Kahunyo & 6 others v Commissioner For Co-Operative Development & 2 others (Judicial Review Miscellaneous Application 279 of 2018) [2019] KEHC 10905 (KLR) (Judicial Review) (5 March 2019) (Ruling)

James Mweri Kahunyo & 6 others v Commissioner for Co-operative Development & 2 others [2019] eKLR

Neutral citation: [2019] KEHC 10905 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION 279 OF 2018

JM MATIVO, J

MARCH 5, 2019

IN THE MATTER OF APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT AND ORDER 45 OF THE CIVIL PROCEDURES RULES

AND

IN THE MATTER OF THE COOPERATIVE SOCIETIES ACT, CAP 490, LAWS OF KENYA.

AND

IN THE MATTER OF THE SACCO SOCIETIES ACT, ACT NO. 14 OF 2008

BETWEEN

JAMES MWERI KAHUNYO ..... 1ST APPLICANT

GEORGE ABONG ..... 2ND APPLICANT

GEORGE ANYARA ..... 3RD APPLICANT

WYCLIFFE OGAL ..... 4TH APPLICANT

CHARLES OLUNGA ..... 5TH APPLICANT

JOSEPH ESAU ..... 6TH APPLICANT

GEORGE GUTHAIYA ..... 7TH APPLICANT

AND

THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT .... 1ST RESPONDENT

CHUNA CO-OPERATIVE, SAVINGS AND CREDIT SOCIETY LTD ..... 2ND RESPONDENT

SACCCO SOCIETIES REGULATORY AUTHORITY ..... 3RD RESPONDENT

RULING

Introduction

1. This ruling disposes a preliminary objection filed by counsel for the third Respondent objecting to this court's jurisdiction to entertain this case citing the doctrine of exhaustion of dispute resolution mechanism provided under a statute.

2. A similar objection was raised by the second Respondent at paragraphs 16 and 17 of the Replying Affidavit of Richard Ndemo Onwonga dated 9th November 2018. He deposed that a person aggrieved by a decision of the first Respondent has a right to invoke the dispute settlement mechanism provided under sections 76 and 77 of the *Co-operative Societies Act* (herein after referred to as the act). [1]Additionally, he averred that a person aggrieved by a decision of the third Respondent can appeal to the relevant Cabinet Secretary pursuant to Regulation 72(8) of the Regulations, 2010.

3. At the hearing of the Preliminary objection, Mr. Munene, counsel for the first Respondent also supported the objection.

The Parties.

4. The applicants are adults of sounds residing and working for gain in Nairobi.

5. The first Respondent is the Commissioner for Co-operative development established pursuant to section 3 of the act. The Commissioner, pursuant to section 3(3) of the act is responsible for the growth and development of co-operative societies by providing such services as may be required by co-operative societies for their organization, registration, operation, advancement and, dissolution and for administration of the provisions of this Act.

6. The second Respondent is a co-operative Society within the meaning assigned to a Co-operative Society under the act.

7. The third Respondent, the Sacco Societies Regulatory Authority is established under section 4 of the *Sacco Societies Act*.[2] It is a body corporate with perpetual succession and common seal capable of suing and being sued, taking, purchasing or otherwise acquiring, holding, charging, and disposing of both movable and immovable property, borrowing or lending money, entering into contracts and doing or performing all such other things or acts necessary for the furtherance of the provisions of this Act. Its objects and functions prescribed under section 5 thereof include to license Sacco societies, to carry out deposit-taking business in accordance with the Act, regulate and supervise Sacco societies, hold, manage and apply the General Fund of the Authority in accordance with the provisions of the Act, levy contributions in accordance with the Act, do all such other things as may be lawfully directed

by the Minister; and perform such other functions as are conferred on it by the Act or by any other written law.

Factual Matrix.

8. By an ex parte Chamber Summons dated 13th July 2018 expressed under the provisions of section 8 & 9 of the *Law Reform Act*[3]and order 53 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*[4] the applicants moved this court seeking leave to apply for orders of certiorari, mandamus and prohibition to quash the third Respondents recommendations to remove them from office, and, to compel them to "clear and reinstate them to office" and, to prohibit them from effecting the recommendations.

9. The applicants also seek an order that the leave sought if granted do operate as stay of execution, performance, application, enforcement and or implementation of the recommendations pending the hearing and determination of the application/the suit. The applicants also sought to stop a meeting that was scheduled to take place on 14th July 208 (now past) to elect new board members.

10. The grounds in support of the application are that sometimes in July 2016, the third Respondent conducted an onsite inspection on the second Respondent and found that their books of accounts and financial statements did not true reflection its financial position as at 30th April 2016 in violation of section 40(1) of the Act. It is also contended that the third Respondent on 12th May 2017 issued an administrative directive suspending the then members of the second Respondent's board for 90 days.

11. The applicants contend that the reconstituted Board comprised of some of the applicants herein, and that the Board subsequently convened an annual General Meeting on 22nd July 2017 which passed a resolution requesting the first Respondent to institute an investigative audit/inquiry on the second Respondent. Further, it is contended that the first Respondent authorized Hesbon Kiura and Anthony Waithaka to perform the inquiry. The applicants state that the first Respondent through a recommendation from the third Respondent directed the immediate removal of 4 suspended board members from the service of the second Respondent and prohibited them from holding an office with immediate effect in any SACCO in Kenya for a period of 3 years, and, that, on 16th September 2017, elections were held to fill the vacant 4 positions.

12. It is further contended that the findings of the inquiry report were that funds were misappropriated, and, that there were signs of fraud and irregularities, and, that, the report recommended the removal of the board members from office. The applicants maintain that they were blamed for the fault of former members of the Board, and, that, the first and second Respondents removed them from office unlawfully and without a fair hearing in violation of Rule 25 of the Sacco by-laws. The applicants contend that, the actions complained of are marred by bias, bad faith, irrelevant considerations and unreasonableness.

13. Also, the applicants state that the Respondents intend to surcharge them based on the findings of the inquiry, hence, the need for this courts intervention.

The first Respondent's Replying Affidavit.

14. Mary Mungai, the Commissioner for Co-operative swore the Replying Affidavit dated 17th December 2018. She averred inter alia that sometimes in the year 2006, the third Respondent conducted an inspection on the second Respondent and found that its books of accounts and financial statements failed to reflect its financial position as at 30th April 2016. She also averred that on 12th May 2017, after thorough investigations on the conduct of the second Respondent, the third Respondent issued an administrative directive under section 51 of the *Sacco Societies Act*[5] suspending members of the

second Respondent who were responsible for the violation of the provisions of section 30 of the act. Also, she averred that the third Respondent directed that the Respondent' Board be re-constituted, and, the reconstituted board held an Annual General Meeting on 22nd July 2017 and passed a Special Resolution requesting the Commissioner for Co-operative Development to institute an investigation into the conduct of its business.

15. She also averred that violation of section 30 of the *Sacco Societies Act*[6]continued in the second Respondents management, hence, a decisive action to regulate it was necessary to protect the interests of its members from the rogue custom of non compliance with the law. She further deposed that upon investigation and on the recommendation of the third Respondent, the first Respondent pursuant to powers vested upon it by section 65 of the *Sacco Societies Act*[7] ordered the removal of 4 board members of the second Respondent's reconstituted board and disqualified them from holding a Sacco Society Office in Kenya. She also averred that the first and third Respondents' actions were in line with the *Sacco Societies Act*[8] and was in compliance with the rules of natural justice, hence, the prayers sought should not issue.

Second Respondent's Replying Affidavit.

16. Richard Ndemo Onmwonga, the second Respondent's chairman swore the Replying affidavit dated 9th November 2018. He averred that the second Respondent is not a public body and therefore it not subject to Judicial Review proceedings. He deposed that the second Respondent and its management as duly constituted have nothing to do with the contents of the Inquiry Report and decisions of the first and third Respondent. Additionally, he averred that the applicants' application offends the *Sacco Societies Act*[9] and the *Fair Administrative Action Act*,[10] hence, it is incompetent. Further, he averred that the applicants have failed to exhaust the mandatory statutory dispute resolution mechanism provided under the Act and the *Sacco Societies Act*[11] or request the requisite exemptions under the *Fair Administrative Action Act*.[12]

17. Mr. Onmwonga also averred that a person aggrieved by a decision of the first Respondent has a right to appeal pursuant to section 76 and 77 of the Act and if aggrieved by a decision of the third Respondent can appeal to the relevant Cabinet Secretary pursuant to Regulation 72(8) of the Sacco Societies (Deposit-Taking Sacco Business) Regulations, 2010 (herein after referred to as the Regulations).

18. Lastly, he deposed that the deponent to the affidavit in support of the application has not exhibited authority to swear the Affidavit

Third Respondent's Preliminary Objection on Jurisdiction.

19. Counsel for the third Respondent filed the Preliminary Objection dated 7 December 2018 the subject of this ruling objecting to this court's jurisdiction citing the following grounds:-

    a. That by virtue of Articles 47, 50(1) and 159(2) (c) of *the Constitution*, section 9(2)(3) & (4) of the *Fair Administrative Action Act*,[13]sections 67(3) of the *Sacco Societies Act*,[14] Regulation 30 Rule 72 of the Regulations and section 74 and 76 of the Act, this honourable court does not have jurisdiction to entertain this Judicial Review application;

    b. That the application was initiated prematurely since the applicants have not exhausted the right of appeal to the Co-operative Tribunal or the Cabinet Secretary before lodging any application to this court;

    c. That no exceptional circumstances have been demonstrated by the applicants to except them from appealing and or referring the dispute herein to the Co-operative Tribunal for redress;

d. That the applicant has no cause of action against the third Respondent and this Honourble Court ought to expunge the third Respondent from these proceedings;

e. That the Judicial Review application is an abuse of court process, lacks merit and ought to be dismissed with costs to the third Respondent.

The arguments.

20. Mr. Kihara, counsel for the first Respondent submitted that this court has no jurisdiction to entertain a dispute arising out of Sacco business as provided under section 67(3) of the *Sacco Societies Act*[15] or a dispute concerning the business of a Co-operative Society as provided in section 76 of the Act. He submitted that the dispute in this case is between past officials of the second Respondent and the third Respondent. It was his submission that the second Respondent is a Sacco Society licensed, regulated and supervised by the third Respondent pursuant to section 24 of the *Sacco Societies Act*[16]as read with part 11 of the Regulations.

21. It was his submission that the two statutes governing the supervision and regulation of Sacco's in Kenya is the *Sacco Societies Act*[17]and the *Co-operative Societies Act*. Counsel argued that the Act applies to all co-operative societies while the *Sacco Societies Act*[18]applies to prudential aspects of supervision and regulation of deposit taking Sacco's.

22. Mr. Kihara relied on section 67(3) of the *Sacco Societies Act*[19] which provides that all disputes arising out of Sacco Business under the act be referred to the Co-operative Tribunal. He also cited the definition of Sacco business in section 2 of the act and submitted that the applicants are aggrieved by an alleged recommendation made by the third Respondent to remove them from office. It was his submission that since the dispute involved removal of the applicants as officials of the Sacco Society and not Sacco business as defined in section 2 of the act, the dispute was of a disciplinary nature since it revolves around direct or indirect violation of the act, Regulations or Sacco Societies bylaws or engagement of unsafe practice in connection with the Society which fall within the ambit of Regulation 30 Rule 72 of the Sacco-Societies (Deposit-Taking Sacco Business) Regulation, 2010.

23. To buttress his argument, Mr. Kihara cited Republic v Sacco Societies Regulatory Authority ex parte Joseph Kiprono Maiyo & 3 Others[20] where the court held that a dispute relating to removing persons and prohibiting them from acting as officials fell squarely within the ambit of Regulation 30 and 72. He also cited Republic v Board of Management Asili Credit nd Savings Cooperative & 3 Others ex parte Abuto George Omollo[21] where the court upheld a similar objection as in this case.

24. Mr. Kihara also argued that where *the Constitution* or statute provides for alternative dispute resolution mechanisms, these must in the first instance be fully exhausted before the aggrieved party moves to the High Court. To further buttress his argument, he cited Articles 50(1) and 159(2) of *the Constitution* and section 9(2) of the *Fair Administrative Action Act*[22]arguing that the section expressly prohibits the courts from reviewing matters where alternative remedy is provided. He further submitted that for a court to review an administrative action, an applicant must demonstrate that he/she has exhausted the alternative remedies under the written law or demonstrate to the court in an application for exemption that they deserve exemption.

25. Mr. Munene and Mr. Otieno, counsels for the first and second Respondents respectively supported the objection by Mr. Kihara and associated themselves with his submissions.

26. Miss Swaka, counsel for the applicants opposed the objection. She argued that the application is properly before the court. She contended that the applicants are challenging "removal from office

and seek to stop the general meeting to choose other members." It was her submission that there are exceptional circumstances in this case.

Determination.

27. A casual look at the ex parte applicant's pleadings shows that an inquiry by the Commissioner of Co-operative Development found that the second Respondents funds were misappropriated and that there were signs of fraud and irregularities. The inquiry recommended that the board members be removed from office. It is common ground that the applicants are challenging the removal from office and are also aggrieved by a decision to surcharge them. Additionally, they sought to stop an Annual General Meeting. In short, they seek to quash the recommendations made by the third Respondent premised on the inquiry report and to compel the first and second Respondents to reinstate them in office. That is the crux of the applicants case.

28. The question that falls for determination is whether or not this court has the jurisdiction to entertain the dispute. Differently stated, the phrase that best describes the Preliminary objection under consideration is whether this suit is bad in law under the doctrine of exhaustion of statutory provided dispute resolution mechanism.

29. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya.[23]It was perhaps most felicitously stated by the Court of Appeal[24] in Speaker of National Assembly vs Karume[25] in the following 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."

30. The above case was decided before *the Constitution* of Kenya, 2010 was promulgated. However, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.[26] The Court of Appeal provided the constitutional rationale and basis for the doctrine in Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others,[27] where it 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...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

31. In the Matter of the Mui Coal Basin Local Community,[28] the High Court stated the rationale thus:-

> " The reasoning is based on the sound Constitutional policy embodied in Article 159 of *the Constitution*: that of a matrix dispute resolution system in the country. Our Constitution

creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." *The Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, *the Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

32. From the above jurisprudence at least two principles can be discerned:- First, while, exceptions to the exhaustion requirement are not clearly delineated, courts 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.[29] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

33. Mr. Kihara's assault on the applicants failure to exhaust the statutory provided dispute resolution mechanism as I understood it, is premised on two fronts. First, he cited Regulation 72(8) of the Regulations which provides that "a person aggrieved by the removal order may appeal to the Minister." As stated above, the applicants are challenging the removal from the second Respondents board. By dint Regulation 72(8), it is clear the applicants ought to have challenged their removal by appealing to the Minister.

34. The second limp of Mr. Kihara's objection was premised on the provisions of the *Sacco Societies Act*[30] and the *Co-operative Societies Act*. Section 2 of the *Sacco Societies Act*[31] defines "Sacco business" to mean financial intermediation and any other activity by a Sacco society based on co-operative principles and in accordance with the act...Regulation 72(6) provides the circumstances under which the third Respondent or the Sacco may remove an officer from office in the following words:-

> (6) The Authority or Sacco Society may remove an officer from office, if the officer?
>
> (a) directly or indirectly violates the Act, these Regulations or the Sacco societies bylaws;
>
> (b) engages or participates in any unsafe or unsound practice in connection with the Sacco Society;
>
> (c) has a non performing loan or becomes a bad debtor; and
>
> (d) commits any act, or practice or fails to take appropriate action, thereby committing a breach of fiduciary responsibility, resulting in or likely to result in?
>
> (i) a Sacco Society suffering financial loss or other damage;
>
> (ii) members' interest being prejudiced; or
>
> (iii) any party receiving unfair financial gain or other benefit.

35. The findings of the inquiry which informed the reasons for the removal cite grounds which fit under paragraphs (a) & (b) above.

36. More significant is section 67 of the *Sacco Societies Act*[32] which provides for the application of the *Co-operative Societies Act*[33] in the following words:-

(1) For greater certainty, the provisions of the *Co-operative Societies Act*, 1997 (No. 12 of 1997) shall apply to a Sacco society carrying out deposit-taking business under this Act with respect to any matter, to the extent that the matter in question is not dealt with in this Act.

(3) In the case of a conflict between the provisions of this Act and the provisions of the *Co-operative Societies Act*, 1997 (No. 12 of 1997) with respect to Sacco societies to which this Act applies, the provisions of this Act shall take precedence.

(3) All disputes arising out of Sacco business under this Act shall be referred to the Tribunal.

37. Section 67(1) reproduced above provides for the application of the provisions of the Act. Section 67(3) is explicit. It provides in no uncertain terms that all disputes arising out of a Sacco business under the act shall be referred to the Tribunal. The act defines a "Tribunal" as follows:-"has the meaning assigned to it in the *Co-operative Societies Act*."

38. Section 76 of the Act provides as follows:-

"76.

(1) If any dispute concerning the business of a co- operative society arises:-

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative Society; it shall be referred to the Tribunal.

39. It is common ground that the applicants are challenging a decision to remove them from the Board of the second Respondent. Section 67(3) reproduced above is very clear and warrants no explanation. It provides that all disputes arising out of Sacco business under the Act shall be referred to the Tribunal. This provision effectively disposes this case.

40. Additionally, the provisions of the Act apply by dint of section 67(1) cited above. Section 2 of the *Sacco Societies Act*[34] provides that except where the context otherwise requires—

> "officer" includes a chairman, vice-chairman, secretary, treasurer, committee member, employee or any other person empowered under any rules made under this Act, or by-laws of a co-operative society, to give directions in regard to the business of the society;

41. The question is whether the dispute presented in this case concerns the business of a cooperative society, which should have been referred to the Co-operative Societies Tribunal as provided for under Section 76 cited above. The expression "business of the society" has not been defined in the Act or elsewhere. The expression has fallen for interpretation by the courts in this country and elsewhere with commendable frequency. Pronouncements from different courts in this country and elsewhere have led to a cleavage in judicial opinions as to the true meaning and scope of that expression appearing in the Act. In Gatanga Coffee Growers Co-operative Society Ltd vs Gitau[35] the court interpreted the meaning of the term 'business of the society' in the *Co-operative Societies Act*. It refused to adopt a restricted interpretation and cited the Ugandan case of Wakiro and Another v Committee of Bugisu Co-operative Union,[36] at p 527 where Russell J, considering the expression "business of the society" under the Ugandan *Co-operative Societies Act* which provision is similar to our Section 76 cited above

stated that the expression "business of the society" is not confined to the internal management of the society but covers every activity of the Society within the ambit of its by laws and rules. A similar finding was arrived in Murata Farmers Sacco Society Ltd v Co-operative Bank of Kenya Ltd.[37]

42. Guidance can be obtained from the decision of the Bombay High Court[38] which discussing a similar provision observed that the phrase "any dispute touching the business of society," should be interpreted in a very wide sense. The expression "touching the business of a society" in the act, and the word "business" is a very wide term and is not synonymous with the objects of a society. The expression means affecting or relating to the business of a society.[39]Thus, the words "touching the business of a society" are very wide and include any matter which relates to, concerns or affects the business of the society.[40]

43. In view of my analysis of the above provisions, I find that the dispute disclosed in this case revolves within the ambit of the provisions of Section 76 of the Act and by dint of section 67 of the *Sacco Societies Act*,[41] the dispute ought to have been referred to the Co-operative Societies Tribunal. I find that this suit offends the doctrine of exhaustion of statutory available remedies. First, the applicants ought to have appealed to the Minister. Second, the applicants claim ought to have been filed at the Co-operative Societies Tribunal.

44. My finding is fortified by the provisions of section 9(2) of the *Fair Administrative action Act*[42](an act of Parliament that was enacted to bring into operation Article 47 of *the Constitution*) which provides that the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

45. The use of the word shall in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[43]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[44] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

46. It is the duty of courts of justice to try to get at the real intention of *the Constitution* or legislation by carefully attending to the whole scope of *the Constitution* or a statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

47. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[45] The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.[46] Ordinarily the words ‘shall’ and ‘must’ are mandatory and the word ‘may’ is directory.

48. A proper construction of section 9(2) & (3) above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by section 9(4) which provides that:- "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. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances.

49. What constitutes exceptional circumstances depends on the facts of each case.[47] Article 47 of *the Constitution* and the *Fair Administrative Action Act*[48] are heavily borrowed the South African Constitution and their equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions may offer useful guidance. The following points from the judgment of Thring J are relevant:-[49]"

    i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . ."

    ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

    iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

    iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

    v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

50. There is no definition of 'exceptional circumstances' in the *Fair Administrative Action Act*,[50] but this court's interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[51]

51. In yet another South Africa decision[52] the court said the following about what constitutes exceptional circumstances:-

> " What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."

52. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

53. The second requirement is that on application by the applicant, the court may exempt the person from the obligation. It is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the *Fair Administrative Action Act*.[53] The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[54] Section 9(4) of the *Fair Administrative Action Act*[55] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. No such application for exemption was made to this court.

54. It is uncontested that the impugned decision constitutes administrative action as defined in section 2 of the *Fair Administrative Action Act*.[56] Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the ex parte applicant can show exceptional circumstances to exempt it from this requirement.[57] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in *the Constitution* and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[58] An internal remedy is adequate if it is capable of redressing the complaint.[59]

55. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it. In the case before me, no argument was advanced that the mechanism under the above act was not adequate nor do I find any reason to find or hold so.

56. The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively. This argument was not advanced before me nor do I discern it from the facts of this case.

57. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. No argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute.

58. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicants ought to have exhausted the available mechanism before approaching this court. I find that this case offends section 9 (2) of the *Fair Administrative Action Act*.[60] Second, the ex parte applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the *Fair Administrative Action Act*.[61]

59. In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail. Consequently, I dismiss the application dated 13th July 2018 with costs to the Respondents.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MARCH 2019

JOHN M. MATIVO

JUDGE