Republic v Ouko & 11 others; Mutua & 2 others (Exparte) (Application 176 of 2023) [2025] KEHC 88 (KLR) (Judicial Review) (16 January 2025) (Judgment)

Neutral citation: [2025] KEHC 88 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION 176 OF 2023

J NGAAH, J

JANUARY 16, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

SAM OUKO ..... 1ST RESPONDENT

HARRIET CHIGGAI ..... 2ND RESPONDENT

CEPHAS OSORO ..... 3RD RESPONDENT

MARYANN MUCHINA ..... 4TH RESPONDENT

SAMUEL MURAYA ..... 5TH RESPONDENT

ANN WANDIA ..... 6TH RESPONDENT

IAN AMAGOLA ..... 7TH RESPONDENT

JOSIAH ADUDA ..... 8TH RESPONDENT

RICHARD MUHERZI (SUED AS CARETAKER COMMITTEE, IMPALA CLUB) ..... 9TH RESPONDENT

REGISTRAR OF SOCIETIES ..... 10TH RESPONDENT

MARIA GORETTI NYARIKA ..... 11TH RESPONDENT

CARETAKER COMMITTEE, IMPALA CLUB ..... 12TH RESPONDENT

AND

PETER MUTUA ..... EXPARTE

CHRISTINE LUKALO ..... EXPARTE

KENNETH MIRITI ..... EXPARTE

JUDGMENT

1. The application before court is the applicants' motion dated 7 November 2023 expressed to be brought under articles 10(2) (a) and 47 of *the Constitution*; sections 4,5,6,7 & 11of the *Fair Administrative Action Act* , 2015; sections 8(2) and 9(1)(b) of the Law Reforms Act, cap. 26; and, Order 53 Rule 1(2) of the Civil Procedure Rules. The prayers have been framed, thus:

> " 1. An order of certiorari to remove into the Honourable Court to quash the notice dated 9th October 2023 from the 1st-9th Respondents convening the Annual General Meeting (AGM) scheduled for the 14th November 2023 pending hearing and determination of this application thereby cancelling the AGM.
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> 2. An order of certiorari to remove into the Honourable Court to quash the 10th and 11th Respondent's administrative action communicated through the letter dated 14th July, 2023 unilaterally and unlawfully extending term of the 1st -9th Respondents after its expiry on the 31st March 2023.
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> 3. An order of prohibition to cease implementation of the 10th and 11th Respondent's unlawful decision to extend the term of the caretaker committee.
>
> 4. An order of mandamus to compel the 10th Respondent to freshly reconstitute and or appoint a new interim/caretaker executive committee of the Impala Club prior to elections to implement the terms of reference as follows-
>
> i. Facilitate an audit of the list of members and review the register of members to establish club members of good standing,
>
> ii. Facilitate the conduct of an audit of finances and assets of Impala Club to determine financial position of the club,
>
> iii. Give members the opportunity to give their views during the amendment of the club's constitution, and
>
> iv. Prepare the club for fresh AGM and elections and hand over to the management to the duly elected executive committee.
>
> 5. Costs be provided for."

2. The application is based on a statutory statement dated 7 November 2023 and affidavits verifying the facts relied upon sworn by Ms. Christine Lukalo and Mr. Peter Mutua. The two affidavits were respectively sworn on 6 November 2023 and 7 November 2023.

3. Ms. Lukalo has, in her affidavit, introduced herself as being "the Chairman of the Impala Club's Tennis Section" and that she has sworn the affidavit on her own behalf and on behalf of other members, apparently, of the Impala Club.

4. She has sworn further that vide a circular dated 27 July 2022, the Chairman of the Board of Trustees communicated the appointment of a Caretaker Executive Committee, named as the 12th respondent

in these proceedings, and re-opening of the club to the members. The circular also communicated the appointment of the following as members of a caretaker committee whose term was to lapse by the end of March 2023:-

i. Dr Sam Ouko – interim Chairman,

ii. Mr. Cephas Osoro – Interim Honorary Secretary,

iii. Ms. Wandia Ikua – Interim Honorary Treasurer,

iv. Prof. Josiah Aduda – Interim Member,

v. Ms. Maryann Muchina – Interim Member,

vi. Mr. Sam Muraya – Interim Member,

vii. Ms. Harriet Chiggai – Interim Member,

viii. Mr. Ian Amagola – Interim Member,

ix. Mr. Richard Meherzi – Interim Member.

5. The appointment of the interim caretaker committee was made pursuant to the intervention of the 10th and 11th respondents and this was confirmed vide a letter dated the 6 September 2022 which conveyed the Terms of Reference of the committee. The terms were as follows:

> " i. management of the club,
>
> ii. facilitate audit of list of members, review membership register and ensure access is granted to legitimate members of good standing,
>
> iii. facilitate audit of club finances, assets and ensure statutory compliance,
>
> iv. appoint a team to review the club constitution,
>
> v. implement decisions of Internal dispute resolution process, and
>
> vi. Prepare the club for fresh annual general meeting and elections and hand over the management of the club to duly elected executive committee."

6. Members of the club are said to have expressed concern following allegations of violation of the provisions of the club's constitution and by-laws specifically insisting on the need to focus on free and fair elections, presentation of grievances to the internal dispute resolution mechanism under and consequently smooth transition given the goodwill demonstrated by the majority of the club membership.

7. Following the lapse of tenure of the caretaker committee and its inability to fully implement the terms of reference, organise elections and convene an Annual General Meeting for that purpose, the firm of Ashioya, Mogire and Nkatha Advocates notified the interim caretaker committee of being in office unlawfully.

8. Vide a letter dated 20 March 2023 and 10 July 2023, the office of the Registrar of Societies directed the caretaker executive committee to convene an Annual General Meeting to enable members to exercise their democratic rights by electing its Executive Committee. Nonetheless,the Registrar vide a letter dated the 14 July 2023 purportedly cancelled the letter dated the 10 July, 2023 and unilaterally extended the term of the caretaker executive committee for a further period of four months.

9. Ms. Lukalo has sworn that while the letter dated 10 July 2023 sought to implement the Terms of Reference agreed upon at the commencement of the tenure of the caretaker committee, the letter of 14 July 2023 and the administrative action of the 10th respondent was in clear violation of the club's constitution and the law. The action was also unreasonable and was not communicated to members prior to being taken.

10. Members of the club, through their letter dated 17 July 2023, protested the extension of the term of the caretaker committee and suggested a way forward but the 10th and 11th respondents disregarded, neglected and rejected the members' views. Although the members attempted to reach out to the 10th and 11th respondents to organise a meeting between parties to ensure that actions taken were in accordance with *the constitution* and by-laws of the club and other guiding legislation, their efforts did not bear any fruit.

11. Consequently, by a letter dated 5 September 2023, the members through an interested party caucus sought reconstitution of the caretaker executive committee. Similarly, the Board of Trustees through their letter dated 20 September 2023 cautioned the 10th and 11th respondents of its breach of the club's constitution through its unlawful directives. In response, the 10th respondent through a letter dated the 2 October 2023 denied the interested party and the Board of Trustees opportunity to ventilate and have since directed them to resolve their issues internally.

12. Members have also explored alternative dispute resolution through the office of the Registrar of Societies without success. According to Ms. Lukalo, it is only this court that can resolve the dispute on the executive structure of Impala Club.

13. Ms. Lukalo has sworn further that on 16 October, 2023, the 1st to 9th respondents presided over club's Special General Meeting. However, the Special General Meeting did not meet requisite quorum of 10% of the membership as provided for in *the constitution* hence the purported adopted changes to the club's constitution are unconstitutional.

14. It is alleged that the agenda of the scheduled Annual General Meeting introduced agenda items not contemplated and hence violated the provisions of the club's constitution. Ms. Lukalo has also been advised by her advocates, which advice she verily believes to be true, that the 10th and 11th respondents could not purport to unlawfully review the club's constitution by vesting authority to preside over elections to caretaker committee as that action violates Article 33(b) of the Impala constitution which vest similar powers to the electoral board appointed by Board of Trustees.

15. Thus, the 1st- 9th respondents are said to have unlawfully appointed a parallel Electoral Board creating confusion among members leading to withdrawal of some candidates. On her part, Ms. Lukalo withdrew her candidature for the position of the Sports Convenor, which is a position on the Executive Committee. Ms. Lukalo insists that unless the terms of reference are fully implemented the consequential elections could not have been free, fair and true democratic representation of the members of the club.

16. In his affidavit, Mr. Mutua has, by and large, replicated the depositions made by Ms. Lukalo. He has sworn that he is the chairperson of the interested party representing interest of the several members within the club.

17. The 1st to 9th and 12th respondents filed a preliminary objection opposing the application. In the objection they raised the following grounds:

> " 1. The jurisdiction of this Honorable court in the exercise of Judicial Review jurisdiction as conferred by Sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya is not to hear the merits of the dispute. Thus;
>
> i. The resolution of this whole dispute requires interrogation of the merits of the function of the Caretaker Committee, the conduct of the Special General Meeting of 14th October, 2023 and the Annual General Meeting of 11th November, 2023 and whether the Terms of Reference were achieved in tandem with the duties of the Caretaker Committee which is not in the purview of this Court.
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> ii. This case is simply a misconceived shortcut designed to obtain judicial review orders in an otherwise civil dispute. The validity of the Caretaker Committee in office, achievement of their mandate and all purposes related thereto is essentially a matter to be resolved by way of evidence, which falls within the jurisdiction of a civil court.
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> iii. The purported Judicial Review is fatally defective, incontestably bad in law, and incompetent since the Applicants are dragging this Honourable Court into internal wrangles and dealings in a private members' club. It is not within the purview of this Honourable Court to address alleged violations of fundamental rights and freedoms arising from dealings between the private club and its membership.
>
> iv. The entire Judicial Review Application is admittedly incompetent, bad in law, an afterthought, misadvised, frivolous, scandalous, vexatious and an outright abuse of the court process and, therefore, only fit for dismissal with costs to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 12th Respondents."

18. Dr. JJ Masiga swore and filed a replying affidavit on behalf of the Impala Club Board of Trustees, who joined this suit as interested parties. In the replying affidavit, Dr. Masiga has sworn that there are leadership challenges bedeviling Impala Club and which this Honourable Court ought to take judicial notice of having disposed of a case in which the similar leadership wrangles emerged. The case has been identified as High Court Judicial Review No. 102 of 2012.

19. According to D. Masiga, the leadership challenges have resulted in an atmosphere of wanton illegalities and irregularities that have permeated through the operations of the club at the instigation of the 10th and 11th respondents. The Board of Trustees, being the only legitimately elected organ of the club capable of guiding the club back from total collapse, is now the only vanguard against the irregular and unlawful usurpation of the club's constitution and rules.

20. It is sworn further that the interested party has always adopted a neutral stance in relation to the said leadership challenges but that they were dragged into the said litigation when the 1st to 9th respondents, made averments to the effect that they passed resolutions in the impugned 11thNovember 2023 Annual

General Meeting to the effect that *the constitution* of Impala Club had been amended and that the members of the Board of Trustees had been removed from office.

21. The interested party, as the persons vested by *the constitution* of Impala Club with the real and movable assets of the club is neither aware nor was it involved in any process of constitutional review and approval process. Through their maladministration, the respondents are alleged to have overthrown *the constitution* of Impala club and installed a caretaker committee otherwise than in accordance with *the constitution* of Impala Club in contravention of Section 12 (1) (g) of the *Societies Act*. The caretaker committee, nonetheless, failed to meet the Terms of Reference prescribed by the 10th and 11th respondents.

22. Even then, the unlawful caretaker committee had failed to meet critical terms of reference which go to the heart of the existence of the club as a Society and in furtherance of their bad faith maladministration, the 10th and 11th respondents went ahead to unilaterally and unlawfully extend the term of the said caretaker committee without the participation of all stake holders and the Board of Trustees as critical stakeholders.

23. Subsequently, the caretaker committee is said to have unlawfully assumed the role of conducting elections and appointed its own electoral board and alleged officials from the defunct Independent Electoral and Boundaries Commission to oversee the elections in the impugned October and November 2023 Annual General Meetings.

24. It has been sworn that the process of removing Trustees is clearly spelt out in Article 40 of the Impala Club constitution and that the right to be heard, which is a fundamental tenet of the rule of law, was not accorded to the Board of Trustees.

25. It is further sworn that the persons presently purporting to be officers of the Executive Committee of Impala Club came into office by unlawful means on the basis of inquorate meetings and a dubious Membership Register and are in fact part of the same cabal which has hijacked the operations of the club and are presently overseeing wastage of club funds acting in common purpose with the unlawful caretaker committee.

26. Although the Board of Trustees did not institute the present action, Dr. Masiga urges that it is necessary that this court immediately arrests the situation by granting the prayer in the motion Motion Application to vest the running of the club to the Board of Trustees in order to ensure that the club's assets are not wasted.

27. Even before considering the respective parties' submissions, I must state at the very outset that the window for intervention by a judicial review court into acts or commissions subject to judicial review is the grounds upon which the application for judicial review reliefs is made. I have held before in numerous applications, and it is worth repeating here, that without the grounds on which judicial review reliefs are sought, an application for judicial review would be fatally defective.

28. Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

29. The grounds to which reference has been made in these provisions of the law have not been left to speculation. They were enunciated in the English case of Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410. In that case, Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
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> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

30. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may grant the remedy for judicial

review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

31. Since they form the foundation upon which the application for judicial review is based, these grounds must be stated in precise, clear and unambiguous terms in the statement accompanying the application for leave.

32. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything' including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court."

33. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the Civil Procedure Rules, 2010. The point is, however, clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity. It follows that where the grounds are not stated, the application is fatally defective as, strictly speaking, it has no foundation upon which it is built. On this ground alone the applicant's application would fail.

34. Turning back to the applicants' application, it is rather difficult to tell the judicial review grounds upon which their application is based. What has been presented as grounds is largely the depositions made in the affidavit verifying the facts relied upon. Indeed, the facts may as well fall under any of the acknowledged grounds but it is not for the court to make out whether they under one particular ground rather than the other. In other words, it is not for the court to speculate the grounds upon which relief is sought; the burden is on the applicant to set out with a certain degree of clarity the grounds of judicial review and notto 'throw everything' at the court. My conclusion is that the applicants have not discharged this burden to my satisfaction.

35. The second reason why I am not inclined to grant the applicants' application is because although the application turns on what is claimed to be non-compliance with *the constitution* of Impala Club, *the constitution* has not been exhibited on any of the affidavits, either verifying the facts relied upon or, generally in support of the applicant's application.

36. In the absence of *the constitution*, the court cannot verify allegations of violation of the provisions of the club's constitution and by-laws. For instance, when the applicants say that the 10th respondent violated the club's constitution by extending the term of the caretaker committee, it is difficult for the court to hold the 10th respondent accountable on this score without reading the club's constitution and its by-laws. The court cannot tell whether indeed *the constitution* provided for internal dispute resolution mechanisms and whether those mechanisms were tried to resolve the impasse at the club that culminated in this suit.

37. For the same reason, the court has no basis upon which to reach the conclusion that the holding of an Annual General Meeting said to have purported to change *the constitution* of Impala Club and remove the Board of Trustees from office was procedural and unlawful. It is also difficult to tell whether the amendment of *the constitution* by the caretaker committee was done contrary to the club's constitution.

38. Again, when it is stated, for instance, that trustees can only be removed in accordance with Article 40 of *the constitution*, the court cannot verify this fact without reading this particular provision of the club's constitution. Neither can the court reach any conclusive decision on whether the meetings held on 11 November 2023, 27 April 2024 and 14 October 2024 were held in accordance with the provisions of *the constitution*.

39. It is trite that the judicial review is more concerned with the process rather than the merit of the decision. The only way the court can satisfy itself of the process by which the impugned decision or decisions were reached is by weighing the respondents' actions against the process established by the club's constitution. Why the applicants omitted such a pivotal document when the prayers sought in the application revolve around it is difficult to understand.

40. I can only conclude that, in the absence of the club's constitution, there is insufficient material upon which this Honourable Court can exercise its discretion in favour of the applicant.

    For the foregoing reasons, I am not persuaded that the applicants' application is merited. It is hereby dismissed. I make no orders as to costs. It is so ordered.

SIGNED, DATED AND UPLOADED ON THE CTS ON 16 JANUARY 2025

NGAAH JAIRUS

JUDGE