights and privileges under the Companies Act¹ and the Co-operative Society's Act² (herein after referred to as the Act) have been violated, infringed and denied; (iii) an order requiring the Respondent to be surcharged and made to refund money's misappropriated in the sum of Kshs. 180,000,000/=; (v) and any other relief the court may deem just to grant.

The 1st Respondent's Notice of Preliminary Objection

5. The 1st Respondent through his advocates filed a Notice of a Preliminary Objection premised on the grounds that the High Court lacks original jurisdiction to hear this suit as per section 76 of the Act; that the High Court can only exercise appellate jurisdiction under section 81(3) of the Act; that the Petition does not meet the threshold set out in *Anarita Karimi Njeru v Republic*³ and *Trusted Alliance Society of Human Rights v Attorney General and others*⁴ on the manner of pleadings in constitutional Petitions; and that the Petition is an abuse of court process.

The 2nd to 13th Respondent's Notice of Preliminary Objection

6. The 2nd to 13th Respondent's through their advocates also filed a Notice of Preliminary Objection dated 13th October 2021 citing the following grounds: -
 - a. That the Petition is fatally defective, wanting in legal premise and grossly lacking in merit.
 - b. That the Petition is frivolous, vexatious and otherwise an abuse of the due process of the court because; (i) the dispute relates to ownership of land, so this court lacks jurisdiction under Article 162(2) of the Constitution and section 13 (1) & (2) of the Environment and Land Court Act;⁵ (ii) That the Petition discloses no public interest but it is a private interest disguised as a constitutional Petition; (iii) That the law extensively and exclusively provides for regulation of disputes between a Co-operative Society.

¹ Act. No. 17 of 2015.

² Act No. 12 of 1997.

³ {1976-80} I KLR 1283.

⁴ {2015} e KLR.

⁵ Act No. 19 of 2011.



- c. That by dint of section 76 of the Act as read together with section 81 of the Act, this court lacks original jurisdiction to resolve the dispute.
- d. That the Petition is grossly misconceived because there is a statutory procedure for resolving the issues raised in the Petition by dint of sections 73 and 74 of the Act which the Petitioner did not invoke.
- e. That since the Petitioner is aware of the various suits and proceedings in court touching on the issues raised herein, this Petition is brought in bad faith and in contempt of court.

The 1st Respondent's advocates submissions

7. The 1st Respondent's counsel submitted that the High Court lacks original jurisdiction to hear this suit. He cited section 76 (1) & (2) of the Act which provides: -

- (1) If any dispute concerning the business of a co-operative society arises—
 - (a) among members, past members and persons claiming through members, past members and deceased members; or
 - (b) between members, past members or deceased members, and the society, its committee or any officer of the society; or
 - (c) between the society and any other co-operative society, it shall be referred to the Tribunal.
- (2) A dispute for the purpose of this section shall include—
 - (a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
 - (b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
 - (c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

8. Counsel cited *Egerton University Sacco Society Ltd v Egerton University & Another*⁶ which held that the Cooperative Tribunal is seized with jurisdiction over matters set out in section 76 of the act. He also cited section 67(3) of the *Sacco Societies Act*⁷ which provides that all disputes arising out of Sacco business under the act shall be referred to the Tribunal. He submitted that the instant dispute involves members of a Sacco and the business of Bandari Sacco Limited which the Petitioner failed to join in this Petition. He argued that this court only has appellate jurisdiction and cited Article 165 (3) of the Constitution and section 81 of the Act which provides for appeal to the High Court. He also argued that under sections 58 and 73 of the Act, the Commissioner can conduct an inquiry to determine

⁶ {2020} e KLR.

⁷ Act No. 24 of 2008.



the health of a Sacco. He submitted that the Interested Party can also receive complaints from Sacco Members and argued that the Petitioner ignored the above statutory provisions.

9. Further, counsel cited *Bernard Mugo & 8 others v Kagaari South Co-operative Society Ltd & 4 others*⁸ which cited *Gatanga Coffee Growers v Gitau*⁹ which defined the business of a society as follows: -

“...business of the society is not confined to the internal management of the society but covers every activity of the society within the ambit of its by-laws and rules.”

10. Additionally, counsel cited *Alex Malikhe Wafubwa & 7 others v Elias Nambakha Wamita & 4 others*¹⁰ which cited previous cases in support of the proposition that it's not right for a litigant to ignore a dispute resolution mechanism provided in a statute which would easily address his concerns and instead resort to the court. Also, he relied on *Antony Katumi Mbebe & 105 others v AG & 7 Others* which followed *Diana Kethi Kilonzo v IEBC and 2 others* which held that the Constitution allocated certain powers and functions to various bodies and tribunals and that it is important for these bodies and tribunals to be given the leeway to discharge the mandate bestowed upon them by the Constitution provided they comply with the Constitution and national legislation. Lastly, counsel cited *Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd*¹¹ in support of the proposition that a court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
11. Also, counsel submitted the Petition does not meet the threshold in the Anarita Karimi Njeru v Republic (No. 1)¹² which are the Petitioner should set out with reasonable degree of precision that which he complains, the provisions infringed and the manner in which they are alleged to be infringed. He argued that the Petitioner has not demonstrated in the Petition the rights alleged to have been denied, violated, infringed or threatened nor did the Petitioner set out the manner in which the rights have been infringed.
12. Further, counsel submitted that the Petition offends the doctrine of exhaustion which requires a party to exhaust all available dispute resolution mechanisms provided by the law before approaching the court. To buttress his argument, he cited *Geoffrey Muthanja Kabiru & 2 others v Samuel Munga Henry & 1756 others*¹³ which underscored that where a dispute resolution mechanism exists outside courts, the same ought to be exhausted before the jurisdiction of the court is invoked with courts being the last resort. Also, he cited Kenya Section of the *International Commission of Jurists v Attorney-General and 2 others*¹⁴ and submitted that the Petition is misconceived and an abuse of court process.

The 2nd to 13th Respondent's advocates submissions

13. The 2nd to 13th Respondent's counsel argued six grounds. One, that the Petition is fatally defective, wanting in legal premise and merit. He submitted that save for Article 40 of the Constitution, the Articles cited by the Petitioner apply to State Organs, hence, there is no legal premise upon which the

⁸ {2016} e KLR.

⁹ {1970} E A 361.

¹⁰ {2012} e KLR.

¹¹ {1989} KLR.

¹² {1979} 1 KLR 154.

¹³ {2015} e KLR.

¹⁴ {2012} e KLR.



Petition can be sustained against the Respondents. Two, he cited section 13 (1)(2) of the *Environment and Land Court Act*¹⁵ and submitted that this Petition ought to have been filed in the Environment and Land Court because the dispute relates to the ownership and management of land parcel no. MN/11/817.

14. Three, he submitted that the Petition relates to a private interest disguised as constitutional issues, and that a constitutional Petition cannot be brought against a private individual. He argued that a reading of Article 21 shows that the duty to observe, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights is imposed on the State and every State Organ and not on individual private citizens. To fortify his argument, he cited *Kenya Bus Service Ltd & 2 others v Attorney General*¹⁶ which held that fundamental rights and freedoms set out in the Bill of Rights are enforceable by private individuals by way of a constitutional reference only as against the state and not against private individuals who should be pursued claims under private law. He also cited *Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd*¹⁷ and urged the court to find that the Petition is defective.
15. Four, counsel argued that under section 76 of the Act as read with section 81 of the act, this court lacks jurisdiction to entertain the case. He submitted that the Petitioner has described himself as a member and Shareholder of Bandari Sacco Ltd and that the Respondents are all sued in their capacities as officials of the Sacco. He submitted that the Petitioner's claim falls under section 76(2)(b) of the Act, hence, this court has no jurisdiction.
16. Five, counsel submitted that under section 82 of the Act, a party can only approach the High Court by way of an appeal. Buttressed by the said provision, he submitted that this court lacks original jurisdiction and cited *Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Ltd (supra)*, *Kipkoech Rotich v Skyline Sacco Society Ltd & another* and *Kinogerana Farmers Co-operative Society Ltd v Meruta Farmers Sacco Ltd*¹⁸ in support of his submission that the Petitioner's claim does not fall within the ambit of this court.
17. Six, counsel submitted that the Petitioners plea that the Respondents be surcharged and be ordered to refund Kshs. 180,000,000/= ought to have been brought under section 73 of the Act and cited *Speaker of National Assembly v Njenga Karume*¹⁹ and *Kipkalya Kones v Republic & Another ex parte Kimani Wanyoike & 4 others*.²⁰

The Petitioner's advocates submissions

18. The Petitioner's counsel cited *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited*²¹ which defined a Preliminary Objection as constituting of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. He argued that the two objections are based on issues which

¹⁵ Act No. 19 of 2011.

¹⁶ {2016} e KLR.

¹⁷ {2013} e KLR.

¹⁸ {2006} e KLR.

¹⁹ {2008} 1 KLR 425.

²⁰ {2008} e KLR.

²¹ {1969} EA 696.



require the court to exercise its discretion to determine whether the Petition is frivolous and vexatious and also requires evidence to determine whether the rights of over 16,000 shareholders is private or public interest. He argued that the issues raised in the objections do not qualify as a Preliminary Objections.

19. On the question whether the Petition discloses a cause of action against the Respondents, counsel submitted that the Petition is premised on violation and infringement of individual rights and fundamental freedoms and seeks determination whether the said rights are private or public rights which issues can only be ascertained at the trial. He cited *Wilmot Mwadilo and others v Eliud Timothy Mwamunga & Sagalla Ranchers Ltd*²² in support of the proposition that upholding the preliminary objection at this stage is draconian because there are issues for determination at the hearing.
20. On the question of jurisdiction, he cited *Shadrack Mogesi and another v the Commissioner for Co-operative Development and others*²³ which dismissed an objection raised in a similar case arguing that it did not fall under section 76 of the act but rather it cited violation of rights.

Determination

21. I will first address the argument by counsel the 2nd to 13th Respondents that save for Article 40 of the Constitution, the Articles cited by the Petitioner apply to State Organs, so there is no legal premise upon which the Petition can be sustained against the Respondents. He explicated his argument by explaining that the instant Petition relates to a private interest disguised as constitutional issues. He added that a constitutional Petition cannot be brought against a private individual. To back his argument, he submitted that a reading of Article 21 shows that the duty to observe, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights is imposed on the State and every State Organ and not on individual private citizens. He anchored his suppositions on *Kenya Bus Service Ltd & 2 others v Attorney General*,²⁴ a pre- 2010 decision which held: -

“Moreover, fundamental rights and freedoms are contained in the Constitution and are principally available against the State because the Constitution’s function is to define what constitutes Government and it regulates the relationship between the Government and the governed. On the other hand, the rights of individual interests are taken care of in the province of private law and are invariably redressed as such.”

22. He also relied on also a High Court decision which *Muigai Kenyatta v Nairobi Star Publications Ltd*²⁵ a post 2010 decision which followed the above decision and adopted the reasoning in the said case and held: -

“I am in agreement with the above findings and looking at Article 21 of the Constitution, it is the State and every State Organ that is required to “observe, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.” No such obligation is imposed on an individual (including a company) and so I am in agreement with the Respondent arguments in that regard – see also *Chomondely v Republic* (2008) eKLR.”

²² {2017} e KLR.

²³ Constitutional Petition No. 7 of 2018, {2018} e KLR.

²⁴ {2005} e KLR.

²⁵ {2013} e KLR.



23. Whereas the decision in *Kenya Bus Service Ltd & 2 others v Attorney General*²⁶ rendered prior to the promulgation of the 2010 Constitution represented the law then under the retired constitutional dispensation, the decision *Muigai Kenyatta v Nairobi Star Publications Ltd*²⁷ decided post 2010 cannot be said to represent the law post 2010. The constitution of Kenya, 2010, ushered in a new set of national values, a new Bill of rights and a new system of government. It reset the relationship between the citizen and the state and reconfigured both the ethos and the architecture of governance.²⁸ The Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law.²⁹ Inevitably, the philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order. This included enactment of new legislations, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.³⁰
24. For starters, Article 20 provides that the Bill of Rights applies to all law and binds all State organs and all persons. Article 3 places an obligation on every person to respect, uphold and defend the Constitution.
25. The 2nd to 13th Respondents advocates submission is anchored on Article 21 of the Constitution which places a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. This selective construction of the Constitution ignores the now accepted canon of holistic interpretation of the Constitution and decided jurisprudence. This canon of holistic interpretation was repeated in *Judges and Magistrates Vetting Board vs Centre for Human Rights and Democracy*³¹ where it was held that “...the Constitution should be interpreted in a holistic manner; that the country’s history has to be taken into consideration; and that a stereotyped recourse to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of the Constitution.”³² The 2nd to 13th Respondents’ argument ignores the fact that Article 23 of the Constitution confers courts with the authority to enforce the Bill of Rights and also lists remedies available from the courts in proceedings brought under Article 22. It also ignores that Articles 47 and 50 (1) of the Constitution guarantees every person the right to a fair administrative action and the right to have any dispute resolved by an impartial court respectively.
26. Fundamentally, the entrenchment of the power to grant the remedies prescribed under Article 23 as a constitutional principle should of necessity expand the scope of the remedies. Thus, parties who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. An order of judicial review or a declaration of rights are some of the reliefs for violation of fundamentals rights and freedoms under Article 23(3).

²⁶ {2005} e KLR.

²⁷ {2013} e KLR.

²⁸ Njeri Githang’a, Law Reporter, June 2013, <http://kenyalaw.org/kenyalawblog/a-compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/>. Accessed on 24th November 2017

²⁹ Article 10 (1) (a)-(e)

³⁰ Ibid

³¹ {2014} e KLR.

³² at 206



- Court decisions should show strands of the recognition of the Constitution as the basis of enforcing fundamental rights.
27. The point am asserting is that the common law, in its method, substance, and philosophical underpinnings, carries with it elements and tendencies that do not accord with the transformative vision reflected in modern bills of rights. Such notions are incompatible with the transformative ideals of the Constitution of Kenya, 2010. Thus, Judges and legal practitioners cannot afford to routinely cite common-law cases to deny or grant remedies for breach of rights on the basis of the public-private dichotomy. The incompatibility of the common law with transformative constitutional-ism has also been the concern of Davis and Klare in *Transformative Constitutionalism and the Common and Customary Law*³³ where they express the apprehension that, the inbred formalism of the legal culture and the absence of a well-developed tradition of critical jurisprudence may stultify efforts to renovate the legal infrastructure in the way envisaged by the Constitution.
 28. Under the Constitution of Kenya, 2010 judicial review orders and declaration of rights are applicable against a private person, body or authority who exercises a judicial or quasi-judicial functions by which a right or fundamental freedom of a person has been or is likely to be adversely affected. It's not for cosmetic purposes that the words "every person" appear in various Articles of the Constitution among them Articles 3, 20, 22, 26, 27, 28, 31, 32, 33, 35, 37, 39, 41, 42, 44, 37 and 50 of the Constitution. Article 165(6) gives the High Court the powers of judicial review over the subordinate courts and overany person, body or authority exercising a judicial or quasi-judicial function.
 29. Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.
 30. Article 47 provides for the right to a fair Administrative Action. To give effect to Article 47, Parliament enacted the *Fair Administrative Action Act*.³⁴ Section 2 of the act defines an "administrative action" to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Article 47 codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.³⁵ Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.
 31. All that an applicant is required to do is to demonstrate that the impugned decision violates or threatens to violate the Bill of Rights or violation of the Constitution. The test is whether the decision, act or omission complained of falls within the ambit of an administrative decision as defined section 2 of the *Fair Administrative Action Act*.³⁶ From the above discourse, it is clear that the argument that the Petition is premised on private rights has no place under the 2010 Constitutional dispensation. The Constitution now recognizes that actions by private citizens or private institutions can affect rights. In

³³ {2010} 26 SAJHR at 405.

³⁴ Act No. 4 of 2015.

³⁵ Article 47(1) of the Constitution of Kenya, 2010

³⁶ Act No. 4 of 2015.



fact, our courts are awash Constitutional Petitions and judicial review applications filed against private citizens and court decisions finding in favour of private citizens in such cases.

32. The other reason why I am unable to agree with the post 2010 decision cited is that decisions of co-ordinate courts are not binding. But they are highly persuasive because of the concept of judicial comity which is the respect one court holds for the decisions of another, a concept closely related to stare decisis. In *R. v Nor. Elec. Co.*,³⁷ McRuer C.J.H.C. stated:-

“...The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his *First Book of Jurisprudence*, 6th ed., p. 321: “The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary...”. (Emphasis added).

33. “Strong reason to the contrary” does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was “given without consideration of a statute or some authority that ought to have been followed.” As stated earlier, under the 2010 Constitution, the scope of court intervention is entrenched in the Constitution. Two, the decision, the test is whether the impugned decision or action of any person, or body of persons or state organ affects or threatens fundamental rights. Three, the High Court has a supervisory role to play over inferior tribunals, courts and any person and it has powers to strike out nullities.³⁸

34. I now turn to the other issues raised in the arguments before me. I start by addressing my mind to the case of Shadrack Mogesi and another v the Commissioner for Co-operative Development and others (supra) a decision which heavily followed *Alex Malikhwa Wafumbwa & 7 Other v Elias Nambakha Wamita & 4 Others*.³⁹ Both decisions declined to allow similar objections as raised in this case arguing that the Petitions before the court raised matters relating to violation of fundamental rights. Fortified by the said reasoning, the applicant’s counsel urged this court to be persuaded by the said decision and find that this Petition cites breach of fundamental rights. The said invitation is attractive, but it collapses, not on one, but several fronts.

35. First, a case is only an authority for what it decides and it is not meant to be a general exposition of the whole law, a position aptly captured in the following passage:-⁴⁰

“A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides...” (Emphasis added)

³⁷ *R. v Nor. Elec. Co.* {1955} O.R. 431.

³⁸ See *Republic vs. Kajiado Lands Disputes Tribunal & Others ex parte Joyce Wambui & Another* Nairobi HCMA. No. 689 of 2001 {2006} 1 EA 318.

³⁹ {2012} e KLR.

⁴⁰ As observed in *State of Orissa v Sudhansu Sekhar Misra* MANU/SC/0047/1967



36. The law as I understand is that the ratio of any decision must be understood in the background of the facts of the particular case.⁴¹ A case is only an authority for what it actually decides, and not what logically follows from it.⁴² It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.⁴³ This is because each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.⁴⁴ In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.⁴⁵ To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. As I have stated in my several decisions, precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.⁴⁶
37. Second, the learned judge in the said case was clear why she disallowed the objection. She was persuaded that the case raised questions of violation of constitutional rights. In the instant case, as observed later in this ruling, the instant Petition does not raise constitutional questions at all. Third, and very important, the cited decision appears to have been made per in curium because it overlooked the fact that the Fair Administrative Action Act⁴⁷ flows from Article 47 of the Constitution. Fourth, the said decision is not binding on this court having been rendered by a court of coordinate jurisdiction.
38. It is common ground that the Petitioner and the Respondents are all Members of Bandari Savings and Co-operative Society Limited (the society). The Respondents are officials of the Society. The Sacco Societies Act⁴⁸ defines a Sacco Society as follows: - "Sacco society" means a savings and credit co-operative society registered under the Co-operative Societies Act. Section 3 the Sacco Societies Act provides that it applies to (a) every deposit-taking business; and, (b) specified non-deposit taking business, in the manner specified in subsection (2).
39. The Petitioner's grievance is that the Management Committee has deliberately mismanaged the society to the detriment of its shareholders; that the Respondents are in office illegally since their terms have expired. The alleged mismanagement relates to alleged misuse of funds. Its on the basis of this that the Petitioner claims his constitutional rights have been breached and seeks a declaration that his rights and privileges under the Companies Act⁴⁹ and the Co-operative Society's Act⁵⁰ have been violated, infringed

⁴¹ *Ambica Quarry Works v State of Gujarat and Ors.* MANU/SC/0049/1986

⁴² Ibid.

⁴³ *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)

⁴⁴ In the High Court of Delhi at New Delhi February 26, 2007 W.P. (C).No.6254/2006, *Prashant Vats v University of Delhi & Anr.* (Citing Lord Denning).

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Act No. 4 of 2015.

⁴⁸ Act No. 14 of 2008.

⁴⁹ Act. No. 17 of 2025.

⁵⁰ Act No. 12 of 1997.



and denied. He also seeks an order requiring the Respondent to be surcharged and made to refund money's misappropriated in the sum of Kshs. 180,000,000/=.

40. The key question here is whether the Petitioner's grievance highlighted above falls within the above definition. More significant is section 67 of the Sacco Societies Act⁵¹ which provides for the application of the Co-operative Societies Act⁵² in the following words: -

(1) For greater certainty, the provisions of the Co-operative Societies Act, 1997 (No. 12 of 1997) shall apply to a Sacco society carrying out deposit-taking business under this Act with respect to any matter, to the extent that the matter in question is not dealt with in this Act.

(3) All disputes arising out of Sacco business under this Act shall be referred to the Tribunal.

41. Section 67(1) reproduced above provides for the application of the provisions of the Co-operative Societies Act.⁵³ Section 67(3) provides in no uncertain terms that all disputes arising out of a Sacco business under the act shall be referred to the Tribunal. The act defines a "Tribunal" as follows: -"has the meaning assigned to it in the Co-operative Societies Act."

42. Section 76 of the Act provides as follows: -

"76.

(1) If any dispute concerning the business of a co- operative society arises: -

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its committee or any officer of the society; or

(c) between the society and any other co-operative Society; it shall be referred to the Tribunal.

43. Section 67(3) provides that all disputes arising out of Sacco business under the Act shall be referred to the Tribunal. Additionally, the provisions of the Co-operative Societies Act⁵⁴ apply by dint of section 67(1) cited above. Section 2 of the Sacco Societies Act⁵⁵ provides that except where the context otherwise requires—

"officer" includes a chairman, vice-chairman, secretary, treasurer, committee member, employee or any other person empowered under any rules made under this Act, or by-laws of a co-operative society, to give directions in regard to the business of the society;

⁵¹ Act No. 14 of 2008.

⁵² Act no. 12 of 1997.

⁵³ Ibid.

⁵⁴ Act No. 12 of 1997.

⁵⁵ Act No. 14 of 2008.



44. The question is whether the dispute presented in this case concerns the business of a cooperative society, which should have been referred to the Co-operative Societies Tribunal as provided for under Section 76 cited above. The expression “business of the society” has not been defined in the Act or elsewhere. The expression has fallen for interpretation by the courts in this country and elsewhere with commendable frequency. Pronouncements from different courts in this country and elsewhere have led to a cleavage in judicial opinions as to the true meaning and scope of that expression appearing in the Act.
45. In *Gatanga Coffee Growers Co-operative Society Ltd vs Gitau*⁵⁶ (supra) the court interpreted the meaning of the term ‘business of the society’ in the *Co-operative Societies Act*. It refused to adopt a restricted interpretation and cited the *Ugandan case of Wakiro and Another v Committee of Bugisu Co-operative Union*,⁵⁷ at p 527 where Russell J, considering the expression “business of the society” under the Ugandan *Co-operative Societies Act* which provision is similar to our Section 76 cited above stated that the expression “business of the society” is not confined to the internal management of the society but covers every activity of the Society within the ambit of its by-laws and rules. A similar finding was arrived in *Murata Farmers Sacco Society Ltd v Co-operative Bank of Kenya Ltd*.⁵⁸
46. Guidance can be obtained from the Bombay High Court⁵⁹ which discussing a similar provision observed that the phrase “any dispute touching the business of society,” should be interpreted in a very wide sense. The expression “touching the business of a society” in the act and the word “business” is a very wide term and is not synonymous with the objects of a society. The expression means affecting or relating to the business of a society.⁶⁰ Thus, the words “touching the business of a society” are very wide and include any matter, which relates to, concerns or affects the business of the society.⁶¹
47. Applying the above jurisprudence to the facts before me, I find and hold that the dispute disclosed in this Petition falls within the ambit of Section 76 of the Act and by dint of section 67 of the *Sacco Societies Act*⁶² the dispute ought to have been referred to the Co-operative Societies Tribunal. This finding disposes the two objections before me effectively terminating the Petition before me.
48. My finding is fortified by the provisions of section 9(2) of the *Fair Administrative action Act*⁶³ (an act of Parliament that was enacted to bring into operation Article 47 of the Constitution) which provides that the High Court or a subordinate court under subsection (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 subsection (3) which provides that “the High Court or a subordinate Court shall, if it is not satisfied that

⁵⁶ {1970} EA 361.

⁵⁷ {1968} EA 523.

⁵⁸ {2001} eKLR

⁵⁹ In *Rambhau Jairam Dhamange vs Vinkur Co-Operative Society Ltd* 1967 (14) FLR 27

⁶⁰ See the High Court of Bombay in *G.I.P. Railway Employees' Co-operative Bank, Ltd. v. Bhikaji Karanjia* where Chagla, J.

⁶¹ See *Farkhundali v. Potdar* [1961 - I L.L.J. 51]

⁶² Supra.

⁶³ Act No. 4 of 2015.



the remedies referred to in sub-section (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

49. The use of the word shall in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.⁶⁴ There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.⁶⁵ The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.
50. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.
51. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.⁶⁶ The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.⁶⁷ Ordinarily the words 'shall' and 'must' are mandatory and the word 'may' is directory.
52. A correct reading of section 9(2) & (3) above leads to the conclusion that they are couched in mandatory terms. The only way out for an applicant is the exception provided by section 9(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.
53. What constitutes exceptional circumstances depends on the facts of each case.⁶⁸ Article 47 of the Constitution and the *Fair Administrative Action Act*⁶⁹ are borrowed the South African Constitution and their equivalent legislation, so, jurisprudence from South African Courts interpreting similar

⁶⁴ *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions*. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

⁶⁵ Ibid.

⁶⁶ See *Dr Arthur Nwankwo and Anor vs Albaji Umaru Yaradua and Ors* (2010) LPELR 2109(SC) at page 78, paras C - E, Adekeye, JSC .

⁶⁷ This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

⁶⁸ See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini*; *S v Dladla & others*; *S v Joubert*; *S v Scheitkat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

⁶⁹ Act No. 4 of 2015.



circumstances and provisions may offer useful guidance. The following points from the judgment of Thring J are useful: -⁷⁰

- i. What is ordinarily contemplated by the words “exceptional circumstances’ is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different”
- ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.
- iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.
- iv. Depending on the context in which it is used, the word “exceptional” has two shades of meaning; the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.
- v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional. # In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

54. Even though there is no definition of ‘exceptional circumstances’ in the *Fair Administrative Action Act*,⁷¹ my view is that exceptional circumstances mean circumstances that are out of the ordinary which render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

55. 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 *Fair Administrative Action Act*.⁷² 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.⁷³ Section 9(4) of the *Fair Administrative Action Act*⁷⁴ postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. No application for exemption was made to this court, therefore, this Petition cannot surmount the

⁷⁰ In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

⁷¹ Act No. 4 of 2015.

⁷² Act No. 4 of 2015.

⁷³ See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

⁷⁴ Act No. 4 of 2015.



hurdle erected by section 9(4) above. On this ground alone, the two objections succeed. The Petition collapses.

56. I may add that it is uncontested that the impugned decision constitutes administrative action as defined in section 2 of the *Fair Administrative Action Act*.⁷⁵ Therefore, an internal remedy must be exhausted prior to Judicial Review or review, unless the Petitioner can show exceptional circumstances to exempt him from this requirement.⁷⁶ An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.⁷⁷ An internal remedy is adequate if it is capable of redressing the complaint.⁷⁸ There is absolutely nothing before me to suggest that the remedy under section 76 of the *Co-operative Societies Act* is not effective to address the Petitioner's grievance.
57. The principle discernible from decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it. In the case before me, no serious argument was advanced that the mechanism under the above act was not adequate nor do I find any reason to find or hold so.
58. The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, 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. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively.
59. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this Petition. The jurisdiction of the Tribunal is expressly provided under section 76 of the act. No serious argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute. The attempt to clothe the dispute with alleged breach of rights as shown shortly is legally frail and cannot stand.
60. The Petitioner seeks a declaration that his rights and privileges under the *Companies Act* and the Co-operative Society's Act have been violated. No argument was made to suggest that such a remedy cannot be granted by the Tribunal. Simply put, this case offends section 9(2) of the *Fair Administrative*

⁷⁵ Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

⁷⁶ *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

⁷⁷ Ibid para 44.

⁷⁸ Ibid paras 42, 43 and 45.



Action Act.⁷⁹ Second, the Petitioner has not satisfied the exceptional circumstances requirement under section 9(4) of the Fair Administrative Action Act.⁸⁰

61. Lastly, I will address the question whether this Petition discloses constitutional questions which the Petitioner cannot get an effective remedy before the tribunal. For starters, the “deepest norms” of the Constitution should determine whether the dispute involves explicit constitutional adjudication, or whether it could safely be left to the statutory provisions. I must underscore the fact that courts abhor the practice of parties converting every issue in to a constitutional question where such issues can safely be left to the dispute resolution mechanism established under the statute. The Court of Appeal in *Gabriel Mutava & 2 Ors. v Managing Director Kenya Ports Authority & Another*⁸¹ underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law. A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.⁸² A constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.⁸³ Sincerely, the issues raised in the Petition can be resolved using the governing statutes without resorting to the Constitution.
62. In determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.⁸⁴ The question of what constitutes a constitutional question was ably illuminated in the South African case of *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*⁸⁵ in which Justice O’Regan recalling the Constitutional Court’s observations in *S v Boesak*⁸⁶ noted that: -

“The Constitution provides no definition of “constitutional matter.” What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of ...the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State..., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,... is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and

⁷⁹ Act No. 4 of 2015.

⁸⁰ Ibid.

⁸¹ {2016} eKLR

⁸² See *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, Petition No. 14, 14A, B & C of 2014

⁸³ <http://www.yourdictionary.com/constitutional-question>

⁸⁴ Justice Langa in *Minister of Safety & Security v Luiters*, {2007} 28 ILJ 133 (CC)

⁸⁵ {2002} 23 ILJ 81 (CC)

⁸⁶ {2001} (1) SA 912 (CC)



structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction.”⁸⁷

63. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.⁸⁸ At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights.
64. Arising from the various issues discussed above, the authorities and provisions of the law cited, the determination of the issues herein above, the conclusion becomes irresistible that the Petitioner ought to have pursued the dispute resolution mechanism provided under the section 76 of the *Co-operative Societies Act* and only approach this court by way of an appeal. Having so concluded, I find that this Petition offends the doctrine of exhaustion of remedies. Accordingly, I hereby dismiss the Petitioner’s Petition dated 12th October 2021 with costs to the Respondents.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JANUARY 2022

JOHN M. MATIVO

JUDGE

⁸⁷ 2001 (1) SA 912 (CC).

⁸⁸ Supra note 5 at paragraph 23

