



**Republic v Sports Disputes Tribunal; Mohamed & 3 others (Interested Parties);  
Talib (Exparte Applicant) (Miscellaneous Judicial Review E005 of 2024)  
[2024] KEHC 939 (KLR) (Judicial Review) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 939 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
MISCELLANEOUS JUDICIAL REVIEW E005 OF 2024  
JM CHIGITI, J  
FEBRUARY 7, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**AND**

**RIDHWAN MOHAMED ..... INTERESTED PARTY**

**KENYA AQUATICS ..... INTERESTED PARTY**

**MAUREEN OWITI ..... INTERESTED PARTY**

**COLLINS MARGIRI ..... INTERESTED PARTY**

**AND**

**SWALEH ABUBAKAR TALIB ..... EXPARTE APPLICANT**

**JUDGMENT**

1. The Applicant has moved this court through the Application dated 24<sup>th</sup> January, 2024 seeking the following orders: -
  1. An Order of Certiorari to issue quashing the entire proceedings and decision of the Sports Disputes Tribunal (Elyna Shiveka - Panel Chair, Allan Owinyi - Member and Benard Wafula Murunga - Member) contained in the Decision delivered on/dated 15<sup>th</sup> January 2024 in SDTSC Appeal Number No. E052 OF 2023; Ridhwan Mohamed Versus Kenya Aquatics,



Maureen Owiti and Collins Margiri and all consequential decisions and or directions arising therefrom.

2. An Order of Mandamus to issue compelling the 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties, or any persons acting in their respective offices and or under them, to retain the ex parte applicant herein, Swaleh Abubakar Talib, as Kenya's representative to World Aquatics Championships 2024 (Doha-Qatar) for the 50 Freestyle category as per the Selection Report of Kenya's Representatives to World Aquatics Championships 2024 Doha – Qatar.
3. The costs of this application be awarded to the Ex-ParteApplicant.
2. The Application was supported by a Statutory Statement, and a Verifying Affidavit sworn by Annajevvifer Duff - both dated 22<sup>nd</sup> January, 2024.

### **Applicant's Case**

3. The Applicant's case is that he was selected to represent Kenya at the 2024 World Aquatics Championships (Doha-Qatar) in the 50 Freestyle Category, having gathered the most points and emerging top.
4. However, that the 1<sup>st</sup> Interested Party moved to the Respondent Tribunal through SDTSC Appeal Number No. E052 OF 2023; Ridhwan Mohamed Versus Kenya Aquatics, Maureen Owiti and Collins Margiri to appeal against the decision of the Federation and vide the Decision dated 11<sup>th</sup> December, 2023 the Appeal was dismissed.
5. Thereafter, the 1<sup>st</sup> Interested Party filed an application for the Review of the decision of 11<sup>th</sup> December,2023 on 20<sup>th</sup> December,2023 and on the alleged ground that he had new evidence that he took part in the 2023 Coimbra Swimming Open in Portugal held between 14<sup>th</sup> December,2023 and 18<sup>th</sup> December,2023 where he clocked 52.87 seconds in the boys 100 meters freestyle and which placed him higher than previously placed in the rankings used for the selection of the Kenyan team to the 2024 World Aquatics Championships
6. That the so-called new evidence, even if true, was way after the conclusion of the selection process for the 2024 World Aquatics Championships, and after the Decision of 11<sup>th</sup> December 2023 on the appeal.
7. As per the Applicant, pursuant to the impugned decision of 15<sup>th</sup> January,2024; the 4<sup>th</sup> and 2<sup>nd</sup> Interested Parties, vide the letter dated 17<sup>th</sup> January, 2024 informed him [Applicant] of the decision to replace him with the 1<sup>st</sup> Interested Party - contrary to all rules of natural justice and without his involvement.
8. The Applicant maintains that he was never involved in the proceedings before the Respondent, yet it is and remains clear that the orders therefrom affect him directly and adversely.
9. Therefore, to the Applicant, the decision and action was unreasonable; denied him the right/ opportunity to be heard; violated his right to fair administrative action as under Article 47 of *the Constitution*; was discriminatory and contrary to Article 27 of *the Constitution*; and was illegal as it violated Section 55(2)(a) of the *Sports Act*.
10. Section 55(2)(a) of the *Sports Act* provides that the Chairperson of the Tribunal shall be qualified to be appointed a Judge of the High Court yet Mrs. Elynah Sifuna-Shiveka, who was the Panel Chair is not an Advocate of the High Court of Kenya and cannot therefore be qualified to chair a panel of the Tribunal. There is a reason the Chairperson must be qualified to be a Judge and at least 3 members be Advocates of the High Court of Kenya with over 7 years.



11. Accordingly, that the entire proceedings and decisions in SDTSC Appeal Number No. E052 OF 2023; Ridhwan Mohamed Versus Kenya Aquatics, Maureen Owiti and Collins Margiri are thus a nullity and should be quashed at the earliest opportunity.

### **Respondent's Case**

12. In Response to and opposing the Application, the Respondent filed a Replying Affidavit dated 29<sup>th</sup> January, 2024 sworn by John Ohaga SC. It is the Respondent's case that the Applicant's lack of inclusion as a party and subsequent failure to get audience in the 1<sup>st</sup> Interested Party's case is not only proper, but also immaterial to the trajectory of the decision which was anchored on validity of the 2<sup>nd</sup> Interested Party's action to prematurely shut the qualification window.
13. That in the impugned decision of 11<sup>th</sup> December, 2023 that was reviewed, the Respondent clearly pointed out [at paragraph 54] that it was inclined to review the selection of the athletes, but not on conjecture for as long as the window period to nominate athletes remained. That the Applicant just like other athletes had the same opportunity to better their times, and if he slept on his rights, he cannot blame the 1<sup>st</sup> Interested Party for not sleeping on his rights.
14. The Respondent averred that the purported discrimination against the Applicant is but a figment of imagination, since the extension of time in tandem with the global timeline to forward the athletes' names was universally applied.
15. The Respondent maintained that the impugned decision which is challenged by the Applicant emanates from a properly constituted and qualified Panel as guided by the governing law. Section 55 of the *Sports Act*, No. 23 of 2013 ('the Act') establishes the Sports Disputes Tribunal and proceeds to set out the qualifications for the members of the Sports Disputes Tribunal including the Chairperson of the Tribunal.
16. To the Respondent, the said Section is not to be confused with the Chairperson of the various Panels that are set up to hear the matters filed before the Tribunal. That in accordance with Section 61 of the Act, the Chief Justice has published rules governing the practice and procedure of the Tribunal.
17. The Sports Dispute Tribunal Rules, 2022 provides under Rule 4 that, "The chairperson shall coordinate the work of the Tribunal and shall in addition be responsible for ... (a) constituting a panel of members of the Tribunal to hear and determine matters brought before the Tribunal; ... "
18. Accordingly, that the Panel that was appointed to hear and determine the matter when it was first filed at the Tribunal, and which rendered the two (2) decisions was properly constituted - as per the cited law, as the members thereto are properly in office and appointed under the various qualifications of Advocate and the Non-Advocate categories of membership of the Tribunal as allowed by Section 55(2) (b) and (c).
19. The Respondent contended that it is a misguided belief that only the Chairperson of the Tribunal can chair panels hearing matters for it is impractical to have the Chair of the Tribunal sit on each and every dispute before the Tribunal. Each panel of the Respondent constituted by the Chairperson exercises its powers as prescribed in law and given effect by the Chairperson.
20. That Rule 23 of the Sports Disputes Tribunal Rules 2022 anticipates a Chairperson of a Panel or the person presiding over a Panel which implies that the Chairperson of the Tribunal is not the only one who can preside over Tribunal hearings.



21. Also, the assertion that the Respondent has to include all parties to the proceedings who may be potentially affected by its decision is an affront to the expedient determination of suits. Furthermore, that joinder of parties provided by the Sports Dispute Tribunal Rules, 2022 is only enforced where there is an apparent need to do the same.

### **1st Interested Party's Case**

22. In further opposition to the Application, the 1<sup>st</sup> Interested Party filed their Replying Affidavit 29<sup>th</sup> January, 2024 sworn by Ridhwan Abubaker Bwana Mohamed.
23. In the main, the deponent averred that the Applicant is not entitled to approbate and reprobate; The Respondent was properly constituted and fulfilled its mandate in my case in accordance with the established sports law and norms in Kenya; It is extremely unfortunate and unfounded to personally attack the Deputy Chairperson whilst she was acting in the ordinary course of fulfilling the mandate and powers of her statutory office all in the name of the Applicant getting his way by whatever means.
24. Further, that the application is not made bona fide and the Applicant has neglected, failed and/or refused to present a complete record of the facts in this matter; The Applicant has not come to this Honorable Court with clean hands and with utmost good faith which is mandatory in the circumstances; The application lacks merit and is intended to mislead the court; and that The application is frivolous, vexatious, and otherwise an abuse of the court process.
25. Further, in opposing the Application, the 1<sup>st</sup> Interested Party filed their Grounds of Opposition dated 26<sup>th</sup> January, 2024 based on grounds that:
  1. The Ex-parte Applicant has been a litigant before the Respondent in Swaleh Talib Abubaker v Stabilisation Committee of the Kenya Swimming Federation and 4 Others SDTSC No.18 of 2023 where he lauded the Respondent as an impartial arbiter and duly benefited from the decision of 12<sup>th</sup> June, 2023. He cannot therefore approbate and reprobate - Republic v Institute of Certified Public Secretaries of Kenya ex-parte Mundia Njeru Geteria [2010] eKLR duly adopting the Court of Appeal holding in Behan & Okero Advocates v. National Bank of Kenya [2007] eKLR.
  2. The 1<sup>st</sup> Interested Party's application for review in SDTSC Appeal Number No. E052 OF 2023 - Ridhwan Mohamed Versus Kenya Aquatics, Maureen Owiti and Collins Magiri (the subject matter of this Judicial Review Reference) was first certified urgent by the Honourable Chairman of the Respondent Mr. John Ohaga SC on 21<sup>st</sup> December, 2023 who then proceeded to issue directions including *the constitution* of the Panel that heard and determined the matter in line with the provisions of Rules 4(1) and 4(2) of the Sports Dispute Tribunal Rules, 2022.
  3. The panel that heard and determined the 1<sup>st</sup> Interested Party's Notice of Motion dated 19<sup>th</sup> December, 2023 was duly and properly constituted pursuant to the provisions of Rule 31 of the Sports Dispute Tribunal Rules, 2022.
  4. The spurious, unfounded and unfortunate attack upon the person of the Deputy Chairperson of the Tribunal particularly given the clear and unequivocal provisions of Sections 55(2) and 55(3) of the *Sports Act* are an affront to the proper administration of justice in this country are made mala fides and are solely intended to mislead this Honorable Court.
  5. Even on the merits,



- 6.1 The 1<sup>st</sup> Interested Party is the highest-ranking Male Swimmer in Kenya with 696 World Aquatics/FINA points.
  - 6.2 The 1<sup>st</sup> Interested Party holds the following Kenya National Swimming Records:
    - (1) 200 meters' freestyle - Time: 1.51.08
    - (2) 400 meters' freestyle- Time: 3.59.78
    - (3) 800 meters' freestyle - Time: 8.22.16
  - 6.3 The 1<sup>st</sup> Interested Party achieved the foregoing within the World Aquatics Swimming Qualification period – 1<sup>st</sup> October 2022 to 19<sup>th</sup> December 2023.
  - 6.4 The 1<sup>st</sup> Interested Party closest rivals rank as follows-
    - (1) Maina Monyo - 674 World Aquatics/FINA points
    - (2) Swaleh Talib Abubaker - 660 World Aquatics/FINA points
  - 6.5 The 1<sup>st</sup> Interested Party was duly nominated and registered in line with the World Aquatics published deadlines.
  - 6.6 The Sports entries deadline was 16<sup>th</sup> January 2024 which the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties have duly confirmed was adhered to with the 1<sup>st</sup> Interested Party's sports entry being submitted with his duly earned World Aquatics/FINA points.  
World Aquatics Key Dates and Swimming Qualifications Championships Doha 2024 dated 13<sup>th</sup> June, 2023.
6. The application is not made bona fide and the Ex-parte Applicant has neglected, failed and/or refused to present a complete record of the facts herein.
  7. The Ex-parte Applicant has not come to this Honorable Court with clean hands and with utmost good faith.
  8. The application lacks merit and is intended to mislead the court.
  9. The application is frivolous, vexatious and otherwise an abuse of the court process.
  10. Other grounds and reasons set out in the Replying Affidavit to be filed by, for and on behalf of the 1<sup>st</sup> Interested Party filed herein considering that he is currently based in Bath, England.

### **Parties Submissions**

26. In buttressing their cases, the parties filed their respective written submissions.
27. The Applicant filed written: Submissions dated 28<sup>th</sup> January, 2024; Supplementary Submissions dated 30<sup>th</sup> January, 2024; Further Supplementary Submissions dated 31<sup>st</sup> January, 2024; 2<sup>nd</sup> Further Supplementary Submissions dated 6<sup>th</sup> February, 2024.
28. On their Part, the 1<sup>st</sup> Interested Party filed written: Skeletal Submissions dated 30<sup>th</sup> January, 2024; Skeletal Submissions dated 1<sup>st</sup> February, 2024; Supplementary Submission dated 1<sup>st</sup> February, 2024; and an undated 2<sup>nd</sup> Supplementary Submissions.
29. I have considered the submissions by learned counsel representing the parties. I have also payed due regard to the cited case law authorities in the submissions.



### **Issue(s) for Determination**

30. On consideration of the materials on record, the issues that arise for determination are: Whether the Application is merited to grant the orders of Certiorari and Mandamus as prayed for, in the circumstances; and Who bears the cost of this Application.

### **Analysis and Determination**

31. The parties herein filed the various documents. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Interested Parties (IP2, IP3, and IP4) have not filed any documents herein.
32. Judicial review jurisdiction was discussed in the Ugandan case of *Pastoli v 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 Muntuand 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: *Re 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).”

33. It is not in doubt that the Applicant was selected to represent Kenya at the 2024 World Aquatics Championships (Doha-Qatar) in the 50 Freestyle Category.
34. The 1<sup>st</sup> Interested Party moved to the Respondent Tribunal through SDTSC Appeal Number No. E052 OF 2023; *Ridhwan Mohamed Versus Kenya Aquatics, Maureen Owiti and Collins Margiri* to appeal against the decision of the Federation and vide the Decision dated 11<sup>th</sup> December, 2023 the Appeal was dismissed.
35. The 1<sup>st</sup> Interested Party filed an application for the Review of the decision of 11<sup>th</sup> December, 2023 on 20<sup>th</sup> December, 2023 leading to the Decision of the 1<sup>st</sup> Interested Party’s application for review delivered on 15<sup>th</sup> January, 2024.



36. On 17<sup>th</sup> January, 2024 the 4<sup>th</sup> and 2<sup>nd</sup> Interested Parties, informed the applicant of the decision to replace him with the 1<sup>st</sup> Interested Party. The issue of whether or not, the parties were heard in the past in different suits is neither here nor there. What is before the court is a challenge mounted against the decision of the tribunal of January, 2024. It is a fact that the Applicant did not participate in the proceedings. Two wrongs will never make a right. The fact that an ailing tribunal heard and determined matters in the past cannot be advanced as a justification for a procedural impropriety. Issues of jurisdiction can be raised at any time.
37. This court has a duty to look at what has been placed before it. The court has a duty to protect, promote, and fulfil the rights of the parties herein within the provisions of *the Constitution*. Article 47 provides as follows, “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”
38. Article 47(2) states that, “If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”
39. Article 47 has now been effectuated by the *Fair Administrative Action Act*, 2015 under which section 4(3) provides as follows:

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. an opportunity to be heard and to make representations in that regard;
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. a statement of reasons pursuant to section 6;
- e. notice of the right to legal representation, where applicable;
- f. notice of the right to cross-examine or where applicable; or
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

40. The status of fair administrative action in Kenya’s Constitutional and jurisprudential framework was discussed by Onguto, J in Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board [2016] eKLR a case in which the powers of the same Respondent were in question, in which the learned Judge expressed himself inter alia as follows:

“As to what constitutes fair administrative action, the court in President of the Republic of South Africa and Others vs. South African Rugby Football Union and others (CCT16/98) 2000 (1) SA 1, stated thus:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not



necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...” [Emphasis supplied]

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of *the Constitution*. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The *Fair Administrative Action Act*, 2015 must be viewed in that light.

The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of *the Constitution* makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The right to fair hearing is evidently closely intertwined with fair administrative action. The often cited case of *Ridge vs. Baldwin* [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put it as a ‘duty lying upon everyone who decides anything’ that may adversely affect legal rights.

Halsbury Laws of England, 5<sup>th</sup> Edition 2010 Vol. 61 at para 639 on the right to be heard states that:

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court.”

I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of “reasonable” action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50 (1) of *the Constitution*. The court proceeding under Article 47 of *the Constitution* is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor.

It may sound like stretching the precincts of traditional judicial review, but clearly by *the Constitution* providing for a “reasonable” administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the



line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review.”

41. Article 50(1) provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body.
42. The twin rules of natural Justice that no man shall be a Judge in his own cause (Nemo Judex in causa sua) and that no man shall be condemned unheard (audi alteram partem) are cardinal principles of law which are fundamental in our Justice system. They are basically an embodiment of the duty to act fairly. However, there is no legal definition or standard regarding what constitutes procedural fairness and each case must be decided on its own merits.
43. Article 25 of *the Constitution* insulates the right to fair hearing. It stipulates that despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited - (a) freedom from torture and cruel, inhuman or degrading treatment or punishment; (b) freedom from slavery or servitude; (c) the right to a fair trial.
44. The Respondent in the Replying Affidavit has demonstrated that it believes in the right to fair hearing. The impugned decision affected the Applicant directly. The Respondent did not hear the Applicant before arriving at the impugned decision.
45. In the Replying Affidavit, the Respondent fronted the arguments that; In addition, the Sports Dispute Tribunal Rules 2022 acknowledge the urgency of hearing of matters that challenge selection and indeed under Rule 12 states that if the appellant succeeds on an appeal against selection or non-selection of a national squad, the Tribunal may allow the appeal and conclusively determine the issue of selection of appellant.
46. That the assertion that the Respondent has to include all parties to the proceedings who may be potentially affected by its decision is an affront to the expedient determination of suits. Furthermore, joinder of parties provided by the Sports Dispute Tribunal Rules 2022 is only enforced where there is an apparent need to do the same.
47. That selection of the athletes to take part in competition where the country is represented is often made by the national sports federations and when an athlete challenges the selection, it is incumbent upon the said national sports federation to defend its selection and by doing so it would not prejudice those selected as the national sports federation will give reasons why they were selected.
48. That as an illustration, if one hundred athletes took part in an event for qualification and the national sports federation selected three athletes and one athlete challenged the selection, it will not be practical to join all the ninety-nine athletes as the national sports federation will present reasons why it selected those whom it selected.
49. That only parties to a suit can derive relief or liability, thus, the Applicant herein who is raising a subsequent grievance arising from the decision of the Respondent would not have been remedied by his inclusion as an interested party in the matter that was before the Tribunal.
50. That for the avoidance of doubt, the Applicant's lack of inclusion as a party and subsequent failure to get audience in the 1<sup>st</sup> Interested Party's case is not only proper but also immaterial to the trajectory of the decision which was anchored on validity of the 2<sup>nd</sup> Interested Party's action to prematurely shut the qualification window.



51. The 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties had notified the Applicant of the change in the selection because he was affected by the changes. The outcome of the impugned administrative action on the part of the 2<sup>nd</sup> and 4<sup>th</sup> Interested Parties and the Respondent culminated in displacing the Applicant. He clearly had the largest stake in the proceedings.
52. It is only after the impugned decision of 15<sup>th</sup> January, 2024 that the 4<sup>th</sup> and 2<sup>nd</sup> Interested Parties, vide the letter dated 17<sup>th</sup> January, 2024 informed him [Applicant] of the decision to replace him with the 1<sup>st</sup> Interested Party - contrary to all rules of natural justice and without his involvement.
53. I find the explanation that was advanced by the Respondent to not include him in the hearing took away the Applicants right to fair hearing. This court is under a duty to protect promote and fulfill the rights of the Applicant. Without getting into the merits of the case, I am satisfied that the Applicant was condemned unheard. This calls for redress.
54. Another challenge was mounted by the applicant on the qualification of the person who presided over the impugned decision. The Applicant's concern is to the effect that Section 55(2) (a) of the *Sports Act* provides that the Chairperson of the Tribunal shall be qualified to be appointed a Judge of the High Court. The question Whether or not Mrs. Elynah Sifuna-Shiveka, who was the Panel Chair is qualified or not is not properly before me.
55. The rules of natural justice are at the heart of this court. It is no wonder the Applicant decided to file his suit before this court. Mrs. Elynah Sifuna-Shiveka must not be condemned unheard. She is not a party to the suit. As and when a proper suit is brought before the court, the issue of her competence will be dealt with. I need not say more.

## Disposition

56. This court is satisfied that the applicant has proven that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety.
57. The order of mandamus cannot be granted as prayed since the court cannot impose its decision on the sports tribunal. The Applicant has not made out a case that would invite this court to conduct a merit analysis. The Supreme Court in *Petition No. 6(E007) of 2022 Edwin Dande & Others v The Inspector General, National Police Service & Others* reaffirmed that:

...The court concluded at paragraph 85 [see page 33]and held as follows:

It is clear from the above decisions that when party approaches a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of *the Constitution*, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in *SGS Kenya Ltd* and not the merits of the decision per se.

58. The 1<sup>st</sup> Interested party invited the court to consider on the merits that:
  - i. The 1<sup>st</sup> Interested Party is the highest-ranking Male Swimmer in Kenya with 696 World Aquatics/Fina points.
  - ii. The 1<sup>st</sup> Interested Party holds the following Kenya National Swimming Records:
    1. 200 meters' freestyle Time: 1.51.08



2. 400 meters' freestyle – Time: 3.59.78
  3. 800 meters' freestyle – Time: 8.22.16
  - iii. The 1<sup>st</sup> Interested Party achieved the foregoing within the World Aquatics Swimming Qualification period – 1<sup>st</sup> October 2022 to 19<sup>th</sup> December 2023.
  - iv. The 1<sup>st</sup> Interested Party closest rivals rank as follows –
    1. Maina Monyo - 674 World Aquatics/Fina points
    2. Swaleh Talib Abubaker - 660 World Aquatics/Fina points
  - v. The 1<sup>st</sup> Interested Party was duly nominated and registered in line with the World Aquatics published deadlines.
  - vi. The Sports entries deadline was 16<sup>th</sup> January, 2024 which the 2<sup>nd</sup> – 3<sup>rd</sup> Interested Parties have duly confirmed was adhered to with the 1<sup>st</sup> Interested Party's sports entry being submitted with his duly earned World Aquatics/Fina points.
59. The court is very careful with the call to do a merit analysis. The court is aware that the sports disputes tribunal is vested with the jurisdiction to attend to these arguments.
60. The doctrine of exhaustion as read alongside Article 159 which provides:
- “(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).”
61. The Sports Tribunal is a specialized statutory outfit that is clothed with the expertise to deal with issue like the one the Applicant is seeking in prayer 2 to compelling the 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties, or any persons acting in their respective offices and or under them, to retain the ex parte applicant herein, Swaleh Abubakar Talib, as Kenya's representative to World Aquatics Championships 2024 (Doha-Qatar) for the 50 Freestyle category as per the selection report of Kenya's representatives to world aquatics championships 2024 doha – qatar.

## Order

The Application dated 24.1.24 is determined in the following terms:

1. An Order of Certiorari is hereby issued quashing the entire proceedings and decision of the Sports Disputes Tribunal (Elyna Shiveka-Panel Chair, Allan Owinyi-Member and Benard Wafula Murunga-Member) contained in the Decision delivered on/dated 15<sup>th</sup> January, 2024 in SDTSC Appeal Number No. E052 OF 2023; Ridhwan Mohamed Versus Kenya Aquatics, Maureen Owiti and Collins Margiri and all consequential decisions and or directions arising therefrom.
2. Prayer 2 is declined.
3. SDTSC Appeal Number No. E052 OF 2023; Ridhwan Mohamed v Kenya Aquatics, Maureen Owiti and Collins Margiri shall be heard afresh before a different chairperson other than Mrs. Elynah Sifuna-Shiveka.



4. The appeal shall be heard and determined within 2 days of today's date.
5. Costs to the Applicant.

It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2024.**

**J. CHIGITI (SC)**

**JUDGE**

