



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MISC. APPL. NO. 116 OF 2018**

**IN THE MATTER OF AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF SPORTS ACT NO. 25 OF 2013 AND SPORTS REGISTRAR REGULATIONS 2016**

**AND**

**IN THE MATTER OF ARTICLE 50 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ARTICLE 10 (2) OF THE CONSTITUTION OF KENYA 2010**

**AND IN THE MATTER OF PROCEEDINGS AND FOR RULING DATED 9<sup>TH</sup> MARCH 2018 (BY HON. JOHN M. OHAGA,  
CHAIRPERSON, SPORTS DISPUTES TRIBUNAL)**

**BETWEEN**

**KENYA SQUASH RACQUETS ASSOCIATION.....APPLICANT**

**-VERSUS-**

**SPORTS DISPUTES TRIBUNAL.....RESPONDENT**

**KHAALIQA NIMJI.....INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

1. According to the ex parte applicant herein, **Kenya Squash Racquets Association**, in October, 2017 it was served with sports entries Guide for the commonwealth games to be held in Australia starting from 4<sup>th</sup> April, 2018. Thereafter, the applicant circulate the information vide print media with the intention of carrying out countrywide Squash Team selection trials and the method that was agreed and discussed in the Board Committee was the “ranking” of players system whereof the two players in both men and women was picked. Accordingly, **James Dalidi** for men and **Elizabeth Mulwa** were selected for men and women respectively while Leon Kea was selected as the coach. At the trials, it was averred that the interested party herein was in position 2 and did not lodge any complaint with the applicant’s disciplinary panel.

2. Instead the interested party lodged a complaint with the Respondent Tribunal on the basis that she was not picked to join the Kenyan Team in the Commonwealth games in Australia to represent the Country. The said complaint was lodged on 6<sup>th</sup> March, 2018 when the deadline for the selection was 7<sup>th</sup> March, 2018. It was the ex parte applicant’s case that purely out of an act of malice, bad faith and was only calculated to frustrate a national and selected Kenya Team for the said games.

3. The ex parte applicant accused the Respondent Tribunal for acting ultra vires since the interested party herein participated without any complaint and was ranked no. 2 in the ladies category. However, the said games required only one lady and **Elizabeth Mulwa** was the one who qualified.

4. However the Respondent Tribunal delivered its ruling on 7<sup>th</sup> March, 2018 directing the repeat of the selection though in the ex parte applicant's view, the complaint had been overtaken by the events. It was the ex parte applicant's case that in directing that the selection be repeated using "trials" mode rather than the recommended mode by the Board of "ranking", the Tribunal acted unconstitutionally hence its decision was irrational, unreasonable, arbitrary and unjust. It was disclosed that the selected two Kenyans are already in South Africa undergoing thorough and final training.
5. It was the ex parte applicant's case that there cannot be any replacement at this stage as replacement can only be effected in special exceptions such as in cases of injury or illness. It was further averred that the interested party cannot and it is impossible for her to participate in the said games because she is not accredited by National Olympic Committee Kenya.
6. According to the ex parte applicant, the said games has already been finalised and the draw and programme of the players done.

### **Respondent's Case**

7. In opposing the application, the Respondent filed an affidavit sworn by its chairman. It was averred that whereas the Respondent Tribunal normally sits every Tuesday after from 2.30pm to hear disputes under the **Sports Act, 2013** (hereinafter refer to as "the Act") and every Wednesday and Thursday afternoon to hear matters brought under the Anti-Doping Act, 2013, where a matter is urgent or particularly long, the Tribunal will sit on other days according to the convenience of its members and the parties.
8. It was deposed that this matter was filed before the Tribunal on 28<sup>th</sup> February, 2018 and was brought to the attention of the Chairman soon after filing. As the matter was urgent the Chairman certified the matter as urgent and directed that the appeal be served on the ex parte applicant herein, who was the Respondent as well as persons who were identified as interested parties and the same was fixed for mention on Tuesday, 6<sup>th</sup> March, 2018 at 2.30pm.
9. On the said day, the appellant was represented by **Mr Malinzi Kwesiga**, Advocate while the Respondent was represented by its chairman, **Mr David Ngunjiri Theuri**. Present were other interested parties. It was disclosed that as the chairman of the ex parte applicant complained that he had not been served with the substantive appeal, the interested party was directed to serve him immediately and the hearing of the dispute was stood over to Thursday, 8<sup>th</sup> March, 2018 and the applicant was permitted to produce any documents and make representations in support of its position, without the necessity of filing a replying affidavit. The Respondent's averred that the ex parte applicant inquired from the Tribunal whether he could engage an advocate and was informed that he was perfectly entitled to do so.
10. It was averred that the dispute was argued before a two-member panel of the Tribunal sitting with the Chairman whereat the parties were allowed the fullest opportunity of putting forward their cases. Thereafter the Tribunal reserved its decision to the following day, 7<sup>th</sup> March, 2018 at 12.00 noon.
11. According to the Respondent, in arriving at its decision the Respondent was well aware of the entry deadline of 7<sup>th</sup> March, 2018 but was also aware that every international sporting event has a provision for late entry to cover exceptional circumstances such as illness, injury, death or disqualification of the athlete. In support of its case, the Respondent relied on section 58 of the Act as well as the second schedule to the Act which sets out certain mandatory matters to be provided for in the Constitution of all sports organisations including the fact "*that the selection of the Kenyan team and the technical personnel shall be done in good time and transparently using fair criteria.*"
12. In the decision sought to be quashed it was disclosed that the Tribunal found that the selection of the two (2) athletes for the sport of squash as undertaken in an opaque manner and without proper regard to the criteria previously published by the ex parte applicant and was accordingly set aside.
13. According to the Respondent, the ex parte applicant has no capacity to maintain these proceedings and the description of itself at paragraph 2 of the statement of facts as being a registered sports organisation is misleading, as was dealt with by the Tribunal at paragraph 31 of its decision dated 9<sup>th</sup> March, 2018. According to the Respondent, in terms of section 49 of the Act, the ex parte applicant was required to apply for registration under the **Sports Act** within one year after the commencement of the said Act and pursuant to section 49(3) thereof, a sports organisation which does not do so within the time prescribed will not be recognised as a sports organisation for the purposes of the Act.
14. It was disclosed that in the course of the hearing of the dispute before it, the Tribunal enquired from **Mr David Ngunjiri Theuri** whether the ex parte applicant had complied with the provisions of section 49 of the Act and he acknowledged that it had not. The Respondent further relied on the communication dated 18<sup>th</sup> April, 2017 from the Sports Registrar in which it is confirmed that the ex parte applicant is not recognised as a sports organisation in terms of section 46 of the Act and therefore cannot maintain these proceedings in its own name.
15. The Respondent therefore argued that this application is misguided and has no merit hence ought to be dismissed.

### **Interested Party's Case**

16. The application was similarly opposed by the interested party and in so doing the following grounds of opposition were filed:

- 1) The application as drawn is fatally defective and an abuse of the Court process as the Applicant has not sought leave of this Honourable Court in complete and blatant disregard of Order 53 Rule 1.**
- 2) The Applicant has neither made the application to a Judge in chambers, no filed a statement and verifying affidavit as required under Order 53 Rule 2.**

3) The application is brought in bad faith and in clear disregard of the authority of this Honourable Court as the Applicant is at the moment in contempt of the Sport Tribunal orders issued on the 9<sup>th</sup> March 2018 in their presence.

4) The applicant, in further contempt to the Tribunal has blatantly refused to attend and has indeed absconded tribunal hearings even after summons for its attendance were issued on the 13<sup>th</sup> March 2018.

5) The present application and entire suit together are all geared towards delaying enforcement of Tribunal orders that is currently underway by the interested parties in the Tribunal Appeal No. 1of 2018 which were given to remedy gross injustice carried out continuously by the appellants on its members.

6) The application and entire suit are all premature as the applicant has not sought stay of orders issued by the tribunal within the tribunal mechanism and has been in contempt of tribunal order for more than (4) four days and surprisingly is now requesting this Honourable Court for reprieve and forum shopping for favourable orders whilst in Contempt of Court orders.

7) The Applicant is not a duly registered national sports organization having failed/refused to register itself and comply with requirements of Sports Acts No. 25 of 2013 and illegally constituted therefore not competent to institute any action or to purport to act on behalf of any interests of Squash and Racquets in Kenya.

17. Apart from the said grounds the interested party filed a sworn replying affidavit in which it was deposed that applicant she is a member of the Kenya Squash and Racquets Association and has previously represented Kenya at the 2010 Commonwealth games in New Delhi where she was No. 2 at the age of 12. She also participated in the 2014 Commonwealth games in Glasgow when she was No. 1 at the age of 16.

18. According to the interested party, she filed a notice of Appeal against the decision/selection done by the Kenya Squash and Racquets Association of Kenya on the 28<sup>th</sup> February 2018 for players to represent Kenya at the Commonwealth Games in Gold Coast, Australia. In the said appeal, she contended that the selection of the team as was presently constituted was unfair and was not in accordance with the criteria previously published by the Applicants. The said appeal was certified urgent by the Chairman of the Tribunal due to the scheduled date of the Gold Coast Commonwealth games, who ordered that the Applicant's be served and the matter mentioned on the 6<sup>th</sup> March 2018.

19. According to the interested party, she was informed by her advocate on record that he managed to serve the Kenya Squash and Racquets association Committee member, **Ms. Elizabeth Mulwa** with the orders of the tribunal on the 2<sup>nd</sup> March 2018 and attempted to serve her on the 3<sup>rd</sup> March 2018 with the appeal itself but she was unreachable after confirming that she would be available to receive the same. On the 6<sup>th</sup> of March 2018 when the matter was mentioned before the Tribunal, the Applicant was represented by its chairman while the interested party was represented by counsel.

20. It was averred that the Applicant opposed proceeding on that day as they alleged to have not been served with the aforementioned directions. Accordingly they were served in the presence of the tribunal after which the tribunal ordered that the matter be adjourned to the 8<sup>th</sup> March 2018 at 4:00pm to allow all parties to prepare their responses. It was the interested party's view that the short time was allowed due to the fact that the National Olympic Committee was required to submit the final list for Team Kenya to the Commonwealth games by the 7<sup>th</sup> March 2018 and therefore it was necessary that the appeal was heard and determined as soon as possible. In view of the short time, the tribunal allowed all parties to submit relevant documentation with the aforementioned time frame to support their points and to give *viva voce* evidence.

21. The interested party's case before the Tribunal was that the Applicants had advertised in the September 2017 the criteria to be used for trials for the 21<sup>st</sup> Edition of Commonwealth games and put potential players on notice to practice, train and prepare for the same trial scheduled to commence in January 2018 as per their notice. In the same notice and indeed in all other similar notices, the Applicants stated that the decision of the KSRA is final and binding. All attempts to discuss or even inquire about their decisions have however been met by threats, harsh words and even suspension creating a climate of fear and blind submission.

22. According to the interested party, in January of 2017, the Applicants, without consulting any of their members thereafter posted another notice informing members that one **James Khasatsili Dalidi** and **Elizabeth Mary Mulwa** had been selected to represent Kenya at the forthcoming Commonwealth games 2018, in Gold Coast Australia through their national ranking system. However, no explanation was given for the sudden change or even as to why trials has been suspended yet the interested party and other players had been preparing for the same positions for over three months and some of them had even travelled from out of the country to train and get in shape for trials as previously advertised.

23. It was averred that other issues of the Applicant's incompetence were also presented before the committee such as secrecy in dealings, denying their members information and manipulating decisions to serve a few committee member's interests, lack of proper registration, unfit leadership, veracity of ranking and mode of determination thereof, suspension and banning of players and conflict of interest all of which were properly traversed in the Suit.

24. The Tribunal accordingly quashed the Applicant's selection for Commonwealth Games 2018 and the Applicants were ordered to come up with a transparent and verifiable trial program for both men and women and also for coaches which was to be placed before the Tribunal on Tuesday the 20<sup>th</sup> March 2018. The said programme was to include players plying their trade out of the country, and those on indefinite suspension since the cases had not been handled to the Tribunal's satisfaction.

25. It was averred that the Applicant is currently in contempt of court orders as it has since the 8<sup>th</sup> March 2018 not attended the committee hearings and absconded from the tribunal and has also not even complied with Tribunal orders. Accordingly, the Tribunal issued summons

for the Applicant's attendance on the 13<sup>th</sup> March 2018 following the Applicants Contempt of court and the applicant has still do date note not availed itself. According to the interested party, the tribunal through the interested parties in Appeal No. 1 of 2018 ordered trials to be done and the same was concluded on the 18<sup>th</sup> March 2018 with results to be presented before the Tribunal on the 20<sup>th</sup> March 2018.

26. It was disclosed that all players participating in the trials are in the full list of provisional names submitted to National Olympic Committee of Kenya and indeed the Common wealth Games and the names finally selected will be accepted by the Common wealth Games organizing committee. The interested party therefore refuted the contention that the names cannot be changed passed the deadline of the 7<sup>th</sup> March 2018 as she had a confirmation from the World Squash organization that since the Full list is already with them, the final slots can always be shuffled and rearranged accordingly as it does not entail resubmission of names but just reselection from the list already with them.

27. Based on legal advice, the interested party believed that this application is in itself an afterthought whose only purpose is to delay tribunal orders so as to frustrate in all ways any progress of Tribunal orders and indeed and remedy to the already dire position that the Applicant has occasioned on its members. To her, the Applicant is not popular at all with international bodies, National bodies and indeed its own members and has no popularity to protects by its application as it has continuously been run a means of accruing benefits to its committee member to the expense of other members, been used as a means to travel outside the country by its members, and generally brought disrepute to the affair of squash in the country and the image of the sport outside the country.

### Determinations

28. I have considered the issues raised herein.

29. It was contended that the *ex parte* applicant had *no locus* to institute these proceedings. In this case, it is the interested party that instituted proceedings against the *ex parte* applicant which proceedings were decided in favour of the interested party. Aggrieved by the said decision which arose from proceedings not commenced by itself, the applicant was, in my view entitled to move this Court for the orders sought herein. To block the applicant from accessing this Court to challenge orders issued against it in proceedings not of its own making would be unjust and unfair. It would clearly amount to a violation of the rules of natural justice.

30. The issue of *locus* was even prior to the promulgation of the Constitution of Kenya, 2010 dealt with *in extenso* by Nyamu, J (as he then was) in Mureithi & 2 Others (for Mbariya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 as follows:

**“The function of standing rules include: to restrict access to judicial review; to protect public bodies from vexatious litigants with no real interest in the outcome of the case but just a desire to make things difficult for the Government. Such litigants do not exist in real life – if they did the requirement for leave would take care of this; to prevent the conduct of Government business being unduly hampered and delayed by excessive litigation; to reduce the risk that civil servants will behave in over cautious and unhelpful ways in dealing with citizens for fear of being sued if things go wrong; to ration scarce judicial resources; to ensure that the argument on the merit is presented in the best possible way, by a person with a real interest in presenting it (but quality of presentation and personal interest do not always go together); to ensure that people do not meddle paternalistically in affairs of others...Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a court of law...The other reason is that although initially it was feared that the relaxation of standing would open floodgates of litigation and overwhelm the Courts this has in fact not happened and statistics reveal or show that on the ground, there are very few busybodies in this area. In addition, the path by eminent jurists in many countries highlighting on the need for the courts being broadminded on the issue... Under the English Order 53 now replaced in that country since 1977 and which applies to us by virtue of the Law Reform Act Cap 26 the test of *locus standi* is that a person is aggrieved. After 1977 the test is whether the applicant has sufficient interest in the matter to which the application relates. The statutory phrase “person aggrieved” was treated as a question of fact – “grievances are not to be measured in pounds and pence”...Although under statute our test is that of sufficient interest my view is that the horse has bolted and has left the stable – it would be difficult to restrain the great achievements in this area, which achievements have been attained on a case to case basis. It will be equally difficult to restrain the public spirited citizen or well organised and well equipped pressure groups from articulating issues of public law in our courts. It is for this reason that I think Courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case. The words person aggrieved are of wide import and should not be subjected to a restricted interpretation. They do not include, if course, a mere busybody who is interfering in things that do not concern him but this include a person who has a genuine grievance because an order has been made which prejudicially affects his interests and the rights of citizens to enter the lists for the benefit of the public or a section of the public, of which they themselves are members. A direct financial or legal interest is not required in the test of sufficient interest...In my view the Courts must resist the temptation to try and contain judicial review in a straight jacket. Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...The applicants are members of a Kikuyu clan which contends that during the Mau Mau war (colonial emergency) in 1955 their clan land was unlawfully acquired because the then colonial Governor and subsequently the presidents of the Independent Kenya Nation did not have the power to alienate clan or trust land for private purpose or at all. In terms of Order 53 they are “persons directly affected”. I find no basis for giving those words a different meaning to that set out in the case law above. The Court has to adopt a purposive interpretation. I have no hesitation in finding that the clan members and their successors are sufficiently aggrieved since they claim an interest in the parcels of land which they allege was clan and trust land and which is now part of a vibrant Municipality. I find it in order that the applicants represent themselves as individuals and the wider clan and I unequivocally hold that they have the required standing to bring the matter to this Court. Moreover in this case I find a strong link between standing and at least one ground for intervention – the claim that the land belonged to the clan and finally there cannot be a better challenger than members of the affected clan.”**

31. Similarly, in Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010, the Court expressed itself as follows:

“over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by an outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives the right *locus standi* to any member of public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddling interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, *bona fide* and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *action popularis* of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the Court can provide an effective remedy... In Kenya the Court has emphatically stated that what gives *locus standi* is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of *locus standi* were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of *locus standi*. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...”

32. The Court continued:

“In the interest of the realisation of effective and meaningful human rights, the common law position in regard to *locus standi* has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to *locus standi* is required to fulfil the Constitutional court’s mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.”

33. In Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 the Court of Appeal stated at page 16 as follows:

“Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1<sup>st</sup> respondent had the *locus standi* to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in Article 258 of the Constitution.”

34. I therefore find that the applicant had *locus* in these proceedings. These are not ordinary civil proceedings but are public law proceedings in the nature of judicial review which are *sui generis*.

35. The grounds upon which the instant application was based were stated in the statement of facts as hereunder:

(1). The Respondent has issued a Ruling with grave far-reaching consequences in excess of its mandate or and jurisdiction. The same is absolutely overtaken.

(2) The decision and subsequent proceedings is a setback to and will cripple down the applicant in terms of its popularity to its members who are preparing to attend the common wealth games which are set to commence on 4<sup>th</sup> April, 2018.

(3) Unless this application is allowed, the applicant will stand to suffer loss and prejudice.

36. It is therefore clear that the issues which **Mr Mbuvi**, learned counsel for the ex parte applicant, submitted on with respect to the failure to afford the ex parte applicant sufficient time and denial of legal representation were not part of the grounds relied upon in the statement of facts filed herein. Order 53 rule 4(1) of the *Civil Procedure Rules* provides that:

*Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.*

37. Therefore without an amendment to the grounds relied upon this Court is expressly barred from basing its decision on any other grounds other than those expressly set out in the statement of facts. Nevertheless, I have considered those two grounds and I find no merit in them. As regards the issue of sufficient time, there is no record placed before me that the ex parte applicant sought for an adjournment when the matter came up for the adjourned hearing. In **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR**, the court held the view that:

**“The petitioners have argued that they were not accorded a fair hearing as they did not receive the letters inviting them for the disciplinary hearing, and that they were invited by way of short text messages (SMS). I have considered the letters inviting the petitioners for the hearings. The letters are addressed to the petitioners at addresses to which other letters from the respondent to the petitioners contained in the replying affidavit are addressed. It would perhaps have been prudent for the respondent to obtain a certificate of posting or some other evidence of delivery of the letters, but in the end, I am not satisfied that the petitioners’ claim in this regard has merit, for two reasons. First, I note that the respondent took the further step of inviting the petitioners to the hearings by way of short text messages and telephones. More importantly, I note that all the petitioners attended the disciplinary proceedings on the scheduled dates and did not raise the issue of the non-delivery of the letters at the hearing before the Committee, nor did they seek an adjournment of the hearing.”**

38. In **Peris Wambogo Nyaga vs. Kenyatta University [2014] eKLR** this Court expressed itself on the same issue as follows:

**“That the applicant was heard is not in doubt. The applicant however contends that the notice she was given to appear before the Committee was short. Whereas under Article 47 the applicant was entitled to a fair administrative action which in my view would connote inter alia that the applicant be given adequate time to prepare for the case, in this case there is no evidence from the record that the applicant sought for time to do so.”**

39. Without any evidence that the ex parte applicant sought more time than the time given by the Respondent, the Court cannot fault the Respondent on that score.

40. As regards legal representation, the Respondent conceded that the ex parte applicant inquired from the Tribunal whether he could engage an advocate and was informed that he was perfectly entitled to do so. That contention was not denied. In fact it was relied upon by the ex parte applicant as evidence that the ex parte applicant was denied the right to legal representation. With due respect that statement does not support such position. The only obligation placed on the Respondent was to inform the ex parte applicant of its right to be represented by counsel but not to ensure that the ex parte applicant was in fact so represented.

41. As regards jurisdiction of the Respondent, section 58 of the *Sports Act* provides as follows:

*The Tribunal shall determine—*

*(a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including—*

*(i) appeals against disciplinary decisions;*

*(ii) appeals against not being selected for a Kenyan team or squad;*

*(b) other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and*

*(c) appeals from decisions of the Registrar under this Act.*

42. It is therefore clear that the Respondent had jurisdiction to determine the question of the selection of the Kenyan Team and whether the decision not to select the applicant was proper. As to whether in so deciding the Respondent’s decision was correct is not for this Court sitting in its judicial review jurisdiction as opposed to an appellate capacity. That is the legal position propounded in **Hangsraz Mahatma Gandhi Institute & 2 Others [2008] MR 127** where it was stated that:

**“Judicial Review is not a fishing expedition in uncharted seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However it will intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the Wednesbury sense; had acted in an unfairly manner and the applicant was not given a fair treatment.”**

43. Similarly in In Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR, the Court of Appeal held at para 58:

**“The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e) and (h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.”**

44. It must be noted that the Sports Tribunal is a specialised tribunal that considers such matters as policy in its determinations. Therefore its decisions on merits ought not to be lightly interfered with. That this is so was appreciated by the Supreme Court of India in Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and Others [1985] CLR 1083 at pg 104 where it was held that:

**“As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper...in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of...institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice”.**

45. As to whether the decision of the Respondent had been overtaken by events, from the material placed before the Court it is not clear that the selection is *fait accompli*. In any case that was a matter that ought to have been placed before the Respondent for consideration. Nevertheless as was held in Resley vs. The City Council of Nairobi [2006] 2 EA 311 where the Court held that:-

**“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed (sic)...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed.”**

46. While I am not an adherent to the radical judicial expression of deontology: *fiat justitia ruat cælum* (“Let justice be done though the heavens fall”); a proper constitutional understanding – especially of Articles 1 and 159 of the Constitution as well as the interpretive theory in Article 259 of the Constitution obliges the Court in cases such as this to balance the public interest and the private interest in determining whether to grant orders and in fashioning appropriate remedies. However, balancing between the public interest and the rights of successful litigants before the Court is a fact-intensive inquiry. It must be based on facts and permissible inferences of the likely consequences of granting the orders. It is not enough for a party to warn the Court that administrative chaos will ensue, that the heavens will shatter, and that the sky will fall down if the orders sought are granted. A party seeking to rely on this doctrine of public interest to inoculate its otherwise unlawful actions against Judicial Review orders bears a heavy burden to demonstrate that it will burden under the yoke of impossibility if the merited orders are granted. As aforesaid, in balancing the competing aspects, the nature of the right which was breached and its importance in the constitutional scheme of rights must be considered.

47. It is now trite that contravention of the Constitution or a Statute cannot be justified on the plea of public interest as public interest is best served by enforcing the Constitution and Statute as was held in Republic –vs- County Government of Mombasa Ex-Parte – Outdoor Advertising Association of Kenya (2014) eKLR thus:-

**“I have no hesitation in finding that the respondent’s decisions of the 29<sup>th</sup> May 2013 and the 8<sup>th</sup> October 2013 were made in breach of the rules of natural justice for the hearing of the affected persons and in contravention of their legitimate expectation created by the provisions of the Physical Planning Act and borne of the development approvals given by the national Roads Authority and the respondent’s predecessor upon payment of the requisite licence fees. There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public**

**interest must accord to the Constitution and the law as the rule of law is one of the national values of the Constitution under Article 10 of the Constitution. Moreover, the defence of public interest ought to have been considered in a forum where in accordance with the law, the ex-parte applicant members were granted an opportunity to be heard. There cannot be public interest consistent with the rule of law in not affording a hearing to a person likely to be affected by a judicial or quasi judicial decision.”**

48. It is therefore my view that this matter cannot be decided simply on the basis of the alleged public interest in light of contradicting averments with respect to whether the decision of the Tribunal is capable of being implemented. In any case the Tribunal is still seised of the matter and it is upon it to decide how its decision is to be implemented.

49. Having considered the material placed before me it is my view and I hereby find that this application is unmerited.

**Order**

50. In the premises the same fails and is dismissed with costs to the interested party.

51. It is so ordered.

**Dated at Nairobi this 22<sup>nd</sup> day of March, 2018**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mbuvi for the applicant***

***Mr Kwesiga for the interested party***

**CA Ooko**