REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

JUDICIAL REVIEW APPLICATION NO 3 OF 2020 (JR)

IN THE MATTER OF ARTICLES 1(1), (2) & (3) (A) 10,20, 21 (1), 22, 23, 27,

47, 48, 50, 185, 232 (1), 232 (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 5, 15, 16, 17, 19, 20, 27 OF THE

COUNTY ASSEMBLIES POWER & PRIVILEGES ACT NO 6 OF 2017

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATICE ACTION ACT, 2015

AND

IN THE MATTER OF STANDING ORDERS NO 44, 47, 49 & 50 OF THE

STANDIG ORDERS OF COUNTY ASSEMBLY OF KISII

BETWEEN

REPUBLIC...APPLICANT

VERSUS

THE COUNTY ASSEMBLY OF KISII COMMITTEE OF POWERS & PRIVILEDGES....1ST RESPONDENT

THE COUNTY ASSEMBLY SERVICE BOARD KISII COUNTY ASSEMBLY...................2ND RESPONDENT

COUNTY ASSEMBLY OF KISII...3RD RESPONDENT

THE HON. SPEAKE KISII COUNTY ASSEMBLY..4TH RESPONDENT

THE CLERK OF COUNTY ASSEMBLY OF KISII...5TH RESPONDENT

EXPARTE

KAREN NYAMOITA MAGARA...EXPARTE APPLICANT

JUDGEMENT

EX-PARTE'S APPLICANT'S CASE

1. The ex parte Applicant (hereinafter the applicant), KAREN NYAMOITA MAGARA, is a nominated member of the County Assembly of

Kisii having been nominated by the Kenya National Congress Party (KNC) to represent women in the 3rd Respondent Assembly.

2. The ex parte Applicant has filed an application by way of a Notice of Motion dated 7th September 2020, seeking the following orders:

> *1) THAT the Exparte Applicant be granted an Order of Certiorari to bring into this Court and quash the Recommendations by the Committee of the 1st Respondent dated 22nd July,2020, tabled and laid on the table of the House on the 25th July, 2020 & debated and adopted as a resolution of the 3rd Respondent purporting to;*
>
> > *1) Suspend the Exparte Applicant from the service of the Assembly for a period of three (3) Assembly Calendar Sitting Months from the date of adoption of the impugned Report of the 1st Respondent.*
> >
> > *2) Bar the Exparte Applicant from the Assembly precincts for a period of three (3) Assembly Calendar Sitting Months from the date of adoption of the Report by the 1st Respondent being the 28th July, 2020.*
>
> *2) THAT the Exparte Applicant be granted an Order of Prohibition directed at the Respondents in particular the 2nd, 3rd, 4th& 5th Respondents prohibiting and restraining them from implementing the Report of the 1st Respondent dated22nd July,2020 and tabled and laid on the Table of House on 28th July,2020,and debated and adopted as a resolution of the 3rdRespondent purporting to;*
>
> > *1) Suspend the Exparte Applicant from the service of the Assembly for a period of three (3) Assembly Calendar Sitting Months from the date of adoption of the impugned Report to the 1st Respondent.*
> >
> > *2) Bar the Exparte Applicant from the Assembly precincts for period of three (3) Assembly Calendar Sitting Months from the date of adoption of the Report by the 1st Respondent being the 28th July, 2020.*
>
> *3) THAT in the alternative, the Honourable Court do grant a Conservatory Order of Injunction restraining the Respondents from implementing the resolution made on 28th July,2020 by the 3rd Respondent based on the impugned Report of Committee of the 1st Respondent.*
>
> *4) THAT the Honourable Court be pleased to issue an order for compensation for Responsibility, Sitting, Per diem and transport allowances not paid to the Exparte Applicant by the implementation of the impugned resolution by the 3rdRespondent with effect from 28th July, 2020 till the date of stay and/or determination of the Substantive Application under Articles 22(1)and 23(3) of the Constitution of Kenya,2010.*
>
> *5) THAT the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstance*
>
> *6) THAT the costs of these proceedings be borne by the Respondents.*

3. The application is supported by an affidavit sworn on 7th September 2020 by Karen Nyamoita Magara. The applicant avers that during the COVID-19 pandemic the Office of the 4th Respondent came up with Guidelines for conducting Plenary and Committee Sittings during the period. It directed that only 13 Members of the 3rd Respondent would sit in the chambers while the rest could sit at the holding areas within the 3rd respondent.

4. She further averred that on 25th June, 2020 the 3rd Respondent scheduled to have a morning and afternoon plenary sittings, and the morning session had the following businesses among others, debate on the presentation of the Budget Report by the Budget & Appropriations Committee of the Fiscal year 2020-2021. The applicant after reviewing the copy of the Budget & Appropriations Committees Report came up with a draft amendment to the said Budget Report, issued a Notice to amend certain vote heads and duly served the Office of the Speaker, but the Honourable Speaker declined to accept service. She advanced that on the said date of the debate she was denied entry to the public gallery by persons working within the executive arm of the county government leading to an altercation. As a result she suffered bodily injuries and was treated at Kisii Teaching and Referral Hospital.

5. According to the applicant, during the afternoon session Hon Ibrahim Mbuya raised the issue that the applicant had been disorderly at the speaker's office and the issue was referred to the Powers and Privileges Committee to make inquiries thereto. Although the committee had been directed to make inquiries into the issue on 25th June 2020 it was not until 9th July that it had its first sitting. On 12th July 2020 Hon Ibrahim Mbuya withdrew his statement made on the alleged disorderly conduct. However on the 13th July 2020 the ex-parte applicant was served with a letter to appear before the committee. She appeared before the committee on 15th July 2020 and when the committee finished its deliberations it recommended that the ex-parte applicant be suspended and barred from the Assembly precincts for 3 assembly calendar sitting months.

6. According to the applicant, the alleged disorderly conduct having been referred to the 1st respondent's Committee on 25th June 2020 the inquiry had to be completed within 14 days from 25th June 2020. That would have been 9th July 2020. She averred that the decision of the 1st respondent therefore offended the provisions of **Section 15** of the **County Assemblies Powers and Privileges Act No 6 of 2017**('*the Act'*). The ex-parte applicant advanced that the 1st respondent lacked jurisdiction to proceed with the inquiry and the report adopted on 22nd July 2020 was thus *ultra vires*, null and void. She further contends that Hon Ibrahim Mbuya having withdrawn the complaint the committee had no authority to proceed *suo moto* and make inquiries into the alleged misconduct.

EX-PARTE APPLICANT'S SUBMISSIONS

7. The applicant submitted that neither the 1st respondent nor the 4th respondent had discretion under **Section 15 (5)** of the **Act** to continue with the inquiry after the expiry of the 14 days. She cited the case of **Republic vs Public Procurement Administrative Review Board & 2 Others [2019] eKLR** where the court held that;

> *"23. ……A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.*
>
> ….
>
> *Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action.[18]Each of these prescriptions fit the recognized grounds for judicial review of administrative actions."*

8. They advanced that the actions were taken outside the expressly provided period by an Act of Parliament.

RESPONDENT'S CASE

9. The respondent filed their response dated 22nd December 2020. James O. Nyaoga in his affidavit deposed that the orders sought by the applicant have now been rendered nugatory.

10. It was the respondent's case that the applicant in her quest to have an amendment to the bill ought to have brought the amendment in writing to the 5th respondent's and the same be captured on the order paper. This should have arisen during the 2nd reading of the bill where the applicant should have risen to move the amendment.

11. He averred that on 25th June 2020 after presentation of the Kisii County Budget Appropriation Bill, 2020/21 report, the 4th respondent walked to his office only to find the applicant among others who sought his audience but since he was in the company of the Hon. David Kombo, Hon. Moses Onderi and Dennis Ombachi, the 4th respondent gave them an appointment before the commencement of the afternoon sitting. The applicant declined the appointment and created a scene unbecoming of an Honourable Member of the 3rd Respondent by shouting and hurling insults at the 4th Respondent. Following the incident, Hon. Ibrahim Ombuya brought to the attention of the house the alleged gross misconduct by the applicant and a debate ensued. The 4th respondent then ruled that the matter be referred to the 1st respondent. The 1st respondent was guided by the rules of natural justice and fair hearing in considering the allegations of misconduct by the appellant. Although vide a letter dated 12th July 2020 Hon. Ibrahim Ombuya sought to withdraw the statement made over the applicant's alleged misconduct, the 1st respondent after deliberations decided that withdrawal of such manner should be pegged on the provisions of Standing Order 55 of the 3rd respondent. This meant that only the 3rd respondent could sanction Hon. Ibrahim Ombuya's motion to withdraw the complaint for it was a decision of the 3rd respondent. The 2nd reason why the 1st respondent declined the withdrawal was because there had been reasonably and unjustifiable delay in withdrawing the statement.

12. According to the respondent, due to the covid-19 restrictions the 1st respondent was not able to conclude the matter within the time limit and the chairman of the Committee Hon. Kennedy Mainya sought for more time and the house approved the extension of time. He explained that the inquiry was commenced within 14 days as provided by section 15 (5) of the County Assemblies Powers and Privileges Act. The ex parte applicant was suspended for 3 assembly calendar month and with each calendar month having 16 sittings; she was suspended for a total of 48 sittings. The 14 months suspension as alleged by the applicant was not only meant to mislead the court but to whip emotions by alarmingly compounding suspension to make it lengthy to unsuspecting members of the public. It was advanced that the court is not seized with the jurisdiction to arrest the service of the suspension by the applicant as the orders in the application have been rendered nugatory and unenforceable. It was also averred that the applicant resumed duty on 3rd November 2020.

13. The respondent averred that in any event the applicant was not financially prejudiced since during the pendency of her suspension she enjoyed her full salary and other allowances save for committee and plenary sitting allowances which are predicated on actual presence and physical participation either in committee or plenary. The applicant was nominated under special interest groups, more specifically in recognition and attaining affirmative action and that during the service of her suspension, the County Assembly remained properly constituted notwithstanding.

14. It was also advanced that the applicant did not seek for an exemption order from the doctrine of exhaustion. She also failed to exhaust the review and dispute resolution mechanisms available to her before filing the suit.

RESPONDENT'S SUBMISSIONS

15. It was submitted that the committee should commence its inquiry within 14 days of receipt of a complaint. The case of **Nyamira High Court Miscellaneous Civil Application No 02 of 2019 Republic v the County Assembly of Kisii Committee of Powers and Privileges & 4 Others ex-parte Hon. Thaddeus Nyaboro & Another (unreported)** has been cited where the court stated;

> "…*However, it was not until 23rd July, 2019 that the committees chaired by the Speaker started inquiring into the conduct the*

subject of the complaint (sic). This was 24 days after receipt of the complaint. Clearly the committee did not have jurisdiction to do so when the Act states it should gave done so within fourteen days of receipt of the complaint….”

16. It was also submitted that the applicant did not dispute the misconduct but only took issue with the procedure. They cited the case of **Republic v Public Procurement Administrative Review Board & 2 Others (2019) eKLR** where the court held that:

> *“…The requirements relating to procedure contained in the statute or other instrument must be complied with. However failure to comply with required procedure does not automatically mean that the decision which follows is invalid. The Courts take a range of factors into account in deciding whether or not to nullify a decision…”*

17. They submitted that due procedure was followed and a fair and just decision arrived at. The respondents maintained that the applicant enjoyed her full salary save for committee, plenary sitting allowances, per diem, transport and responsibility allowance. In **Kabarnet High Court Petition No 2 of 2020 Hon. Ameja Zemeloi v County Assembly of Baringo & 2 Others (2020) eKLR,** it was held;

> *“….there is no property in a public office, and for the same reason there can be no damages or compensation for monies in form of allowances lost by the petitioner from the time of removal….”*

ANALYSIS AND DETERMINATION

18. Having carefully considered the pleadings, the rival submissions by the parties as well as the law, and the issues that inevitably arise for determination are as follows;

(a) Whether there was a procedural impropriety in the decision to suspend the ex parte applicant.

(b) Whether the ex parte applicant’s right to fair administrative action was breached.

(c) Whether the ex parte applicant has breached the doctrine of exhaustion.

(d) What remedies if any are available to the ex parte applicant.

(a) Whether there was procedural impropriety in the decision to suspend the ex parte applicant.

19. The mainstay of the applicant’s case under this limb is that the inquiry leading to her suspension was not conducted within the time frames set by the relevant Law, being **Section 15(5)** of the **County Assembly Powers and Privileges Act No. 6 of 2017**. The section provides;

> *“S 15(5) The Committee of Powers & Privileges shall, either on its own Motion or as a result of a complaint made by any person, inquire into the conduct of a member whose conduct is alleged to constitute breach of privilege in terms of section 16 within fourteen (14) days of receipt of complaint.”*

20. It is the applicant’s case that the allegations of disorderly conduct against her was raised on a point of order by one Hon. Ibrahim Mbuya. The allegation of disorderly conduct (complaint) was referred to the Powers and Privileges Committee by Hon. Speaker of the Kisii County Assembly for an inquiry. On 9th July 2020, the Powers and Privileges Committee convened its first meeting to inquire into the alleged disorderly conduct. Hon Mbuya who had raised the issue wrote a letter on 12th June 2020 in which he withdrew the statement he had made on the floor of the house on 25th June 2020.

21. The applicant was vide a letter dated 13th July 2020 summoned to appear before the Committee on 15th July 2020. She duly attended in presence of her counsel, Mr. Samuel Kerosi Ondieki. The Committee subsequently compiled the impugned report. The report was tabled for debate on 25th July 2020 in a session whose mood was hostile to the applicant and the same was adopted in the afternoon in a session the applicant boycotted for reasons that she knew the report would be adopted anyway.

22. Flowing from the above summary, the applicant’s contention is that the inquiry was not conducted within 14 days as envisaged under **S 15(5)** of the **Act**. That contention is countered by the 1st respondent who state that the inquiry was commenced on the 9th July 2020 which was within the 14 days as required by the Law. In support of this contention, the respondents have relied on the decision by **E.N Maina J in Nyamira High Court Misc. Civil Application No. 02 of 2019, R vs The County Assembly of Kisii Committee of Powers and Privileges & 4 Others Ex parte Hon. Thaddeus Nyabaro and Another (unreported)** where the Court held;

> ***“…. However, it was not until 23rd July, 2019 that the committees chaired by the Speaker started inquiring into the conduct the subject of the complaint. This was 24 days after receipt of the complaint. Clearly the committee did not have jurisdiction to do so when the Act states it should have done so within fourteen days of receipt of the complaint….”***

23. I have considered this proposition by the respondents. I have had due regard to the decision by my sister E.N Maina J above. I am of the considered view that the remarks of E.N Maina J in R vs County Assembly of Kisii Case (supra) has been taken out of context and an attempt has been made to import a new meaning to the relevant paragraph.

24. The Concise Oxford English Dictionary Twelfth edition gives the meaning of the word within as;

"Inside (something), inside the range of, inside the bounds set by, occurring inside a period of time."

By the deliberate use of the word ***within*** in **section 15(5)** of the **Act**, the legislature must have intended that upon the making of a complaint, the inquiry had to be initiated and concluded within 14 days. For of what use would be the objective of the use of the word within if the inquiry could go on and on without limits? If the contrary was true, nothing would have been easier than for the legislature to use clear words (and there are many) showing that the 14 days stated would be the period by which the inquiry needed to be started. The word commence which has apparently been imported to the Act by the respondent in their submissions would have been among the many words that would have been readily available to the legislature.

25. It follows therefore that in the decision to suspend the applicant, the timelines set by Law were not strictly followed. Does that render the decision fatal? While procedure is a relevant and important factor in determination of propriety of an administrative action, courts have been reluctant to invalidate decisions solely on the basis of procedural lapses.

26. In **Nairobi (Milimani) Misc Application No. 187 of 2018, Republic vs Public Procurement Administrative Board & 2 Others [2019] eKLR**, Mativo J stated;

"…. The requirements relating to procedure contained in the statute or other instrument must be complied with. However failure to comply with required procedure does not automatically mean that the decision which follows is invalid. The Courts take a range of factors into account in deciding whether or not to nullify a decision….."

27. In our instant case, this court is alive to the fact that the Covid 19 pandemic had hit and affected the operations of all entities, both public and private, within the period when the facts giving rise to the present suit arose. The uncertainties surrounding the operations of all entities in this period would in my view allow lapses in timelines and especially where the lapse does not demonstrate undue delay. It would then behove on this court to lay more emphasis on the propriety of the decision based on compliance with, or non compliance with, as the case may be, with the ethos of natural justice espoused under **Article 47** of the **Constitution** and expounded under the Fair Administrative Action Act and this forms the next part of consideration.

b) Whether the applicant's right to fair administrative action was breached.

28. To succeed in an application for judicial review an applicant has to put himself under the ambit of the principles set in **Municipal Council of Mombasa vs Republic & Another [2002] eKLR** where the Court of Appeal expressed itself as follows;

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

29. This position is further enunciated in **Republic vs Attorney General & 4 Others ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji 2014 eKLR** where the court held;

"Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters."

30. In ***Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300*** the court stated;

"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".

31. And finally in **Republic vs Chairman Amagoro Land Disputes Tribunal & Another Ex-parte Paul Mafwabi Wanyama [2014] eKLR** the Court of Appeal held that;

"Judicial review applications do not deal with the merits of the case but only with the process. For instance judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were given an opportunity to be heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute, the Court would not have jurisdiction in such proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."

32. The report of the Powers and Privileges Committee was tabled in the County Assembly, debated and adopted. The applicant was present but in her own words states that she did not attend the afternoon session as by the look of things the report would be adopted anyway.

33. The Powers and Privileges Committee as well as the County Assembly had the power (the jurisdiction) to make the decision made. The ex parte applicant was summoned before the committee and was heard in the presence of her Advocate. The report was tabled in the County Assembly, debated in presence of the ex parte applicant and adopted (in her voluntary absence). There is no evidence that either of the entities did not take into account relevant matters nor took into account irrelevant matters. This Court cannot therefore purport to sit on appeal over the decision in the absence of any infractions as illustrated above. There thus exists no grounds upon which an order of certiorari or prohibition would issue. I must say something more on the prayer for an order of prohibition.

34. The respondent's decision upon which the applicant seeks an order of prohibition has already been fully carried out. In **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *the court stated that*:

> ***"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings….Only an order of*** *certiorari* ***can quash a decision already made and an order of*** *certiorari* ***will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."***

35. In the circumstances, the decision of the County Assembly having been made and implemented, the remedy of prohibition would not have been available to the applicant.

36. Am alive to the fact that the legislature, arising from '*Parliamentary Privilege'* enjoys freedom from control by the executive and the courts so as to discharge its functions effectively. In **Republic vs Ethics and Anti-Corruption Commission Ex parte Nairobi City County Assembly & 13 Others [2019] eKLR** the court stated;

> *"23. It is undisputed that all legislative bodies enjoy certain legal privileges, powers and immunities known as "Parliamentary Privilege." Parliamentary privilege is designed to remove any impediments or restraints to the legislature going about its work, and to enable it to deal with challenges to its authority. Parliamentary privilege has been justified in law on the grounds that a legislature must enjoy freedom from control by the executive and the courts (an aspect of the constitutional separation of powers); that it must possess certain powers to facilitate the carrying out of its functions; and that it, its members and others participating in its proceedings must enjoy certain immunities for the legislature to discharge its functions effectively. The privileges that a legislature enjoys are not an end in themselves; they form part of a constitutional expression of parliamentary autonomy and are a means to achieving an end—an effectively functioning legislature able to operate in the public interest.*
>
> *24. Although parliamentary privilege is a (more or less) well-defined category of law, it must coexist within the general corpus of legal rights, powers and immunities that are established and recognised by legislation and the common law. It is not a body of higher or fundamental law that overrides all other law, but is subject to statutory abrogation in the ordinary way. Only clear, unambiguous legislation will override or abrogate an aspect of parliamentary privilege. Such provisions are rare owing to the constitutional role of parliamentary privilege."*

From the foregoing, it is clear on the material before court that this court must steer clear of exercising any control over the respondent and allow the necessary freedom to exercise their functions and mandates effectively by upholding the challenged decision.

c. Whether the court has jurisdiction due to the doctrine of exhaustion.

37. It has been urged from the respondents that this court has no jurisdiction over the matter owing to the doctrine of exhaustion. It is the respondent's case that the applicant is yet to exhaust all the avenues laid down in Law and to her as a member of the County Assembly. If dissatisfied with the resolution of the Assembly, the applicant should have had recourse to **Kisii County Assembly Standing Order Number 46 (2) (a)** which provides;

> ***"A motion to rescind the decision on such a question may be moved with the permission of the Speaker."***

38. It is urged that the applicant had the opportunity to move a motion with the permission of the Speaker to rescind the decision, which she never did, and is yet to do. She has thus not exhausted the avenues available to her.

39. Courts have pronounced themselves in cases where parties ignore avenues availed to them and instead opt to rush to court. In **Mayson Services Ltd vs Parklands Baptist Church Registered Trustees and Another** it was held that;

> ***"A party seeking Judicial review remedy must exhaust the review and appeal remedies available under the applicable law and where in the interest of justice, exhaustion of those remedies is not a viable route, the Applicant is obligated to move the court for an exemption order."***

40. The applicant did not seek an exemption order and by moving court without exhausting the available avenue and without an exemption order, she fell foul of the doctrine of exhaustion. As held in **Geoffrey Muthinja Kabiru and 2 Others vs Samuel Munga Henry and 1756 Others [2015] eKLR**;

"It is imperative that where a dispute resolution mechanism exists outside courts, the same must be exhausted before the jurisdiction of the court is invoked. Court ought to be a fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts…."

41. In my earlier ruling in this matter at the preliminary stage, I left the issue of doctrine of exhaustion in abeyance awaiting evidence if any that the applicant had employed the mechanisms available to resolve the issue at hand before having recourse to court. The applicant has failed to demonstrate evidence of such compliance and therefore this point alone would dispose off the application adversely to her.

42. With the result that for reasons above elucidated, this court finds the Notice of Motion dated 7th September 2020 without merit and I make the following orders;

1. The Notice of Motion dated 7th September 2020 is dismissed.

2. Each party to bear its own costs.

Dated, Signed and Delivered at Kisii this 28th day of April, 2021.

A.K. NDUNG'U

JUDGE