



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 55 OF 2020

BETWEEN

CHARLES APUDO OWELLE.....APPLICANT

VERSUS

ANNABELLA KIRIINYA, AND

BATRAM MUTHOKA (Sued respectively as the Chairman

and Chief Executive Officer of THE AGRICULTURAL

SOCIETY OF KENYA.....1ST RESPONDENT

JAMES R. NJENGA,

HON. STEWARD MADZAYO,

ALICE KYALA,

BENSON KAARIA,

ACHIYA ECHAKARA & HELLEN KOMBO,

MS. RHODA AHONOBADHA AND GEN JEREMIA KIANGA

(Sued as Registered Trustees of

THE AGRICULTURAL SOCIETY OF KENYA.....2ND RESPONDENT

JUDGMENT

Introduction

1. Charles Apudo Owelle (hereinafter “the Applicant”) is a member of the Agricultural Society of Kenya, in which he has served in various capacities. He has sued the Officials and Trustees of the said Society as the 1st and 2nd Respondents herein, arising from his exclusion from running for the position of Chairman of the Agricultural Society of Kenya (“ hereinafter referred to as the ASK”) elections, which were scheduled to be held on 28th February, 2020 , and after a disciplinary process he alleged to have been unlawful and unfair.

2. Consequently, the Applicant is seeking the following outstanding orders in an application he has filed by way of an Originating Notice of Motion dated 25th February 2020:

(a) THAT the decision and judgment of the Staff and Finance Committee of the Agricultural Society of Kenya dated 9th December, 2019 reprimanding Mr. Charles Apudo Owelle be quashed.

(b) THAT the decision of the National Executive Committee of the Agricultural Society of Kenya dated 22nd January, 2020 dismissing Mr. Owelle’s appeal against the said decision of the Staff and Finance Committee be quashed.

(c) THAT the decision of the Electoral Committee of Agricultural Society of Kenya dated 28th January, 2020 barring Mr. Charles Apudo Owelle from running for the position of National Chairman of the Agricultural Society of Kenya be quashed.

(d) THAT decision of the Returning Officer of the ASK dated 13th February, 2020 dismissing Mr. Charles Apudo Owelle's appeal against the said disqualification be quashed.

(e) THAT the costs of and occasioned by these proceedings be provided for .

3. The application was supported by an affidavit and further affidavit sworn by the Applicant on 25th February 2020 and 11th March 2020 respectively, and an affidavit deposed to on 16th March 2020 by John Karanja Kimani, a member of ASK. In response to the Notice of Motion, the 1st Respondent filed a Notice of Preliminary Objection dated 4th March, 2020, while the 2nd Respondent filed a Replying Affidavit sworn on even date.

4. The Court directed the parties to canvass the application and preliminary objection together by way of written submissions. A summary of the parties' respective cases now follows.

The Applicant's case

5. The Applicant stated that the genesis of the dispute herein are the events of a meeting of the ASK Staff and Finance Committee held on 25th October 2019, which he attended in his capacity as a member of the said Committee, and in which one of the items of the agenda was complaints by members of the society. Further, that during discussions on the item, the Applicant was informed that the complaints were in respect to derogatory comments alleged to have been made by his wife to unidentified senior officials of the ASK on 3rd October 2019, at the Nairobi International Trade Fair.

6. The Applicant states that he was not given the notice of any disciplinary action against him as required by Rule 2 of the ASK's *Conduct of Members- Disciplinary and Appeal Process Rules*, which require that before any disciplinary action is taken a member shall be notified of such an intention, and shall be informed the nature thereof and of the time and place at which the council will consider the same. Further, that no such notice has been produced by the Respondents, and that an unparticularized agenda item titled "*complaints form members*" cannot constitute a notice nor can it excuse failure to give such a notice.

7. That after some discussion on the said item during the said meeting, it was agreed that the Applicant was to consult his wife and write to the Staff and Finance Committee with her version of the events, and apologize for any miscommunication or misunderstanding that might have arisen. However, that upon being consulted, the Applicant's wife denied the comments that were attributed to her, and confirmed that she had held conversations with some officials of the ASK on general and non-specific discussions.

8. The Applicant thereupon wrote a letter to the Staff and Finance Committee dated 19th November, 2019, setting out his wife's version of the events, and that to bring to the matter to the end, he concluded the said letter as follows:

"It is with this background that I regret the perception that may be created and the inconvenience that may have been caused. I therefore sincerely apologize to the Staff and Finance Committee at the Society at large regarding this absurd scenario."

9. Subsequently, the Applicant received a letter from the ASK dated 3rd December, 2019 inviting him to attend a hearing on his letter of 19th November, 2019, which was characterized as a defence. He stated that he did not respond to the letter as it was not one of the agenda items for the 9th December 2019 meeting. He nevertheless attended the said meeting, during which an attempt to endorse the complaints against him was resisted by members of the Committee, and consequently no hearing took place.

10. After the meeting was closed, the Applicant stated that he was served with a letter dated 9th December, 2019 forwarding what was described as the decision of the National Finance and Staff Committee also dated 9th December 2019, whose material findings were as follows:

(a) The Applicant's wife was found to have uttered the remarks which were the subject to the complaint which had been tabled first hand by the person who heard the statements, which the Applicant failed to controvert as he failed to bring my wife to testify.

(b) The comments were false and not in line with acceptable language and conduct and were a minor violation as per section 5 of the Green Book

(c) As the Applicant's wife was his guest, the Applicant bore responsibility for his wife's actions *under the Society internal mechanisms*,

(d) Accordingly, the Applicant's apology was accepted, and he was reprimanded as per section 5 of the Green Book.

8. According to the Applicant, the copy of the Green Book relied upon by the Respondents is not the authentic one, as it includes provisions which were neither approved by the Council nor circulated to the branches, and in particular, part 8 of the version on "*Internal Dispute Resolution*". Further, that at the very least, it is obvious that ASK has published at least two versions of the Green Book which is a gross irregularity.

10. On 11th December, 2019, the Applicant appealed to the ASK's National Executive Committee against the said decision, which appeal

was heard on 22nd January, 2020 and dismissed. The Applicant alleges that three of the members of the ASK's Staff and Finance Committee who had made decision appealed from, namely Mrs. Kiriinya, Dr. Omanga and Mr. Mugo, purported to hear the appeal as members of the National Executive Committee and his request for their recusal was ignored.

11. Further, that a member of the Staff and Finance Committee who made the decision against him, a Mrs Onzere, attended the appeal as a witness to give evidence as the complainant, which is the first time that the Applicant officially learnt she was the complainant. Lastly, that he was not notified that the National Executive Committee would take any evidence or that it was open to him to bring witnesses at the appeal stage.

12. The Applicant also averred that the ASK's National Executive Committee failed to address the substance of his appeal in its judgment in respect the complaint made against him, and that the only substantive issue which was addressed in the judgment was whether or not he was responsible for the actions of his wife. Further, that the National Executive Committee invoked a hitherto unknown provision, namely Clause 15 of the Society's Code of Conduct which had not been relied upon by the Staff and Finance Committee or the complaint made against him, nor included in the ASK Green Book. Lastly, the Applicant averred that on 30th January, 2020, he lodged an appeal against the National Executive Committee's judgment with the ASK Council, which has declined to act on it.

13. According to the Applicant, the appeal to the National Council, this is no longer viable option as it is still pending unattended, and he has been locked out of forthcoming elections of the ASK on the basis of the reprimand by the same individuals, as the decision to bar him from running was made by the Electoral Committee which constituted of Mr. Muthoka and Mrs. Kiriinya only, and his appeal to the Returning Officer was dismissed by Mr.Muthoka as the Returning Officer. Further, that it has become clear that the 1st Respondent was intent on conducting the elections on 28th February, 2020 without hearing and/or determining the Applicant's appeals,

14. On his disqualification from contesting the ASK elections, the Applicant averred that upon the delivery of its judgment in his appeal, three members of the ASK's National Executive Committee, namely Mrs. Margaret Anami, Mr. John Kibera and Mr. Omanga immediately resigned from the said National Executive Committee so as to vie for the position of National Chairman. In addition, that on 28th December, 2019, the ASK's Chief Executive Officer issued a notice inviting applications for eligible council members to apply run for the positions of National Chairman and Deputy Chairman, and that the Applicant duly applied for the position of National Chairman.

15. However, that by a letter dated 28th January, 2020, Mrs. Kiriinya, who had presided over the proceedings against the Applicant both before the Staff and Finance Committee and the National Executive Committee, informed him that he was disqualified from running on account of:

(a) Financial probity in reference to his failure to refund the sitting allowance for the Council's meeting on the 11th December, 2019. However, that on 17th January, 2020, he had written to the secretariat requesting them to provide details of any sums he owed the ASK, and had since repaid the full sum owed of Ksh.10,000/=.

(b) He was not a member in good standing as he had been reprimanded.

16. The Applicant appealed against his disqualification to the Returning Officer, which appeal was dismissed by the ASK's Chief Executive Officer, who under the Election Rules is a Deputy Returning Officer and can step into that role of Returning Officer is absent. Furthermore, that ASK failed to notify the 1st Vice Patron of the upcoming election to enable him to appoint a returning officer as stipulated under the election rules, as a consequence of which the said elections are being conducted by the national chair and ASK's Chief Executive Officer as the election committee.

17. The Applicant averred that the elections were scheduled to be held on 28th February, 2020 with Mrs. Onzere, Dr. Omanga and Mr. Tuwei cleared to run for the position of National Chairman, and that Dr. Omanga continued to improperly serve as the legal advisor to the ASK and a member of both the National Executive Committee and Council even though he had been appointed Vice Patron, which barred him from holding any national office.

18. It is the Applicant's case that the elections are supposed to be conducted by the Electoral Committee comprising of ASK's Staff and Finance Committee members not seeking election and the Returning Officer, and the Returning Officer is supposed to be appointed by the 1st Vice Patron who is the ASK Chairman. He averred that there is no evidence that the letter dated 9th January 2020 to appoint a returning officer was ever delivered to the 1st Vice Patron as alleged by the Respondents. In any event, that no valid elections can be carried out without a Returning Officer, and the Chief Executive Officer can only deputise an existing Returning Officer that is absent but cannot usurp the role and duty of the Returning Officer who has not been appointment in the first place.

19. The Applicant annexed various copies of notices, letters, decisions and other supporting documents to as evidence of the facts alleged.

20. John Karanja Kimani on his part averred that he has been a member of the ASK for over thirty years, and had no recollection of a Code of Conduct being discussed or adopted at a Council meeting held on 21st August 2015 which he attended, nor has any such Code of Conduct been circulated to the ASK branches or placed in its Rule Book.

The 1st and 2nd Respondents' Cases

21. The 1st Respondents stated in their Notice of Preliminary Objection that they are appointed as Chairman and Chief Executive Officer of the 2nd Respondent, and that they carry out their duties in that official capacity and not in their personal or individual capacity. Further, that they are therefore agents of the 2nd Respondent, which is the known principal, and any wrong committed by the 1st Respondents do not

attract independent personal liability against them. It is thus their case that the Applicant's suit against them is incompetent and should be struck out.

22. The 2nd Respondent in its response in the replying affidavit sworn on 4th March 2020 by Betram Muthoka, its Chief Executive Officer, raised two preliminary issues. Firstly, that the Applicant's application was brought without the leave of the Court, and secondly, that the Applicant had not exhausted the internal alternative dispute resolution mechanisms of the ASK contained in its Green Book, on disciplinary issues and election disputes.

23. According to the Respondents, leave is required under the relevant laws, as the instant application is a judicial review application. Therefore, as no such leave was granted, the application is incompetent and this Court is bereft of jurisdiction to hear it. The Respondents also explained that the 2nd Respondent is a society incorporated under the Societies Act, and is governed by a constitution and rules and regulations which regulate the conduct of members, and in particular its Green Book and Code of Conduct. Further, that the internal alternative dispute resolution mechanisms are contained in the Green Book, and are in relation to disciplinary issues, national election disputes and branch election disputes.

24. On the grounds raised in relation to the disciplinary proceedings against the Applicant, the 2nd Respondent averred that the Applicant was charged and reprimanded on an existing document of the ASK, and cited the responsibilities of members of the ASK and their families under paragraph 15 of its Code of Conduct. Further, that the said Code of Conduct was formulated under Article 53 of the ASK's Constitution and approved by the ASK Council on 21st August 2015.

25. The 2nd Respondent more or less reiterated the Applicant's account of the meetings and hearings that took place on the complaint made against the Applicant, from the hearing on 25th October 2019, until the hearing of the Applicants appeal by the ASK's National Executive Committee on 22nd February 2020. The differing accounts by the 2nd Respondent was with respect to the information given to the Applicant on the charges and allegations made against him, and as to what transpired during the said meetings.

26. As regards the meeting of the Staff and Finance Committee on 25th October 2019, the 2nd Respondent averred that the Applicant was invited to the said meeting by a notice dated 17th October 2019, and one of the items on the agenda was "complaints from members". That when the meeting reached the said item, the Chairman duly informed the members of the Committee of the complaints by one Mrs. Edith Onzere, which complaints touched on the utterances made by the Applicant's spouse. That the Staff and Finance Committee members, of which the Applicant was present as a member, duly discussed the Agenda, including the complaint from Mrs. Edith Onzere, and resolved that the Applicant be taken through a hearing after which he would officially apologize. Therefore, that the Applicant was informed clearly of the substance of the charge(s) against him, and invited for hearing before any action could be taken by the Staff and Finance Committee, and was aware that Mrs Onzere was the complainant.

27. As regards the meeting of the National Staff and Finance Committee held on 9th December 2019, the 2nd Respondent averred that members of the Committee, including the Applicant, were invited to the said meeting by a notice dated 12th November 2019. Further that among the agenda items of the meeting was the hearing of the Applicant's response, and in addition, the Applicant was formally invited to highlight his response by a letter dated 3rd December 2019. According to the 2nd Respondent, the Applicant was granted an opportunity to highlight his defense and make his representations at the meeting of 9th December, 2019.

28. That after the Applicant filed his appeal, all the members of the National Executive Committee were by way of a notice dated 17th January 2020, invited for a Special National Executive Committee meeting which was to be held on the 22nd January 2020 for the hearing of the appeal. Further, that the National Executive Committee by a letter dated 17th January 2020, invited the Applicant to appear and be heard on the appeal, and by a letter dated 20th January, 2020 also invited the complainant, Mrs. Edith Onzere to elaborate on the complaint lodged as against the Applicant. The 2nd Respondent averred that on 22nd January, 2020, the Applicant and complaint duly attended and participated at the hearing of the appeal by the National Executive Committee.

29. The 2nd Respondent confirmed that the Applicant has since appealed the judgment of the National Executive Committee to the National Council, which is yet to deliberate on the appeal. Lastly, the 2nd Respondent denied that the same members who sat on the National Staff and Finance Committee are the same ones who sat in the National Executive Committee. According to the 2nd Respondent, the composition of members of the Staff and Finance Committee and the National Executive Committee who were to hear charges against the Applicant is dictated by the ASK Constitution without qualification. Further, that at the time the Applicant's appeal was being heard, three (3) members of the National Staff and Finance Committee had already resigned and did not sit National Executive Committee.

30. On the Applicant's disqualification to vie for the position of National Chairman, the 2nd Respondent detailed the officers making up the ASK national office, and the provisions of its Constitution in this regard as regards their election and term of office. The 2nd Respondent also informed that the term of the current Chairman and Deputy National Chairmen was to lapse in March 2020.

31. Therefore, that by a notice dated 18th December, 2019, the 2nd Respondent notified all council members who are eligible for the position of the National Chairman and Deputy National Chairmen to apply for the said positions on or before the 22nd January, 2020. Further, that the 2nd Respondent by a letter dated 9th January, 2020 duly notified the 1st Vice Patron, the Cabinet Secretary Ministry of Agriculture Livestock Development & Fisheries, to appoint the Returning Officer for the Electoral Committee, but the 1st Vice Patron did not do so. However, that the ASK Rules in its Green Book allows the Chief Executive Officer to discharge the functions of the Returning Officer in the absence of the Returning Officer.

32. The 2nd Respondent stated that the Applicant made an application the Electoral Committee for the position of the National Chairman by a letter dated 18th January, 2020. Further, that the 2nd Respondent's Electoral Committee duly considered the Applicant's application, and

found him ineligible to vie for the position of National Chairman for the reasons indicated herein earlier on by the Applicant. The 2nd Respondent confirmed that the Applicant's subsequently appealed the decision, which appeal was dismissed by the Deputy Returning Officer, and that he was also informed of his right to further appeal, which right he has not exhausted.

33. Lastly, the 2nd Respondent denied that the barring of the Applicant was orchestrated by its Chief Executive Officer, or that one of its candidates found eligible to vie were non-compliant with the ASK rules. It averred that on the contrary it was the Applicant who was not compliant with the laid down procedures and requirements for the position of National Chairman, and that all the candidates shortlisted for National Office were eligible to vie.

34. The 2nd Respondent similarly annexed various copies of notices, letters, minutes of meetings, decisions the ASK Constitution and rules, and other supporting documents as evidence of the facts alleged.

The Determination

35. The parties urged the Applicant's application through written submissions. The Applicant's Advocates on record, W. Amoko Advocates filed two sets of submissions dated 16th March 2019 and 12th May 2020 respectively. Milimo Muthomi & Company Advocates also filed two sets of submissions, both dated 27th April 2020, on behalf of the 1st and 2nd Respondents.

i. The Preliminary Issues

36. There were a number of preliminary issues raised by the Respondents in their pleadings and submissions on the competence of the Applicant's application, which need to be determined at the outset, as their outcome will affect the feasibility of the substantive issues raised by the application. These are firstly, whether these proceedings are defective for want of leave, secondly whether the 1st Respondents are properly joined in these proceedings, and lastly, whether this application is properly before this Court for want of exhaustion of alternative dispute resolution mechanisms.

On the issue of leave

37. The Respondents submitted that the Applicant did not seek the leave of the Court prior to seeking the judicial review orders herein. Reliance was placed on the decision by the Court of Appeal in **Jaldesa Tuke Dabelo vs. Independent Electoral & Boundaries Commission & Another** [2015] eKLR, for the position that a party who chooses the wrong procedure cannot turn around and rely on Article 159 of the Constitution. Further, that Order 53 of the Civil Procedure Rules has set out the procedure to be followed before filing an application for judicial review, and the Applicant must first obtain leave to commence the judicial review proceedings. By failing to do so, the Applicant had not complied with the laid down procedure and this entire suit must fail for being incurably defective.

38. The Applicant did not address this issue in its submissions. I note in this regard that the Applicant's Notice of Originating Summons was brought pursuant to sections 7,9, 11 and 12 of the Fair Administrative Act. Section 7 of the said Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to *inter alia* a court.

39. The procedure and applicable conditions for one to apply for such review are set by section 9 of the Act, which provides as follows:

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

40. Section 10 of the Act specifically provides that applications for judicial review shall be heard and determined without undue regard to procedural technicalities, and the Chief Justice is granted discretion and power to make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action. No such regulations have however been made.

41. It is notable in this regard that the requirement of leave applies to applications brought under Order 53 of the Civil Procedure Act, and the instant application was not brought pursuant to the provisions of the said Order 53. In addition, in light of the provisions of sections 7, 9 and 10 of the Fair Administrative Action Act, it is the finding of the Court that there was no requirement for leave to be granted by this Court at the time of filing of the Applicant's Originating Notice of Motion, as it was exclusively brought pursuant to the provisions of the Fair Administrative Action Act.

On the 1st Respondents Joinder

42. The second preliminary issue is the preliminary objection raised by the 1st Respondents, that it is not proper for the Applicant to enjoin them in this suit in their personal capacity. Reliance was placed on the case of **Anthony Francis Wareheim t/a Wareheim & 2 Others vs. Kenya Post Office Savings Bank, Civil Application Nos. Nai 5 & 48 of 2002** as cited in the case of **Victor Mabachi & another v Nurtun Bates Limited [2013] eKLR**, for the position that the 1st Respondents were impleaded as agents of a disclosed principal, contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. According to the 1st Respondents, nothing that has been placed in this court to vitiate the principal agent relationship that they have with the 2nd Respondent, nor has the Applicant shown any rights that they have breached.

43. The Applicant in response submitted that the 1st Respondents have not been sued in their personal capacities, and since the ASK is an unincorporated body, they have been named in a representative capacity as its officials of its behalf. Further, that it is the ASK which is the 1st Respondent sued through the serving members of the Staff and Finance Committee, the National Executive Committee, and Electoral Committee most intimately involved with all the matters implicated in these proceedings, and that no relief is sought against either of the 1st Respondents personally, as all orders sought are directed at actions and decisions of those three bodies.

44. The circumstances in which a preliminary objection may be raised were explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

45. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

46. The 1st Respondents allege to be agents of the ASK. They do not dispute that they are Chairman and Chief Executive Officer of the ASK, but insist that the relationship is one of agent and principal. The Applicant also alleges that they are 1st Respondents are the serving members of the Committees involved in this application. It is my view that the nature of the relationship that exists between the 1st Respondents and ASK, and their participation in the proceedings giving rise to this application are all questions of fact that have to be established, and cannot be raised as a preliminary point of law.

47. What in my view is not disputed are the averments by the Applicant and admissions by the Respondents that ASK is a society. A society is in this regard defined in section 2 of the Societies Act to include any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not include a company or incorporated bodies incorporated under various laws listed in the section.

48. The propriety of the joinder of the 1st Respondents as a preliminary point of law only arises with respect to the procedure as regards suits brought against unincorporated bodies of persons. The law in this respect is that ASK, being an unincorporated body, can only be sued through its officials. The procedure was in this regard stated by Bosire J. (as he then was) in **Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank [1992] eKLR** as follows:

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit must be instituted by or against one or more such persons in the representative capacity pursuant to the provision of Order 1 rule 8 Civil Procedure Rules. The suit may also be instituted by or against trustees of the body of persons.”

49. Order 1 Rule 8 of the Civil Procedure Act in this regard provides as follows:

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.

50. The Originating Notice of Motion filed herein by the Applicant is therefore competently brought by the Applicant as against the 1st Respondents as it clearly stated therein they have been sued as officials of the ASK, which is an unincorporated society, and as such in a representative capacity and not in a personal capacity.

On Availability of Alternative Dispute Resolution Mechanisms.

51. The last preliminary issue raised by the 2nd Respondent is that there is an internal appeals mechanism that the Applicant has not exhausted, hence this application is an abuse of the Court process. The 1st and 2nd Respondents relied on the decision by the Court of Appeal in **Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others [2015] eKLR** that where there is an alternative dispute resolution mechanism, a party should exhaust the same before approaching court. The 1st and 2nd Respondents further submitted that it is not in dispute that the 2nd Respondent has an appeal process for disciplinary issues and elections disputes.

52. According to the Respondents, the allegation by the Applicant that the ASK internal dispute resolution mechanism was not time effective is not plausible, as the determination of whether the Applicant is reprimanded or not is not an issue of time, but one of merit which can be made at any time. In addition, that as regards the election dispute, the Applicant never attempted to invoke the mandatory requirement of filing a second appeal, and that Article 43 of the 2nd Respondent's Constitution also has mechanisms on how to deal with any issue that may arise out of the election process at the Annual General Meeting.

53. Reliance was also placed on section 9(2) of the Fair Administrative Action Act for the position that the Courts are expressly barred from reviewing an administrative decision under the Act, unless and until all the internal dispute resolution mechanism of appeal or review and all remedies available under any other law are exhausted. Further, that the Applicant has also not indeed shown any exceptional circumstance that would entitle the court to waive the mandatory nature of section 9(2) of the Fair Administrative Action Act. In addition, that no such application for exemption has been made by the Applicant for consideration and in any event the same cannot be made post the fact.

54. The decision in **Republic vs Kenya Revenue Authority, Commissioner Ex parte Keycorp Real advisory Limited (2019) eKLR** was cited for the submission that a construction of section 9(2) & (3) leads to the conclusion that they are couched in mandatory terms, and that section 9(4) of the postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

55. The Applicant's submissions on the issue are that the doctrine of exhaustion of remedies is not a jurisdictional issue but one of discretion, dictated by the circumstances of any particular case. Further, that the Respondent's invocation and reliance of this doctrine in this case is misplaced, as the Applicant has exhausted the remedies set out in the Green Book as best as he could, until it became clear that it was no longer practical to do so to be able to obtain timely, effective relief.

56. Further, that there is no time limit for either the National Executive Committee or the Council to determine appeals made to them, and although the Applicant promptly appealed to the National Executive Committee on 11th December, 2019, it did not make its decision dismissing his appeal until 22nd January, 2019, almost six weeks later. The Applicant submitted that he subsequently appealed to the Council, which has not acted on his appeal, yet he has been excluded from elections on the basis of the decision he was challenging, with the ASK determined to go ahead with the said elections on 28th February, 2020.

57. On the election dispute resolution process, the Applicant submitted that under the Election Rules, decisions on applications to run are made by the Electoral Committee, with appeals to the returning officer, and there is no provision for any further appeal. According to the Applicant, ASK deliberating slept on his appeal to the Council, effectively making sure that he could not exhaust that remedy until it was rendered otiose and of zero value, as the elections would have taken place. It was his contention that when justice dictates it, a party should not be driven from the Court because of an unexhausted alternative remedy.

58. Reliance was placed on the decision of the Court of Appeal in **Fleur Investments Limited v Commissioner of Domestic Taxes & Another, [2018] eKLR**, that cautioned against mechanical application of the unexhausted alternative remedy arguments without considering the actual grounds upon which relief was sought from the Court. The Applicant submitted in this regard that the treatment he has received is *ultra vires* the rules of the ASK; has breached the Constitution, the Fair Administrative Action Act and the rules of natural justice; was arbitrary and unfair; and that it is only the High Court that is best placed to adjudicate on the dispute.

59. It is not in dispute that an internal dispute resolution mechanism is provided for by the ASK's Constitution and its Rules also known as the Green Book. Under part 5 of the Green Book "*The Conduct of Members-Disciplinary Process and Appeal Process Rules*, appeals from the decisions of the ASK Staff and Finance Committee are to the National Executive Committee, with a further option of an appeal to the Council. Aggrieved parties are required to appeal within 14 days. Part 1 M of the Green Book also has a dispute resolution process for the ASK national offices elections.

60. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, as explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra)** as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be 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 a 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. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

61. In addition, sections 9(2) and (3) of the Fair Administrative Action Act cited in the foregoing provide for the exhaustion of internal mechanisms for appeal or review before a party seeks judicial review.

62. The Courts may however, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the

values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where the dispute resolution mechanism is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons.

63. The approach to be taken by the Courts when this issue is raised was suggested by the Court of Appeal in **R vs National Environmental Management Authority (2011) eKLR** as follows:

“.. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it....”

64. The Applicant in this regards contends that the alternative remedy of an is not effective and accessible on account of the infractions by the Respondents during the alternative dispute resolution process, and the delay in undertaking the process, that would have rendered his grievances nugatory. It is notable in this respect that according to the Green Book Rule 1M, a dispute from the electoral process is to be referred to the Returning Officer, and an appeal from the Returning Officer's decision lies with the Electoral Committee. The said rule does not provide for any further appeal contrary to the Respondents' submissions. Therefore for the electoral dispute, the Applicant did indeed exhaust the internal dispute resolution mechanism.

65. The outstanding dispute resolution mechanism was in the disciplinary process, where the Applicant's appeal to the ASK council was yet to be heard. In considering whether this alternative remedy was applicable and ought to have been exhausted by the Applicant, this Court will address a number of applicable considerations. The first is the adequacy of the alternative remedy as a matter of substance, in that the alternative remedy should be convenient, expeditious and effective in practical terms, and the procedure employed should provide the claimant with the outcome sought as a matter of substance.

66. In the present application, the Applicant has illustrated the delays in having his appeals heard, and it is not disputed that his appeal to the ASK Council dated 30th January 2020, remained unheard as at the time of filing the present application on 26th February 2020. It is also notable in this regard that the subject of the appeal was the reprimand that was used to disqualify the Applicant from elections, which elections were scheduled to be held on 28th February 2020. Clearly, the Applicant would not achieved substantive justice had he waited for the Respondents' appeal processes to its course, irrespective of whether the delay was intentional or not.

67. The second considerations is the availability of the alternative remedy. Thus, in the case of **Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96**, the African Commission of People and Human Rights held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

68. It has been indicated in the foregoing that that the Applicant was unable to use the remedy available as a result of the delay by the Respondents in hearing his appeal to the Council. It must be noted that the rationale for alternative dispute resolution is for expeditious justice, and the result of the time taken up by the Respondents in hearing the Applicant's appeal rendered the said remedy inaccessible in the circumstances of the Applicant's case.

69. The last consideration is the procedure by which the alternative remedy is obtained, particularly in light of the nature of the challenge. If the challenge raises a factual dispute, judicial review is normally not the appropriate procedure, and the alternative remedy might be better suited to hear the dispute. On the other hand, a claim may raise a point of law of general importance, which in the public interest ought to be definitively determined by a court of law.

70. In the present application the Applicant has undergone a substantial part of the Respondents' alternative dispute resolution process, and claims that he has not been accorded a fair hearing, and that the procedure employed is biased towards him. This is an issue of law that in my view this Court can rightly hear in terms of interrogating the procedures being employed by the Respondents to prevent any further infractions, if any. “

71. As held by the Court of Appeal in **Fleur Investments Limited v Commissioner of Domestic Taxes & Another, [2018] eKLR**:

Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

72. Lastly, section 9(4) of the Fair Administrative Action Act suggests an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. In this respect, I find that while a formal application to be exempt from the provisions of section 9(2) to (4) of the Fair Administrative Action Act is advisable, it will in the circumstances of this application not only cause unnecessary and undue delay to these proceedings, but will also not add any substantive value, as the relevant factors have already been canvassed by the parties, and considered by this Court.

73. This Court also has discretion under Article 159 of the Constitution and section 3A of the Civil Procedure Act to make such orders as are necessary to achieve substantive justice, and not to give undue regard to procedural technicalities in the process. This Court can therefore intervene to hear the Applicant's grievances, irrespective of non-exhaustion of the Respondents' disciplinary dispute resolution processes for the foregoing reasons.

II. The Substantive Issues

74. Since this Court is properly seized of the instant application, it will proceed to consider the substantive issues raised in the application. In this regard, the Respondents submitted the Applicant is questioning the merits of the decision made by the 2nd Respondent, as he seeks the Court to find that the decision to reprimand him was not proper because he cannot be held liable for the actions of his wife, and that the decision blocking him from the vying was unlawful as he had subsequently paid the money he is alleged to have retained and that he had appealed the decision on reprimand.

75. It is therefore necessary in light of this submission, to restate the parameters of judicial review as the outset. The grounds for judicial review were explained in detail in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** at pages 303 to 304 thus:

“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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision 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.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

76. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right to fair administrative action. Section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that Article 47 of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveal an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator.**

77. This Court as a judicial review court therefore cannot interrogate any of the issues raised as to the merits of the 2nd Respondent's decisions, in terms of whether they were the right or wrong decisions. The merit review that can be undertaken by this Court is limited to aspects of the lawfulness of the said decisions, as delineated by the grounds set out in section 7(2) of the Fair Administrative Action Act which provides as follows:

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if

(a) the person who made the decision

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; (f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that(a) the administrator is under duty to act in relation to the matter in issue; (b) the action is required to be undertaken within a period specified under such law; (c) the administrator has refused, failed or neglected to take action within the prescribed period.

78. With this delineation in mind, the four substantive issues that arise for determination from the parties' pleadings and arguments herein are firstly, whether the 2nd Respondent's gave the Applicant adequate notice of the complaint made against him; secondly, whether the disciplinary proceedings against the Applicant were procedurally fair, thirdly, whether the decision to disqualify the Applicant was made lawfully; and lastly whether the remedies sought are merited.

On whether there was adequate notice of the complaint

79. The Applicant submitted that the disciplinary process was vitiated by wanton and repeated disregard of the principles of fundamental fairness, and breaches of the rules of natural justice. It was his case that the first essential principle was his right of to be informed fully of the case against him, and yet his first inkling that anything remiss was when, towards the tail end of the Staff and Finance Committee meeting held on 25th October 2019 the agenda item "complaints by members" was reached. According to the Applicant, he was confronted with allegations without disclosing the identity of the complainant, that his wife had made derogatory comments against officials as well as the ASK during the Nairobi International Trade Fair.

80. The Applicant cited Rule 2 of the ASK Rules on *Conduct of Members- Disciplinary and Appeal Process Rules* for the position that before any disciplinary action is taken, a member is notified of the intention to consider and adjudicate upon the charge made against the member. It was his submission that the Staff and Finance Committee was bound to observe this provision, however that no such notice with full particulars has ever been given to the Applicant.

81. Furthermore, that fair notice requirements are guaranteed in Article 47 of the Constitution and elaborated in sections 4(3) of the Fair Administrative Action Act. The Applicant relied on the decision by Majanja J. in **Geothermal Development Company Limited v Attorney General & 3 Others (2013) eKLR** that the importance of initial notice with all the necessary information is to enable a party have reasonable opportunity to know the basis of allegations against it.

82. The Applicant submitted that in the present case he was not informed that he was answering charges of breaching the ASK's Code of

Conduct, which code of conduct does not exist and has never been adopted as part of the rules of the ASK. Further, that he was not informed who the complainant was, whether he had a right to lead evidence or call witnesses, challenge the evidence against him, or cross-examine all the witnesses adverse to him. The Applicant in this respect cited the holding by Lord Morris in **Malloch vs Aberdeen Corporation [1971] 1 WLR 1578** at 1588F that there is no point of giving someone a right to be heard while denying him any knowledge as to what he would be heard about.

83. The Respondents on the other hand insisted that the Applicant was presented with the substance of the complaints of members about the utterances of his wife, during the Staff and Finance Committee meeting of 25th October, 2019, which meeting the Applicant was invited and attended as one of the members of the said Committee. Further, that the Applicant was then granted an opportunity to consult with his spouse on the same and thereafter be heard on his representations.

84. According to the Respondents, the Applicant does not contest that he was informed of the substance of the charge, and that what he alleges is that it was not in writing. However, that the applicable Rules allowed ASK to inform him in writing or any another acceptable means, of which he was verbally informed of the same at the Staff and Finance Meeting, which was any other acceptable way. Lastly, that he duly acknowledged and responded to the charge in the letter dated 19th November, 2019, where he elaborated that his wife declined having uttered the said words, but went on ahead to apologize to the society for the conduct of the wife.

85. The Respondents' case is that it is not necessary for an investigative body to inform the person charged of the names of the informant, and it is sufficient if the substance of the charge is made known to the person charged. However, that in this case the Applicant was informed of the substance of the charge and of the informant of the charge.

86. The core element of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken. This requirement is what informs the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that will be relied upon during that administrative action. Section 4 (3) (a) of the Fair Administrative Action Act also specifically requires notice to be given 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...”

87. Other requirements in the section include an opportunity to be heard and to make representations in that regard; notice of the right to legal representation and to cross-examine where applicable; and of the information, materials and evidence to be relied upon in making the decision or taking the administrative action.

88. It is also notable that the requirement of notice is also found in Rule 2 of Part 5 of the ASK's Green Book on *“The Conduct of Members-Disciplinary Process and Appeal Process Rules*, which provides that:

“Before any disciplinary action is taken a member shall be notified by electronic mail, registered post or any other commonly accepted mode of communication of the intention of the council to consider and adjudicate upon the complaint, allegation or enquiry and shall be informed the nature thereof and of the time and place at which the council will consider the same. The member shall be invited to attend in person before the council at the appointed time and place and give any evidence, information, defense for purposes of the process.”

89. Since the purpose of giving adequate notice is to ensure that an individual has effective opportunity to make representations in respect of a prospective decision, fairness will therefore require that any such notice be given in sufficient time to enable adequate preparation. The question of whether the time afforded is sufficient will depend on the circumstances. Relevant factors to consider is the extent to which an individual will be disadvantaged by the period of notice given, including by the complexity of the matter, the amount of materials needed to be considered, the familiarity with the issues and evidence, and whether the facts are disputed. The reasons and justification given by a decision maker for adopting a particular timeline will also be a relevant consideration.

90. Coming to the present case, the Respondents provided evidence of a notice dated 17th October 2019 inviting members of the Staff and Finance Committee to the meeting held on 25th October 2019. Item 12 of the agenda of the said notice was about “complaint from members”. No other evidence of notice of the actual complaint made against the Applicant was availed, and indeed the Respondents submitted that the particulars of the complaints against the Applicant were first communicated to him during the meeting of 25th October 2019. There were discussions on the said complaint during the said meeting, and a decision made thereon by the Committee that the Applicant officially apologizes to the Society upon a hearing being held.

91. It is thus evident that in the instant application no prior notice was given to the Applicant of the specific complaints made against him, and he was as it were ambushed with the said complaint during the meeting to discuss the same. It must be emphasized that the giving of prior notice of a decision to be made affecting an individual is not negotiable, as firstly it is a requirement of the law, and secondly for the reasons of fairness given in the foregoing in terms of effective representation and participation by that individual in the decision making. The flexibility that is allowed is only as regards the period of notice, and as in the case of the Respondents, the nature of notice that may be required to be given.

92. The requirements are also more onerous with respect to disciplinary proceedings that might result in the imposition of a penalty or sanctions as happened in the present case. In such cases, not only should prior notice be given, but also sufficient information of all the allegations that might be considered, even if not necessarily in the form of a formal charge. In this respect, the Respondent relies on paragraph 15 of the ASK's Code of Conduct and the rules in the Green Book as the basis of the charges against the complainant, and

submitted that the Applicant was informed of the nature of the complaints made against him during the hearings.

93. It has been noted in the foregoing not only was the information on the complaints made against the Applicant presented to him at the time of the first hearing of the same on 25th October 2020, it is also notable from the judgments dated 9th December 2019 and 22nd January 2020 by the respective 2nd Respondent's committees that the Code of Conduct was first considered at the hearing of the Applicant's appeal by the National Executive Committee, and was not relied on by the National Staff and Finance Committee in its judgment. There is also no evidence provided by the Respondent that the provisions of the said Code of Conduct were brought to the Applicant's attention.

94. This Court is in this respect not concerned with the issue of whether or not the Respondents erroneously relied on the Code of Conduct to reprimand the Applicant which is one of merit, but whether the fact of this reliance was communicated to the Applicant in good time to enable the preparation of his case. The Respondents did not present any evidence of notice given to the Applicant of the rules he is alleged to have been breached, whether of the Green Book or Code of conduct. On the contrary as demonstrated in the foregoing, the reliance on the Code of Conduct by the Respondents appears have been an afterthought that arose at the hearing of the Applicant's appeal.

95. Arising from the foregoing, this Court therefore finds that the disciplinary proceedings against the Applicant were tainted with illegality from their inception and commencement, by the lack of prior notice of the specific complaints made against him, and lack of sufficient information on the said complaints prior to the first hearing on 25th October 2019 to enable his effective representations at the said meeting.

On whether the 2nd Respondent's decision was Procedurally Fair

96. The second limb urged as to the legality of the 2nd Respondent's decision to reprimand the Applicant, is in relation to whether it was undertaken with procedural fairness. The Applicant submitted that the requirement in this regard was that he was afforded a real opportunity to be heard before an unbiased Staff and Finance Committee. He cited section 4(4) of the Fair Administrative Action Act on the minimum requirements of a fair hearing. It was his further submission that the hearing on 9th December, 2019 fell short of the minimum requirements of fundamental fairness for two reasons.

97. Firstly, that the decision to find him guilty and reprimand him was predetermined as the judgment had been written beforehand by Dr. Omanga, and all circumstances support this conclusion. Further, that the complainant namely Mrs Onzere, was a member of the Staff and Finance Committee sitting on her own complaint against the Applicant. The Applicant in this regard cited the decision by Nyarangi JA in the Court of Appeal in **Peter Okech Kadamas vs Municipal Council of Kisumu [1985] eKLR** that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgement to decide in that particular case.

98. Furthermore, that three members of the National Executive Committee sat against their own decision made as members of the Staff and Finance Committee. The Applicant contended that the fact that Mrs. Kiriinya is the National Chairman did not relieve of her obligation to recuse herself, on account that she was party to the decision being challenged on appeal before the National Executive Committee. Reference was made to the decision in **Gathigia vs. Kenyatta University Nairobi [2008] KLR 587** in which the Court addressed the issue of improperly constituted committee.

99. Secondly, that the complainant's evidence was never put to the Applicant, nor was he given an opportunity to controvert it, given that a chance of cross-examination was the minimum fairness required, as there were contentious facts and oral evidence given. Reliance was placed on the decision in **Ernst & Young LLP vs Capital Markets Authority & Another (2017) eKLR** for this proposition. In addition, that the said complainant appeared as a witness at the hearing without prior notice to the Applicant, and he was never given any chance to challenge her testimony, nor was he informed that he had a right to call witnesses.

100. The Respondents on their part submitted that the Applicant was duly invited to make representations at the Staff and Finance Meeting held on the 9th December 2019 by a letter dated 19th November 2019, while he was invited to the said meeting by way of a notice dated 12th November 2019, where one of the agenda items was the hearing of the Applicant's response. Further, that the Applicant has acknowledged that the agenda for him to highlight his defence was discussed, and he was allowed to make presentations on the same at the said meeting. Therefore, that the Applicant had the opportunity to orally and in writing highlight his defence and to be heard, and the 2nd Respondent's Staff and Finance Committee was indeed fair in the manner it arrived at its decision.

101. On the allegations made by the Applicant of impartiality, and that the complainant sat as one of the decision makers, the Respondents submitted that the Applicant was allowed to prosecute his appeal afresh in the National Executive Committee, and evidence was presented by him. Further, that the complainant was also asked to elaborate on the accusations and or complaints that she had, and that in order to avoid the scenario where the complainant sits on the decision making panel, the Applicant and complainant were asked to step out in order for the National Executive Committee to arrive at a determination.

102. Therefore, that the appeal having been subjected to a fresh hearing, the members of the National Staff and Finance Committee would not have been conflicted as they were sitting as a fresh hearing case. According to the Respondents, the Applicant was therefore granted a fair hearing. Reliance was placed upon the case of **Judicial Service Commission vs Gladys Boss Shollei & Another [2014] eKLR** to support the Respondents' arguments.

103. I note in this regard that the ASK Rules in Part 5 of the Green Book on "*The Conduct of Members-Disciplinary Process and Appeal Process Rules*" provide that the process shall be that a member shall be invited to attend in person before the effecting institution and give any evidence in defence or information that may assist the process. Further, that the member may choose to respond in writing. It is also now a core requirement of the Bill of Rights under Article 47 of the Constitution that every person who is to be affected by a decision must be accorded fair administrative action, and the procedures are provided by the Fair Administrative Action Act of 2015.

104. Section 2 of the Fair Administrative Action Act, which was enacted to implement Article 47, in this regard defines an administrative

action to include—

- (a) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

105. In addition, under section 3, the said Act applies to all state and non-state agencies. Therefore, the provisions of the Act as regards fair action also bind the 2nd Respondent not only as an administrative authority, but also as a body whose decision is likely to affect the rights and interests of the Applicant. In addition, section 4(4) of the Act details the manner the opportunity to be heard and make representations should be accorded to the person against whom administrative action is taken as follows:

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

106. This Court has already found that the ASK's Staff and Finance Committee meeting held on 25th October 2019 was vitiated by lack of adequate notice and information to the Applicant of the complaint made against him. It was at this meeting that the case against the Applicant was presented for the first time, and on which a decision was made to put the Applicant on his defence. It also appears that a decision appears to have been made on the Applicant's culpability at this meeting, as he was required to apologise after the hearing.

107. The Respondent has provided evidence of notices sent to the Applicant for the subsequent meeting held on 9th December 2019, as well as of the appeal heard by the National Executive Committee on 22nd January 2020, in support of its argument that its procedure was fair. This Court notes that the Respondent did not provide any evidence of the minutes of the meeting held on 9th December 2019. Likewise, the procedure adopted in the meeting of 22nd January 2020 was detailed in the judgment, and there were no minutes of the said hearing.

108. More importantly however, the two hearings were a consequence of, and reliant on the findings and decisions made in the meeting held on 25th October 2020, which this Court has impugned, and were therefore fruits of a poisoned tree so to speak, and could not be sanitized by subsequent adherence to due process and procedure which did not address and redress the initial irregularities and breaches of a fair hearing. The result was that the initial unfairness was therefore reinforced throughout the entire hearing process.

109. In addition, the subsequent meetings were also tainted with impartiality for the reasons alleged by the Applicant. Firstly, it is not disputed that the complainant, Mrs Onzere, sat in judgment on her complaint against the Applicant in the judgment of the National Finance and Staff Committee dated 9th December 2020. Secondly, at the hearing of the appeal therefrom, three members of the National Finance and Staff Committee, Mrs. Kiriinya, Mr. Omanga and Mr. Mugo, participated in judgment on the appeal dated 22nd January 2020 as members of the National Executive Committee. These facts are also self-evident from the said judgments.

110. A likelihood or apprehension of bias arises where a decision maker acts in such a way that would lead a fair-minded and informed observer to conclude that there was a real possibility that he or she will be biased. The test to be applied in determining whether there is a likelihood of bias was stated in Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge, [1995-1998] 1 EA 134 by Lakha, JA as follows: -

"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

111. The test for apprehension of partiality or bias for decision makers was also set out in 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. M.K.Ibrahim JSC expressed himself as follows:

"The court has to address its mind to the question is whether a reasonable and fair minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible"

112. The applicable test therefore, is whether a fair minded person, who was informed of the circumstances in which the decision against the Applicant was made, and having considered the facts, would conclude that there was a possibility that the decision makers may be biased.

113. In the present application, the fact that Mrs Onzere sat in judgment over her own complaint in the Staff and Finance Committee hearings and judgment is clearly one which gives rise to a clear appearance of actual and presumed bias, given the real likelihood of partiality and

prejudice arising from her status as the complainant, her identity of interests as decision maker and complainant, and her direct interest in the outcome of the disciplinary hearing.

114. As regards the case of the committee members participating in the judgments of both the National Staff and Finance Committee and that of the National Executive Committee, the question that needs to be answered is whether there was a likelihood or appearance of predetermination of the judgment on their part. In my view, having made a decision on the complaint about the Applicant at the National Staff and Finance Committee member, this led to the likelihood and appearance that they had already made up her mind about the matter, and were therefore unlikely or able to consider the appeal on its merits.

115. The argument in this respect by the Respondents that the hearing before the National Executive Committee was a fresh hearing is not borne out by the evidence tendered by both parties and the ASK rules, which clearly show that the said hearing was of an appeal from the decision of the National Staff and Finance Committee hearings. The law required the conflicted members to recuse themselves from the respective hearings of the National Staff and Finance Committee and National Executive Committee, and their failure to do so rendered the said hearings unfair and irregular.

116. In conclusion, this Court finds that the disciplinary hearings of the complaint made against the Applicant were riddled with unfairness and bias, and the said hearings cannot in the interests of justice be allowed to stand.

Whether the decision to disqualify the Applicant was lawful

117. The Applicant relied on Rule G(1) of the ASK's Election Rules, to submit that the Electoral Commission which has the conduct of elections, comprises of non-conflicted members of the Staff and Finance Committee and a Returning Officer appointed by the 1st Vice Patron of the ASK. Further, that on a proper reading on the Election Rules, the ASK Chief Executive Officer only deputizes for a Returning Officer when his is unavailable. That this presumes that one has been appointed but one reason or another is temporarily absent, and the Chief Executive Officer cannot under the guise of deputizing, actually take over position of a non-existent Returning Officer.. Therefore, in absence of a RO, there can be no valid elections.

118. Secondly, that with the resignation of three members of the Staff and Finance Committee so as to vie for elections, none of the eligible longest serving of the National Executive Committee in order of seniority have been coopted to make up for vacancies caused by the resignations, and meet the quorum required by the rules, and there is thus no properly constituted committee.

119. According to the Applicant, Mrs Kiriinya and Mr. Muthoka who were therefore left to run the were impartial to him arising from their prior encounter with the Applicant during the disciplinary proceedings. In addition, Mr. Muthoka heard the Applicant's appeal against a decision to which he was a party, and in which he had already rejected the Applicant's application and was thus sitting on appeal against his own decision. The Applicant cited the provisions of section 7(2)(a)(iv) of the Fair Administrative Actions Act upon which an administrative decision is quashed if it is shown the decision maker was biased or may reasonably be suspected of bias.

120. The 2nd Respondent's submissions on the allegation that the Electoral Committee was improperly constituted were that the Applicant has used the wrong provisions of the 2nd Respondent's Green Book which were on mid-term elections, to allege that the Electoral Committee was wrongly constituted, and that the applicable rules are those on full term elections. As regards the second challenge that the Chief Executive Officer was improperly the Returning Officer, the 2nd Respondent relied on the rule as regards the appointment of a Returning Officer and what should happen in his absence.

121. According to the Respondents, the said rule is clear that when the Returning Officer is absent, the Deputy Returning Officer, who is the Chief Executive Officer shall be the Returning Officer. It is not in dispute that the 1st Vice Patron did not appoint a Returning Officer and consequently the Returning Officer was absent and by virtue of this provision, the Chief Executive Officer as the Deputy Returning Officer duly took up the role of the Returning Officer.

122. Lastly, on the allegations that the decision to bar the Applicant from vying for National Chairman was marred with bias, the Respondents relied on the definitions of bias and bad faith to submit that one must establish that indeed the decision maker had a preconceived opinion or pre-disposition to decide a cause in a certain manner. It was submitted that at the time of the decision-making none of the members of the National Executive Committee who sat in the proceedings was indeed vying for any of the positions.

123. Therefore, that there cannot be any perception of bias or reasonable apprehension of bias on the part of the Respondents, as was elaborated in the case of **Attorney-General vs Anyang' Nyong'o & Others [2007] 1 E.A. 12**. In addition, that there was no ulterior motive in the process of declaring the Applicant ineligible to vie for the position of National Chairman, as the 2nd Respondent was duly complying with its constitution and rules.

124. A determination of the issue of whether the decision to bar the Applicant from vying for elections as ASK's National Chairman was lawful, turns on a construction of the applicable rules and their compliance. In this regard, the Part 1 Rule G of the Green Book provides that an Electoral Committee made up of office bearers of the National Staff and Finance Committee not seeking elective office and the returning officer shall scrutinize the applications of respective candidates seeking elections as National Chairman, and communicate its decision to council members within three days.

124. In this regard, other than the letter dated 28th January 2020 by Mrs Annabella Kiriinya, the chairperson of the Electoral Committee, informing the Applicant of his disqualification from vying, no other evidence was brought by the Respondent of the membership of the Electoral Committee, and if indeed it was compliant with Part 1 Rule G of the Green Book. The Respondents however did aver that the ASK Chief Executive officer was a member of the Electoral Committee, in the absence of a returning officer.

125. The membership of the National Staff and Finance Committee and Electoral Committee are set out in the ASK Constitution and Green Book, and it would be reasonably expected that as the compliance of the rules was in issue, and was averred to by the 2nd Respondent, and in light of the allegations made by the Applicant in this regard, the Respondents would have provided evidence of their compliance. In particular, the Respondents required to demonstrate which members of the National Staff and Finance Committee had resigned, and which ones were available to sit in the Electoral Committee and did indeed decide over the Applicant's application, to illustrate their compliance.

126. The burden of proof clearly shifted to the Respondents in this regard, as the Applicant was able to demonstrate the participation of only one member of the National Staff and Finance Committee and the Chief Executive Officer in his capacity as returning officer, in the making of the decision to bar him from vying for election. In the absence of evidence by the Respondent of the composition of the Electoral Committee at the time of the decision to disqualify the Applicant, this Court cannot make a finding that the Electoral Committee was properly constituted and that its decision was lawful.

127. On the requirements as regard the returning officer, Part 1 Rule L of the Green Book provides as follows:

“The Returning Officer shall be appointed in writing by the 1st Vice Patron of the Society and the Deputy Returning Officer shall be the Chief Executive of the Society. Where the Returning Officer shall be absent, the Deputy Returning Officer shall perform the function of the Returning Officer.”

128. A reading of this provision makes it mandatory for a returning officer to be appointed by the 1st Vice Patron, through the use of the word “shall”. To hold otherwise would be to render the provisions inoperable, as the 2nd Respondent would then proceed to hold elections in complete avoidance and disregard of the rules and their objectives. This lends credence to an interpretation that the phrase “where the returning officer shall be absent” to mean a substantively appointed Returning Officer being absent, and not a situation where there is no Returning Officer appointed.

129. The **Collins English Dictionary** defines being absent as “being away or not present, while the **Black's Law Dictionary, Ninth Edition** at page 7 defines absence as “the state of being away from one's usual place of residence”. An ordinary and proper grammatical meaning to the term absent therefore presumes a state of having been present or *in situ* in the first place, and reinforces the interpretation that a returning officer must first be appointed before a deputy returning officer can perform his or her function in their absence.

130. To this extent therefore, the performing of functions of the returning officer when there was no such returning officer appointed was unlawful and irregular. Lastly, on the issue of bias on the part of the members of the Electoral Committee, the applicable principles of law are the same ones enunciated when discussing the impartiality of the disciplinary process against the Applicant. It is in this respect not disputed that Mrs Kiriinya made the decision on the Applicant's disqualification, having also sat in and rendered judgment against the Applicant in previous disciplinary proceedings, and used the judgment and decision in those proceedings to disqualify the Applicant.

131. A fair minded person privy to these facts would reasonably, be apprehensive of bias on Mrs Kiriinya part in the circumstances, and the Applicant cannot be faulted in suspecting that there was indeed an orchestrated plan to disqualify him from running for elections. Likewise, it is not disputed that Mr. Muthoka, the Chief Executive Officer, was party to the initial decision to disqualify the Applicant, and also decided the Applicant's appeal from that decision, and could not in the circumstances be found to have been impartial in the appeal, as he was effectively a judge in his own cause.

132. To sum it all up, this Court can only agree with the Applicant that the process of his disqualification was such that there was no evidence of compliance of the applicable rules, and no independent and fair consideration of his application. It must be reiterated in this regard that in addition to compliance with its own Constitution and rules, the 2nd Respondent is now also under a constitutional and statutory obligation to act fairly in its decision-making.

On Whether the remedies sought are merited

133. The Applicant has sought orders to quash all the decisions made by the 2nd Respondent that are the subject of his application, and which have been detailed herein. A quashing order nullifies the decision to which it relates, with the same effect as if the relevant decision had never been taken or made in the first place, and therefore has retrospective effect. The Court may however remove or limit the retrospective effect of its ruling. The principles governing the grant of a quashing order are that it will only be granted where there is an identified decision upon which such an order can take effect, and the Court will not quash incomplete processes.

134. A quashing order is therefore very similar to the order of certiorari, which was explained by the Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** 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.”

135. Evidence was brought of the decisions sought to be quashed by the Applicant, and that they have been conclusively made. The 2nd Respondent has also been found to have acted unfairly, impartially and unlawfully in the making all the impugned decisions. The quashing orders sought are therefore merited.

136. In the premises this Court finds that the Applicant's Originating Notice of Motion dated 25th February 2020 is merited, and accordingly orders as follows:

i. An order be and is hereby granted quashing the decision and judgment of the Staff and Finance Committee of the Agricultural Society of Kenya dated 9th December, 2019 reprimanding Mr. Charles Apudo Owelle.

ii. An order be and is hereby granted quashing the decision of the National Executive Committee of the Agricultural Society of Kenya dated 22nd January, 2020, dismissing Mr. Charles Apudo Owelle's appeal against the decision of the said Society's Staff and Finance Committee dated 9th December, 2019.

iii. An order be and is hereby granted quashing the decision of the Electoral Committee of Agricultural Society of Kenya dated 28th January 2020, barring Mr. Charles Apudo Owelle from running for the position of National Chairman of the Agricultural Society of Kenya.

iv. An order be and is hereby granted quashing the decision of the Returning Officer of the Agricultural Society of Kenya dated 13th February, 2020, dismissing Mr. Charles Apudo Owelle's appeal against his disqualification to vie for the position of National Chairman of the Agricultural Society of Kenya.

v. The 2nd Respondent shall meet the Applicant's costs of the Originating Notice of Motion dated 25th February 2020.

137. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the Applicant's and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE