



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Sports Disputes Tribunal; Anti-doping Agency of Kenya (Interested Party); Taki (Exparte Applicant) (Judicial Review Miscellaneous Application E057 of 2024) [2025] KEHC 6620 (KLR) (Judicial Review) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6620 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW**

**JUDICIAL REVIEW MISCELLANEOUS APPLICATION E057 OF 2024**

**JM CHIGITI, J**

**MAY 23, 2025**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE  
JUDICIAL REVIEW ORDERS OF MANDAMUS, PROHIBITION & CERTIORARI**

**-AND-**

**IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF SECTION 7 OF THE FAIR  
ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**-AND-**

**IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**-AND-**

**IN THE MATTER OF SECTION 58 OF THE SPORTS ACT**

**-AND-**

**IN THE MATTER OF SECTION 20 AND 21 OF  
THE ANTI - DOPING (AMMENDMENT) ACT, 2010**

**-AND-**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**



REPUBLIC ..... APPLICANT  
AND  
SPORTS DISPUTES TRIBUNAL ..... RESPONDENT  
AND  
ANTI-DOPING AGENCY OF KENYA ..... INTERESTED PARTY  
AND  
ERICK KUMARI TAKI ..... EXPARTE APPLICANT

## JUDGMENT

1. The application that is before this court for determination is the one dated 28.11.24 wherein the applicant is seeking the following orders;
  1. The Honorable Court be pleased to issue an order of CERTIORARI to bring to the High Court for purposes of being quashed the decision of the Respondent, contained in its Ruling delivered on 23<sup>rd</sup> November, 2023 dismissing the applicant's Preliminary Objection dated 5<sup>th</sup> September, 2023 and ruling that the Respondent has jurisdiction to hear and determine an appeal against its own decision.
  2. The Honorable Court be pleased to issue an order of PROHIBITION, PROHIBITING the Respondent from hearing Spdt Appeal No. E039/2023; Adak –Vs- Eric Kumari Taki for want of jurisdiction.
  3. Costs of this Application be hereby provided for.

### **The Applicants case;**

2. On 29<sup>th</sup> July, 2022 the Applicant received an anti-doping rule violation notice from the interested party herein informing him that a sample collected from him on 22<sup>nd</sup> June, 2022 had returned a positive result for a prohibited substance ordering him to serve an immediate mandatory provisional suspension.
3. He is aggrieved by the fact that the interested party instituted an anti-doping rule violation case against him at the Respondent tribunal.
4. A panel of three (3) members constituting of Hon. Elynah Sifuna Shiveka, Hon. Peter Ochieng and Hon. Allan Owinyi Was set up to preside over the case. In the ensuing decision rendered on 11<sup>th</sup> August, 2023 the respondent dismissed the case.
5. This prompted the interested party to file a notice of appeal dated 14<sup>th</sup> August, 2023 at the same tribunal.
6. The applicant then raised a preliminary objection against the appeal on the ground that the respondent did not have jurisdiction to hear the appeal dated 5<sup>th</sup> September, 2023.
7. On 23<sup>rd</sup> November, 2023 the respondent dismissed the preliminary objection and held that it had the jurisdiction to hear the appeal against its own decision.



8. The second instance panel of different panel members including: Hon. John Ohaga, SC, Hon Njeri Onyango and Hon Benard Wafula Murunga.
9. It is his case that by agreeing to basically sit on appeal of its own decision the respondent acted ultra vires and the decision was contrary to the provisions of the law.
10. He argues that when parties submitted to the respondent to hear the anti-doping charge violation in the first instance they basically waived their right to appeal knowing fully well that the respondent would not have jurisdiction to hear an appeal against its own decisions.
11. He refers to The Owners Of Motor Vessel Lilian “S” Vs Caltex Oil (Kenya) Ltd [1989] Klr which has been accepted as the leading authority and is now trite law on the issue of jurisdiction states as follows;
 

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without Jurisdiction.”
12. It is the ex parte applicant’s submission that the respondent lacks jurisdiction to hear and determine the appeal that was filed before it on 14<sup>th</sup> August, 2023 by the interested party herein.
13. The supreme court in Samuel Kamau Macharia -VS- Kenya Commercial Bank Limited & 2 Others stated that;
 

“.....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.”
14. In Re The Matter Of The Independent Electoral And Boundaries Commission the Supreme Court held thus;
 

“[29] Assumption of jurisdiction by courts in Kenya is a subject regulated by *the constitution*, by statute and by principle laid out in judicial precedent.”
15. Section 55 of the *Sports Act* establishes the Sports Dispute Tribunal while Section 58 of the Act provides for the jurisdiction of the Tribunal.
16. It is his case that although the panel constituted to hear the appeal though differently constituted the bottom line is the members are from the same level and derive their powers from the same instrument.
17. There is no hierarchy of membership to the respondent and no one member is superior to the other as to overturn the decisions of the other members.
18. He argues that to give the tribunal the appellant an opportunity to re-litigate and re-argue its case against all known principles of law and rules of natural justice.
19. Reliance is placed in the case of Board of Governors Moi High School Kabarak & another versus Malcolm Bell Supreme Court Petitions Nos. 6 and 7 of 2013 (eKLR) for the proposition that a “Court’s Jurisdiction flows from either *the Constitution* or Legislation or both. As such a Court cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by Law. It must operate within the Constitutional limits; and lastly the inherent power of the Court is meant to prevent its process from being misused in such a way as to diminish its capability to arrive at a Just decision of the dispute”.
20. Section 58 of the said Act provides as follows:



- a. The Tribunal shall determine—
  - a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including —
  - b. appeals against disciplinary decisions;
  - c. appeals against not being selected for a Kenyan team or squad;
    - a) other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear; and
    - b) appeals from decisions of the Registrar under this Act
21. Section 58 (a) (i) gives the Respondent powers to hear appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the respondent in relation to that issue including appeals against disciplinary decisions.
22. To give more meaning to that section in the context of the present case, parliament enacted the [Anti-Doping Act](#) No. 5 of 2016 which establishes the Interested Party herein.
23. It is his case that Section 31 of the said Act specifically provides that;
 

The Tribunal shall have jurisdiction to hear and determine cases on—

  - a. anti-doping rule violations on national and lower level athletes and athlete support personnel;
  - b. anti-doping rule violations on other persons subject to the Anti-Doping Rules;
  - c. anti-doping rule violations arising from national and lower level events; 22 [Rev. 2020] Anti-Doping No. 5 of 2016
  - d. Therapeutic Use Exemptions (TUE) decisions of Anti-Doping Agency of Kenya (ADAK); and
  - e. matters of compliance of sports organizations in the first instance and appellate level.
- 3) Appeal level disputes involving national and lower level athletes, athlete support personnel, sports federations, sports organisations, professional athletes and other persons subject to the Anti-Doping Rules shall be resolved by the Tribunal—
  - a. which shall consist of a panel of three members appointed by the Chairperson of the Tribunal; and
  - b. after the panel members have signed a no conflict of interest declaration in form provided by the Agency.
24. He argues that it would appear therefore from a cursory reading of the above section and particularly section 31 (4) of the [Anti-Doping Act](#) that the respondent does indeed have powers to consider appeal level disputes involving national and lower level athletes, athlete support personnel, sports federations, sports organizations, professional athletes and other persons subject to the Anti-Doping Rules shall be resolved by the Respondent.



25. He argues that there is no dispute that the ex parte applicant herein is a national level athlete and is subject to the Anti-Doping Rules. To determine whether the appeal is one that could be heard by the respondent as per the section, we must first determine what the drafters of the Act meant by “appeal level disputes”.
26. He submits that what appeal level disputes mean in the context of that section and it would appear that perhaps in the realization of the confusion that the said section might create, parliament proceeded to amend the Act vide the Anti-Doping (Amendment) Act, 2020 and particularly by inserting new sections immediately after section 31 of the Ant-Doping Act.
27. Sections 31A provides as follows;
  - “ 1) There is established the Anti-Doping Results Management Panel.
    - i. Section 31B provides that the Results Management Panel shall—
      - a. conduct Results Management hearings related to Anti-Doping rule violations referred to it by the Agency;
      - b. determine whether an Anti-Doping violation has occurred;
      - c. impose sanctions; and
28. Section 31C stipulates that;
  1. Where the athlete, athlete support personnel or other person charged with an anti-doping rule violation requests a hearing, the Agency shall lodge a charge with the Results Management Panel by—
  2. The hearing and determination of any anti-doping matter in the first instance shall be conducted by a Results Management Panel consisting of three members, unless the Chairperson considers that—
    - b. Section 31F provides,
      1. All parties with a right to appeal except World Anti-Doping Agency (WADA) may file an appeal within fourteen days from the date of the delivery of the decision by the Results Management Panel.
      - c.
        - 4) An appeal lodged in accordance with this section may be made at—
          - a. the Tribunal where the matters involve a national and lower level athletes or other persons; or
          - b. the Court of Arbitration for Sports where the matter involves an international level athlete or arises from the participation in the international event.
  29. He submits that the respondent ought to have interpreted the above section of the law in a holistic manner in relation to section 31 (4) of the [Anti-Doping Act](#) in order to determine the question as to whether the appeal by the interested party was an appeal level as per the Act.



30. In the case of *The Engineers Board of Kenya v Jesse Waweru Wahome & others* Civil Appeal No 240 of 2013 the court observed as follows:
- “One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as ‘stand -alone’. An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.”
31. Section 21 of the Anti-Doping (Amendment), Act 2020 the law provides for the establishment of a Results Management Panel which is mandated to hear and determine anti-doping cases in the first instance.
32. Decisions from the results management panel can then be appealed to the respondent in cases involving national level athletes such as the ex parte applicant.
33. He submits that Section 31 (4) of the *Anti-Doping Act* meant cases emanating from decisions of the Results Management Panel and not an appeal from a decision of the respondent.
34. Section 31 (1) (a) of the *Anti-Doping Act* gives the respondent powers to hear anti-doping rule violations.
35. It is that provision that the respondent invoked in determining Spdt Anti-Doping Case No. 21 of 22.
36. Appeal level cases therefore clearly insinuates that the case must have emanated from elsewhere.
37. He submits that it would be an absurdity for certain members of the respondent to sit on appeal of decisions of other members of the respondent.
38. There is no hierarchy of membership to the respondent and no one member is superior to the other.
39. The Respondent has placed itself at the risk of having some members overturning the decisions of their colleagues and possibly creating conflicts among themselves.
40. The respondent does not have an appellate structure within itself, and the law has not created one.
41. He submits that the respondent herein has decided to venture into unprecedented exercise of sitting on an appeal of its own judgement, the respondent became functus officio the moment it delivered its judgement on the main charge.
42. In *Raila Odinga & 2 Others V. Independent Electoral & Boundaries Commission & 3 Others* [2013] Eklr, the Supreme Court cited with approval a passage in an article by Daniel Mala Pretorius Titled “The Origins Of The Functus Officio Doctrine, With Special Reference To Its Application In Administrative Law”, In *South African Law Journal*, Vol. 122 (2005), At P. 832, In The Following Terms: “The functus officio doctrine is a mechanism by which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter” ... The [principle] is that once such a decision has been taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.
43. The respondent dismissed the Charges against the applicant in their decision delivered on 11<sup>th</sup> August, 2023.



44. The Court of Appeal stated in *Telkom Kenya Limited v John Ochanda* (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, that;

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon” .....The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued.”

45. It is its submission that what the interested party herein asks the respondent to do is to reopen the case and rehear it.

### **The Interested Party Submissions;**

46. In *Adak -Vs- Erickkumari Taki* (Case No. 21 Of 2022), An Adverse Analytical Finding For Presence Of A Prohibited Substance S2 Peptide Hormones, Growth Factors Related Substances And Mimetics/ Erythroprotein (EPO), In A Urine Sample Collected From The Applicant was found.

47. Consequently, the Applicant was charged before the Respondent, The Sports Disputes Tribunal. A panel of three (3) members constituting of Hon. Elynah Sifuna Shiveka, Hon. Peter Ochieng and Hon. Allan Owinyi was constituted to hear the charge and upon hearing evidence presented by both parties, the panel in its considered decision delivered on 11th August, 2023 dismissed the charge against the Applicant.

48. Being dissatisfied with the said decision, the Interested Party filed a notice of appeal dated 14th August, 2023 with The Respondent; *ADAK -VS- ERICKKUMARI TAKI SPDT* Appeal No. E039/2023.

49. The Respondent admitted the appeal and vide directions issued on 15th August, 2023, the then chairman of the Respondent, constituted a second instance panel to hear the appeal constituting a set of different panel members including: Hon. John Ohaga, SC, Hon Njeri Onyango and Hon Benard Wafula Murunga.

50. The Applicant subsequently filed a notice of Preliminary Objection dated 5<sup>th</sup> September, 2023 challenging the jurisdiction of the Sports Dispute tribunal to hear the appeal being an appeal of its own decision.

51. The Respondent vide its ruling delivered on 23rd November 2023, dismissed the preliminary objection and held that the second instance panel had the jurisdiction to sit on an appeal of the decision of the first instance panel.

52. The Applicant being dissatisfied with the decision of the Tribunal filed a Judicial Review challenging the decision by the tribunal.

53. In answering whether the sports dispute tribunal has jurisdiction to handle its own appeal reliance is placed in the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, it was held:

- i. “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction...”



54. Further, reliance is placed in the Supreme Court made this clear in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, thus:
- a. “...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...”
55. It submits that Section 58(b) of the *Sports Act*:
- c. “The Tribunal shall determine—
    - a. Appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the Tribunal in relation to that issue including —
      - i. appeals against disciplinary decisions;
      - ii. appeals against not being selected for a Kenyan team or squad”
56. It is the Interested Party’s humble submission that in this particular context, the Tribunal is not functus officio; Considering that the Applicant is a local athlete, and that the matter had progressed to the appellate level, it is our humble submissions that pursuant to the above provision, the Tribunal is not functus officio in this context as Parliament has expressly granted it the power to hear appeals from its decisions in specific matters.
57. It is submitted that the Appellate jurisdiction of the Tribunal to hear this dispute is conferred to it by parliament under Section 31(4) of the *Anti-Doping Act* CAP 245B which stipulates that:
- “Appeal level disputes involving national and lower level athletes, athlete support personnel, sports federations, sports organizations, professional athletes and other persons subject to the Anti-Doping Rules shall be resolved by the Tribunal;”
58. It submits that considering that the Applicant is a local athlete, and that the matter had progressed to the appellate level, it its submission that pursuant to the above provision, the Tribunal is not functus officio in this context as Parliament has expressly granted it the power to hear appeals from its decisions in specified matters.
59. The duality of the jurisdiction of the Tribunal is explicit and founded in the law and in particular the *Anti-Doping Act*, 2016 which in many aspects is sui generis law. Under Section 31(1), of the *Anti-Doping Act*, 2016, the Tribunal has original jurisdiction to hear anti-doping matters for national and



lower level athletes and also to hear anti-doping rule violations arising from national and lower level events. The Tribunal did hear the charge against the Appellant through its first instance Panel.

60. It submits that in accordance with Section 31(4) the Tribunal has independent powers to hear appeal level disputes involving the same national level and lower-level athletes. This was done by the Tribunal by a second instance Panel and thus it was NOT the same Panel that sat in the first instance Panel that sat on appeal and dismissed the Preliminary Objection on Jurisdiction that had been raised by the Appellant
61. It further submits that the Sports Dispute Tribunal has indeed laid precedence in regards to handling its own appeal, being a clear indication of the tribunal's inherent jurisdiction on the matter. (See the case in Appeal No. 15 of 2020 ADAK V George Ng'ang'a Kimotho).
62. It submits further, that Article 13.2.2 of the Anti-Doping Rules, 2016 empowers the Sports Disputes Tribunal to handle appeals;

“13.2.2. Appeals involving other Athletes or other Persons In cases where Rule 13.2.1 is not applicable, the decision may be appealed to an appellate body, in accordance with rules adopted by the National Anti-Doping Organisation having authority over the Athlete or other Person.”
63. It is its submission that there are also sufficient safeguards against any prejudice that can be experienced by a party. Such safeguards include the appointment of separate Panels, such that the panel that hear the matter in the first instance, will not be the panel that would adjudicate on the appeal of the same matter.
64. Reliance is placed in the case of Eshiwani v Kenya Judo Federation (Tribunal Case E015 of 2023) [2023] KESDT 467 (KLR) where the Tribunal intimated that where legislation explicitly provides an internal appellate mechanism within a tribunal, such jurisdiction is valid and must be exercised as intended by the legislature. The Tribunal in arriving at its decision were guided by the decision in the case of Dennis Kadito vs Sofapaka FC Appeal No. 23 of 2016 where it was held that:
  - d. “A reading of section 58 shows that in the case of disputes falling under section 58(a) the tribunal has jurisdiction to hear such disputes or decisions made by sports organizations so long as rules of these organizations allow appeals against their decisions to be lodged and heard by the tribunal. That means before the tribunal can hear such appeals, it must satisfy itself that those sports organizations’ rules provides for appeal to it (Tribunal) otherwise the tribunal would not have jurisdiction to hear such disputes.”
65. Having exhausted the first appeal, then and only then, is the appellant empowered to a second appeal at the Court of arbitration of Sports as stipulated under section 31(5) of the *Anti-Doping Act*

“(5) The World Anti-Doping Agency, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federations shall have the right to a second appeal to the Court of Arbitration for Sports (CAS) with respect to the appeal decisions of the Tribunal.”
66. It is submitted that the Sports Disputes Tribunal possesses the authority to hear appeals against its own decisions, as conferred by Section 31(4) of the *Anti-Doping Act* and that the Tribunal exercised its jurisdiction as conferred by Parliament.
67. The *Anti-Doping Act* 2016 is a negotiated legal instrument that has underpinnings in the world anti-doping code as stipulated at section 4 of the Act and is reiterated in Section 35(2) as the judicial body



that is designated to hear the anti-doping rule violation cases together with the appeals therefrom is indicated by Section 31 of the Act.

68. In 2009, Kenya ratified the International Convention Against Doping in Sports, which is a multilateral UNESCO treaty, by which states agree to adopt National measures to prevent and eliminate drug doping in sports. The treaty provides for the creation of National Antidoping Organizations designated by their country or government as the primary authority at the national level for the anti-doping programs in a country.
69. The World Anti-Doping Agency, which was established in 1999, as an international independent agency to lead a collaborative worldwide movement, for doping free sport, has its primary role as developing, harmonizing and coordinating anti-doping rules and policy across all sports and countries
70. It should be noted that by 2011, Kenya was yet to form a National Anti-doping Organization, yet the number of Kenyan athletes who were alleged to be doping, was on the rise. The World Anti-Doping Agency got wind of the matter, which resulted in Kenya being non-compliant for lacking a National Anti-Doping Organization (NADO) and consequently banned in 2016 for 3 months, which had the dire effect of Kenya almost missing out on the RIO Olympics. In a bid to ensure compliance, the [\*Anti-Doping Act\*](#) was enacted which established the Anti-Doping Agency of Kenya
71. The Tribunal is thus guided by the WADA Code, the International Standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the [\*Sports Act\*](#) (Cap. 223), and the Agency's Anti-Doping Rules, amongst other legal sources. The tribunal needed to not only be institutionally and operatively independent but also, the members of the tribunal needed to be autonomous in handling doping matters and appeals thereafter. Kenya was and is thus still bound to this agreement between the World Anti-Doping Agency and itself.
72. In order to ensure uniformity of decisions made across the globe, every country was to strictly abide by the WADA code, the International Standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the [\*Sports Act\*](#) (Cap. 223) thus all countries follow the same model where the first and second instances are heard at the tribunal and any appeal afterwards would be handled by Court of Arbitration for sports (CAS.)
73. In invites this court in exercising its discretion, should thus be careful, not influence the recurrence of 2016 events, whereby the country was banned for non-compliance with the WADA Code. It further submits that the Sports Dispute Tribunal properly exercised its jurisdiction by entertaining the appeal its decision pursuant to the legislative intent provided under Section 31(4) of the [\*Anti-Doping Act\*](#).
74. In any event, at no point has the Appellant challenged the constitutionality or otherwise of Section 31(4) of the [\*Anti-Doping Act\*](#).
75. It submits that as noted in the decision, the appellate function of the Tribunal not only affords ADAK as the National Anti-Doping Agency with an opportunity to have first appeals heard within the country by the Tribunal but also affords national and lower-level athletes in the country an opportunity to have their appeals heard. A finding that the Tribunal does not have powers to hear the Appeals would be an injustice not only the Respondent but also to all the national and lower-level athletes as they cannot access the High Court for the hearing of their appeals under the WADA Code.
76. In submitting on costs reliance on the provisions of section 27(1) of the [\*Civil Procedure Act\*](#), CAP 21, which provides that;

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the



discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”

77. Further, in the case of *Musaina v General & another; Salaries and Remuneration Commission & 3 others (Interested Parties) (Petition E019 of 2023)* [2024] KEHC 8239 (KLR) the High Court cited with approval the case of *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd* Judicial Review application no 6 of 2014 where the court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

#### **Analysis and determination:**

78. Upon perusing the pleadings, rival submissions and authorities, following are the issues that commend themselves for determination;

Whether submissions amount to evidence.

Whether the application has merit.

Who will bear the costs.

79. The Interested party herein filed submissions but no replying Affidavit.

80. In the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR, justice GV Odunga as then he was stated as : -

“It also relied on submissions of parties to which the no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions.

81. In the case of *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007 it was held that:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

82. In *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993* the court found as follows:

“Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly



establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So, submissions are not necessarily the case.”

83. In *Ngang'a & Another vs . Owiti & Another* [2008] 1KLR (EP) 749 , the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

84. It is this court’s finding and I so hold that the Interested party and the Respondents have not tendered any evidence.

85. The interested Party submissions cannot stand on nothing. On their own they cannot assist this court in determining the issues before it.

#### **The 2<sup>nd</sup> issue;**

86. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, thus:

“...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...”

87. The Jurisdiction of the Sports Tribunal is couched and enforced under Section 58(b) of the *Sports Act*:

“The Tribunal shall determine—

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



- (i) appeals against disciplinary decisions;
- ii) appeals against not being selected for a Kenyan team or squad”.

88. Section 31 of the *Anti-Doping Act* Provides

1. The Tribunal shall have jurisdiction to hear and determine cases on—
    - a. anti-doping rule violations on national and lower level athletes and athlete support personnel;
    - b. anti-doping rule violations on other persons subject to the Anti-Doping Rules;
    - c. anti-doping rule violations arising from national and lower level events;
    - d. Therapeutic Use Exemptions (TUE) decisions of Anti-Doping Agency of Kenya (ADAK); and
    - c. matters of compliance of sports organizations in the first instance and appellate level.
  - (2) The Tribunal shall be guided by the Code, the International Standards established under the Code, the 2005 UNESCO Convention Against Doping in Sports, the *Sports Act* (Cap. 223), and the Agency's Anti-Doping Rules, amongst other legal sources.
  - (3) The Tribunal shall establish its own procedures.
  - (4) Appeal level disputes involving national and lower level athletes, athlete support personnel, sports federations, sports organisations, professional athletes and other persons subject to the Anti-Doping Rules shall be resolved by the Tribunal—
    - a. which shall consist of a panel of three members appointed by the Chairperson of the Tribunal; and
    - b. after the panel members have signed a no conflict of interest declaration in form provided by the Agency.
  - (5) The World Anti-Doping Agency, the International Olympic Committee, the International Paralympic Committee, and the relevant International Federations shall have the right to a second appeal to the Court of Arbitration for Sports (CAS) with respect to the appeal decisions of the Tribunal.
  - (6) For the avoidance of doubt, the Tribunal shall not have jurisdiction over Appeals involving International Level athletes or arising from the participation in International Events or national crimes related to doping.
  - (7) The Cabinet Secretary may prescribe rules to give effect to this section.
89. It is not in dispute that The interested party instituted an anti-doping rule violation case against against the Applicant at the tribunal being, the Respondent herein.
90. It is also not in dispute that a panel of three (3) members constituting of Hon. Elynah Sifuna Shiveka, Hon. Peter Ochieng and Hon. Allan Owinyi presided over the case
91. On 11<sup>th</sup> August, 2023 the respondent dismissed the case prompting the interested party to file a notice of appeal dated 14<sup>th</sup> August, 2023 at the same tribunal.



92. The applicant then raised a preliminary objection against the appeal on the ground that the respondent did not have jurisdiction to hear the appeal dated 5<sup>th</sup> September, 2023.
93. On 23<sup>rd</sup> November, 2023 the respondent dismissed the preliminary objection and held that it had the jurisdiction to hear the appeal against its own decision.
94. The second instance panel of comprised of Hon. John Ohaga, SC, Hon Njeri Onyango and Hon Benard Wafula Murunga presided over the issue.
95. It is this court’s finding that it offends the rules of Natural Justice for a Tribunal to preside over an anti-doping trial and then preside over its own finding or determination on appeal.
96. The fact that the panel that sat and presided over the trial is different from the panel that sat and presided over the appeal cannot amount to a fair administrative procedure. This offends the rule of law.
97. The two panels are under the same Tribunal and are on the same status and rank. They are within the same hierarchy. They enjoy independent but equal power. No panel can advice, review or preside over an appeal challenging the findings of the other. To allow that would lead to anarchy.
98. The only time that a different panel can hear a case that was heard by another panel is in cases where the High Court or higher quote directs that different panel hears a matter, which has been set aside by the said court.
99. None of the panels that are formed or drawn from the tribunal is superior to the other. The panels have the same power which they exercise and under the leadership of the same chairman.
100. To allow a different panel that is drawn from the same tribunal to sit in an appeal emanating from the determination of the first panel offends the right to fair hearing as guaranteed under Article 50 of *the Constitution*.
101. In *Raila Odinga & 2 Others V. Independent Electoral & Boundaries Commission & 3 Others* [2013] Eklr, the Supreme Court cited with approval a passage in an article by Daniel Mala Pretorius Titled “The Origins Of The Functus Officio Doctrine, With Special Reference To Its Application In Administrative Law”, In *South African Law Journal*, Vol. 122 (2005), At P. 832, In The Following Terms: “The functus officio doctrine is a mechanism by which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter” ... The [principle] is that once such a decision has been taken, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.
102. Once the Tribunal through a panel renders itself, it becomes functus officio. To allow what happened at the Tribunal would be tantamount to allowing the Tribunal to sit and hear its own appeal. There would be multiple tribunals being formed in quick succession to rehear the findings of the previous panel leading to potential of bias and uncertainty when it comes to the outcomes that each new panel would generate.
103. Justice cannot be seen to have been done in a case where the trial and the appellate court is the same Tribunal.
104. No one should be a judge in their own cause. It is one of the cardinal rules of natural justice that no one should act as a judge a case in which they have a personal (vested) interest.



105. In order to succeed in this suit, the applicant has to prove that its case falls within the parameters that settled in the case of *Pastoli vs Kabale District Local Government Council & Others*, (2008) 2 EA 300, that:

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also, *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality....

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

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

106. In the case of *Republic v Attorney General & 4 others Ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [2014] eKLR it was observed that:

“Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.

The Court in judicial review proceedings is mainly concerned with the question of fairness to the Applicant in the institution and continuation of the criminal proceedings and once the Court is satisfied that the same are *bona fides* and that the same are being conducted in a fair manner, the High Court ought not to usurp the jurisdiction of the trial Court and trespass onto the arena of trial by determining the sufficiency or otherwise of the evidence to be presented against the Applicant.



Where, however, it is clear that there is no evidence at all or that the prosecution’s evidence even if were to be correct would not disclose any offence known to law, to allow the criminal proceedings to continue would amount to the Court abetting abuse of the Court process by the prosecution.”

107. This court has not delved into the merits of the tribunals finding. Instead the court has looked at the procedural aspect in the setting up of panels to preside over the case.
108. Section 4 (1) of the *Fair Administrative Action Act* provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
109. This court makes a finding that the applicant was subjected to a process that was not lawful, reasonable and procedurally fair.
110. The respondent acted ultra vires by arrogating itself powers it does not have and the decision rendered on 23<sup>rd</sup> November, 2023 must therefore be quashed by this Honorable Court.
111. It has made out a case for the grant of an order of certiorari and prohibition as sought.

**The issue of costs;**

112. In Halsbury’s Laws of England, 4<sup>th</sup> ed Re-Issue (2010), Vol. 10, para. 16:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” [emphasis supplied].
113. In Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J. thus observed:

“...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the *Civil Procedure Act*] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ...” [emphasis supplied].
114. The *Civil Procedure Act* (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):

“Subject to such conditions and limitations’ as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:



Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order” [emphases supplied].

115. The applicant is entitled to costs.

**Determination;**

116. It is this court’s finding that the application has merit.

**Order:**

1. An order of CERTIORARI to bring to the High Court for purposes of being quashed the decision of the Respondent, contained in its Ruling delivered on 23<sup>rd</sup> November, 2023 dismissing the applicant’s Preliminary Objection dated 5<sup>th</sup> September, 2023 and ruling that the Respondent has jurisdiction to hear and determine an appeal against its own decision is hereby issued.
2. An order of Prohibition, Prohibiting the Respondent from hearing SPDT Appeal No. E039/2023; Adak –vs- Eric Kumari Taki for want of jurisdiction is hereby issued.
3. Costs to the Applicant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025**

.....

**J. CHIGITI (SC)**

**JUDGE**

