



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. MISC E1101 OF 2020**

**IN THE MATTER OF AN APPLICATION**

**FOR ORDERS OF CERTIORARI AND MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL GOVERNMENT CONSTITUENCIES**

**DEVELOPMENT FUND BOARD.....1<sup>ST</sup> RESPONDENT**

**THE SELECTION PANEL OF THE NATIONAL GOVERNMENT**

**CONSTITUENCIES DEVELOPMENT FUND COMMITTEE**

**FOR KAMUKUNJI CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**AND**

**BRIAN MAKUBA INGALULA .....1<sup>ST</sup> INTERESTED PARTY**

**DICKENS OTIENO OKODE.....2<sup>ND</sup> INTERESTED PARTY**

**ESTHER WAIRIMU KINYWA.....3<sup>RD</sup> INTERESTED PARTY**

**HAMIDA HUSSEIN ROBA.....4<sup>TH</sup> INTERESTED PARTY**

**VIOLET LIHEMO KIVAYA.....5<sup>TH</sup> INTERESTED PARTY**

**ALI JORAM JUMA .....6<sup>TH</sup> INTERESTED PARTY**

**ANN MUTHONI KURIA .....7<sup>TH</sup> INTERESTED PARTY**

**EX PARTE APPLICANTS:**

- 1. NELSON MWENDA PAUL**
- 2. FRANCIS MUTIJKU KIMITI**
- 3. JACKLINE KARAMBU**

**RULING NO. 2**

## **Introduction**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants herein upon being granted leave, moved this Court by way of a Notice of Motion application dated 30<sup>th</sup> September 2020, in which they are seeking the following orders:

**1. THAT an Order of Certiorari be and is hereby issued quashing and setting aside the decision of the 2nd Respondent arising from the interviews conducted on 3rd February 2020, where they selected persons to be considered for appointment to the National Government Constituencies Development Fund Committee for Kamkunji Constituency.**

**2. THAT an Order of Certiorari be and is hereby issued quashing the selection, nomination, co option, gazettelement and appointment of members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency by the Respondents as published in the Kenya Gazette vide Gazette Notice No. 3737 on 29th May 2020.**

**3. THAT an Order of Mandamus be and is hereby issued to compel the 1st Respondent to constitute a proper Selection Panel for Kamkunji Constituency to conduct fresh and proper interviews of persons to be selected, nominated, co-opted , gazetted and appointed to the National Government Constituencies Development Fund Committee for Kamkunji Constituency .**

**4. THAT this Court be pleased to issue such further Orders and Directions as it may deem fit.**

**5. THAT costs of the application be provided for.**

2. The grounds for the application are stated in the *ex parte* Applicants' statutory statement dated 11<sup>th</sup> September 2020, a verifying affidavit sworn on the same date and a supporting affidavit sworn on 30<sup>th</sup> September 2020, both by the 1<sup>st</sup> *ex parte* Applicant. In summary, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants state that they submitted their applications for consideration by the Selection Panel of the National Government Constituencies Development Fund Committee for Kamkunji Constituency (the 2<sup>nd</sup> Respondent herein), for appointment as members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency. Further that the said Selection Panel had been constituted by the National Government Constituencies Development Fund Board, which is sued as the 1<sup>st</sup> Respondent herein.

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> *ex parte* Applicants are aggrieved by the process adopted by the said selection panel, and the composition and qualifications of the persons selected, nominated, co-opted and appointed to the National Government Constituencies Development Fund Committee for Kamkunji Constituency, whose names were published in the Kenya Gazette Vol. CXXII- No. 97 on 29<sup>th</sup> May 2020 vide Gazette Notice No. 3737.

4. The 1<sup>st</sup> Respondent thereupon filed a Notice of Preliminary Objection dated 7<sup>th</sup> October, 2020, while the 2<sup>nd</sup> Respondent filed a Replying Affidavit dated 15<sup>th</sup> October, 2020 in opposition to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants' Notice of Motion application dated 30<sup>th</sup> September 2020. This Court consequently directed that the 1<sup>st</sup> Respondent's Notice of Preliminary Objection dated 7<sup>th</sup> October 2020 shall be heard and determined first.

## **The Preliminary Objection**

5. The main ground for the 1<sup>st</sup> Respondent's Preliminary Objections is that this Court lacks jurisdiction to hear and determine the issues raised in the said application as the issues of interviews, selection and nomination impugned by the *ex parte* Applicants happened in January and February, 2020 and as such are time-barred pursuant to section 9 of the Law Reform Act, which demands that applications for judicial review orders be made within six (6) months after the act or omission to which the application relates.

6. Secondly, that all the issues raised by the *ex parte* Applicants fall within the ambit of the adjudicatory powers of the 1<sup>st</sup> Respondent, pursuant to the mandatory provision of Section 56 (3) of the National Government Constituencies Development Act, 2015 which excludes the High Court from handling such issues in the first instance. Moreover, that the instant application is premature hence incompetent and unavailable for court's consideration as it contravenes Section 9(2) to (5) of Fair Administrative Actions Act. Lastly, that the instant application raises issues similar to **Judicial Review Misc. 62 of 2020** which was filed by the *ex parte* Applicant but has been withheld from the Court.

7. The 1<sup>st</sup> Respondent filed its submissions dated 7<sup>th</sup> October, 2020 in support of its Preliminary Objection, and cited the decision in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**, for the position that where a court has no jurisdiction, there would be no basis for a continuation of proceedings and should down its tools in respect of the matter before it. In addition, that the source of this jurisdiction was highlighted by the Supreme Court of Kenya in **Samuel Kamau Macharia and Another vs Kenya Commercial Bank and 2 Others, Application No. 2 of 2011** where the Court held that a Court's jurisdiction flows from either the Constitution or legislation or both.

8. On the instant application being time-barred, the 1<sup>st</sup> Respondent submitted that the *ex parte* Applicants are contesting issues which took place in January and February 2020, which is more than 7 months from the time the application was filed, thus falling outside the time limitation of six (6) months provided by the Law Reform Act under section 9. Further, that this Court interrogated this limitation period in **Republic vs Council of Legal Education & another Ex parte Sabiha Kassamia & Another [2018] eKLR** and held that the provision is couched in mandatory terms and must be complied with. As such, the Court lacks jurisdiction to entertain the same as prescribed by the Law Reform Act.

9. The 1<sup>st</sup> Respondent also asserted that section 56 of the National Government Constituencies Development Act, 2015 provides that all complaints and disputes by persons arising due to the administration of the Act shall be forwarded to the Board in the first instance, and that complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers. It further provides that disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel to consider and determine the matter before the same is referred to court. Therefore, that section 56 of the Act ousts the jurisdiction of the Court in the first instance in disputes/complaints akin to the ones raised by the Applicants.

10. Reliance was placed on various court decisions for this position, including those in **Geoffrey Karimi & 2 Others vs Constituency Development Fund Board & 2 Others 2013 eKLR**, **Ahmed Ismail Adan & 7 others vs The National Constituency Development Fund Board & 2 others [2017] eKLR** and **James Cheruiyot vs National Government Constitution Development Fund Manager Nakuru West Constituency & 2 others [2018] eKLR**. Section 9 of the Fair Administrative Actions Act was also cited for the submission that the *ex parte* Applicants have neither demonstrated that they exhausted mechanisms under section 56 of the National Government Constituencies Fund Act, nor shown special circumstances in the issues they have raised.

11. It was averred that the same Applicants lodged a similar application as the instant one namely **Judicial Review No. Misc. Appl. 62 of 2020**, but failed to disclose this fact to the Court, and that the instant application is therefore in manifest abuse of the Court process.

12. The 2<sup>nd</sup> Respondent filed also filed skeletal submissions dated 23<sup>rd</sup> November, 2020 wherein it submitted on the competency of the suit, given that the National Government Constituency Development Fund Act 2015 vests the resolution of the disputes like the *ex parte* Applicants' herein in the 1<sup>st</sup> Respondent. It was contended that the *ex parte* Applicants failed to follow the mandatory provisions of Section 56(1) & (3) of the Act before approaching the court and further, that the selection complained of occurred in February 2020, and the suit was filed in September 2020, seven months later.

13. Therefore, that the application offends the provisions Order 53 Rule (2) which provides a six months' period within which an application for the orders of certiorari. The 2<sup>nd</sup> Respondent submitted that this suit is therefore incompetent, and relied on the case of **James Marienga Obonyo & 2 others vs Fund Manager Suna West National Government Constituency Development Fund Committee & Another [2019] eKLR** on the source of a Court's jurisdiction.

#### **The ex parte Applicant's Reply**

14. The *ex parte* Applicant The Applicants filed Submissions dated 27<sup>th</sup> November, 2020 in opposition to the 1<sup>st</sup> Respondent's Notice of Preliminary Objection, wherein it was contended that the advocates for the *ex parte* Applicants tried to serve a hard copy of their complaint Letter upon the 1<sup>st</sup> Respondent on 18<sup>th</sup> May 2020, but were not allowed to access the offices due to the risks associated with the Covid-19 pandemic, and consequently served the 1<sup>st</sup> Respondent with a the complaint letter on 28<sup>th</sup> May, 2020 through their email address, a copy of which they stated they annexed to the affidavit in support of their Notice of Motion application of 30<sup>th</sup> September 2020.

15. It was further contended that the said complaint letter elicited no response or action from the 1<sup>st</sup> Respondent and the *ex parte* Applicants therefore proceeded to file this suit. The *ex parte* Applicants asserted that they therefore complied with section 56 of the National Government Constituencies Development Fund Board Act and section 9 of the Fair Administrative Action Act, and that the failure by the 1<sup>st</sup> Respondent to address the complaint or to appoint an arbitration panel cannot be attributed to the Applicants. It was their submission that the Applicants exhausted the available remedies as envisioned by Section 56 of the National Government Constituencies Development Fund Board Act and Section 9 of the Fair Administrative Actions Act, before filing this suit. They further submitted that this suit is properly before this Honourable Court and cannot be said to be premature and unavailable for the court's consideration.

16. On whether the suit is time-barred, the *ex parte* Applicants submitted that this suit was brought before court on 15<sup>th</sup> September, 2020 which is within six months from 29<sup>th</sup> May, 2020 when the process of selection, nomination, co-option, gazettelement and appointment of the Interested Parties herein by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was completed. It was also averred that the *ex parte* Applicants seek an order of certiorari to quash the whole process of selection, nomination, co-option, gazettelement and appointment of the Interested Parties herein by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which process begun in February 2020 but was completed on 29<sup>th</sup> May, 2020. It was contended that the Applicants had initially filed **Judicial Review Misc. Application 62 of 2020** on 4<sup>th</sup> March, 2020 seeking orders of prohibition to stop the 1<sup>st</sup> Respondent from appointing and gazetting the names of persons appointed to the Constituency Committee of Kamkunji Constituency by the Respondents. However, due to the Covid-19 interruptions, the application for leave was not heard and the *ex parte* Applicants withdrew the case to enable them file the complaint before the 1<sup>st</sup> Respondent pursuant to section 56 of the National Government Constituencies Development Fund Board Act.

17. Lastly, the *ex parte* Applicants submitted that be as it may, it the ends of justice require that their application be heard and determined on merit, and they urged the court to be guided by the decision in **Republic vs Kiambu County Executive Committee & 3 Others ex parte James Gacheru Kariuki & 9 others (2017) eKLR** and **Republic vs Speaker of Nairobi City County Assembly & another ex parte Evans Kidero (2017) eKLR**, where the court in finding that the suit was not time-barred stated that the Constitution expressly constitutionalizes administrative justice as a right and removes it from the clutches of common law, and that Order 53 of the Civil Procedure Rules is meant to avoid the strict rules of section 9 of the Law Reform Act.

#### **The Determination**

18. I have carefully considered the arguments made by the *ex parte* Applicants and Respondents. The first question that this Court needs to answer is whether the grounds raised in the 1<sup>st</sup> Respondent's Preliminary Objection raise pure points of law. It is only after determining this question, that this Court can proceed to answer the secondary question as to whether the said preliminary objection has merit and should be upheld.

19. The circumstances in which a preliminary objection may be raised, as explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

20. **“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

21. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro vs Mbaja, (2005) 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company vs West End Distributors Ltd (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

22. A Court’s jurisdiction flows from either the Constitution or statute or both, or and by principles laid out in judicial precedent. It is thus clearly a pure question of law. I am in this respect guided by the case of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1** where Justice Nyarangi JA (as he then was) held:

**“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

23. The Court of Appeal proceeded to define jurisdiction and its source as follows:

**“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”**

24. The judicial review jurisdiction of this Court is in this respect granted by Articles 47 and 165(6) of the Constitution, particularly when any contravention and/or violation of constitutional and statutory provisions by a public body is alleged, or unfair action by an administrator is alleged. In addition, Article 165 (6) of the Constitution in this regard provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard.

25. It is notable that in the present proceedings, the main ground raised by the 1<sup>st</sup> Respondent in its preliminary objection is that of this Court’s jurisdiction, which it argues is divested for reasons that the instant application is time barred under section 9 of the Law Reform Act, and by the provisions on internal dispute resolution provided in section 56 of the National Government Constituencies Development Act, 2015.

26. The first argument that this suit is time barred can properly be raised as a point of law, if the facts are not in dispute. However, in the present case the parties have disputed the time the cause of action arose. While the Respondents have urged that the *ex parte* Applicants are contesting issues which took place in January and February 2020, the *ex parte* Applicants argues that the cause of action arose when the process of appointment of members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency was completed upon publication of the selection in the Kenya Gazette on 29th May 2020.

27. It is however not in dispute that the *ex parte* Applicants’ cause of action is the process of selection and appointment of the members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency. Section 43 of the National Government Constituencies Development Act, 2015 provides as follows about the appointment of members of the said Committee:

**(1) There is established a National Government Constituency Development Fund Committee for every constituency.**

**(2) Each Constituency Committee shall comprise of—**

**(a) the national government official responsible for co-ordination of national government functions; (b) two men each nominated in accordance with subsection (3), one of whom shall be a youth at the date of appointment;**

**(c) two women nominated in accordance with subsection (3). one of whom shall be a youth at the date of appointment;**

**(d) one persons with disability nominated by a registered group representing persons with disabilities in the constituency in accordance with subsection (3);**

(e) two persons nominated by the constituency office established under Regulations made pursuant to the Parliamentary Service Act;

(f) the officer of the Board seconded to the Constituency Committee by the Board who shall be an ex officio member without a vote.

(g) one member co-opted by the Board in accordance with Regulations made by the Board.

(3) The seven persons referred to in subsection (2)(b), (c), (d) and (e) shall be selected in such manner and shall have such qualifications as the Board may, by Regulations, prescribe.

(4) The names of the persons selected under subsection (3) shall be submitted by the Board to the National Assembly for approval before appointment and gazette by the Board.

28. The National Government Constituencies Development Fund Regulations of 2016 further provide for the method of selection in Regulation 5 as follows:

(1) The members of a Constituency Committee provided for under section 43(2) (b), (c) and (d) of the Act shall be selected by a selection panel established under paragraph (4) upon an occurrence of a vacancy in the Constituency Committee.

(2) A vacancy shall occur in Constituency Committee upon—

(a) commencement of a new parliamentary term;

(b) dissolution of a Constituency Committee;

(c) removal of a member of a Constituency committee; or (d) the occurrence of a vacancy in a Constituency Committee.

(3) Upon the occurrence of a vacancy in a Constituency Committee, the Board shall within fourteen days, constitute a selection panel.

(4) The selection panel referred to in paragraph (1) shall consist of—

(a) one person nominated by the national government official in charge of the sub-county or a designated representative, who shall be the chairperson of the selection panel;

(b) the Officer of the Board seconded to the Constituency who shall be the secretary to the selection panel; and

(c) two persons, one of either gender, nominated by the Constituency office.

(5) The officer of the Board seconded to the Constituency shall within fourteen days of the first meeting of the selection panel invite applications from persons who qualify for appointment to a Constituency Committee in accordance with guidelines issued by the Board.

(6) The selection panel shall, within fourteen days of receiving the applications under paragraph (5), consider the applications and shall select five applicants taking into account age, gender, special interest groups and regional balance in accordance with section 43(2) (b)(c) and (d) of the Act.

(7) The officer of the Board seconded to the Constituency shall within seven days of the selection process referred to in paragraph (6) submit to the Board the names of the selected candidates together with the report of the selection panel.

(8) The Board shall co-opt the person referred to in section 43(2) (g) of the Act to ensure equitable representation in the membership of a Constituency Committee.

(9) The Board shall, in writing, request the clerk of the National Assembly to notify the Constituency Office to nominate two persons of either gender, pursuant to section 43(2)(e) of the Act and to forward the names to the Office of the Board seconded to the Constituency.

(10) The Board shall submit the names of the seven persons selected from each Constituency in accordance with section 43(2)(b),(c),(d) and (e) of the Act to the National Assembly for approval.

(11) The Board shall, within fourteen days after receipt of the names approved by the National Assembly, appoint the members of a Constituency Committee by notice in the Gazette.

**(12) The selection panel shall stand dissolved upon the appointment of the members of a Constituency Committee.**

**(13) The Board shall, within fourteen days after gazettelement of the members of a Constituency Committee inform the members of their appointment in writing.**

29. It is evident from the above provisions that the process of appointment of members of the Committee is complete after their gazettelement. In the present case, the appointment of the members of the National Government Constituencies Development Fund Committee for Kamkunji Constituency was published in the Kenya Gazette on 29th May 2020, and the *ex parte* Applicants commenced the judicial review proceedings herein on 15<sup>th</sup> September 2020. The *ex parte* Applicants are therefore within the 6-month's limitation period for seeking orders of certiorari provided for in section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules. It is also notable in this regard that one of the orders of certiorari sought is to quash the Gazette Notice dated 29<sup>th</sup> May 2022.

30. The second argument put forward by the 1<sup>st</sup> Respondent on this Court not being vested with jurisdiction is as regards the existence of an alternative dispute resolution method. The exhaustion of alternative remedies is a constitutional and legal imperative under Article 159 (2)(c) of the Constitution and section 9(2) and (3) of the Fair Administrative Action Act, and is also exemplified by emerging jurisprudence in cases such as those by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others [2015] eKLR**.

31. However, sections 9(2) (3) and (4) of the Fair Administrative Action Act provides an element of discretion to this Court as follows:

**“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**

**(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**

**(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”**

32. The ground of alternative dispute resolution methods is therefore strictly speaking not a pure point of law, as it invites the adducing of facts and legal arguments as regards the existence of, and compliance with the applicable legal provisions, and also allows for the exercise of this Court's discretion depending on the circumstances of each case. It is therefore necessary to point out that an alternative dispute resolution method does not divest a Court of jurisdiction to entertain a claim for judicial review. However, an available adequate alternative remedy is a material consideration in the exercise of the Court's discretion to grant the relief sought, for the reasons that judicial review is a remedy of last resort, and Courts require other avenues of redress to be first utilised in relation to the actions or decisions of a public body.

33. The *ex parte* Applicants have in this respect contended and brought evidence of their compliance with section 56 of the National Government Constituencies Development Act, 2015, which is not disputed by the Respondents. They annexed copies of a complaint dated 15<sup>th</sup> May 2020 they made to the 1<sup>st</sup> Respondent and email forwarding the said complaint dated 28<sup>th</sup> May 2020 in compliance with the said section. Section 56 provides as follows in this regard:

**(1) All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.**

**(2) Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.**

**(3) Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court.**

**(4) Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary to reconsider the Board's decision and determine the matter.**

**(5) Subject to this Act, no person in the management of the Fund shall be held personally liable for any lawful action taken in his official capacity or for any disputes against the Fund.**

34. It is notable that there are no time limits within which the said Board, which is the 1<sup>st</sup> Respondent herein, is required to act on a complaint in the said provisions, which presents a challenge in determining whether the alternative remedy is still available to the *ex parte* Applicants, and adequate to address their grievance. In this respect, it was held by the African Commission of People and Human Rights in the case of **Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96** as follows:

**"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only**

**if the applicant can make use of it in the circumstances of his case."**

35. This Court is in this respect also guided by the general principle of law that when there are no time limits prescribed, an administrative authority and public body is required to act within a reasonable period of time. In the present case the *ex parte* Applicant's complaint was brought to the attention of the 1<sup>st</sup> Respondent in May 2020, and the 1<sup>st</sup> Respondent did not bring any evidence of having acted on the same by the date of filing of the instant judicial review proceedings in September 2020. This delay of four months is in my view unreasonable, given that the term of office of the members is two years under section 43(8) of the National Government Constituencies Development Act, 2015. The delay also essentially makes the alternative remedy not only unavailable but also ineffective to the *ex parte* Applicants in the circumstances.

36. This Court therefore has the discretion to assume jurisdiction in the circumstances and hear the *ex parte* Applicants' application, in the interests of expeditious disposal and substantive justice.

### **The Orders**

37. Arising from the foregoing reasons, this Court orders as follows:

**I. The 1<sup>st</sup> Respondent's Notice of Preliminary Objection dated 7<sup>th</sup> October 2020 is found not to have merit, and is hereby dismissed with costs to the *ex parte* Applicants.**

**II. The 1<sup>st</sup> Respondents and Interested Parties are granted the last opportunity to file and serve their responses to the *ex parte* Applicants' substantive Notice of Motion dated 30<sup>th</sup> September 2020 within fourteen (14) days from today's date.**

**III. Upon service of the said responses or default thereof, The *ex parte* Applicants shall file and serve their submissions on the substantive Notice of Motion within fourteen (14) days.**

**IV. The Respondents and Interested Parties are granted leave to file and serve reply submissions within fourteen (14) days of service of the *ex parte* Applicants' submissions.**

**V. This matter shall be mentioned on 16<sup>th</sup> June 2021 to confirm compliance and to reserve a judgment date.**

**VI. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the Applicants' substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.**

**VII. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) and [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**VIII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at [judicialreview48@gmail.com](mailto:judicialreview48@gmail.com) with copies to [asunachristine51@gmail.com](mailto:asunachristine51@gmail.com).**

**IX. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.**

**X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 16<sup>th</sup> June 2021, and shall send a copy of this ruling to the *ex parte* Applicants, Respondents and Interested Party by electronic mail by close of business on 16th April 2021.**

**XI. Parties shall be at liberty to apply.**

38. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF APRIL 2021**

**P. NYAMWEYA**

**JUDGE**

**FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING**

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this judgment was delivered electronically by transmission to the email addresses of the *ex parte* Applicants' Respondents' and Interested Parties' Advocates on record.

**P. NYAMWEYA**

**JUDGE**