



Mibuku & another v Kenya Obstetric & Gynecological Society (KOGS) & 14 others; Registrar of Society (Interested Party) (Constitutional Petition E001 & E002 of 2024 (Consolidated)) [2024] KEHC 7025 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 7025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CONSTITUTIONAL PETITION E001 & E002 OF 2024 (CONSOLIDATED)**

SM MOHOCHI, J

MAY 17, 2024

**IN THE MATTER OF ELECTION OF KENYA
OBSTETRIC & GYNECOLOGICAL SOCIETY (KOGS)**

AND

IN THE MATTER OF THE SOCIETIES ACT CAP108 LAWS OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 3,10,
27, 28, 36, 86, 232, 258 AND 259 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF RULE 4, 10, 11, AND 13 OF THE CONSTITUTION OF
KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL
FREEDOMS) HIGH COURT PRACTICE AND PROCEDURE RULES 201**

BETWEEN

DR. FREDRICK KARITHIA MIBUKU PETITIONER

AND

**KENYA OBSTETRIC & GYNECOLOGICAL SOCIETY (KOGS) 1ST
RESPONDENT**

DR. KIRERI OMANWA 2ND RESPONDENT

DR. ALICE ISIKA 3RD RESPONDENT

PROF MOSES OBIMBO 4TH RESPONDENT

DR. WINNIE MWEBIA 5TH RESPONDENT

DR. RUTH WAMAE 6TH RESPONDENT



DR. ANJELA ANZENZE 7TH RESPONDENT
DR. ANTHONY MONYO 8TH RESPONDENT
DR. CHARLOTTE KALITI POLLE 9TH RESPONDENT
PROF ELKANA OMENGE ORANGO 10TH RESPONDENT
DR. PAUL MITEI 11TH RESPONDENT
DR. SAM NGUGI 12TH RESPONDENT

AND

REGISTRAR OF SOCIETY INTERESTED PARTY

AS CONSOLIDATED WITH
CONSTITUTIONAL PETITION E002 OF 2024

BETWEEN

DR. SARAH AGUNDA PETITIONER

AND

KENYA OBSTETRICAL & GYNAECOLOGICAL SOCIETY
(KOGS) 1ST RESPONDENT
DR. KIREKI OMANWA 2ND RESPONDENT
PROF. MOSES OBIMBO 3RD RESPONDENT
DR. RUTH WAMAE 4TH RESPONDENT
DR. ANTHONY N. MONYO 5TH RESPONDENT
DR. ANGELA ANZEZE 6TH RESPONDENT
REGISTRAR OF SOCIETIES 7TH RESPONDENT
DR ALICE ISIKA 8TH RESPONDENT
DR WINNIE MWEBIA 9TH RESPONDENT

JUDGMENT

Introduction

1. Before me are two consolidated Petitions, filed under Article 22 1st Petition is dated 20th January 2024 and the 2nd Petition dated 5th day of February 2024. collectively allege contravention of Articles 3,10, 27, 28, 36,47 86, 232, 258 and 259.
2. The 1st Petitioner Dr. Fredrick Kairithia Mibuku (MBChB (Moi), Mmed (UoN) is Medic and Consultant obstetrician/Gynecologist and a member of Kenya Obstetrical & Gynecological Society (KOGS) with No. KOGS127 resident of Meru, Nakuru and Nairobi. He Kenyan Medic by profession, a parent and patriotic citizen of Kenya who looks into a future of Kenya where society strictly



follows rule of law for betterment of society. He styles himself as a law-abiding citizen and a public-spirited individual with objectives to promote reproductive health in Kenya, democratic governance, non-discrimination, uphold the rule of law constitutionalism, defend human rights, and agitate for sustainable economic development for the prosperity and well-being of the general population in Kenya.

3. The 2nd Petitioner, is doctor and an obstetrician/gynecologist by profession. She is also member No. KOGS622 of Kenya Obstetrical and Gynecological Society ("KOGS"), filing the current petition in her capacity as a member, in her own interest, the interest of current members of the society, the 1st Respondent, future members of the 1st Respondent and for her resolute will to protect the Constitution of Kenya and also to uphold the rule of law both at KOGS and in the Republic of Kenya.
4. The 1st Respondent is the Kenya Obstetrical and Gynecological Society (KOGS) is a duly registered Society under The Societies Act, Cap 108. A forty-seven-year-old (47) professional association with over seven hundred (700) specialist obstetricians and gynecologists. The society is mandated to improve and standardize the practice of Obstetrics and Gynecology in Kenya while also upholding the highest standards of practice in the science of obstetrics and gynecology in Kenya.
5. The 2nd Respondent Dr Kireki Omanwa, is the current President of the KOGS and head of the Council of the Society and to ensure full compliance with the provisions of the KOGS Constitution, the Rules and standing orders.
6. The 3rd Respondent Dr. Alice Isika is a current National Executive council (NEC) officer and nominee of the national elections supposedly elected unopposed.
7. The 4th Respondent is Dr. Prof Moses Obimbo, the Secretary to KOGS. His duties include dealing with all correspondences of the society and also issues notices convening all the meetings of the council and all the general meetings of the society. He is also in charge of keeping all the minutes of all such meetings.
8. The 5th Respondent Dr. Winnie Mwebia is a current National Executive council (NEC) officer and nominee of the national elections supposedly elected unopposed
9. The 6th Respondent Dr. Ruth Wamae, is Treasurer to KOGS. Her duties include the receiving and disbursement, under the direction of the Council, of all monies belonging to the society, issue receipts are issued and ensure that proper books of accounts are kept by the society and available for inspection should any member so require.
10. The 7th Respondent Dr. Angela Anzeze, is a nominee candidate for the position of Treasurer in the Society's elections scheduled for 13th February, 2024 to 15th February, 2024.
11. The 8th Respondent Dr. Athony N Monyo is the Chairman of the Elections Committee appointed, by the Council of KOGS pursuant to Article 16 of the Constitution of the society
12. The 9th to the 12th Respondents are the members of the elections committee/board of the Kenya Obstetrical and Gynecological Society (KOGS).
13. The Interested Party is an appointee under Section 8 of the Societies Act, Cap 108 of the Laws of Kenya. Among other duties, he/she has the mandate to register and regulate societies such as the 1st Respondent and to issue consents to societies that apply to have their names changed or amendments to the constitution of the societies effected.



The Petition

14. The Petitioners moved this court under Article 22 as read together with Article 23 of [the Constitution](#) of Kenya gravating for the following reliefs;
- i. A Declaration that, the call for nominations by the 3rd Respondent and the procurement of the voting system by the Council, as opposed to the election committee, in violation of Article 16 of the KOGS Constitution is unconstitutional, illegal, null and void. A resultant order be thereby made cancelling the scheduled elections and a rescheduling of the meeting and elections pursuant to the 2020 KOGS Constitution.
 - ii. A Declaration that, the impugned elections and/or process of 2024 the Kenya Obstetric & Gynecological Society (hereafter referred as KOGS) elections is in violation of the KOGS) constitution, relevant statutes and the Kenyan constitution (2010).
 - iii. An Order, Declaring the inclusion of the 6th Respondent in the list of nominee candidates, as illegal and her candidature be and is hereby quashed.
 - iv. A Declaration that, the proposed election of office bearers of the 1st Respondent is marred by illegalities, hence null and void, and the resultant election of the 2nd and 3rd, 8th and 7th Respondents as communicated by the 5th Respondent through the letter bearing a date stamp of 14.12.2023 is a sham which should be quashed by an order of this Honorable Court.
 - v. A Declaration that, the calling for nomination, processing of aspirants/candidates, voting, declaration, certification and any other processes related to KOGS elections should at all material times strictly follow society (KOGS) constitution, relevant statutes and the Kenyan constitution (2010).
 - vi. A Declaration that, the conduct of the 1st Respondent's AGM on 17.08.2023 violated the Constitutional dictates of Article 10 and Article 36 of [the Constitution](#) of Kenya, 2010.
 - vii. A Declaratory Order, that all the Amendments to the Kenya Obstetrical and Gynecological Society (KOGS) passed by the General Meeting on 17.08.2023 were in violation of Section 20 of the [Societies Act](#) as well as Article 17 of the KOGS 2020 Constitution and therefore are unconstitutional, null and void.
 - viii. That an Order of judicial review by way of Prohibition, prohibiting the Respondents, interested parties or any other person from acting on the purported elections except as provided the KOGS society constitution rules and regulations, relevant statutes and [the constitution](#) (2010).
 - ix. That the Honorable Court be pleased to issue Order against the interested party (Registrar of societies) barring him/her from registering or in any way recognizing any official(s)/persons purportedly elected in the above impugned elections until the respondents have conducted elections in strict conformity to society (KOGS) constitution, relevant statutes and the Kenyan constitution (2010).
 - x. That if already elected and gazetted, this Honorable Court is pleased to issue order for Nullification and/or degazettement of the purported election AND all its officials thereto and order a fresh election to be undertaken within 6 months in strict conformity to the KOGS constitution, KOGS by-laws/rules & regulations, relevant statutes and the Kenyan constitution (2010).



- xi. This Honorable Court be pleased to issue such further orders as it may deem just and expedient for the ends of Justice to be met.
- xii. That, Costs of this Petition to be borne by Respondents.

Petitioners Arguments

- 15. That, on 30th October 2023, the 4th Respondent who is the National Secretary of the 1st Respondent (Kenya Obstetric & Gynecological Society (KOGS)) usurped the powers of the elections committee in ultra vires way and un-procedurally called for submissions of nomination papers for any member interested in vying for the forthcoming society (KOGS) elections scheduled to take place on or about the 13th February 2024 in all parts of Kenya.
- 16. That, while doing above, the 4th Respondent called nominations of national executive elections only, leaving out branch elections, essentially disenfranchising all members who intended to vie branch elections. This is contrary to the KOGS constitution which mandates the elections committee to call for nominations for national and Branch elections. Article 6(a) & (b) of the KOGS society constitution states
 - “6(a) The council shall consist of: All the office bearers of the society (National) and all the chairs of KOGS branches.
 - 6(b) All council members shall hold office until the following election conducted at an annual general meeting. As provided for in article 16”.
- 17. That, the said memo the dated 30th October 2023 was unspecific as to which positions were available to be contested for.
- 18. That, the KOGS constitution does not give room/envisage elections of national officials alone, since the council is made up of office bearers (national officials) and chairs of KOGs branch elections. The KOGS electoral committee and 5th Respondent failed to follow the Society's constitution and as a result, disenfranchised members who had intention to vie for Branch Elections.
- 19. That, further on 14th December 2023, the elections committee released a list of Candidates who had presented their nominations for various elective positions. However, in twist of events, the said list included one of the candidate, Dr. Angela Anzeze, 7th Respondent who was not a fully paid up member.
- 20. That, the 2nd Petitioner questioned/inquired the date in which the 7th Respondent applied for registration from the CEO of the 1st Respondent Dr. Elly Odongo and he (the latter/CEO) confirmed that the 7th Respondent applied for registration on or about 15th November 2023 by paying ksh.10,000 and was immediately deemed to be a full member of the society by the Respondents contrary to article 3 of the KOGS Society constitution.
- 21. That, as per article 3(a) (i)-(iv) of the KOGS society constitution states:
 - iii. Full membership status is conferred to those who are up-to-date in all mandatory contributions due to the Society.
 - iv. Every full member shall pay a monthly subscription of KShs.417/= not later than the 15th day of each month or an annual subscription of KShs. 5000/= not later than the 15th of January each year.



22. That, despite this provision, the electoral committee cleared the 7th Respondent to vie for the position of treasurer, yet she paid new member registration fee on 15th November 2023, 2 weeks to end of nomination period and when call for nominations were already in place. This essentially means, as at the time she became a member she was not a full paid up member by the above provision and hence ineligible to vie for the said position.
23. That, further the rule no.2(g) and (h) of Kenya Obstetrical and Gynecological Society- Election Rules & Regulations (2020) States;
- g) An election register of full members eligible to vie and vote shall avail at the Society's head office and on the Society's website for scrutiny and inspection by all candidates from the 23rd of January of the election year.
- (h) Only members whose names appear in the election register during the election year shall be eligible to vie and vote in that election
24. That, the Respondents (elections committee) way of doing things like vetting of nominations is opaque and is not known to any of the members. They are not transparent and accountable. Their modus operandi is shrouded in mystery and darkness. Therefore, there was no way the 7th Respondent could have been in the register of members between 16th and 23rd January 2023 whereas she has not joined the society and she was a stranger to the KOGS Society:
25. Therefore, if one is not a paid-up member as per definition of article 3(a)(i) -(iv) of the KOGS society constitution-that is 15th January of the preceding year (2023), then he or she does not possess full membership, and hence cannot qualify to be in a register of full membership to enable him/her to vie and vote.
26. That, the electoral committee of the 1st Respondent illegally and irregularly cleared the 7th Respondent to vying, despite the fact that she paid and become a member (but not a ratified full membership), mid-November 2023 as opposed to the required 15th January (of preceding year of elections, 2023 in this case) hence ineligible to vote and vie for position of national treasurer elections for the forthcoming elections.
27. That, the actions of the electoral: committee is contrary to section 25 of the *Societies Act*, Cap 108 of the laws of Kenya, which states;
- Every registered society shall keep a register of its members in such form as the Registrar may specify or as may be prescribed, and shall cause to be entered therein the name and address of each member, the date of his admission to membership and the date on which he ceases to be a member.
28. That, on the 21st November 2023, the elections committee (of the 1st Respondent) later changed rules of engagement/rule of nomination through a letter sent to members. The process of elections is clear and had been discussed in the 2020 KOGS AGM and members came to learn that, the electronic voting system has been quietly and secretly procured and sneaked in without information of members, aspirants and KOGS Council



29. That this behavior/action, of having opaque procurement of electronic voting system contravene article 86(1) of the Kenyan constitution (2010) which states
 - “ 86(a) That whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent:(emphasis)
30. That, Multiple inquiries to the electoral committee and the KOGS council by various members on issues surrounding elections inter alia on the candidature of the 7th Respondent, electronic voting system(EVS), failure to call branch elections and failure of the electoral committee to call for elections, usurpation of electoral committee powers by the 4th Respondent has not borne fruits.
31. That all these systemic failures are aimed at having opaque elections contrary to tenets of democracy of modern society and disenfranchising of members.
32. That, the actions of the Respondent impede the right of association as espoused in article 36(1) of the Kenyan constitution (2010) as the threatened with contravention.
33. That, there is real and eminent danger, that if this court does not intervene the elections might be done against KOGS constitution and violations of rights of individuals members of the KOGS Society.
34. That both Articles 22 and 258 of *the Constitution* provides that every person has the right to institute court proceedings, claiming that this Constitution (a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened) has been contravened, or is threatened with contravention.
35. That, Article 3 of *the constitution* states that every person has an obligation respect, uphold and defend this Constitution. That, from the foregoing, this action of the Respondents will lead to inter alia loss of public confidence and outright abuse of positional power to the detriment of many other member of the KOGS Society.

Irrational and Arbitrary and Unreasonable

36. That, the actions of the Respondents are illegal, irregular and irrational to say the least and are discriminatory and smirk of the use of Society Office for ulterior motives where there is complete failure to follow Society Constitution. The Respondents have abused their power by not following KOGS constitution. The 2nd petitioner has done all he could to solve this issue in vain as the Respondents are adamant to get their way. The Respondents' decision is irrational to say the least.
37. That, 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. As matter of fact, the above process is not transparent and accountable.

Legitimate Expectation

38. That, the Petitioners and KOGS members being law abiding citizens and members of the KOGS society have a legitimate expectation that officials and electoral committee had to follow the law the KOGS Constitution 2023, Kenya Obstetrical and Gynecological Society-Election Rules & Regulations (2020) and the Kenyan Constitution (2010) requirements and if there was contrary to this expectation: the KOGS members ought to be given legal explanations and not innuendos.
39. That, the petitioner and KOGS members being law abiding citizens have a legitimate expectation that, the Respondents ought to respect the law on membership, nominations and calling of nominations as



per the KOGS constitution and rules; and if there was Contrary to this expectation; KOGS members ought to be given legal explanations and not innuendos.

Specific Violations of *the Constitution* by The Respondents against the Petitioners

40. That, the following are some of the specific violations;
- a. That, the Respondents arbitrary and without following e Law deliberately failed to call for KOGS Branch elections which in essence deprived members their right to be involved in their society activities as officials contrary, to Article 6(a) & (b) of KOGS constitution, fact of which is Contrary to Article 36(1) of the Kenyan constitution (2010).
 - b. That, the Respondents action of failing to openly and accountably being open and accountable to procurement of electronic voting system (EVS) especially particulars of a vendor, process of procuring the EVS system, licenses on compliance, action of which deprived the KOGS members of fair free, credible, accountable and transparent elections contrary to Article 86(a) of the Kenyan constitution(2010) which states 86(a)That whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.
 - c. That, the Respondents action of producing a register with wrong list of paid up members went against the constitutional principle of right to accurate records on one's self, Contrary to article 35(2) of *the constitution*.
 - d. That, failure by Respondents to reply to members concern goes against constitutional principles of governance and right to information as provided in Articles 10 and 35 of *the constitution*.
 - e. That, the unaccountable manner of Respondents, electoral committee and the KOGS council's failure to provide to members and aspirants full explanation of all questions relating on elections inter alia on the candidature of the 7th Respondent party, electronic voting system (EVS), failure to call branch elections and usurpation of electoral committee powers by the 4th Respondent among others is contrary to Article 10 and 232 of *the constitution* on accountability of administrative actions in Article 38 of *the constitution*.
 - f. That, failure by the Respondents to provide KOGS members an opportunity to vie in branch elections without known reasonable cause deprives one's right to a political choice as espoused.

Rule of Law

41. That, it is therefore in the interest of justice that, irregular and illegal calling of KOGS national election only, leaving out branches, opaque procurement of electronic voting system and illegal and irregular clearance on ineligible candidates be declared an illegally and a nullity since the same is aimed of going against the society constitution, disfranchisement of members.
42. That, it is important to maintain constitutionalism, rule of law, Law and Order, good governance and protecting of *the constitution*. That, they are a country governed by laws of the country. The 1st Respondent is not an exception.
43. That, the Petitioners and its alleged membership contend that they face extreme injustice if the court does not intervene and the new officials as elected in the unlawful elections shall operate in breach of Rights of KOGS members all over Kenya.
44. That, the Respondents' decision is irrational to say the least and as a result the Petitioners have done all they could to solve this electoral issues internally vain as the Respondents are adamant to get their



way and have refused/failed to address the issues at hand, leaving the petitioner with no option but to approach court for appropriate reliefs and in the circumstances, this radical, irrational, illegal decision which has been made by the Respondents to defenseless KOGS members ought to be declared illegal null and void and be quashed.

45. That, there is no other suit pending between the parties herein, nor has there been any proceeding in any court between the parties herein over the same subject matter herein.
- 47) That this court has jurisdiction over this matter and I pray that it will be fair, just and expedient that this petition be allowed.
- 48) That The petitioner requests this honourable court for following prayers, seeking the following interlocutory orders: -
- i. Spent
 - ii. Spent
 - iii. That, pending hearing determination and final disposal of this petition a Temporary Conservatory Order be issued prohibiting the Respondents or interested parties or any other person by themselves, their agents and/or other persons whatsoever, from Acting and/or Giving effect to any communications and/or any preparations for Elections of Kenya Obstetric & Gynecological Society (KOGS) 2024.
 - iv. A temporary restraining order, against the Registrar of societies, restraining him/her from registering or from in any way recognizing any officials purportedly elected or to be elected in the elections of Kenya Obstetric & Gynecological Society (KOGS) 2024, pending determination of this Application and thereafter pending hearing and determination of the Petition.
 - v. That, pending hearing determination and final disposal of this petition, the Court be pleased issue an order compelling the Respondents to avail to the Petitioner and the court, the following documents;
 - a. Information/Document(s) used for procuring the electronic voter system (EVS).
 - b. KOGS Bank statements for the period (January 2023 to December 2023).
 - c. Completed Nomination forms of all candidates.
 - d. Certified minutes of the election committee during the nomination vetting and criteria used for the said process.
 - e. Any other documents relevant to this case.
 - vi. Any other Order(s)/Modifications of Orders as the Court may deem fit in the interest of justice.
 - vii. Costs be in the cause
46. The directed inter-parte hearing of the Application for conservatory orders on the 12th February 2023 and it was in the course of the Arguments by Mr. Aboge for the Respondent that Constitutional petition number E002 of 2024 was placed before court and therein were injunctive orders issued against the Respondents herein that effectively made the Application moot.



47. The injunctive Orders issued in Constitutional petition number E002 of 2024 were as follows;
- i. This Honourable Court issues an interim order of injunction barring the 1-5th Respondents, their agents or any other member of the 1st Respondent or its secretariat from opening the voting portal or in any other way conducting elections whose voting is expected to commence on 13.02.2023 as part of the Agenda for the Annual General Meeting scheduled for 15.02.2024 or any other date to which the AGM may be adjourned to.
 - ii. The letter by 5th Respondent dated 14.12.2023 declaring the 2nd and 3rd, 6th and 9th Respondents as elected unopposed is hereby be stayed and the said Respondents barred from assuming office.
 - iii. The 3rd Respondent and/or the 7th Respondent are hereby compelled to provide the members attendance register for the AGM held on 17.08.2023 as well as the application and minutes/ resolutions accompanying the application to amend *the Constitution* made on 14.08.2023.
 - iv. Pending the hearing and determination of the Petition inter parties this Honourable Court issues an interim order of injunction barring the 1st - 5th Respondents, their agents or any other member of the 1st Respondent or its secretariat from opening the voting portal or in any other way conducting elections whose voting is expected to commence on 13.02.2023 as part of the Agenda for the Annual General Meeting scheduled for 15.02.2024 or any other date to which the AGM may be adjourned to.
 - v. This Petition be consolidated with Nakuru HC Petition No. E001 of 2024 before Justice Mohochi for further direction.
48. All parties were offered an opportunity to interact with the Orders dated 12th February by Hon. Lady Justice H. Ongudi and on the 13th February all parties were invited to comment on proceeding herein or what their view were in view of the orders issued in Constitutional petition number E002 of 2024.
49. All parties save for Mr. Aboge were of the view that the instant Application was moot, while Mr. Aboge insisted on being heard expecting a ruling.
50. Notwithstanding hearing the parties for and against the motion and having considered the Ruling and Orders as subsist in Constitutional petition number E002 of 2024, this court is of the considered view that the instant Application by Dr. Fredrick Karithia Mibuku is overtaken by events, in that, the elections sought to be restrained by the conservatory Orders sought has already been enjoined which orders are in force and that entertaining the Application without addressing the subsisting orders might be a pure academic exercise as the injunction orders are not reviewed, varied or set aside.
51. Today Article 23 of *the Constitution* specifically identifies an order of injunction as one of the reliefs that a court can grant if it is satisfied that a person's right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated.
52. Order 40 recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.



53. Because of its importance and susceptibility to abuse certain guidelines have been developed while considering an application for temporary injunction. The three well-known tests enunciated in *Giella v Cassman Brown* (1973) EA 358 are to the effect that a party seeking a temporary injunction has to establish a prima facie case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.
54. In 2010 the Rules Committee being conscious of the susceptibility to abuse of the remedy of temporary injunction introduced in the Civil Procedure Rules certain strictures in Order 40 rule 4, intended to obviate those abuses.
- i. The first condition is that, where the court is satisfied that the object of granting the injunction would be defeated by the delay, it may hear the application ex parte.
 - ii. Secondly, an ex parte injunction may be granted only once for not more than 14 days, which in turn cannot be extended thereafter, except once by consent of the parties or by order of the court for a period not in excess of 14 days.
 - iii. Thirdly, where an ex parte injunction has been granted, the application, pleading and the order must be served on the other side within 3 days of the date of issue of the ex parte order and in default, the injunction would automatically lapse.
 - iv. The fourth condition is that, all applications for injunction must be heard expeditiously and in any event within 60 days from the date of filing unless for good reason time is extended by the court.
 - v. The next requirement is that, after inter partes hearing the ruling has to be delivered either at once or within 30 days of the conclusion of the hearing.
 - vi. Finally, where a suit in respect of which an interlocutory injunction has been granted is not determined within 12 months from the date of the grant, the injunction is to lapse unless for some sufficient reason.
55. Having considered the fact that, there subsist injunctive orders of the same effect sought by the conservatory orders, which injunctive orders are neither reviewed, varied or set-aside.
56. While Arguments have been ably advanced for and against issuance of conservatory order in Constitutional Petition Number E001 of 2024, the parties despite being invited by the court, did not deem it relevant to either invite the court to review vary and vacate the injunction issued in Constitutional Petition Number E002 of 2024.
57. Constitutional Petition E001 of 2024 and E002 of 2024 are now consolidated with the injunctive orders remaining in force.
58. From the pleadings filed, Responses thereto, respective parties' submissions and the authorities, the following issues crystalize for determination:
- a. Whether the Petition meets the threshold set out in *Anarita Karimi Njeru's Case*.
 - b. Whether the doctrine of non-justiciability is applicable in this Petition.
 - c. Whether the petitioners have established a violation (s) of the constitutional rights by the Respondents.
 - d. Whether the petitioners are entitled to the Orders sought.



- e. Who should bear the costs of this Petition?
59. I will deal with the issues in seriatim.
60. This court may entertain an allegation of infringement of a fundamental right or freedom, where it is demonstrated that, no other statutory mechanism exists that would address disputes arising or that the subsisting statutory mechanism is inadequate under the circumstances to redress the grievance.
61. In *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR*, Onguto J stated:
- (27) Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases..... The court is prevented from determining an issue when it is too early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.
62. The doctrine of constitutional avoidance, therefore, deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion.
63. A 5 -Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR elaborately dealt with the doctrine of exhaustion. The Court stated as follows: -
52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in *R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR*, where the Court opined thus:
42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume [1992] KLR 21* in the following oft-repeated words:
- Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.



This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where 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 fora of last resort and not the first port of call the moment a storm brews... 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. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

64. Returning to the case at hand, this court whilst sitting as a constitutional court, must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.
65. No evidence of exhaustion of administrative redress mechanism located within the *Societies Act* CAP 108, has been show-cased by the Petitioners and that, a logical deduction would lead one to conclude that, the Petitions are premature before this court. The regulator of societies and associations, was never involved in addressing the wrangles subsisting in the Kenya Obstetrical and Gynecological Society (KOGS).
66. The Petition fails to meet the threshold set out in Anarita Karimi Njeru's Case as it is trite that, a party seeking judicial review remedies in a constitutional petition must first satisfy jurisdictional threshold that, the petition seeks to uphold and enforce the Bill of Rights. In this instance both petitions fail to articulate the fundamental right(s) or freedom(s) that is/are sought to be upheld or enforced.
67. The rest of the contraventions alleged and argued in submissions by the Petitioners are located in Part IV of the *Societies Act* on conduct and administration of societies, which is the statutory regulatory framework of associations such as Kenya Obstetrical and Gynecological Society (KOGS)
68. The two issues fermenting wrangles are firstly, the Amendment of *the Constitution* of Kenya Obstetrical and Gynecological Society (KOGS) and whether the same was a valid and lawful amendment? and secondly, the Conduct of elections of Kenya Obstetrical and Gynecological Society (KOGS).
69. The role of the Interested Party, the Registrar of society in the wrangle has not been clarified, none of petitioners is heard to be complaining of any action or in action on the part of the interested party.
70. This Court is Persuaded that, the Role of the Interested party is not passive or ceremonial and it includes, the registration of all types of societies and/or exemption from registration, deregistration where necessary all under the *Societies Act*, Cap 108 which came into operation on 16th February, 1968 and regulation of Societies operating in Kenya.
71. The failure to fault the Registrar of society in any way, or show case how the regulator has failed in her role manifest the lack of exhaustion of available statutory remedy as is contained in section 18 of the Act.
72. The Registrar of societies is not handicapped from compelling the Respondents in operating within the law and the Kenya Obstetrical and Gynecological Society (KOGS) constitution, and refusing to ratify any unlawful constitutional amendment.



73. With regards to litigation pre-empting the conduct of Kenya Obstetrical and Gynecological Society (KOGS) elections 2024 on the allegation that, if the same is allowed it shall contravene their fundamental rights, this court is of the view that an illegal or unlawful election result can be nullified post-facto and as such, redressing an impending illegal or unlawful association election in a constitutional petition remains unideal.
74. This court observes that, an alleged contravention of values and principles is not justiciable under Article 22 and Article 23 of *the constitution* which concerns fundamental rights and freedoms under chapter four.
75. The Petitioners have failed to established the violation(s) of the constitutional rights by the Respondents and that, the doctrine of non-justiciability is applicable in this Petition. The Petitioners ought to have engaged with and exhausted the mechanism provided for, under the *Societies Act*, Cap 108 before approaching this court. This petition offends the doctrine of exhaustion of remedies. On this ground alone, the petitioners' petition fails.
76. The upshot of my analysis is that, the Petition dated 20th January 2024 by Dr. Fredrick Kairithia Mibuku and the Petition dated 5th February 2024 by Dr. Sarah Agunda have failed to satisfy the threshold test as set-out in the Anarita Karimi Njeru Case and that the doctrine of non-justiciability is applicable to the extent that an appropriate forum ought to have been utilized.
77. Constitutional law litigation has more and more veered away from awarding costs orders to parties bearing their own costs and this court conforms to the school of thought that, adverse cost orders can be made in exceptional cases and that the conducts of the party, prior, during the dispute and during the hearing may inform the decision. In this instance the wrangle is on the leadership and management of a membership association.
78. Any adverse cost orders made against the Respondents would be payable by the membership and the converse is that the Respondents are not without fault the Petitioners grievances are in the wrong forum and the petitioners genuinely believed they could seek redress in a constitutional court an adverse cost order would not be ideal as the intention was to ensure the strict observance to the association constitution and well-being of the association.
79. I accordingly cannot find in favour of any of the (4) four issues in consideration and the petition thus fails
- This Petition is disallowed.

Orders

- i. Petition No. E001 of 2024 and No. E002 of 2024 as consolidated is hereby dismissed.
 - ii. The parties to bear their own costs.
- It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF MAY 2024.

Mohochi S.M.

Judge

