REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL &JUDICIAL REVIEW

PETITION NO. 334 OF 2015

ARTICLES 2, 10, 19, 20, 21(1), 22(1), 23(1), (3), 36(1), (2), 47(1), (2), 50(1), 165(3),

(a), (b), (6) AND 232(1) (c), (e), (f), (2) OF CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 35(1), 36(1) AND 47(1) AND (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE SPORTS ACT SECOND SCHEDULE RULE H

AND

AND IN THE MATTER OF WORLD TAEKWONDO FEDERATION COMPETITION

RULES AND INTERPRETATION MAY 11 2015 ARTICLES 4, 5 AND 6

BETWEEN

GLADYS MWANIKI (REGIONAL CLUB).....1ST PETITIONER

MARTIN ODUOR (MATHARE NORTH CLUB).....2ND PETITIONER

VINCENT OCHIENG (KISUMU CLUB)……...3RD PETITIONER

MILKAH AKINYI (MOMBASA CLUB)……..4TH PETITIONER

YAHYA MOHAMED (KPA CLUB MOMBASA)…....5TH PETITIONER

FRANCIS NDUATI (KPA CLUB MOMBASA)…....6TH PETITIONER

MARU MURERU

(WAITHAKA CLUB MOMBASA)……..7TH PETITIONER

VERSUS

GORDON OLUOCH…..…..……..…..……..1ST RESPONDENT

CHARLES NYABERI…..…...……...……...2ND RESPONDENT

THE HON. ATTORNEY GENERAL

(SUED ON BEHALF OF THE MINISTRY OF

SPORTS, CULTURE AND THE ARTS).....3RD RESPONDENT

AND

WILFRED MUSINGO

MARTIN MALABA

ELIUD MUTALI

PHILIP KHAEMBA

JAYNE FRACES KITALA.....INTERESTED PARTIES

RULING

Introduction

1. The present ruling arises from a Notice of preliminary objection dated 25th August, 2015 filed the same day. In the said objection the 2nd respondent contends that this Court lacks the jurisdiction to hear and determine the matter before it due to the fact that the same is filed in the wrong forum. It was further contended that there is no cause of action against the same respondent. The other ground which was not argued as a preliminary objection, and rightly so in my view, was that the petition is bad in law, misconceived and an abuse of the court process.

2. According to **Miss Omuko**, learned counsel for the 2nd Respondent, Article 169 of the Constitution establishes Subordinate Courts and Tribunals to be established by Parliament. Pursuant to Article 169(2) thereof, ***Sports Act*** (hereinafter referred to as "the Act") was enacted and under part VII thereof a provision was made for arbitration of sports disputes. Section 59 of the Act, it was submitted, establishes a sports tribunal (hereinafter referred to as "the Tribunal) with the powers to arbitrate over disputes on decisions made by sports organisations including the question of failure to select persons to Kenyan Team or Squad.

3. It was contended that the instant petition is about the non-selection of the petitioners to represent Kenya in Taekwondo in the 11th All Africa Games in which the petitioners are challenging the selection of the Kenya Team and the qualification of the persons as well as the process of the said selection. However the bottom line is that the petitioners challenge the selection of the Team and take issue with their having not been selected.

4. Based on *inter alia* **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo & Another vs. IEBC and 10 Others e[2013] KLR** and **Francis Mutuku vs. Wiper Democratic Movement –**

KENYA & 2 Others [2015] eKLR, it was submitted that the Court should allow the bodies established by law to perform their roles.

5. It was further submitted that the constitution of the Kenya Taekwondo Association (hereinafter referred to as "the Association") in Article 12 provides that under no circumstances should disputes thereunder be determined by the Courts. Therefore, it was submitted, the fact that there exist internal dispute resolution mechanisms, the petitioners ought to have resorted thereto. However, there is no allegation that the petitioners attempted to so resolve the same before commencing these proceedings. In learned counsel's view the issues raised herein even if constitutional issues, the Tribunal is competent to deal with the same.

6. On the issue of lack of disclosure of a cause of action against the 2nd respondent, it was submitted that the selection of teams is the mandate of the Association and that the 2nd respondent was not involved in the said selection hence the suit against it ought to be dismissed. In support of this limb of the submission reliance was placed **Gidion Mbuvi Kioko vs. Attorney General and 6 Others [2012] eKLR.**

7. The foregoing position was supported by **Mr Obura**, learned counsel for the 3rd Respondent who associated himself therewith.

8. The objection was however opposed by **Miss Ontiti**, learned counsel for the petitioners. According to her, the petitioners are before the Court challenging their denial to participate in the trials selection. In her view, the selection was only limited to 2 teams out of the 50 Taekwondo Teams in the Country. She added that a short text message was sent to individuals hence the petitioners were denied a right to participate in the trials. In her view the issues raised by the petitioners can only be canvassed before this Court pursuant to Article 258 of the Constitution.

9. It was the petitioners' case that section 59 of the Act only applies to associations whose rules permit the parties to resolve their disputes before the Tribunal and in this case section 12 cited does not do so as it deals with meetings. It was submitted that the petitioners are before this Court not on the merits of the decision in issue but on the process adopted in arriving as the decision. To them section 59(2) of the Act which would only apply to challenges on merit is inapplicable. In support of this position reliance was sought in the case of **Federation of Kenya Women Lawyers (FIDA-K) & Others v. Attorney General & Others [2011] eKLR.**

10. On the propriety of joining the 2nd respondent to these proceedings, it was contended that the 2nd Respondent was obliged to ensure the fairness of the process and was therefore responsible for the flawed process.

11. In her rejoinder **Miss Omuke** submitted that the 2nd Respondent was a mere observer. With respect to the prayers sought, it was contended that the Act does not bar the Tribunal from awarding damages.

Determination

12. I have considered the submissions made herein. Before dealing with the same it is important to understand the circumstances under which this petition was filed. According to the petitioners on the 30th May, 2015, national trials were held at the Public Service Commission officiated by the 1st Respondent, the 2nd Respondent, the Interested Parties and the Starring Committee of Team Kenya to the All African Games at which only a handful of athletes were able to attend by virtue of an SMS sent by **Philip Khaemba** and followed up by phone calls indicating the venue of the trials. In their view, the trials held were not free, open or fair and the Petitioners upon finding out this information made their way to the venue of the trials to air their views. These concerns were brought to the attention of the 1st Respondent and the 2nd Respondent who promised to set up proper trials with ample notice to be given, after consulting with the All African Games Committee; however this did not happen.

13. It was therefore the petitioners' position that the Respondents intentionally concealed the notice

and/or information of the schedule taekwondo trials from the Petitioners in clear violation to Article 35(1) of the Constitution and Rule (h) of the Second schedule of the ***Sports Act*** as stated above and as a result, the Petitioners were hindered and precluded from exercising their right of participating in the activities of the Kenya Taekwondo Association resulting in a breach of Articles 10 and 36 of the Constitution. The consequence of the foregoing, it was averred, was that regardless of meeting the qualifications outlined in Article 4 of the WTF competition Rules at least 48 of the over 50 Taekwondo teams, the Petitioners included, were left of the Public Service Commission trials which decision was contrary to the principles of natural justice, in bad faith and *ultra vires* and contravened the petitioners' right to fair administrative action.

14. By excluding the petitioners from the selection process, it was claimed that the nation has missed the representation of some of the best athletes in the Taekwondo sport occasioned by the Respondents actions which are contrary to public interest. Further, the Petitioners' livelihoods have been impinged upon, some of whom rely on the sport for their livelihood and they have been unlawfully denied a chance at advancement in their careers by not being afforded an opportunity to participate in the trials and subsequently All African Games.

15. The petitioners therefore prayed for the following orders:

> **a. That this honourable court be pleased to make a declaration that the trials held by the Respondents at Public Service Commission of 30/5/2015 for national selection of Taekwondo players to participate in the All African Games in Congo Brazzaville from the 16/9/2015 to 19/9/2015 were unconstitutional, unlawful, violated the Petitioners' rights to an open and fair competition AND to participate in the activities of the Kenya Taekwondo Association and therefore all consequential orders of actions thereof null and void.**
>
> **b. That this honourable court be pleased to order that the Respondents hold fresh Taekwondo trials for the All African Games 2015.**
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> **c. That in the alternative, the Respondents be ordered to compensate the Petitioners in the equivalent of what they would lose by exclusion from participation in the All African Games.**
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> **d. That the costs of this application be in the cause.**

16. On the issue whether the Court's jurisdiction under Article 165 can be limited and/or restricted by an Act of Parliament, it is important to note that under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. However, Sovereign power under this Constitution is delegated to *inter alia* the Judiciary and independent tribunals. The Constitution therefore clearly recognizes the role of independent tribunals in dispute resolution scheme. Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement. As was observed by the Court of Appeal in **The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP),** where there is a specific procedure provided for redress of grievances, that procedure ought to be strictly followed. However, as was stated in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728,** ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognised that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts.

17. Nevertheless, where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is

my view that such ouster clause will be struck down as being unreasonable. I therefore agree with **Mwera, J** (as he then was) in **Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010** to the extent that it is not only the Constitution that can limit/confer jurisdiction on the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums. Accordingly I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to. As was held in **Diana Kethi Kilonzo vs. IEBC and 2 Others** (supra):

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

18. Nevertheless any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act. In **Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,** the Court of Appeal expressed itself as follows:

> **"Although section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty; it is otherwise where the statute is silent on what is to be done in the event of a disagreement...Where the statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit... If the Court acts without jurisdiction, the proceedings are a nullity...The extent of the jurisdiction of the High Court may not only, be that which is conferred or limited by the constitution but also, that which the constitution or any other law, may by express provisions or by necessary implication, so confer or limit...The jurisdiction of the High Court can be ousted by an Act of Parliament and in such cases all that the High Court can do is to enforce by judicial review proceedings, the implementation of the provisions of the Act; certainly not, to usurp the powers of the Minister... Even though resort to the judicial review process, may in appropriate cases not be a bar to other proceedings such as a plaint, this may not apply in peculiar circumstances such as this one, so as to entitle the Judge to do not only what he was not requested to do, but also, to do what he had no jurisdiction to embark upon...Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute".**

19. In the result, I associate myself with my learned brother **Justice Majanja**, in his view expressed in **Dickson Mukwelukeine vs. Attorney General & 4 Others Nairobi High Court Petition No. 390 of 2012** that alternative dispute resolution processes are complementary to the judicial process and by virtue

of Article 159(2)(c) of the Constitution of Kenya, 2010, the Court is obligated to promote these modes of alternative dispute resolution and that it is not inconsistent with Articles 22 and 23 to insist that statutory processes be followed particularly where such processes are for the specific purpose of realising, promoting and protecting certain rights. Accordingly the Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to pursue the alternative remedy.

20. I am however also aware of the principle established by the Court of Appeal of Trinidad and Tobago in the case of **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004** that where there is a means of redress that is inadequate, the Court should not exercise restraint. In that case the Court held:

> **"The opinion in Jaroo has recently been considered and clarified by the Board in A.G vs Ramanoop. Their lordships laid stress on the need to examine the purpose for which the application is made in order to determine whether it is an abuse of process where there is an available common law remedy. In their lordship's words:**
>
> **"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power...Another example of a special feature would be a case where several rights are infringed, some of which are common law rights and some for which protection is available only under the constitution. It would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights"."**

21. I entirely agree and confronted with a question as to which remedy a litigant ought to seek, a Court should examine whether the alternative remedy provides an efficacious and satisfactory answer to the litigant's grievance. Whereas I agree that the selection and qualification of those selected may well fall under a merit review, in this case the Petitioners contest the Respondents' decision on the ground *inter alia* that they were denied an opportunity of being subjected to the selection test hence the decision did not pass the test of fairness as envisaged under the Constitution.

22. Further, the right to access this Court should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms except in the circumstances noted in **Belfonte (supra).** The petitioners instituted these proceedings claiming breach of their rights and fundamental freedoms. The mandate and jurisdiction to determine that question lies in this Court under Articles 22, 23(3) and 165(3)(d) of the Constitution. The Tribunal, in my view, does not have the jurisdiction to determine alleged violations of the Constitution -See **Wananchi Group (Kenya) Ltd vs. The Communications Commission of Kenya Petition No.98 of 2012**. **Majanja J** in **Isaac Ngugi vs. Nairobi Hospital and Another Petition No. 461 of 2012** found on the same lines when he expressed himself as follows:

> **"For instance, the Court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in questions. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the Constitutional guarantee even though there exists private law regulating a matter within the scope of the Application of the Constitutional right or fundamental freedoms. In such cases, the Court may proceed to apply the provisions of the Constitution directly."** (Emphasis added).

23. I associate myself with the decision of **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** where he

held:

> **"On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism."**

24. In this petition, the petitioners seek inter alia damages. Learned counsel for the 2nd Respondent conceded that there was no express power conferred upon the Tribunal to award damages but contended that since there is no provision barring it from doing so, it has jurisdiction to so award damages. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

25. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal such as Rent Control Board, the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication and that a Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461**.

26. In **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval**

Nairobi HCMCC No. 246 of 1981 (supra) the Court proceeded to hold that if the legislature had intended that the tribunal should have power to award compensation in respect of the complaints the subject of the appeal it would have made specific provision as the power to award compensation must be express and cannot be implied. To the Court, compensation for damage is a matter for the ordinary court on whose jurisdiction pecuniary limits have been placed.

27. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. In **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR** the Supreme Court expressed itself as follows:

> **"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

28. I am however aware of the legal position enunciated by **Mulenga, JSC** in the Supreme Court of Uganda case in **Habre International Co. Ltd vs. Kassam and Others [1999] 1 EA 125** which position I believe does not conflict with ours that:

> **"The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this."**

29. Having considered the positions taking by the parties herein I am unable to uphold the first preliminary objection. First, I am not satisfied that the issues raised herein entirely fall within the jurisdiction of the Tribunal. Secondly, I am not satisfied that all the remedies sought in this petition can be granted by the Tribunal.

30. Can it therefore be said that the ex parte applicants have an effective remedy under the Act? In my view I do not think so. Where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008,** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of

remedies provided under the Constitution or an Act of Parliament through the procedure provided under an Act of Parliament an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

31. The law is a living thing and a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which causes damage to the property of another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

32. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. In the present case, there is no express power conferred upon the Tribunal to award damages s ought by the petitioners in this petition. To send the petitioners away would have the effect of permanently denying them the right to ventilate their claim for damages yet there is no other appropriate forum in which such damages may be awarded. The court in the modern society in which we live cannot deny them a remedy. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the petitioners have a right they must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

33. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law". I fully agree and only wish to add that to allow the preliminary objection based on jurisdiction is likely to render the ex parte applicants remediless and would lead to a situation where in order to avoid transparency in procurement procedures the Procurement Entities would simply award tenders clandestinely and when challenged claim that the Court has no jurisdiction knowing very well that at that stage the aggrieved party would not be able to obtain any remedy from the Board. Accordingly I find that the taking into account the issues for determination herein the Court's jurisdiction is not taken away by the Act.

34. The 2nd respondent further contend that he ought not to have been made a party to these proceedings on the ground that he had no role to play in the contested process. The petitioners however maintain that the 2nd respondent was under the obligation to ensure that the process was fairly undertaken. I must emphasise that the matter before me is a determination on a preliminary point of law. In this respect the decision in **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 Of 1969 [1969] EA 696** immediately comes to mind. In that case **Newbold, P,** held:

> **"A preliminary objection is in the nature of what used to be called a *demurrer.* It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop".**

35. It is clear that this issue hinges upon the role of the 2nd respondent in the selection process. That, in my view, is not an issue which can be determined on a preliminary objection unless the facts are agreed

and the parties herein are far from doing so.

Order

36. In the result I find no merit in the two preliminary objections which must fail. They are accordingly dismissed with costs to the petitioners to be borne by the 2nd respondent.

Dated at Nairobi this 27th day of August, 2015

G V ODUNGA

JUDGE

Delivered in the presence of

Miss Ontiti for the petitioners

Miss Omuko for the 2nd Respondent

Mr Obura for the 1st and 3rd Respondents