



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 22 OF 2020

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA MOTORSPORTS FEDERATION LTD..1<sup>ST</sup> RESPONDENT

NATIONAL APPEALS BOARD OF THE KENYA MOTORSPORTS

FEDERATION LTD.....2<sup>ND</sup> RESPONDENT

EX PARTE APPLICANTS: RHTM

JBHM

(Suing through parents and next friend)

NCM

RM

JUDGMENT

1. The *ex parte* Applicants herein are the parents of two minor children, namely RHTM (R) and JBHM (J). The 1<sup>st</sup> Respondent is a corporate body that regulates all forms of motor sports in Kenya, including Karting. The 2<sup>nd</sup> Respondent is a quasi-judicial body set up under the 1<sup>st</sup> Respondent's internal rules and regulations for purposes of determining appeals in relation to the 1<sup>st</sup> Respondent's decisions.

2. The *ex parte* Applicants herein filed an Amended Notice of Motion application on 13<sup>th</sup> February 2020 seeking the following orders:

a. An Order of Certiorari to remove into the High Court and quash forthwith the 2<sup>nd</sup> Respondent's appeal determination dated 23<sup>rd</sup> January 2020 dismissing the *ex parte* Applicant's appeal dated 14<sup>th</sup> January 2020.

b. A Declaration that the 2<sup>nd</sup> Respondent's decision contained in the appeal determination dated 23<sup>rd</sup> January 2020 was a violation of the *ex-parte* Applicants' constitutional right to fair administrative action guaranteed under Article 47 of the Constitution of Kenya, 2010 and the provisions of section 4(1), (2) & (3) of the Fair Administrative Action Act, 2015.

c. An Order of Prohibition preventing the Respondent from awarding or distributing any prizes for Junior Rotax Class and Rotax Mini Max Class to any other persons than RHTM and JBHM.

d. An Order of Certiorari calling into this Court for the purposes of quashing forthwith the 1<sup>st</sup> Respondent's decision contained in the email dated 11<sup>th</sup> January 2019 annulling the results for Round 5 and 8 of the 2018 National Karting Championship.

e. A Declaration that the 1<sup>st</sup> Respondent's decision contained in the email dated 11<sup>th</sup> January, 2019 annulling the results for

**Rounds 5 and 8 of the 2018 National Karting Championship violated the Applicant's constitutional right to fair administrative action and the right to be heard as guaranteed under Article 47 and 50(1) of the Constitution of Kenya, 2010 respectively.**

**f. An Order of Mandamus ordering the Respondent to award prizes for the 2018 National Karting Championship in the Junior Rotax Class and Rotax Mini Max Class to RHTM and JBHM respectively.**

**g. An order of general damages against the 1<sup>st</sup> Respondent for violating the Applicant's constitutional rights.**

**h. The costs of this application be provided for.**

3. The application is supported by a Statutory Statement dated 13<sup>th</sup> February 2020, a Verifying Affidavit dated 24<sup>th</sup> January 2020, a Further Affidavit dated 24<sup>th</sup> February 2020 and a Supplementary Affidavit dated 29<sup>th</sup> May 2020. All the said affidavits are sworn by RM.

4. The Respondents thereupon filed a replying affidavit sworn on 26<sup>th</sup> February 2020 by Mwaura Njuguna, the 2<sup>nd</sup> Respondent's General Manager. In addition, the Respondent filed a Notice of Motion application dated 3<sup>rd</sup> March 2020, that sought orders of stay and dismissal of the instant proceedings on the ground that they are *res judicata*, which application was supported by an affidavit sworn on 26<sup>th</sup> February 2020 by the same deponent. The Court directed that the Respondent's Notice of Motion dated 3<sup>rd</sup> March 2020 be treated as part of their response to the *ex parte* Applicants' substantive Notice of Motion.

5. A summary of the relevant facts of the parties' respective cases, as garnered from the foregoing pleadings, is set out in the following sections.

### **The ex parte Applicants' Case**

6. The *ex parte* Applicants averred that R and J are motor racing enthusiasts, and that they participate in a motor racing discipline known as Karting, which is organized under the sponsorship of the 1<sup>st</sup> Respondent. Further, that the two participated in the 2018 Karting Championship. It was averred that for each Championship, the 1<sup>st</sup> Respondent issues a license allowing the race to be run, and appoints one of its member clubs to organize the event. In addition, that once the 1<sup>st</sup> Respondent has issued the said license, it delegates power to the Karting Commission, a body it has established to regulate the Karting discipline, which body approves the publication of a notice called the Supplementary Regulations. Further, that the said regulations are given for each championship, and set out details of timing, relevant officials and rules to the running of that event. The deponent deposed that ultimately all decisions by the Karting Commission are subject to ratification and /or veto by the 1<sup>st</sup> Respondent's Board of Directors.

7. The *ex parte* Applicants' case is that on 14<sup>th</sup> January 2019, they lodged an appeal against the 1<sup>st</sup> Respondent's decision to annul the results of round 5 and 8 of the 2018 National Karting Championship, and that thereafter the 1<sup>st</sup> Respondent decided to award prizes for the disputed Championship completely disregarding the said appeal. The *ex parte* Applicants state that they thereupon filed **NRB HC JR Case No.10 of 2019 - NCM & Another vs Kenya Motor Sports Federation Ex Parte RHTM and JBHM (Suing through parents and next friend)**, wherein this Court through its decision of 24<sup>th</sup> July 2019 declared that the 1<sup>st</sup> Respondent's conduct was in violation of their legal rights, and directed the 1<sup>st</sup> Respondent to hear the *ex parte* Applicants' appeal.

8. The *ex parte* Applicants deposed that on 24<sup>th</sup> December 2019, the 1<sup>st</sup> Respondent's counsel, Mr. Brian Murangasia, wrote to them informing of the date set for the hearing of the appeal as 17<sup>th</sup> January 2020. However, that at the time the 2<sup>nd</sup> *ex parte* Applicant was out of the country, and he was unable to provide any instructions to his counsel. It was further deposed that by a letter dated 6<sup>th</sup> January 2020, the *ex parte* Applicants demanded to know the composition of the appeals tribunal, as well as the identity of the clerk to the appeals panel, for purposes of furthering all correspondence relating to the appeal hearing. However, that the 1<sup>st</sup> Respondent refused to provide the information requested, and only stated that the composition was in line with the 1<sup>st</sup> Respondent's regulations.

9. Thereafter, that on 17<sup>th</sup> January 2020, the *ex parte* Applicants instructed their counsel to forward skeletal submissions to the 1<sup>st</sup> Respondent, and to protest the irregular manner in which the appeal hearing was being conducted without any transparency as to the composition of the appeals panel. The *ex parte* Applicants further averred that upon appearing at the hearing before the 2<sup>nd</sup> Respondent together with their children and witnesses, they were shocked to find out that Mr. Brian Murangasia was the clerk to the Appeals Board. According to the *ex parte* Applicants, Mr. Brian Murangasia was the advocate who had defended the 1<sup>st</sup> Respondent in **NRB HC JR Case No.10 of 2019**, and was the personal lawyer of Jim Kahumbura, who was representing the 1<sup>st</sup> Respondent together with one John Kamau at the appeal hearing. Further, that the 2<sup>nd</sup> Respondent's members introduced themselves as Rohit Bhudia, Ken Wamae and Daniel Ngugi, but they did not give their background and qualifications which allowed them to sit in the appeal hearing.

10. It is also the *ex parte* Applicants' case that the appeal panel members were openly biased and hand-picked to ensure a predetermined and forgone conclusion, that is to dismiss the appeal. They contended that both Mr. Jim Kahumbura and Mr. John Kamau were senior members of the 1<sup>st</sup> Respondent being chairman and treasurer respectively, and that Ken Wamae was handpicked to sit on the appeals board without any discernible qualification. It was also deposed that Mr. Rohit Bhudia had also officiated at events organized by the 1<sup>st</sup> Respondent, and that Daniel Ngugi Kamau was an advocate of this Court with no apparent links to motorsport, and was handpicked by Brian Murangasia as they schooled at the same university and were admitted to the bar on the same date.

11. Consequently, that on 23<sup>rd</sup> January 2019 at about 4.30 p.m., the *ex parte* Applicants' counsel was served with a hard copy of the 2<sup>nd</sup> Respondent's decision which dismissed the *ex parte* Applicants' appeal and ordered JM to pay filing fees of Kshs. 10,000.00 as well as costs

to the Respondents amounting to Kshs. 300,000.00. It is deposed that no reasons were given for the excessive costs imposed by the 2<sup>nd</sup> Respondent. It was also averred that the determination made the following irregular, biased, unreasonable and illegal findings-

a. That despite this Court declaring in paragraph 69 of the Judgment in **NRB HC JR Case No.10 of 2019** that the 1<sup>st</sup> Respondent had violated the *ex parte* Applicants' right to be heard while conducting an audit of rounds 5 and 8 of the 2018 National Karting Championship, the 2<sup>nd</sup> Respondent rubbished and disregarded this Court's finding.

b. That despite this Court finding in paragraph 65 of the Judgment in **NRB HC JR Case No.10 of 2019** that the meeting of 19<sup>th</sup> December 2018 was not a hearing, the 2<sup>nd</sup> Respondent proceeded to disregard and contradict this Court's finding by irregularly, and without evidence terming it a hearing.

c. The 2<sup>nd</sup> Respondent made most determinations without any reference to the 1<sup>st</sup> Respondent's rules and regulations.

d. That despite there being no evidence that the audit report on rounds 5 and 8 of the 2018 National Karting Championship was availed to the *ex parte* Applicants, the 2<sup>nd</sup> Respondent went ahead to make findings that it was.

e. That despite the *ex parte* Applicants presenting cogent documentary evidence to controvert the allegations made by the 1<sup>st</sup> Respondent in the meeting of 19<sup>th</sup> December 2018 relating to the infringements allegedly made by J, the 2<sup>nd</sup> Respondent completely ignored the evidence and upheld the irrational absurd and illegal findings of the 1<sup>st</sup> Respondent.

12. It was thus contended that the 2<sup>nd</sup> Respondent's determination is an affront to the *ex parte* Applicants' right to a fair administrative action and fair hearing, as guaranteed by the Constitution of Kenya and the provisions of the Fair Administrative Action Act. The *ex parte* Applicants' in this respect produced a transcribed audio recording of the hearing in an electronic flash disk, together with a certificate under Section 106B of the Evidence Act.

13. In response to the allegation that the instant proceedings are *res judicata*, the *ex parte* Applicants argued that this matter is founded on separate and distinct cause of action, since **NRB HC JR Case No.10 of 2019** was precipitated by the 1<sup>st</sup> Respondent's decision to award prizes for the 2018 National Karting Championship despite the *ex parte* Applicants' pending appeal lodged against the 1<sup>st</sup> Respondent's decision to irregularly annul the results of rounds 5 and 8 of the 2018 Championship. On the other hand, that in the current suit, the *ex parte* Applicants' are challenging the 2<sup>nd</sup> Respondent's decision dated 24<sup>th</sup> January 2020, and is based on the internal appeal, its process, procedure and outcome, and the hearing of the appeal had not taken place when the court rendered its determination in **NRB HC JR Case No.10 of 2019**. In addition, that **NRB HC JR Cases No. 235 and 260 of 2019** were seeking to stop specific races in the 2019 National Karting Championship pending the hearing and determination of the appeal that was pending before the Respondents, and their existence is immaterial to the proceedings before this court.

14. On the instant application being overtaken by events, the *ex parte* Applicants averred that the 2<sup>nd</sup> Respondent's impugned decision was served upon them at 5 p.m. on 23<sup>rd</sup> January 2020, and that on 24<sup>th</sup> January 2020, they immediately instructed counsel to file the proceedings before this court. Further, that the court issued a stay order on the same date and the same was extracted and served on the 1<sup>st</sup> Respondent by email at 5.33 pm on the same day. It was further argued that contrary to previous practice where the 1<sup>st</sup> Respondent would conduct the award ceremonies in public, the *ex parte* Applicants were not informed of the alleged presentation of the awards and trophies. In addition, that the 1<sup>st</sup> Respondent contrived and drew up letters dated 24<sup>th</sup> January 2020 to unnamed recipients to collect trophies, in an attempt to defeat the instant proceedings.

15. The *ex parte* Applicants contended that they are the one directly affected in these proceedings by being robbed of their crown as winners of the 2018 Championships, as well as having suspensions and fines imposed on them. Therefore, that since not all competitors were winners, they were not affected by the cancellation of the results of the competition. It was further argued that no other competitor had lodged an appeal against the 1<sup>st</sup> Respondent's decision and it has not been shown how the 30 other competitors have been adversely affected by the Respondents' decisions, to warrant them being enjoined as parties to this suit.

16. Lastly the *ex parte* Applicants claimed that the decision issued on 23<sup>rd</sup> January 2020 expressly states that Mr. Murangasia was the clerk to the appeals board, and that the fact that he has been litigating before this court in **NRB HC JR Case No.10 of 2019** to defend the 1<sup>st</sup> Respondent's decision clearly signals a manifestation of bias in the appeals board; that the composition and conduct of the 2<sup>nd</sup> Respondent was not independent; and that the outcome of the appeal was fully manipulated by the 1<sup>st</sup> Respondent's control.

17. In conclusion, the *ex parte* Applicants argued that paragraph 3.0 of the Respondents' National Competition Regulations expressly states that the decision of the 2<sup>nd</sup> Respondent is final, and that the Respondents have not stated what channels existed to seek redress. Further, that it was not possible to determine prior to the appeal hearing whether or not the members of the appeals body were qualified, as the 1<sup>st</sup> Respondent refused to disclose the identity of the members, and the *ex parte* Applicants could only bring this suit after scrutinizing the reasons offered by the 2<sup>nd</sup> Respondent for arriving at the impugned decision.

### **The Respondents' Case**

18. The Respondents averred that the issues and questions raised relating to the 2<sup>nd</sup> Respondent's hearing and determination of the *ex parte* Applicants' appeal lodged on 14<sup>th</sup> January 2019 are *res judicata*, as the same issues were raised, heard and determined by this court in **Nairobi Judicial Review Case No.10 of 2019 - NCM & Another vs Kenya Motor Sports Federation Ex Parte RHTM and JBHM (Suing through parents and next friend)**. It was deposed that the *ex parte* Applicants failed to disclose to this court that they also instituted

similar proceedings in **Nairobi Judicial Review No.235 of 2019** and **Judicial Review No.260 of 2019 NCM & Another vs Kenya Motor Sports Federation Ex Parte RHTM and JBHM (Suing through parents and next friend)**.

19. It was further deponed that the suit herein has been overtaken by events since the 1<sup>st</sup> Respondent, upon receipt of the decision of the 2<sup>nd</sup> Respondent on 23<sup>rd</sup> January 2020, went ahead to publish the results of the winners of the 2018 Karting Championship Junior Rotax Class and Rotax Min Max Class, and awarded them their respective trophies and awards on 24<sup>th</sup> January 2020. Therefore, that the proceedings herein an academic exercise. Further, the deponent averred that these proceedings are similar to condemning the other thirty (30) children who took part in the competition unheard, since the *ex parte* Applicants have consistently failed to enjoin them into these proceedings.

20. The Respondents also contended that the proceedings before this court are bad in law, since the prayers sought in the Amended Notice of Motion do not raise objections on the process undertaken by the 2<sup>nd</sup> Respondent but are actually an appeal of its decision, contrary to the tenets and creeds guiding judicial review proceedings. The Respondents denied that Brian Murangasia was a member of the Appeals Board, and averred that this assertion was meant to hide the fact that the *ex parte* Applicants were heard as directed by this court in **NRB HC JR Case No. 10 of 2019**, and that in case they were dissatisfied by the 2<sup>nd</sup> Respondent's decision, there was a proper channel within the 1<sup>st</sup> Respondent to seek redress rather than filing multiple suits in the Courts.

21. The personal and professional relationship between Jim Kahumbura and Brian Murangasia, the 1<sup>st</sup> Respondent's Director and counsel respectively, was termed as inconsequential to these proceedings. The Respondents averred that the 2<sup>nd</sup> Respondent was constituted by the 1<sup>st</sup> Respondent, and that its members were competent and qualified in accordance with the 1<sup>st</sup> Respondent's National Competition Regulations. It was contended that the *ex parte* Applicants have not annexed any evidence to warrant the disqualification of the 2<sup>nd</sup> Respondent's members. Further, that no objections nor protests were raised by the *ex parte* Applicants during the hearing of the appeal on 17<sup>th</sup> January 2020, as to the constitution of the 2<sup>nd</sup> Respondent or the manner it conducted the appeal. That on the contrary, after the conclusion of the hearing, the *ex parte* Applicants thanked the Board, proceeded to wait for its decision which was delivered on 23<sup>rd</sup> January 2020.

22. It is thus the Respondents' case that the fact that the *ex parte* Applicants waited until the Board's decision was delivered to institute these proceedings is a clear sign that they were satisfied with the process, and that their application has since been overtaken by time as the trophies and awards had already been issued to the champions before the commencement of these proceedings. Further, that the 1<sup>st</sup> *ex parte* Applicant, NM, failed to disclose to this Court that she was a member of the Karting Commission that oversaw, organized and supervised the 2017 Championships which were "won" by her sons who are the *ex parte* Applicants herein, and that this favoritism led to the disbandment of the Karting Commission by the 1<sup>st</sup> Respondent. Therefore, that these proceedings have been instituted to settle scores.

23. In conclusion it was argued that the Respondents' decision to annul the results of round 5 and 8 of the 2018 Karting Championship Junior Rotax class and Rotax Mini class was fair and just and in case of dissatisfaction, there are internal channels within the 1<sup>st</sup> Respondent to seek redress. It was contended that the *ex parte* Applicants have not raised any reasonable ground to warrant the granting of the orders sought, aside from unreasonable apprehensions, fears and unsubstantiated allegations about the conduct of the Respondents' officers.

### **The Determination**

#### **Preliminary Issue.**

24. A preliminary issue has been raised by the Respondents as to whether this suit is *res judicata*, that needs to be determined first. Section 7 of the Civil Procedure Act bars a court from hearing a suit which is *res judicata* as follows:

**“ No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”**

25. The test as to whether a suit is *res judicata* was explained by the Supreme Court of Kenya in **John Florence Maritime Services Limited & Another vs Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR** as follow:

**“[59] For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:**

- a) There is a former Judgment or order which was final;**
- b) The Judgment or order was on merit;**
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and**
- d) There must be between the first and the second action identical parties, subject matter and cause of action.**

**(See Uhuru Highway Developers Limited v. Central Bank of Kenya & Others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v. Attorney General & 8 Others Civil Appeal 110 of 2011 (2013) eKLR)”**

26. The prerequisites for *res judicata* to arise therefore are that there must be a final judgment on the merits, the claims must be the same in

the first and subsequent suits, and the parties in the subsequent action must be the same as those in the first, or have been represented by a party to the prior action. As observed by the English Supreme Court in **Virgin Atlantic Airways Ltd vs Zodiac Seats UK Limited [2013] UKSC 46**, the thrust of the doctrine is to prevent a party from re-litigating an issue or a defence which has already been determined (known as cause of action estoppel or issue estoppel), or which could have previously been litigated.

27. The Kenyan Court of Appeal also explained the rationale of the doctrine in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR**, as follows:

**“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of Court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”**

28. On appeal, the Supreme Court of Kenya reiterated this position in its judgment in **John Florence Maritime Services Limited & Another vs Cabinet Secretary, Transport and Infrastructure & 3 others (supra)**, and held that the doctrine of *res judicata* prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action and serves the cause of order and efficacy in the adjudication process. Further, that it ensures that litigation came to an end and prevents a multiplicity of suits. The Supreme Court however made an exception for constitutional matters, and held that exemptions to the doctrine of *res judicata* should be permissible where there was real potential for substantial injustice if a constitutional matter was not heard on its merits, after examining the entirety of the circumstances.

29. The Respondents have in this regard referred to the judgment delivered in **NRB HC JR Case No.10 of 2019** and argue that the said judgment determined the issues raised in the present proceedings. An examination of the prayers sought in the instant application reveals that the *ex parte* Applicants are aggrieved by two decisions made by the Respondents. The first is the determination of the *ex parte* Applicant’s appeal dated 23<sup>rd</sup> January 2020 made by the 2<sup>nd</sup> Respondent, and the second is the 1<sup>st</sup> Respondent’s decision contained in the email dated 11<sup>th</sup> January 2019 annulling the results for Round 5 and 8 of the 2018 National Karting Championship.

30. In **NRB HC JR Case No.10 of 2019** the *ex parte* Applicant’s sought orders in relation to an email by the 1<sup>st</sup> Respondent dated 14<sup>th</sup> January 2019, and the Court gave the following orders therein:

**I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing, the decision of the Respondent contained in the email dated 14<sup>th</sup> January, 2019 announcing winners of Junior Rotax Class and Rotax Mini Max Class of the 2018 Kenya National Karting Championship;**

**II. A Declaration that the Respondent’s decision contained in the email dated 14<sup>th</sup> January 2019 announcing winners of Junior Rotax Class and Rotax Mini Max Class of the 2018 Kenya National Karting Championship notwithstanding the Applicant’s intention to appeal lodged on 11<sup>th</sup> January 2019 was a violation of the Applicants’ constitutional right to fair administrative action guaranteed under Articles 47 of the Constitution of Kenya, 2010 and the provisions of Section 4(1), (2) & (3) of the Fair Administration Act, 2015.**

**III. An order of Prohibition be and is hereby granted preventing the Respondent from awarding or distributing any prizes for Junior Rotax Class and Rotax Mini Max Class on 19<sup>th</sup> January 2019 or any other date pending the hearing and determination of the Applicant’s appeal against the Respondent’s decision to annul the results for rounds 5 & 8 of the 2018 Kenya National Karting Championship contained in the 2018 Kenya National karting Championship Standings published on 11<sup>th</sup> January 2019.**

**IV. The Applicants’ appeal as stated in their letter dated 14<sup>th</sup> January 2019 addressed to the Respondent is hereby remitted to the Respondent for hearing and determination in accordance with the provisions of the Constitution, the Fair Administrative Action Act and any other applicable laws or regulations, within six months of the date of this judgment.**

**V. The Respondent shall meet the Applicant’s costs of the Notice of Motion dated 18<sup>th</sup> January 2019.**

31. The orders in **NRB HC JR Case No.10 of 2019** were granted on 24<sup>th</sup> July 2019, and specifically directed the Respondents to hear and determine the *ex parte* Applicants’ appeal. The said appeal was determined by the 2<sup>nd</sup> Respondent on 23<sup>rd</sup> January 2020. Any dispute arising from the said appeal determination cannot possibly have been in issue, nor the subject of the proceedings and decision in **NRB HC JR Case No. 10 of 2019**, as it was not in existence at the time of the hearing of the case, having been made subsequent to the conclusion of the said case. Any facts and legal issues arising out of the said appeal determination by the 2<sup>nd</sup> Respondent therefore constituted a new cause of action and new issues for these reasons.

32. On the other hand, the decision contained in the email dated 11<sup>th</sup> January 2019 was a live issue during the hearing of **NRB HC JR Case No.10 of 2019**. It is notable that one of the principles and application of the doctrine of *res judicata* is that a party may not bring subsequent proceedings which should and could have been dealt with in earlier proceedings. Explanation 4 to section 7 of the Civil Procedure Act provides as follows in this respect:

**“Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit**

shall be deemed to have been a matter directly and substantially in issue in such suit”.

33. This position was also explained in Henderson vs Henderson (1843) 3 Hare 100, 115 as follows:

“In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time... “

34. Specifically, as regards the application of issue estoppel to public law proceedings, Supreme Court of Kenya in its judgment in John Florence Maritime Services Limited & Another vs Cabinet Secretary, Transport and Infrastructure & 3 others (supra), made reference to Halsbury’s Laws of England, Volume 12A, 5th Edition, 2015 wherein it is stated as follows

“1626. Issue estoppel is a doctrine appropriate to proceedings in private law. While in certain circumstances it would be an abuse of process to permit a public authority which had acted in disregard of a declaration or order made in judicial review proceedings to seek to re-open debate about whether its actions were justified, in judicial review there is always a third party who is present: the wider public or private interest. The wider public or private interest should not be prejudiced by the failure of a public authority to place all the relevant material and arguments before the court on the first occasion, or if that authority reconsiders in the light of the previous decision but arrives at conclusions which do not in every respect mirror the court’s conclusions on the first occasion. The extent to which the doctrine of issue estoppel is applicable in judicial review proceedings is therefore doubtful. It has however been held that issue estoppel may apply in habeas corpus proceedings. In planning appeals, although the doctrines of cause of action estoppel and issue estoppel do not apply to decisions of inspectors, a previous inspector’s decision on a matter is material consideration which an inspector is obliged to take into account. It has also been said that courts should not be used as a means to attempting to reargue points that have already been fully considered at a planning inquiry.”

35. In the circumstances of the present case, the decision contained in the 1<sup>st</sup> Respondent’s email dated 11<sup>th</sup> January 2019 annulled the results for Round 5 and 8 of the 2018 National Karting Championship, and was a precursor to the email dated 14<sup>th</sup> January 2019, in which the 1<sup>st</sup> Respondent subsequently announced the winners of Junior Rotax Class and Rotax Mini Max Class of the 2018 Kenya National Karting Championship. Both emails were extensively reproduced in the judgment delivered in NRB HC JR Case No.10 of 2019. The *ex parte* Applicants therefore ideally ought to have addressed any issues relating to the email dated 11<sup>th</sup> January 2019 in the suit they brought in NRB HC JR Case No. 10 of 2019, as the said email essentially arose in the same transactions and course of events as that of 14<sup>th</sup> January 2019.

36. To allow the *ex parte* Applicants to urge the issue in the present proceedings would lead to a rehashing of the facts and arguments that were the subject of NRB HC JR Case No.10 of 2019, which is precisely what the doctrine of *res judicata* frowns upon and prohibits. However, this does not preclude this Court from giving any relief that may be necessary in the interests of justice and the public interest, given the limited application of issue estoppel to judicial review proceedings.

### **The Substantive Issues**

37. The outstanding substantive issues for determination therefore are limited to the 2<sup>nd</sup> Respondent’s appeal determination dated 23<sup>rd</sup> January 2020. These are firstly, whether the hearing of the *ex parte* Applicant’s appeal by the 2<sup>nd</sup> Respondent was procedurally fair, secondly whether the Respondents’ decision was reasonable, and lastly whether the *ex parte* Applicants merit the remedies sought in relation to 2<sup>nd</sup> Respondent’s appeal determination dated 23<sup>rd</sup> January 2020. The legal arguments on these issues were canvassed in written submissions by the parties’ counsel. Anjarwalla & Khanna Advocates for the *ex parte* Applicants filed submissions dated 29<sup>th</sup> May 2020, while Murangasia & Associates Advocates filed submissions dated 28<sup>th</sup> June 2020 for the Respondents.

### **On the Hearing of the *ex parte* Applicants’ Appeal**

38. The *ex parte* Applicants’ counsel submitted that the Respondents in hearing the *ex parte* Applicants’ appeal acted unconstitutionally, unprocedurally, and unfairly on three fronts. Firstly, that the 1<sup>st</sup> Respondent violated the *ex parte* Applicants’ constitutional right to access to information guaranteed under Article 35 of the Constitution. The *ex parte* Applicants submitted that they had a constitutional right to be supplied with the information relating to the composition of the appeals panel members as well as the identity of the clerk, for the reasons that there is a specific criteria for members of the appeal board under Rule 3.2.1 of the 1<sup>st</sup> Respondent’s National Competition Regulations; they had a pending appeal which was to be heard by the appeals board; and they had a right to satisfy themselves that the members met the qualifications set out in the said regulations.

39. It was further submitted that the 1<sup>st</sup> Respondent contravened Section 4(3) of the Fair Administrative Actions Act by failing to provide the documentation that was going to be discussed at the meeting. Counsel submitted that the allegations made were against J and R personally and not their parents, and that because of J’s unavailability, Mr. RM decided to attend the hearing. Therefore, that it was unfair to have expected him to be in a position to answer unspecified questions which he had not been given any notice of, and comment on documentation which he had not been supplied with by the 1<sup>st</sup> Respondent; all of which related to JM.

40. Secondly, that the 2<sup>nd</sup> Respondent violated sections 7 (2) (a) (i) and 7 (2) (b) of the Fair Administrative Action Act, which provide that a

court of law may review an administrative decision if the person who made the decision was not authorized to do so by the empowering provision; and a mandatory and material procedure or condition prescribed by an empowering provision was not complied with. Therefore, that the failure by the 1<sup>st</sup> Respondent to comply with that requirement as regards the criteria for the appointment of persons to be members of the appeals board, rendered the impugned decision illegal, null and void. According to the *ex parte* Applicants, An analysis of the qualifications of the members of the appeals

41. Thirdly, it was submitted that the 2<sup>nd</sup> Respondent acted with manifest bias, and the *ex parte* Applicant's counsel reiterated that Brian Murangasia was the clerk to the appeals board and in a position to influence the outcome of the *ex parte* Applicant's appeal, that Brian Murangasia and Daniel Ngugi Kamau studied law in the same institution and were admitted to the bar together, and that Ken Wamae and Rohit Bhudia were members of Kenya Motorsports Club, where both Jim Kahumbura and John Kamau were senior officials.

42. The *ex parte* Applicant's counsel cited the case of **R v Bow Street Metropolitan Stipendiary Magistrate and Others Ex parte Pinochet Urgarte (No.2)**, where the Court while addressing its mind on the doctrine of disqualification by reason of the appearance of bias, identified one of the categories as that of ***disqualification by association***. It was also submitted that Section 7 of the Fair Administrative Actions Act provides that this court may review an administrative decision if the person who made the decision was biased or may be reasonably suspected of bias.

43. The Respondents submissions on the issue were that the *ex parte* Applicants have not cited any rule under the 1<sup>st</sup> Respondent's National Competition Regulations that stipulates that they ought to be informed of the identity of the members of the Appeals Board beforehand. It was the Respondents' submission that Rule 3.2.1 of the 1<sup>st</sup> Respondent's National Competition Regulations only provides for the qualifications of the members of the appeal panel, and that the Respondents did not violate any rule by failing to inform the *ex parte* Applicant the identity of the three members of the appeal panel. The decision in **Republic vs Public Procurement Administrative Review Board & 2 Others Ex parte Rongo University (2018) eKLR** was cited for the instances when an administrative decision is considered to be illegal .

44. In any event, that the Applicants are contradicting themselves when they allege that the members of the 2<sup>nd</sup> Respondent do not meet the qualifications as set out Rule 3.2.1 of the National Competition Regulations, yet claim that the said members are officials of the Kenya Motorsports Club and previously officiated the 1<sup>st</sup> Respondents motorsports events, which requires them to have knowledge of motor sports. Further, that the members of the 2<sup>nd</sup> Respondent were qualified members and were eligible in accordance with Rule 3.2.1 of the National Competition Regulations, and consisted of one person with legal and motorsport knowledge, one retired motorsport personality and one Sporting Commission Member.

45. According to the Respondents, its advocate, namely Brian Murangasia, was directed by the Court in **NRB HC JR Case No.10 of 2019** to constitute the 2<sup>nd</sup> Respondent, and was not a member of the 2<sup>nd</sup> Respondent but only served as a Clerk for purposes of communicating to the *ex parte* Applicants' advocate the hearing date. Further, that the said Brian Murangasia attended the proceedings of the appeal in his capacity as the Respondents' advocate, and that the *ex parte* Applicants have not proved how his attendance, nor his having studied law with John Kamau, affected the decision that was given in the appeal. Furthermore, that the *ex parte* Applicants have not proved to this court any interference with the said decision by Jim Kahumbura who is a Director of the 1<sup>st</sup> Respondent.

46. Lastly, that the *ex parte* Applicants were given a fair hearing since they were present during the hearing, and were given an opportunity to prove their case and to provide their evidence which they did. Therefore, that there was no procedural impropriety in the conduct of the hearing.

47. The *ex parte* Applicants have impugned the appeals proceedings on two main grounds, on not having received notice and information on the membership of the appeal's board, and on the alleged bias of the members of the appeals Board. The 2<sup>nd</sup> Respondent Appeals Board is in this respect established in Chapter A of the 1<sup>st</sup> Respondent's National Competition Regulations under Rule 3 which provides as follows:

**3.1 The appeals board, appointed by the KMSF, constitutes members appointed by the motorsport council. The final court of Judgment empowered to settle any dispute, which may have arisen between its license holders on its territory in connection with national motor sport. The exercise of these judicial powers and functions shall be final and not subject to review.**

**3.2 The appeals board shall exercise the following functions.**

**(i) Disciplinary Matters referred to it by the KMSF.**

**(ii) Investigatory**

**(iii) Appellate –**

**(a) Appeals pertaining to eligibility will be dealt with by written submission.**

**(b) All other appeals. The Court is the designated national court of appeal for the purposes of the FIA International sporting code**

**(iv) Arbitration**

**(v) Anti-Doping**

**3.2.1 The appeals board, when convened by the motorsport council, shall consist of three members who shall be:**

- (a) Member with legal knowledge and motorsport knowledge.**
- (b) Retired motorsport personality.**
- c) Sporting commission member with knowledge of the appeal.**

**3.2.2 Advocate shall not be present.**

**3.2.3 No person shall be a member of the appeals board if he has taken part as a competitor, driver or official in the competition concerning which a decision is to be given or if he has already participated in a decision on the matter in question, or if he is directly or indirectly concerned in such matter.**

48. It is also necessary at this stage to restate the applicable constitutional and statutory provisions that provide the framework within which the proceedings of the appeals Board were to be conducted. Article 47 of the Constitution provides as follows in this regard:

- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

49. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

**“(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) an opportunity to be heard and to make representations in that regard;**
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- (d) a statement of reasons pursuant to section 6;**
- (e) notice of the right to legal representation, where applicable;**
- (f) notice of the right to cross-examine or where applicable; or**
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

- (a) attend proceedings, in person or in the company of an expert of his choice;**
- (b) be heard;**
- (c) cross-examine persons who give adverse evidence against him; and**
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”**

50. The ingredients of fairness in this regard also incorporate the requirements of natural justice which are that firstly, a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and secondly, that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision.

51. Part C of the 1<sup>st</sup> Respondent’s National Competition Regulations in this regard address the exercise of judicial powers and functions by the Respondents, and provides for the procedures that apply to the appeals Board in Rules 7 to 14 thereof, including on the procedures of lodging appeals, the applicable time limits and the manner of hearing of appeals. Rule 12 in particular provides as follows as regards the hearings by the Appeals Board

**“12.1. All parties concerned in any hearings held by the appeals board must be given adequate notice of the hearing, and (except for matters before an eligibility appeal hearing 7.2) are entitled to call witnesses, give evidence and be represented by an advocate if they choose. The name of any advocate must be advised to the clerk to the appeals board prior to the hearing**

**date. The hearing can proceed to a decision whether or not any or all parties are present.”**

52. It is notable that a representative of the *ex parte* Applicants did attend and participate at the appeals hearing, and have not pointed this Court to any part of the proceedings in which there was a request for adjournment or information, or objection as regards the composition of the appeals Board. It is important that any such objection must be in the first instance be made to the primary decision maker, as the standards of review of this Court are limited to specified aspects and grounds of legality and correctness of a decision made by an administrative or judicial body. Unlike in an appeal, this Court cannot purport to evaluate the entire proceedings or evidence before such a body and make fresh findings thereon.

53. To this extent therefore, I am constrained to find that save for the request made on the identity of the members of the appeals Board, no other evidence was placed before me by the *ex parte* Applicants on specific requests for information or documents that were to be relied upon during the hearing that was denied by the Respondents.

54. Specifically, on the request for information on the identity of the members of the Appeals Board, the *ex parte* Applicants have relied on Article 35 of the Constitution, which provides as follows as regards access to information:

**“(1) Every citizen has the right of access to—**

**(a) information held by the State; and**

**(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**

**(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**

**(3) The State shall publish and publicise any important information affecting the nation.”**

55. The Access to Information Act reiterates this right and obligation in section 4 thereof, and a purposive interpretation of the Act leads to the conclusion that disclosure of information is the normal course of action so as to give effect to the constitutional right of access to information, and that the withholding of information is the exception, and is only permitted in on the grounds set out in the Act and where it is justified. In terms of the content of the right to information, information is defined under the Access to Information Act to include all records held by a public entity or a private body, regardless of the form in which the information is stored, its source or the date of production. A liberal interpretation of these provision would include information the Respondents would have as regards the identity of its appeals Board members.

56. The Respondents have not pleaded nor demonstrated that any of the limitations on access to information set out in section 6 of the Access to Information Act applied to their case, save for stating that there was no requirement in the that the identity of the members of the appeals Board should be disclosed. The *ex parte* Applicants have urged that the disclosure on identity of the said members was necessary for them to determine if the members met the qualifications set out in the and thereby authorized to hear the appeal. To this extent I find that the request by the *ex parte* Applicants was legitimate and reasonable request, for reasons that they had a right to a due process under the applicable regulations.

57. There was thus a constitutional and statutory obligation on the part of the Respondent, to provide any information on the members of the appeals Board, as it was likely to impact on the *ex parte* Applicants’ rights during the appeals hearing, and also for purposes of fostering the principles of transparency and accountability in the proceedings.

58. As the non-disclosure of the identity of the appeals members prior to the appeals hearing is not disputed and has been admitted by the Respondents, the question that remains to be asked is whether the *ex parte* Applicants have demonstrated that this non-disclosure affected their rights during the hearing. It is my view that that their rights were infringed by the non-disclosure for two reasons.

59. Firstly, while it is argued by the Respondents the *ex parte* Applicants still had the opportunity to make an objection as regards the composition of the appeals Board at the hearing, the rationale and requirement for the information and notice to be given in good time, is for the *ex parte* Applicants to be able to adequately prepare and participate in this regard. Secondly, it is also evident that there are disputed facts about the composition of the said appeals Board, and the capacity in which various persons participated in the proceedings, which underscores the need to address any concerns on the composition of a tribunal in a timely and comprehensive manner .

60. The non-disclosure of the identity of the appeals board members was therefore inimical to the protection of the *ex parte* Applicant’s right to a fair hearing, as it impaired their ability to make any effective objection to the composition of the appeals Board during the hearing.

61. The last limb of arguments made on the issue of a fair hearing were on the bias of the appeals Board members. As noted earlier the composition of the appeals Board is disputed. In particular, the nature of the participation by Brian Murangasia in the appeals proceedings is disputed. It is however also notable that the *ex parte* Applicants did not bring any evidence of the association they alleged between the Respondents and other members of the Appeals Board.

62. This Court, in a ruling delivered herein in an interlocutory application, did address the issue of bias and disqualification on the part of a judicial officer or decision maker as follows:

**“Deane J. in his dissent in the Australian case of Webb v. The Queen. [1994] 181 CLR 41 identified four areas of**

conflict of interest, bias or prejudice that may lead to disqualification and recusal of a judge, namely:

(a) disqualification by interest, where some direct or indirect interest in the proceedings, pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment;

(b) disqualification by conduct which consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias including published statements;

(c) disqualification by association consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings; and

(d) disqualification by extraneous information which consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.

63. This Court further noted that the first category of disqualification identified by Deane J. results in actual bias, while the rest of the disqualifications result in apparent bias. Further, that the test for recusal differs between the two types of bias. In the case of actual bias, disqualification and recusal is automatic, without there being any "question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case" as stated by Lord Goff in the English case of R. v. Gough (1993) 2 All E.R. 724.

64. In the case of apparent bias, the perception of impartiality is measured by the standard of a reasonable observer, and the English House of Lords in Magill v. Porter (2002) 2 AC 357, stated that the test for recusal is whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased". This test has been adopted by the Kenyan Courts. in Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge, [1995-1998] 1 EA 134 and Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2013] eKLR where the Supreme Court stated that disqualification of a decision maker was imperative even in the absence of a real likelihood of bias or actual bias, if a reasonable man would reasonably suspect bias.

65. In the present application, what is not in dispute is that there was some participation by Mr. Murungasia as a clerk to the Appeals Board during the hearing of the *ex parte* Applicants' appeal. The Respondents have not denied their association to Mr. Murungasia, and admit that he is their advocate in previous related proceedings as well as in the instant application. In my view, a fair minded person, informed of the circumstances in which the said appeal proceedings were being held, and having considered the facts, would conclude that any participation in the appeals hearing other than as the lawyer for the Respondents during the hearing, would have raised an apprehension of bias because of this admitted association.

66. Therefore, it is my finding that whatever the nature of clerkship that was rendered by Mr. Murungasia to the Appeals Board hearing the *ex parte* Applicants' appeal, it gave rise to an apprehension of bias given his past association with the dispute and the Respondents, and thereby rendered the appeals proceedings unfair.

#### **On whether the 2<sup>nd</sup> Respondent's Appeals Determination was Unreasonable**

67. The *ex parte* Applicants did not submit on this issue, although they deponed to the reasons why they considered the 2<sup>nd</sup> Respondents decision to be unreasonable. The Respondents on the other hand submitted that the 2<sup>nd</sup> Respondent's decision was clear and reasonable, and only dealt with the issues raised by the Applicants. Further, that the said decision was only subject to the 1<sup>st</sup> Respondent's National Competition Regulations. Reliance was placed on the case of Republic vs Public Procurement Administrative Review Board & 2 others Exparte Pelt Security Services Limited (2018) eKLR on what amounts to unreasonableness.

68. It was the further the Respondents' submission that the *ex parte* Applicants are not raising objections in respect of the process of the appeal but are actually appealing to the decision of the Respondents, which is bad in law and against the requirements of judicial review, as indicated in the case of Republic vs Attorney General & 4 others Exparte Diamond Hashim Lalji and Ahmed Hasham Lalji.

69. This court has power to set aside a decision on the ground that the decision is irrational in its defiance of logic or of accepted standards, and that no sensible person who had applied his mind to the question to be decided could have arrived at it. This principle was settled by the decisions in Associated Provincial Picture Houses vs Wednesbury Corporation (1948) 1 KB 223 and Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374. This ground was also explained in Pastoli vs Kabale District Local Government Council & Others, (supra).

70. In the present application I find that the reasons given by the *ex parte* Applicant for impugning the 2<sup>nd</sup> Respondent's decision were that the said decision contravened findings made by this Court in the judgment delivered in NRB HC JR Case No.10 of 2019, and were not supported by the evidence before it. These are reasons that go to the merit of the decision, as the *ex parte* Applicants are essentially urging that the decision was wrong in the circumstances.

71. It is important in this respect to clarify that it is not the role of this Court as a judicial review Court to find whether the said reasons were correct or right. So long as the decision was anchored on reasons that appear to be reasonable and based on the available evidence and applicable law, the limits of this Court's merit review on the grounds of unreasonableness and irrationality will be exhausted. This Court cannot proceed with an examination of the facts and the law and whether the reasons and findings are supported by the said facts and law. This lies in the province of an appeal, and not judicial review. This particular ground is therefore found not to be merited.

#### **On whether the Relief sought is merited.**

72. The *ex parte* Applicants have sought the remedies of mandamus, certiorari, declarations and damages. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances when orders of mandamus can issue as follows:

**““The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

At paragraph 90 headed “the mandate” it is stated:

**“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

**What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..... .”**

73. As regards the issue of an order of certiorari , the Court of Appeal held as follows:

**...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.”**

74. The remedy of a declaration is on the other hand normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a body’s powers and duties, and the rights of individuals or the law on a particular issue.

75. In certain circumstances, a claim for a monetary award such as damages can also be included in a claim for judicial review, where an individual has suffered loss or damage as a result of infringement of a right. However such claims are still subject to the rules as regards proof. The Privy Council in **Siewchand Ramanoop vs The AG of T&T, PC Appeal No. 13 of 2004**, held as follows in this regard:

**"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damage will often be a useful guide in assessing the amount of this compensation. "**

76. Applying these principles to the present case, I find that as the Respondents have breached the *ex parte* Applicants’ constitutional rights and its statutory duties by failing to give the *ex parte* Applicants a fair hearing, the order sought of certiorari to quash the 2<sup>nd</sup> Respondent’s decision to dismiss their appeal is merited. Likewise, the *ex parte* Applicants are also entitled to the order of declarations sought, so as to clarify the legality of the Respondents’ actions and her rights in this respect.

77. On the order of mandamus sought to award the *ex parte* Applicants the prizes for the 2018 National Karting Championship, the question that needs to be answered is whether the Respondents are under such a duty, and if so, whether they breached the duty. I am in this respect ably guided by the decision in **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543** where Goudie, J expressed himself, *inter alia*, as follows:

**“ Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature....**

78. In this respect the Respondent was under a legal duty on the strength of an order issued by this Court to hear the *ex parte* Applicants appeal, but no legal duty existed to award any prizes arising from the judgment delivered in **NRB HC JR Case No.10 of 2019**. The Respondents attempted to comply albeit in an unsatisfactory manner, and the matter is still therefore still outstanding. Therefore, no particular duty arises at this stage for the Respondents to award the subject prizes for the 2018 National Karting Championship, and the orders sought in this respect are not merited.

79. The Respondent is however still under a further duty to consider the *ex parte* Applicant's appeal in accordance with the provisions of the Constitution and Fair Administrative Action Act, and will be given a second chance to do so by the Court. This Court is in this respect bestowed with powers and discretion under section 11 of the Fair Administrative Action Act to grant any order that is just and equitable in cases of judicial review. In addition, section 11 (e) and (h) of the Fair and Administrative Action Act in specifically empowers this Court to grant an order setting aside an administrative action or decision and to remit the matter for reconsideration by the administrator, with or without directions.

80. The prayer seeking to prohibit the Respondents from awarding or distributing any prizes for Junior Rotax Class and Rotax Mini Max Class to any other persons than RHTM and JBHM will therefore also not lie for this reason, as no final decision has been made with respect to the *ex parte* Applicants' appeal, given the possibility of a rehearing of the appeal.

81. Lastly, on the claim for damages and compensation, I note that the *ex parte* Applicants did not elaborate the loss and damage they have suffered as a result of the Respondents' actions, so as to lay sufficient basis for this claim, and to enable the Respondent respond to it. While there is no particular rule requiring extensive evidence to be provided by the *ex parte* Applicants in this regard, there must be a statement of the grounds for the claim in sufficient detail, for the Court and Respondents to understand the nature of the monetary claim and why. This particular relief is therefore not merited.

82. In the premises this Court finds that the *ex parte* Applicants' Amended Notice of Motion application on 13<sup>th</sup> February 2020 is merited to the extent of the following orders:

**I. A declaration be and is hereby granted that the 2<sup>nd</sup> Respondent's decision contained in the appeal determination dated 23rd January 2020 was in violation of the *ex-parte* Applicants' constitutional right to access information and to fair administrative action guaranteed under Articles 35 and 47 of the Constitution of Kenya, 2010, and the provisions of section 4(1), (2) & (3) of the Fair Administrative Action Act, 2015.**

**II. An order of certiorari be and is hereby issued to remove and bring to the High Court for the purposes of quashing and to quash the 2nd Respondent's appeal determination dated 23rd January 2020 dismissing the *ex parte* Applicant's appeal dated 14th January 2020 and all consequential actions therefrom.**

**III. The *ex parte* Applicant's appeal dated 14th January 2020 shall be and is hereby remitted back to a properly and differently constituted Appeals Board appointed by the 1<sup>st</sup> Respondent for reconsideration, and in accordance with the provisions of the Constitution, Fair Administrative Action Act and the 1st Respondent's National Competition Regulations.**

**IV. The Respondents shall meet the costs of the *ex parte* Applicant's Amended Notice of Motion application on 13<sup>th</sup> February 2020.**

83. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021**

**J. NGAAH**

**JUDGE**