Republic v JKUAT Students' Electoral Commission & 2 others; Thiong'o (Exparte Applicant) (Judicial Review Miscellaneous Application E072 of 2025) [2025] KEHC 5004 (KLR) (Judicial Review) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5004 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E072 OF 2025

JM CHIGITI, J

APRIL 25, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE JKUAT STUDENTS' ELECTORAL COMMISSION ..... 1ST RESPONDENT

THE CHIEF RETURNING OFFICER (DEAN OF STUDENTS), JKUAT ..... 2ND RESPONDENT

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY ..... 3RD RESPONDENT

AND

MARK MWANGI THIONG'O ..... EXPARTE APPLICANT

JUDGMENT

1. The application before this court is the Applicant's Originating Motion dated 24th March 2025. The motion seeks the following orders;

    1. the Application herein be and is hereby certified as urgent and be heard ex-parte at the first instance;

    2. That pending the inter parties hearing and determination of this motion this Honorable Court be pleased to grant Conservatory Orders staying the decision of the 1st Respondent communicated via letter dated 19th March 2025 barring the Applicant from vying for

the position of chairperson JKUSA pending the hearing and determination of the instant Application.

3. That pending the inter parties hearing and determination of this motion this Honorable Court be pleased to grant Conservatory Orders suspending the elections for the Chairperson Jomo Kenyatta University Students Association (JKUSA) scheduled for 25th March 2025.

4. That upon the hearing and determination of this suit, an Order of Certiorari be granted and/ or issued to remove into the High Court and quash the decision of the Respondents contained in the letter dated 19th March 2025 which decision purported to disqualify the Applicant from vying for the said position.

5. That upon the hearing and determination of this motion, this Honorable Court be pleased to grant permanent orders in the nature of Mandamus compelling the 1st Respondent, the JKUAT Students' Electoral Commission, to clear the Applicant to vie for the position of Chairperson of the Jomo Kenyatta University Students Association (JKUSA).

6. That the Honourable Court be pleased to Grant any further relief deemed just and necessary to uphold the Applicant's rights and protect the integrity of the electoral process.

7. Cost of this Application be provided for.

2. The application is based on the grounds set out in the Statement of facts filed together with this Application and the Verifying Affidavit of Mark Mwangi Thiong'o.

3. The Applicant's case is that Mwangi Mark Thiong'o, a postgraduate student at JKUAT pursuing a Master's in Project Management, intends to vie for the position of Jomo Kenyatta University Students Association (JKUSA) Chairperson in 2025. It is his case that although admitted for his first semester on 17th September 2024, he was unable to complete the semester due to financial constraints and thus applied for retrospective academic leave.

4. The Applicant's case is that pursuant to Part II, Schedule 1 of the JKUSA Constitution, a candidate must not have pending supplementary exams (Clause v) and must obtain a departmental progress report (Clause vi). It is his case that he was duly cleared by his department. However, that the Dean noted only that her office had not yet received the departmental letter without indicating any pending supplementary exams.

5. According to the Applicant an error had initially led to the mis recording of his group marks as CAT marks which were erroneously presented to the Senate. It is his case that this issue has since been resolved at all relevant levels, except for formal adoption by the Senate, whose next sitting is uncertain despite the JKUSA elections being scheduled for 25th March 2025.

6. The Applicant invokes Section 7 of the *Fair Administrative Action Act*, arguing that the decision to bar him is unfair, unreasonable, and disproportionate. The Applicant urges that he suspects malice and undue influence aimed at blocking his candidature. He also highlights that, per the JKUSA Constitution, departmental clearance suffices for eligibility even if the administrative matter is still pending before the Senate.

7. According to the Applicant his appeal to the Vice Chancellor against the 1st Respondent's decision was seemed to be impractical be the 1st Respondent's impugned letter dated 19th March 2025, prompting this Application. The Applicant stresses the urgency and lack of undue delay in filing. He compares his situation to that involving one Wesley Osiro, who he argues was reinstated without Senate clearance under similar circumstances.

8. He further contends that denial of his candidacy based on an administrative formality violates Articles 38, 81, 47, and 50 of *the Constitution* and calls for immediate court intervention.

The Respondents' case

9. The Respondents in response filed a Replying Affidavit sworn by Dr. Aggrey Wanyama who depones to be the Registrar, Academic Affairs at the 3rd Respondent on 1st April 2025.

10. In his disposition, Mr Wanyama states that The JKUAT Charter, 2013 recognizes the Jomo Kenyatta University Students' Association (JKUSA) as the official student representative body, mandated to promote academic and social welfare, foster communication with university staff and administration, and represent student interests in university governance.

11. Further that the Association is governed by the JKUSA Constitution (2022), which outlines its objectives including protecting student rights, promoting academic excellence and diversity, and ensuring democratic representation.

12. It is the Respondents' case that the Student Council, established under Article 4, is the executive arm of JKUSA, led by a Chairperson and supported by a Vice Chairperson, Treasurer, Secretary General, and Special Needs Representatives. Their powers and functions are said to be outlined under Article 4(1)(A)(c) of the JKUSA Constitution. These include policy making, financial oversight, resource mobilization, and representing students in university organs.

13. It is urged that JKUSA elections are conducted via an Electoral College system as provided under Part II, Schedule 1(b) of *the Constitution*. Further that elections for delegates take place in the 6th week of the second semester of every academic year, while Student Council elections are held on the 8th week. It is also urged that there are no provisions for alternative dates. The Respondents' also refer to Part II Schedule 1(f) which provides that the eligibility criteria include academic and disciplinary standing, good conduct, and full fee payment. They also refer to Part II Schedule 1(g) which among other items provides that candidacy is only valid for one position per election cycle. It also sets out withdrawal procedures.

14. According to the Respondent in the 2025 elections, the Applicant expressed interest in running for Chairperson alongside Ann Kimberly Auma for Vice Chairperson, on a joint ticket. The nomination process included eligibility verification by the university's departments.

15. The Respondents' case is that two conflicting reports were received during this vetting process one from the Department Chair of Entrepreneurship Technology, Leadership and Management (ETLM) indicating the Applicant had no special or supplementary exams since he had not sat for any examination. Another from the Dean of School of Business and Entrepreneurship SOBE which reported that the Applicant had applied for a Master's degree but never formally reported or took academic leave, had some CAT marks but no formal exams, rejoined classes without notice and had not declared his candidacy, was therefore deemed not to have met academic eligibility criteria.

16. These discrepancies are said to have affected the Applicant's eligibility to contest for the JKUSA Student Council Chairperson position.

17. It is also stated that the Chairperson of the Department of ETLM issued a memo regarding the Applicant without a request from the Dean of Students, which is claimed to be irregular and unlawful. The Respondents argue that the Applicant did not meet the academic requirements of his program, as he failed to sit for the end of semester exams for the September–December 2024 semester despite having reported on 17th September 2024.

18. The Respondents further urge that the Examination Report dated 3rd March 2025, as confirmed by the Senate, indicated that the Applicant failed four (4) units and that he did not sit two special exams due to financial issues. The Senate, under Statute XIX(2)(iii), is said to be mandated to approve examination results and to regulate the conduct of examinations. It is the Respondents case that the Applicant has not provided any evidence to show the results were erroneous or improperly recorded.

19. According to the Respondents the Applicant's disqualification from the JKUSA Student Council elections is based on pending supplementaries, which rendered him ineligible under the JKUSA Constitution and University Statutes. The Respondents dispute the Applicant's claim that departmental clearance is equivalent to full academic clearance, noting the Applicant did not cite any legal basis in support.

20. Further, the Respondents contend that a retrospective academic leave letter initially issued to the Applicant was later withdrawn after it was found to be procedurally flawed, as postgraduate deferrals are managed by the Graduate School, not the Deputy Registrar of College of Human Resource Development (COHRED).

21. The Respondents also argue that the Applicant's claim of deferring the semester is false and meant to mislead the Court. They state the Applicant failed to disclose important facts when seeking conservatory orders namely, that the JKUSA elections were tied to a strict academic calendar, that the Chairperson and Vice-Chairperson elections were interlinked, and that a stay of the election would disrupt student governance and disenfranchise delegates who had traveled from other campuses.

22. In conclusion, the Respondents maintain that the Applicant has not demonstrated any illegality, impropriety, or procedural unfairness in the decision to disqualify him. They assert that he has failed to exhaust internal appeal mechanisms and obtained interim orders based on material non-disclosure.

23. The Respondents aver that they expended a significant budget on allowances for the JKUSA delegates, including travel to the Main Campus and preparations for the Student Council elections. They emphasize that there were other aspirants for the positions of Chairperson and Vice Chairperson in the elections scheduled for 25th March 2025 who would suffer prejudice as a result of the orders sought by the Applicant.

24. The Respondents argue that it was incumbent upon the Applicant to join all parties likely to be affected by the orders sought, including his running mate and other aspirants, as they were necessary parties. Failure to do so, they contend, violated Article 50 of *the Constitution* and the principles of natural justice by denying those parties their right to be heard.

25. They also urge that due to the interim orders issued by this Court on 24th March 2025, the Respondents were unable to proceed with the elections for Chairperson and Vice Chairperson as scheduled. Consequently, only the elections for other positions in the JKUSA Student Council were conducted in accordance with Article 4(1)(A)(b) of the JKUSA Constitution, 2022.

26. The Respondents argue that the purpose of conservatory orders is to uphold orderly functioning within public institutions and maintain judicial integrity in the public interest. Further that as a result of the interim orders, the JKUSA Student Council now lacks duly elected officials for the key offices of Chairperson and Vice Chairperson, a situation not anticipated in the transitional clauses of the JKUSA Constitution.

27. The Respondents maintain that the current lacuna has severely prejudiced both the 3rd Respondent and JKUSA. They also urge that the newly elected members of the Campus Council, Student Council, and Congress cannot be sworn in until a valid Chairperson is elected. This delay is said to undermine

the full operational capacity of JKUSA. Furthermore, that some of the elected delegates are in their final semester and may become ineligible to vote in future elections for Chairperson and Vice Chairperson after the semester ends.

28. The Respondents believe that public interest lies in allowing the elections to proceed as per the JKUSA Constitution and the relevant university statutes. They contend that the Application improperly seeks to have the Court usurp the powers of the 3rd Respondent in administering academic affairs and determining candidate eligibility, powers lawfully vested in the institution.

29. They further assert that judicial review should be invoked sparingly and only in exceptional circumstances, emphasizing that the grant of judicial review orders is discretionary and should not facilitate illegality. The Application, they argue, calls for a merit review an exercise beyond the scope of judicial review jurisdiction without demonstrating illegality, irrationality, or procedural impropriety.

30. The Respondents allege that the Applicant's claims are speculative and misleading, lacking evidence, particularly with regard to the allegations involving Wesley Osiro. It is their case that contrary to the Applicant's claims, the Director of SODEL confirmed that Wesley Otunga sat and passed the common university unit HRD 2101 during the September–December 2022 semester, and that the marks had been duly submitted.

31. They submit that the Applicant has not demonstrated that he is being treated differently from other students in contravention of legal and constitutional standards, or that the actions taken were unlawful. They conclude that the Applicant's Application is without merit, based on material non-disclosure, and amounts to an abuse of the Court process. Accordingly, they pray that the Application be dismissed with costs.

Submissions

32. The application was canvassed by way of written submissions. The Applicant filed written submissions dated 7th March 2025.

33. In his submissions the Applicant asserts that the impugned decision constitutes an unfair administrative action in contravention of Article 47 of *the Constitution* of Kenya, 2010 and Section 7 of the *Fair Administrative Action Act*, 2015. He further argues that the decision was inconsistent with the JKUSA Constitution and violated his constitutional rights under Articles 38 and 81 of *the Constitution*.

34. The Applicant submits that Article 47(1) guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) mandates that if a person's right or fundamental freedom is or is likely to be adversely affected by administrative action, the person has a right to be given written reasons.

35. Section 4 of the *Fair Administrative Action Act*, 2015 as refered to echoes this constitutional safeguard and elaborates on the procedures administrators must follow before making a decision that adversely affects a person's rights. The Applicant contends that he was not afforded such procedural fairness, as the Respondents neither gave written reasons nor accorded him an opportunity to be heard prior to disqualification.

36. The Applicant relies on the Court of Appeal's decision in Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR, where the Court is said to have emphasized that the right to fair administrative action under Article 47 encompasses both procedural and substantive justice. The Applicant submits that the Respondents' decision fell short of these standards.

37. He further contends that the disqualification was unreasonable and disproportionate, particularly because the issue of his alleged supplementary examination arose from an administrative error by the university. This error, is said to have related to the mis-recording of marks for examinations he did not sit, and that the same was resolved at the departmental, school, and college levels. The Applicant submits that he had already been cleared by his Departmental Chair, an arm of the Respondents, which he argues should have been conclusive under the JKUSA Constitution.

38. It is also his submission that this clearance should have sufficed in determining his eligibility to contest, as Clause f (vi) at page 21 of the JKUSA Constitution allows postgraduate students to submit an academic progress report from the department, which he did. The Applicant contends that since *the Constitution* of JKUSA designates departmental clearance as sufficient, the Respondents acted inconsistently with their own governing framework by disqualifying him. He argues that this inconsistency, coupled with the fact that the Respondents failed to dispute his departmental clearance, reveals a deliberate intent to unfairly bar him from the election.

39. The Applicant criticizes the lack of an affidavit from the Dean of Students, the Chief Returning Officer responsible for the disqualification decision. He urges the Court to draw an adverse inference from the Dean's absence and adopt the "empty chair doctrine," citing that the Registrar Academics, who swore the affidavit in the matter, was not the decision-maker and thus lacked personal knowledge of the decision.

40. Moreover, the Applicant argues that the disqualification lacked justification under the so called "24-month rule" in Clause f(x) of the JKUSA Constitution, which provides that a candidate must have at least 12 months left in their course to be eligible. He maintains that no evidence was produced by the Respondents to show he had a pending supplementary examination.

41. The Applicant further submits that his political rights under Article 38 81(a) of *the Constitution* were infringed. He argues that his disqualification, based on unfounded claims of a supplementary examination he never sat for, was arbitrary and infringed on these constitutional guarantees.

42. In response to the Respondents' reliance on provisions of the JKUSA Constitution, the Applicant invokes Article 2(1)(2) of *the Constitution* of Kenya, which declares *the Constitution* as the supreme law of the land.

43. He argues that any provision of the JKUSA Constitution that contradicts the national Constitution is void to the extent of the inconsistency. He supports this proposition with the decision in Abdalah v Chebukati, Chairman, IEBC & Another [2022] KEHC 10911 (KLR) (3 June 2022) (Judgment), where the Court affirmed that all institutions and their governing frameworks must conform to *the Constitution*. He also refers to Katiba Institute v Independent Electoral and Boundaries Commission [2017] eKLR, where the Court held that even political parties are bound to adhere to constitutional norms, including the promotion of human rights and freedoms.

44. The Applicant maintains that allowing the disqualification to stand would be unconstitutional and contrary to public interest. He argues that the Respondents' insistence on proceeding with the elections on 26th March is moot and no prejudice would be suffered if the Applicant is allowed to contest.

45. On the issue of costs, the Applicant prays for an award in his favour. He cites Article 23(3) of *the Constitution*, which empowers the Court to grant appropriate reliefs, including costs. He notes that he is a student without a source of income and was compelled to seek legal redress due to the Respondents' unlawful conduct. The Applicant relies on Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others (2013) eKLR, where the Court, quoting Levben Products v Alexander

Films (SA) (Pty) Ltd 1957 (4) SA 225, reiterated that costs should generally be awarded to the successful party unless there are good reasons to depart from that principle.

46. In conclusion, the Applicant asserts that the decision to disqualify him was unreasonable, unjustifiable, unfair, and illegal, thereby constituting an unfair administrative action under Article 47 of *the Constitution* and the *Fair Administrative Action Act*. He relies on the case of Gichuhi & 2 Others v Data Protection Commissioner; Mathenge & Another (Interested Parties) [2023] KEHC 17321, where the Court emphasized that its authority under the *Fair Administrative Action Act* includes issuing orders that are just and equitable. He urges the Court to allow his application dated 24th March 2025 in order to serve the ends of justice.

47. The Respondents also filed written submissions dated 7th April 2025.

48. In their submissions, they urge that the judicial review focuses on the legality of the decision-making process not the merits of the decision itself and that courts should not function as appellate bodies in such matters. They highlight that judicial review remedies are discretionary and can be declined due to factors such as undue delay or public inconvenience.

49. On the substantive issue, the Respondents argue that the Applicant was lawfully disqualified from vying for JKUSA Chairperson due to non-compliance with eligibility criteria under the JKUSA Constitution, specifically having pending supplementary exams. They provide a detailed chronology showing conflicting internal reports about the Applicant's academic record, ultimately resolved through confirmation by the Registrar that the Applicant had failed four units and was due for supplementary exams.

50. The Respondents contend that the disqualification was procedurally and substantively lawful and that the Applicant has not produced evidence to show any errors in the exam records or that departmental clearance suffices for election eligibility there was no breach of law or the JKUSA Constitution.

51. The Respondents argue that the Applicant improperly seeks a merit-based review of his disqualification outside the remit of judicial review. They stress that the 3rd Respondent has exclusive legal authority over academic assessment and eligibility for JKUSA positions. Courts, they contend, should not interfere with technical decisions by academic bodies, citing Republic v KNEC Ex-parte Jeruto & 34 Others JR. Application No.6 of 2015.

52. They further assert that the Applicant has not challenged the accuracy of his examination results with any evidence and that his comparison to another candidate, Wesley Otunga, is misplaced, as Otunga had no pending supplementary exams.

53. Ultimately, the Respondents submit that the Applicant's dissatisfaction does not amount to a legal wrong and that judicial review cannot be invoked to reverse a decision that was lawful and made within the proper institutional mandate.

54. The Respondents further contend that the Applicant has not demonstrated any improper exercise of discretion warranting judicial intervention. Reliance is placed in the case of Republic v Kenya Revenue Authority Ex parte CMC Di Ravenna-Itinera JV [2020] and Nyongesa v Egerton University College [1990] KLR 692 where the courts are said emphasize that courts should refrain from substituting their own judgment for that of specialized institutions or interfering with domestic administrative decisions unless illegality or breach of natural justice is shown.

55. The Respondents acknowledge that the decision to disqualify the Applicant constitutes an administrative action under Section 2 of the *Fair Administrative Action Act* (FAA Act). However, they

assert that the Applicant has failed to establish any unfairness, unreasonableness, or disproportionality in the administrative decision in question.

56. The Respondents further assert that the Applicant has failed to exhaust the internal remedies available within the JKUSA Constitution before seeking judicial review, in violation of the exhaustion doctrine under Section 9 of the *Fair Administrative Action Act* (FAA Act). The Respondents emphasize that Part II Schedule 1(g)(xiii) of the JKUSA Constitution prescribes an appeal process against disqualification, which the Applicant neglected to pursue.

57. In support of this position they rely on the Court of Appeal decision in Geoffrey Muthama v Samuel Muguna Henry & 1756 others[2015] eKLR and the High Court decision in Krystalline Salt Limited v Kenya Revenue Authority [201] eKLR where the courts underscore the mandatory nature of exhausting internal remedies before resorting to judicial intervention, unless exceptional circumstances are demonstrated.

58. It is submitted that the Applicant has not met the criteria for exemption under Section 9(4) of the FAA Act, which requires the party seeking judicial review to show exceptional circumstances that justify bypassing internal remedies. The Respondents further argue that the Applicant has not substantiated any such exceptional circumstances, nor has he formally applied for an exemption, as required by law. Reliance is placed in the case of William Odhiambo Ramogi &3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR. Consequently, the Respondents contend that the Court should not entertain the Applicant's application on these grounds.

59. The Respondents contend that the Applicant has not met the threshold for granting judicial review orders, particularly on the grounds of illegality, irrationality, and procedural impropriety. The Respondents argue that judicial review is not a forum for reviewing the merits of a decision but rather for ensuring that decisions are made lawfully, reasonably, and within the confines of the relevant legal and procedural frameworks.

60. The Respondents further assert that judicial review is not a forum for the Court to assess the merits of the decision. Citing the SGS Kenya Limited v Energy Regulatory Commission & 2 others; Petition No.2 of 2019 where the court is said to have highlighted that the role of the Court revolves around the paths followed in decision making. This principle is said to have been underscored in Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019 (consolidated) [2023] KESC 6 (KLR)(Civ), where the Court emphasized the limitations of judicial review and reiterated that the Court cannot delve into the merits of the case.

61. The Respondents argue that for the Applicant to succeed in judicial review, he must demonstrate that the decision is tainted with illegality, irrationality, or procedural impropriety, as outlined in Section 7(2) of the *Fair Administrative Action Act*. The Respondents assert that the Applicant has not shown that the decision to disqualify him was illegal, irrational, or procedurally improper. In fact, they submit that the decision was made in accordance with the applicable laws and regulations governing the JKUSA elections.

62. The Respondents contend that the Applicant has failed to provide sufficient evidence that the Respondents acted outside their statutory mandate. The decision to declare the Applicant ineligible is based on established rules, and the Applicant has not demonstrated any illegal, irrational, or procedurally improper conduct on the part of the Respondents.

63. Based on the foregoing, the Respondents urge the Court to dismiss the Applicant's application on the grounds that it is premature (due to failure to exhaust internal remedies) and that the Applicant has

not met the necessary legal threshold for judicial review. Furthermore, the Respondents assert that the Applicant has failed to demonstrate the grounds for judicial review, such as illegality, irrationality, or procedural impropriety, in the decision-making process.

64. The Respondents argue that the decision to disqualify the Applicant from vying for the position of Chairperson in the JKUSA Student Council was legally sound and in line with the JKUSA Constitution, the Respondent's Statutes, and the principles of natural justice. They assert that certiorari, a writ to quash a decision, is not applicable in this case because the decision was made within their lawful authority, without any jurisdictional or procedural flaws. They further argue that mandamus, a writ to compel action, is also inappropriate since the Applicant does not meet the qualifications to vie for the position.

65. In conclusion, the Respondents urge the Court to prioritize the public interest, the effective operation of the university, and the integrity of the election process, requesting that the interim conservatory orders be lifted.

66. On setting aside of the ex parte orders reliance is placed in the case of Shah v Mbogo & Another [1967] EA 116. The case of Challis (Suing through the Attorney Isaack Ntongai Samwel) v General & 4 others (Environment & Land Case 18 of 2021) [KEELC] 17195 (KLR) is relied on the gravity of material non-disclosure.

Analysis and determination;

67. Upon perusing the pleadings, the supporting documents, the rival submissions and authorities cited by counsel the following are the issues for determination;

    i. Whether this court has jurisdiction.

    ii. Whether or not the applicant has made out the case for the grant of the order sought.

    iii. Who shall bear the costs.

Whether this court has jurisdiction;

68. In the case of Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] eKLR, where the Court held that jurisdiction is a fundamental prerequisite, and any proceedings conducted without it are null and void.

69. In the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee *& 5 others (Interested Parties) (Petition E007 of 2023*) [2023] KESC 113 (KLR) (28 December 2023) the court held thus:

> " Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, J) stated: "In the instant case, the Petitioners allege violation of their fundamental rights. Where a

suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need- for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court".

70. Black's Law Dictionary, 10th Edition at page 377 defines it as:

> " The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion".

71. The applicant in his supporting Affidavit deponed as follows;

> " Further to the above, I appealed the decision of the 1st Respondent to the Vice Chancellor for intervention, given that the normal appeal process to the Elections Appeal Committee was deemed to be impractical by the 1st Respondent's impugned letter dated 19th March 2025 annexed herewith at pages..... of MMT 1. A determination and response to this Appeal was expected to be delivered on Friday 21st March 2025, which was not delivered. As a result, the Applicant's only recourse is this Court to ventilate his rights."

72. This court has looked at Part II Schedule 1(g)(xiii) of the JKUSA Constitution which stipulates: "The same prescribes an appeal process for a dissatisfied candidate."

73. The Applicant is aware of his obligation and the duty to embrace the internal appellate mechanisms. The reason as to why he approached the Vice Chancellor for redress as opposed to the Elections Appeal Committee is not tenable.

74. This court takes judicial notice of the fact that all electoral regulatory statutory frame works universally are under a duty to settle electoral disputes fairly and in a speedy manner. The applicant in this matter assumed that there would be a delay in the delivery of the ruling which he says led him to this court. This court does not accept this explanation. To allow all candidates to adopt this kind of approach would render all electoral disputes appellate platform otiose.

75. In the case of Dawda K. Jawara vs Gambia, it was held that:

> " A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of

local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

76. This court is of the view that there are no peculiar circumstances in this suit that would allow the applicant to enjoy the privilege of an exemption from the application of doctrine of exemption from the internal appeal process and I so hold.

77. In the case of Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 others [2015] eKLR the Court of Appeal stated that: -

> " It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be of last resort and not the first port of call the moment a storm brew... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...These accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

78. In the instant suit, to allow the Applicants suit to survive will offend Article 159 of *the Constitution*.

79. In the case Communication Commission of Kenya & 5 others v Royal Media Services Ltd & 5 Others [2014] eKLR it was held that: "the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition."

80. In any event, the applicant has not made an application to be exempted from the doctrine of exhaustion under the *Fair Administrative Action Act*.

81. The issue of jurisdiction can also be looked at differently.The 1st Respondent the Independent Electoral Commission is established under Section 41 of the *Universities Act*, 2018 revised.

82. In Judicial Review Application No. E034 of 2025; Dibora Zainab Hirbo vs University of Nairobi Independent Electoral Commission & another, it was held;

> " Para 59. From the judicial pronouncements right from the Court of Appeal which bind this court as cited above, it follows that while Article 260 recognizes unincorporated bodies as "persons" for constitutional purposes, it does not automatically confer legal personality on such bodies for purposes of legal proceedings. Legal capacity, which includes the capacity to sue or be sued, remains subject to additional legal and procedural requirements. Even with the expansive definition of "person" in Article 260, Kenyan courts have clarified that unincorporated bodies generally lack legal personality and cannot independently sue or be sued. This is because legal personality, which confers the ability to hold rights, incur obligations, and engage in legal proceedings independently, is typically reserved for incorporated entities, such as registered companies, societies, or state agencies.
>
> Para 60. Unincorporated bodies can only participate in legal proceedings through specific procedural mechanisms, such as representative suits under Order 1 Rule 8 of the Civil Procedure Rules, which provides that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued on behalf of all persons so interested."

83. In Geoffrey Asanyo & another v John Kiragu Ngunyi & 13 others [2015] eKLR, The Court stated as follows:

> " That finding would be sufficient to dispose of the petition. But I am minded to comment on the locus of the petitioner. The respondents have submitted that the petitioner lacks standing to sue in its name. Under Article 260 of *the Constitution*, a person is defined to include a company, association or other body of persons whether incorporated or unincorporated. Article 258 of *the Constitution* on the other hand provides that every person has the right to institute legal proceedings claiming that *the Constitution* has been contravened or threatened with violation. There is a fairly identical provision in Article 22 dealing with enforcement of the Bill of Rights. The petitioner was registered as a self-help group on 28th December 2009 by the Ministry of Gender, Children and Social Development. That fact is common ground. It is thus beyond dispute that the petitioner is an unincorporated association. To that extent, it is entitled to bring a constitutional petition.
>
> However, it can only bring the proceedings through its registered officials. The reason is simple: the petitioner is not a distinct legal person independent of its members. It cannot then maintain an action in its name or be sued as such. See Kituo cha Sheria vs John Ndirangu Kariuki and another Nairobi, High Court petition 8 of 2013 [2013] eKLR. In Kipsiwo Community Self Help Group v Attorney General & 6 others t Eldoret, High Court E&L Petition 9 of 2013 (unreported) the court was confronted with a similar problem. Munyao J delivered himself as follows-
>
> > "It would seem therefore, from a reading of Article 22 and the definition provided in Article 260, that a company, association or other body of persons whether incorporated or unincorporated, may institute proceedings asserting a violation of a right in the Bill of Rights.
> >
> > I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because *the Constitution* allows unincorporated bodies to sue, does not vest such bodies with legal capacity and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued."
> >
> > I have then reached the conclusion that quite apart from the merits of the petition the petitioner has no legal standing to institute the present proceedings in its own name. The action is thus incurably defective and incompetent. I have already found that the petitioner has failed to discharge the onus of proof that the respondents have violated any of its rights under *the Constitution* or the

international instruments cited by the petitioner. It follows as a corollary that the Court cannot issue any of the declarations or reliefs sought in the petition."

84. No evidence has been tendered by the Applicant to show that the 1st Applicant is incorporated raising the legal question of whether the 1stRespondent has the capacity, in this case, to be sued in its own name as is the case herein. The suit against the 1st Respondent is struck out on this count.

85. The orders sought by the Applicant cannot be granted against the other Respondents in the circumstances. Given that they are not enforceable against them once the suit against the 1st Respondent collapses.

86. Having found as I have above, this court has to down its tools in line with the principles as settled in the Supreme Court Case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019/ eKLR, /36) wherein it was observed that:

> "Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel "Lillian S" Caltex Oil, (Kenya) Ltd [1989) KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step"

Disposition;

87. The applicant has not made out a case fit for the grant of the orders.

Order;

The suit is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2025

.....

J. CHIGITI (SC)

JUDGE