REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 26 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF *CERTIORARI* AND *PROHIBITION*

AND

IN THE MATTER SECTIONS 8 & 9 OF THE LAW REFORM ACT, CAP 26 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF ARTICLES 1,2,3,10,19,20,22,23,27,28,32,33,47,48,50(1),159,165,258,260 AND SECTION 7 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 2(I)(II) 3(A)(C), 4(1)(2), 7(1)(A), 2(B)(C)(D)(F)(G)(H)(I)(J)(K)(L)(M)(N) (O), 9(I) & (II) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE RESPONDENT'S ADMINISTRATIVE DECISION/ACTION IN NOMINATION TO SERVE AS CHURCH OFFICERS OF NAIROBI CENTRAL SEVENTH-DAY ADVENTIST CHURCH (NCSDAC)

BETWEEN

REPUBLIC...APPLICANT

VERSUS

PR. JP. MAIYWO..1ST RESPONDENT

PR. PETER NYAGA..2ND RESPONDENT

PR. (DR) JOHN NGUNYI KIRAGU, PR. PETER KIOKO

& PR. JEREMY MARAMBII…*SUED AS THE EXECUTIVE DIRECTOR,*

TREASURER AND SECRETARY RESPECTIVELY OF…..

CENTRAL KENYA CONFERENCE (CKC)..............................3RD RESPONDENT

AND

MOSES NYANKURU..1ST INTERESTED PARTY

ISAAC RATEMO..2ND INTERESTED PARTY

CLEOPHAS OKIOI..3RD INTERESTED PARTY

HEZRON OKIOMA..4TH INTERESTED PARTY

DAN ORIKO...5TH INTERESTED PARTY

WASHINGTON AYIEMBA...6TH INTERESTED PARTY

GEORGE ANYANGO..7TH INTERESTED PARTY

JENNIFER OROKO...8TH INTERESTED PARTY

JOSEPHINE BURUCHARA..9TH INTERESTED PARTY

LORA MOKAYA...10TH INTERESTED PARTY

LUCY MACHERA...11TH INTERESTED PARTY

MARREEIN OCHOLA..12TH INTERESTED PARTY

MILLICENT ONYONYI...13TH INTERESTED PARTY

LILIAN MIGUDA AWICH...14TH INTERESTED PARTY

HAPPYNET ANGASA...15TH INTERESTED PARTY

DIANA OCHOLLA...16TH INTERESTED PARTY

PATRICIA KALUNDU...17TH INTERESTED PARTY

CHRIS MUREITHI...18TH INTERESTED PARTY

SULLIVAN SOI...19TH INTERESTED PARTY

NICO OPIYO...20TH INTERESTED PARTY

THABITA NJALALE...21ST INTERESTED PARTY

LAMECH NYARIKI..22ND INTERESTED PARTY

FRED MWACHI...23RD INTERESTED PARTY

GEOFFREY NYAMASEGE...24TH INTERESTED PARTY

AND

HUMPHREY NGUMA MACHARIA................................1ST *EX PARTE* APPLICANT

GERALD KIRERI ONGORO..2ND *EX PARTE* APPLICANT

RULING

The Parties.

1. The *ex parte* applicants are members of the Nairobi Central Seventh-Day Adventist Church (hereinafter referred to as NCSDAC). They claim that they are entitled and keen to have their Adventists activities in NCSDAC transacted and or managed within the ambit of the legal regime, process and structures as provided for in the Church Manual and working policy of the Seventh-Day Adventist Church.

2. The first and second Respondents are ordained Seventh-Day Adventist Church (SDA) Pastors ministering at the NCSDAC.

3. The third Respondents are the Executive Director, Treasurer and Secretary of the Central Kenya Conference (CKC), an entity that overseas employment of the first and second Respondents.

4.The Interested Parties are members of NCSDAC serving as members of the Nominating Committee whose mandate was to identify and recommend to the Church suitable members for appointment as Church Officers for the year 2019.

Litigation History

5. By a Chamber Summons dated 1st February 2019, the *ex parte* applicants moved this court seeking leave to commence judicial review proceedings for orders of *certiorari* and *prohibition* to quash the Nominating Committees Report dated 26th January 2019 and prohibit the Respondent's and the Interested Parties from presenting or acting upon the said Report.

6. On 7th February 2019, the court (Nyamweya J) granted the *ex parte* applicant's leave to amend their application. The court in addition to issuing directions on filing pleadings, directed the parties to file submissions specifically addressing two issues, namely- whether the applicants had exhausted the fourth Respondents internal disputes resolution mechanism(s), and, whether, the impugned decision and actions by the Respondents and the interested parties are amenable to judicial review.

The reliefs sought

7. The applicants' in their amended application dated **18th** February 2019 seek this court's leave to apply for:-

*i. An order of **Certiorari** against the respondents to quash the Nominating Committee's Report of 26th January 2019 presented for adoption and/or approval by the Church Business Meeting of the NCSDAC scheduled for the Saturday, the 2nd day of February 2019 or any other date and time thereafter.*

ii. An order of Prohibition, prohibiting the respondents and the Interested Parties jointly and severally, their agents, employees, functionaries or persons acting in their name from further presenting or acting upon and or relying on the Nominating Committee's Report of 26th January 2019 presented for adoption and or approval by the Church Business Meeting of the NCSDAC scheduled for the Saturday, the 2nd day of February 2019 or any other date and time thereafter.

iii. An order that the grant of leave operates as stay of the final reading and adoption or acting upon and or relying on the report of the Respondent's Nominating Committee's Report of 26thJanuary 2019 by the Church Business Meeting of the NCSDAC scheduled for Saturday the 2th day of February 2019 or any other date and time thereafter until the hearing and determination of the substantive motion to be filed hereupon.

iv. That the costs of and incidental to this application be provided for.

The Factual Matrix.

8. The application is supported by the Statutory Statement and the verifying affidavit of Gerald Kireki Ongoro, the second applicant herein annexed to the original application and his Supplementary Verifying Affidavit dated 19th February 2019 annexed to the amended application.

9. The applicants state that the first and second Respondents are pastors of the NCSDAC performing both administrative and spiritual duties. The applicants maintain that in the performing the said duties, they are bound to act fairly and lawfully. They aver that the impugned decision affects their rights and fundamental freedoms and those of the church members.

10. The applicants state that the Nominating Committee comprised of the first and second Respondents and Interested Parties, and, its mandate was to identify and propose for appointment office bearers of NCSDAC for the year 2019. They state the said committee abrogated their solemn duty and calling by conducting a sham and flawed nomination exercise tainted with unlawfulness, illegalities, high handedness, bias. They state that the committee violated fair administrative processes and the Church Manual.

11. They state that the first and second Respondents were openly or constructively biased because they were chairpersons of three separate entities, which were accountable to and between each other, thus exposing them to conflict, and, that they exerted their will on the congregation and the *ex parte* applicants in disregard of fairness and justice.

12. In addition, they state that the nominating committee acted in excess of its mandate and powers by introducing new church structures/offices, a mandate preserved for the Church Business Meeting. Further, they state that the nominating committee proceeded to nominate names of persons to serve in the "new offices" which were never discussed and or approved by the church business meeting.

13. The applicants also state that the respondents ignored the members' legitimate concerns and are determined to see the legally and procedurally flawed process endorsed and or approved by the Church Business Meeting with the resultant effect of disenfranchising the membership of the NCSDAC.

14. They also state that during the deliberations at the meeting of the nominating committee, it became evident that the proceedings were steeped in controversy, contradiction and confrontation because the Respondent as the Chairperson of the nominating committee displayed outright bias, negative influence and breach of confidentiality.

Legal foundation of the application.

15. The applicants maintain that the impugned decision violates their rights to dignity, equality and the law including procedures prescribed in the Church Manual. They also state the nominating committee was motivated by extraneous factors and breaching the rules of confidentiality.

16. In addition, the applicants state that the impugned decision limits their rights to associate guaranteed under Article 36(1) (2) of the Constitution, freedom of conscience guaranteed under Article 32 and the right to equal benefit and protection of the law guaranteed under Article 27.

17. They also allege that the first and second Respondents acted *ultra vires* their mandate thus rendering the entire process unfair; and, that their objections were ignored; and, that they have a legitimate expectation that once an objection is raised, it must be dealt with expeditiously, efficiently, lawfully, reasonably and procedurally fair.

18. They also state that the Respondents acted in breach of their right to a fair Administrative process as guaranteed under section 3(1) of the Fair Administrative Action Act[1] (herein after referred to as the FAA).

19. The applicants also state that the affairs of the NCSDAC are largely governed by the Church Manual which outlines the election procedure, hence, the impugned decision was not arrived at in manner that is consistent with the Manual.

First and Second Respondents' Response

20. The first Respondent, Jean Pierre Maiywa, (wrongfully referred to in the pleadings as Maiywo) is a senior pastor of the NCSDAC. He swore the Replying Affidavit dated 6th February 2019 on behalf of himself and the second Respondent. He averred that the applicant has not identified the impugned decision. He also averred that the report of the Nominating Committee is not binding, and it is presented to the membership of the church sitting as the Church Business Committee, which may adopt or reject it.

21. He deposed that the first applicant is a member of the Nominating Committee and that both applicants were present when the Report was read for the first time on 12th January 2019, and that, the report was read on 26th January 2019 and was adopted following an intense discussion and debate. He added that the newly elected officials have since taken up their respective offices while the previous ones vacated their offices. In addition, he deposed that some of the previous officials have taken up new positions while others have declined to continue serving.

22. Pr. Maiywa deposed that there is an alternative remedy available to the applicants, that is, the Church Manual has provisions for escalation of disputes within the organizational hierarchy. He also deposed that during the second reading the applicants never spoke, but they stood up to vote although they walked out with others who declined to have their names recorded for verification purposes.

23. Mr. Maiywa also averred that Adventists are bound by doctrines, teachings, beliefs and instructions as contained in the Church Manual and Church Working Policy. He stated that the Church Manual describes the operation and functions of local churches and their relationship to denominational structures.

24. In addition, he averred that the Church Manual expresses the church's understanding of Christian life, governance and discipline based on biblical principles and the authority of duly assembled General Conference Sessions. He averred that God has ordained that the representatives of His Church from all parts of the Earth, when assembled in a General Conference shall have authority.

25. Further, he deposed that the Church Manual provides that the content of each chapter is of value and is applicable to every church organization, congregation and members and that the standards and practices of the church are based on the principles of the Holy Scriptures. He averred that the manual defines the relationship that exists between the local congregation and the conference or other entities of the Seventh-day Adventist denominational organization, and, resort to court to resolve internal church matters is discouraged.

26. Pr. Maiywa averred that the church is a representative institution with institutional structures from the Local Church, local conference, Union of churches, Union of conferences/Mission and the General Conference and its divisions all of which have defined roles. In particular, he averred that the structure of the local church includes the Church Business Meeting (all members of the Church) and The Church Board comprising of selected leaders of various officials responsible for the day-to-day operations of the Church but always accountable to and subject to the control of the Church Business Meeting.

27. He also averred that the nomination process for the identification and eventual election of the officials of the church is in two stages, the pre-nomination where the church in business meeting appoints a team of members whose number is agreed upon on the floor or selecting them from the business meeting, and, that, the latter method was adopted.

28. He added that at the second stage, it emerged that two members of the 25 member nominating committee were not qualified to sit as they were not members of the Nairobi Central SDA Church, hence, it was resolved they leave, and even without their votes, the majority decision stood. Regarding the new ministries, he averred that the Adventist Muslim Relation was created by the Nominating Committee, the Prayer Ministry and the Zonal prayer cells were already in use, and, the nominating committee only rationalized them by making them departments, while the Media Committee was created by the church last year to take care of the church's new digital platform.

29. Lastly, he averred that as the Nominating Committee was carrying out its functions, unknown to him, there was an active group under the leadership Dr. Kinara,[2] and other elders, which was carrying on an undisclosed agenda to disrupt the process of transition from the previous church board to the current one.

Third Respondents Replying Affidavit

30. Dr. Enock Kinara is sued as the third Respondent in the original application, but his name does not appear in the amended application. This anomaly has not been explained. However, all the parties continued to address him as the third Respondent. In his Replying Affidavit dated 6th February 2019, he described himself as "an outgoing first head elder" of NCSDAC for the period 2017-2018; hence, he was privy to the on goings in the church.

31. He averred that on 7th October 2018, a Special Organizing Committee prepared a report containing proposed names of a Nominating Committee, which was to be tasked with election of Church Officers for the period 2019-2020, and the report was to be presented before the Church Business Meeting /congregation on the 13th October 2018 for approval.

32. He averred that on 11th October 2018, the first Respondent convened the Special Organizing Committee and communicated that he had received complaints from church members to the effect that names for the Nominating Committee members were skewed towards one tribe, because majority of the proposed names were from the Kisii tribe. He averred that this was the first time in the church history that the tribal angle aspect found its way to matters pertaining to the election and appointment of Church Officers.

33. He also deposed that the first Respondent recommended that that the Nominating Committee be reconstituted by allocating slots to members of dominant communities in the church, who are the Kisii and luo communicates, thereby introducing what he termed as the two pillars in the church, namely, the Kisii Pillar and the Luo pillar. He averred that the first Respondent was categorical that the two communities get equal slots in the proposed Nominating Committee. He averred that the elections have never been based on tribe but on three constituencies, namely, Men, Women and Youth.

34. Dr. Kinara averred that the above proposal attracted a big debate. He also averred that the Church Manual does not envisage election or appointment of church officers based on tribal composition but rather on good church standing and competence of members drawn from the three constituencies. He however averred that it is proper for a cosmopolitan church to reflect diversity. He also deposed that noting that the special committee was becoming polarized, he proposed a sub-committee to be formed to look into the divergent views presented by the members and come up with a proposal on how to resolve the impasse.

35. Dr. Kinara averred that the sub-committee comprising of himself, the first Respondent, Elder Pius Mutay, Sister Irene Omari and Samuel Oyombra came up with a proposal that the Nominating Committee slots be divided as follows: Kisii-8 slots, Luos- 8 slots, other communities- 8, and 1 slot to special needs category making a total of 25, as approved by the church.

36. In addition, Dr. Kinara averred that the above proposal was discussed and subjected to a vote, and, the outcome was to have 11 Kisii's, 8 Luo's, 5 other tribes and 1 special needs category in the Nominating Committee which formed the basis of the report that was submitted to the Church Business Meeting on 20th October 2018 which was approved. He further averred that the first Respondent never disclosed to the Business Meeting that an earlier list was cancelled on his directions that the list was not tribally balanced. He also averred that some names were missing from the Register.

37. Dr. Kinara deposed that as per the church traditions, as an outgoing church head elder, he sat in the Nominating Committee without voting rights to offer guidance. He averred that on 21st October 2018, he attended the first meeting of the Nominating Committee in the said capacity, but after the meeting, the first Respondent directed him not to attend subsequent sittings because his presence was not required. He averred that later he learned that differences of opinions arose between the first Respondent and some members of the Nominating Committee who were also elders of the church because of the first Respondents unilateral introduction of new church structures, which he required new officials appointed thereto, but the elders advised against.

38. He further averred that the elders had never discussed or agreed on the new structure. He also averred that he called an elders meeting which confirmed that the said structure was never agreed upon, and proposed that the idea be tabled before the elders for approval and adoption. Additionally, he averred that the elders proposed a team of two to sit with the first Respondent to understand the structures prior to tabling it before the entire elders' council meeting. He added that a meeting of elders council held on 24th November 2018, which he chaired resolved that the first Respondent desists from introducing and implementing the new structures but rather recommend the same to the church business meeting. He also averred that the elders council reiterated its position to the first Respondent on 1stDecember 2018 and asked him to respect the position, but the fist Respondent disregarded the said position, and this prompted them to notify the employer, the Central Kenya Conference (CKC) of the Seventh-Day Adventists to recall the first Respondent immediately.

39. He added that after it became apparent that the employer would not recall the first Respondent, a reconciliatory meeting was held on 5thJanuary 2019 attended by the Respondents and the head elders and two former elders. He deposed that after a long discussion, it was agreed that the nomination exercise, which had polarized the church, be cancelled and a fresh election process be commenced, but later it emerged that there was lack of goodwill on the part of the Respondents to proceed with the cancellation.

40. He further averred that on 23rd January 2019, a meeting attended by 30 elders to resolve the matter agreed that a team of 10 eminent church elders, 5 from the Luo and 5 from the Kisii be formed to resolve the issue. He deposed that the team resolved that a motion to cancel the entire nomination exercise be tabled before the church business committee for approval. He added that the team presented the proposal to the Elders Council meeting on 25thJanuary 2019 under the chair of the first Respondent and approved that the same be tabled before the Business Meeting the following day, and, that, the motion be supported by all the elders during its tabling.

41. He further deposed that on 26thJanuary 2019, the motion was tabled for debate, and that, the first Respondent un procedurally allowed a question from the floor after he had already announced that the debate and contributions had closed, and, that, those in support of the motion walked out in protest and the group that remained inside voted against the motion. He added that the first Respondent used the results of the motion to declare that the list of nominees earlier read had been voted in by virtue of the rejection of the motion.

42. Lastly, he averred that the Report tabled for the second reading was a clear departure from the report tabled during the first meeting as it contained new names, and, a bias towards the Kisii pillar in that not even a single person from the Kisii pillar was appointed as one of the Elders of the Church.

Second Interested Party's Affidavit in support of the application

43. Isaac Ratemo, the second Interested Party, a member of the NCSDAC and the Nominating Committee swore the affidavit filed on 7th February 2019 in support of the application. He stated that the entire process was flawed. He added that the first Respondent introduced a new church structure, necessitating appointment of church officers to the new positions.

44. He averred that because of asking the first Respondent whether the new structure had been approved by the church, he was informed that his name was missing from the register. He added that later it was confirmed that his name was in the register. He stated that he later learnt that the pastor was using the issue of church membership to deny some members the opportunity to serve as church officers.

45. Mr. Ratemo deposed that the pastor conducted the exercise badly and refused to listen to advice from church elders that the exercise be cancelled.

46. In his further Affidavit dated 19thFebruary 2019, Mr. Ratemo averred that the 1st, 2nd, 3rd ,4th,8th,9th,10th,11th, 22nd, and 24th Interested Parties were members of the Nominating Committee, and that the committee was under the chairmanship of the first Respondent. He deposed that the first Respondent is bound to act reasonably and procedurally fair in accordance with the Church Manual, church policy, doctrines, teachings, beliefs and instructions, and, that, their actions must conform with the FAA Act and the Church Manual.

The Fourth Respondent's Replying Affidavit in opposition to the application

47. Pastor Dr. John Kiragu Ngunyi, an ordained Minister of the Seventh-day Adventist Church and the Executive Director of Central Kenya Conference is named as the fourth Respondent in the original application. In the amended application, he is named as the third Respondent. He swore the Replying Affidavit dated 6thFebruary 2019 on behalf of himself, the Secretary, Treasurer Pastor Jeremy Marambi, and Elder Stephen Kioko respectively.

48. He averred that the Church Manual guides the operations of all entities in the Seventh-day Adventist Church. He stated that CKC is prevented from participating in the nomination process for church offices and therefore, it did not take part in any way, and, that, CKC has been wrongly sued in these proceedings, yet there is no wrong attributed to it.

49. He averred that the applicant's motive is to further their personal interests and that the application is a flagrant abuse of court process. He added that the manual provides for a dispute resolution mechanisms, hence, this application offends section 9(2)(3) of the FAA Act. He also averred that the applicants have failed to demonstrate that they have an arguable case to warrant the leave sought.

The 5th, 6th, 7th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and **23rd Interested Party's Replying Affidavit in opposition to the application**

50. Dan Oriko, the 5th Interested Party, and a member of the Nominating Committee whose deliberations and recommendations to the Church Business Meeting are impugned in these proceedings, swore the Replying Affidavit dated 6th March 2019 on behalf of himself and the 6th, 7th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 23rd Interested Parties.

51. He averred that to the best of his knowledge, the first and second Interested Party did not unlawfully interfere with the process of elections as alleged in the application and the affidavits of Isaac Ratemo. He deposed that all procedural interventions made by the Respondents were issued in their capacity as co-chairpersons of the Nominating Committee and were necessitated by, and response to, attempts by the second Interested Party, Isaac Ratemo and a few member of the nomination committee acting in cahoots with him, to proceed contrary to the Church Manual.

52. Referring to Chapter 3 of the Church Manual, (2015), Mr. Oriko averred that there are available, efficient and effective internal appeal mechanisms within the church systems, which the *ex parte* applicants have not exhausted. He also averred that the Church Manual gives primacy to reconciliation. He added that it provides that members should not instigate litigation against any church entity except under circumstances where the church has not provided adequate process for orderly settlement of the grievance, or where the nature of the case is such that it is clearly not within the authority of the church to settle.

53. Mr. Oriko averred that section 9 of the FAA Act forbids the High Court from reviewing decisions prior to exhaustion of alternative remedies, including internal mechanisms for appeal or review including reconciliation, and, that, the doctrine of exhaustion of primary jurisdiction has a constitutional underpinning under Article 159 of the Constitution.

54. He also averred that to the extent that the applicant seeks to stop an event which has already taken place, the suit is barred by the doctrine of mootness, and, that, the application does not disclose a *prima facie* case to warrant the leave sought. He deposed that the nomination process was conducted strictly in accordance with the provisions of the Church Manual. He further averred that the applicants have not supplied particulars of the alleged unlawfulness, illegalities or bias. He also averred that the allegations that new structures were created is untrue and added that the church manual grants the nominating committee broad discretion and added that the Church Manual permits exclusion of persons who are not church members in regular standing. He denied that Isaac Ratemo's name was in the register, and added that he was ineligible to participate in the nomination committee or recommendation to a church office.

55. He added that some members had questionable suitability to serve and in any event, the applicants never raised any objections on the nominated persons. He averred that the *ex parte* applicants' motion to cancel the process was defeated.

56. Further, he averred that the Respondents were entitled to remind the members of the nomination committee to take into account the ethnic diversity in order to reflect the face of the church, and, that, the walkout by some members did not affect the quorum. Further, he deposed that those who were elected have since been ordained to the offices elected and have assumed duties, and if this application is allowed, it will deprive them the said offices without being heard.

57. In addition, he averred that the persons sued cannot effect the orders sought, and, that, the applicant ought to have sued the NCSDAC or its supreme organ the Church Business Meeting that adopted the recommendations. He averred that the court ought to weigh the individual interests pursued by the *ex parte* applicants against the communal interest of the entire church while exercising its discretion. Lastly, he averred that the alleged violations of constitutional rights do not meet the required threshold, and, that this is not a proper case for judicial review since the issues raised are contested.

***Ex parte* applicant's supplementary Affidavit**

58. Gerald Kireki Ongoro, the second *ex parte* applicant swore the supplementary verifying Affidavit dated 19thFebruary 2019 in response to the Replying Affidavits of Jean Pierre Maiywa, Dr. Enock Kinara and Dr. John Kiragu Ngunyi. He averred that in discharging their duties, the Respondents areexpected to act fairly and lawfully, reasonably and procedurally fair and act within the Church Manual, church working policy, the Seventh-day Adventist Church (SDA) Doctrines, teachings, beliefs and instructions.

59. He averred that the dispute was escalated to the elders' council, the pastorate, and later to the Regional Commissioner for mediation, but the dispute was not resolved, making court process inevitable. He also averred that the first Respondent was the designated chair of three separate committees rendering him conflicted and biased, thus, making the internal mechanisms ineffective since it offered no prospect of success.

Fourth respondent is Further Affidavit

60. Pastor Dr. John Kiragu Ngunyi swore the further affidavit dated 27thFebruary 2019 in response to the amended Chamber Summons and the supporting supplementary verifying affidavit of Gerald Kireki Ongoro and the Isaac Ratemo's (second Interested Party's further affidavit) sworn on 19th February 2019. He reiterated his earlier affidavit and averred that the CKC was not a party to the nomination process.

61. He deposed that following a letter received on 9th December 2018 addressed to CKC from Dr. Kinara, they held a meeting at CKC offices with applicants and other persons in order to appreciate the issues raised. He added that the meeting did not include the pastoral team and some elders. He averred that a separate meeting was held with the first and second Respondents and after hearing both parties it was established that the allegations raised by Dr. Kinara were unsubstantiated and untrue, and, the findings were communicated to the third Respondent and the pastors in writing. He averred that the election process was still an ongoing process at the nomination stage and CKC is not allowed to get involved with such a strictly local church affair. He further averred that the manner in which the allegations were conducted was in breach of the Church Manual, which provides for confidentiality of the nomination process.

62. He also averred that the CKC's involvement in the nomination process would have been a violation of the election process as provided in the church manual.

63. Mr. Ngunyi deposed that on 24th December 2018 he received a call from the first Respondent to the effect that the pastor's office at the Central Church had been locked with a chain and a padlock by unknown persons and unknown guards had been brought who were not part of the official security. He stated that he informed the first Respondent to report the matter to the police prompting the Regional Commissioner to summon him for a meeting at his office. He averred that the Regional Commissioner declined to intervene in ecclesiastical matters and specifically he declined to stop the election process, hence, the meeting was not a mediation process.

64. He averred that no other meetings were ever held to resolve the dispute nor has any appeal been made to CKC regarding the said elections as provided in the Church Manual, hence, the applicants filed these proceedings prior to exhausting the laid down dispute resolution mechanism.

First Respondent's further Affidavit

65. Pr. Jean-Pierre Maiywa swore the further affidavit dated 13thMarch 2019 in reply to the amended chamber summons, the further affidavits of Mr. Ongoro, Mr. Ratemo and Dr. Kinara. He reiterated that the report of the Nominating Committee was adopted by the NCSDAC sitting as the Church Business Meeting on 26thJanuary 2019 and the new officials have since taken up their positions.

66. He also averred that in the amended application, the applicants failed to join the NCSDAC and all the newly elected officials of NCSDAC as Respondents, hence, this court cannot grant the reliefs sought. He further averred that this court is ill suited to determine the dispute disclosed in the pleadings, which are mainly contested issues of facts. In addition, he averred that Dr. Kinara adopted disruptive methods to have his way including attempting to use elders to force his way. He stated that while he was away on a mission, Dr. Kinara purported to convene a meeting of elders allied to him to pass a vote of no confidence in the pastor, a move that contravenes the Church Manual. He averred that the following day, the said meeting which was attended by 24 out of 84 elders, purported to write a letter signed by Dr. Kinara to Pr Kiragu communicating their decision. He stated that, using the said letter Dr. Kinara unsuccessfully tried to disrupt a meeting of the nominating committee on 9th December 2018.

67. Pr. Maiywo also averred that Dr. Kinara communicated to the bank cautioning it about his signatory to the Church bank account, but the bank declined to act on the communication. He also averred that on 15th December 2019, Dr. Kinara unsuccessfully tried to persuade the elders to accede to his illegal proposal to cancel the nominations, but the counsel insisted on a meeting between them and the first and second Respondents. He stated that on 19th December 2018, he explained to the elders that Dr. Kinara's request was contrary to the Church Manual.

68. He further averred that on 22nd December 2018, Dr. Kinara, without consultation as required tried to convert worship into a business meeting by reading a raft of resolutions he claimed emanated from elders council. He averred that the said resolutions, which were against the Church Manual, was cancellation of the nominations and extension of his tenure by one year against the standing position that the term is for two years. The other resolutions were removal of the two pastors in violation of the Church Manual, which prohibits the use of the pulpit to propagate any disputed points of doctrine or church procedure and open defiance of conference communication regarding transfer or removal of pastors and cancellation of nominations.

69. He further averred that Dr. Kinara asked for a vote of his motion without any member moving the motion or seconding it, or having discussions, and, that, only about 10 persons raised their hands in a congregation of approximately 4,000 people. He also averred that he asked for a closing prayer without calling for those with a contrary opinion, but the congregation defied his calls for prayer.

70. Pr. Maiywo deposed that the following day Dr. Kinara sent four men and two security guards to lock the church, which was not only illegal but violated the Church Manual against desecration of place of worship. He deposed that the premises was forcefully opened on the orders of the police who arrested the said persons, but, on his intervention, they were released. He added that by a letter dated 28th December 2018, majority of the elders distanced themselves from Dr. Kinara's actions.

71. He also averred that on 29th December 2018, Dr. Kinara and his allies walked to the pulpit with the intention of physically removing him (Pastor) believing that he was going to present the report of the nominations during the worship. He averred that the Regional Commissioner invited all the parties to a meeting on 31st December 2018, but the applicants and their allies declined to attend, only to attend another meeting held on 2nd January 2019 in which it was agreed that all their grievances be resolved within the framework of the Church Manual.

72. Pr. Maiywo also averred that on 5th January 2019, it was agreed that the Nomination report be tabled, and, that, objections could be received. He deposed that despite the agreement, when an attempt was made to present the report on 12th January 2019, a group of elders led by the first applicant stormed the pulpit nearly paralyzing the worship, but the congregation demanded that the report be tabled. He added that the period for objections was opened as per the Church Manual and none of the applicants objected, and the ones who objected alleged that the process was flawed, but they could not explain how they got to know details of a confidential process.

73. He added that on 24th and 25th January 2019 several elders, all allies of Dr. Kinara demanded that he cancels the nominations but he declined on grounds that he had no powers to do so, instead he suggested to them to craft a motion to be presented to the business meeting which was the right forum.

74. He also averred that he was aware that the same group in violation of the requirement in the Church Manual to safe guard unity of the church, held a meeting with others from Kajiado and Nairobi at the Public Service Club to discuss the issues of NCSDAC. He averred that the report was tabled and voted on 26th January 2019, and that the voting was preceded by a detailed report of the reasons why the report was tabled late detailing the activities and intrigues by the applicants and their allies and that names of those who voted and approved the nomination.

75. In addition, he averred that Mr. Ratemo's complaint stems from his exclusion from the Nominating Committee since he was not a member of NCSDAC though he was a serving church official. He deposed that it is only the nominating committee that prepares the list of the proposed officials, and presents it to the Church Business Meeting for approval, and, that, it is not done by the pastors, elders or the Church Board. Further, he averred that after he was excluded from the Nominating Committee, Mr. Ratemo stormed out of the office alleging that his tribe was being disenfranchised. He added that the 1st, 2nd,3rd, 4th, 8th, 9th, 11th and 22nd Interested Parties never appeared before the Nominating Committee to register their objections.

76. In response to Mr. Ongoro's Affidavit, he averred that the church strictly followed the Church Manual in the nomination process, and, that all the objections were handled procedurally. He added that Mr. Ongoro did not tender his objection whether written or verbal, and, that, there was no motion of referral but a motion to cancel the nomination process which could only be addressed by the business meeting. Lastly, he averred that boycotting a vote once it was clear they would not have their way could not change the position.

Issues for determination

77. As stated earlier, the court invited the parties to address two issues, namely, ***whether the applicants had exhausted the fourth Respondents internal disputes resolution mechanism(s)***, and, ***whether, the impugned decision and actions by the Respondents and the interested parties are amenable to judicial review.*** In addition to these two, the parties addressed the question ***whether the application meets the test for the court grant the leave sought to institute judicial review proceedings.***

78. I will address the above three issues sequentially.

a. Whether the applicants had exhausted the fourth Respondents internal disputes resolution mechanism(s),

79. Differently put, this issue is an invitation to this court to determine whether this court is divested of jurisdiction on grounds that the suit offends the doctrine of exhaustion of internal dispute resolution mechanism.

80. In his submissions, the applicants' counsel argued that the third Respondent[3] and, the 1st, 2nd,3rd,4th, 8th, 9th,10th,11th, 22nd and 24th Interested Parties deposed in their respective affidavits that objections to the nomination exercise were raised and brought to the attention of the presiding officer, namely, the first Respondent. He argued that the objectors were never accorded an opportunity to present their objections, and, that the matter was escalated to the leadership of the fourth Respondent.[4] In his view, the dispute was subjected to the internal mechanism for resolution as provided for in the Church Manual.

81. He further submitted that the fourth Respondent stated in writing that the election was a local church matter for which it had no role to play. To buttress his argument, he cited *Geoffrey Asanyo & Another v John Kiragu Ngunyi & 2 Others**[5]*** where the court stated that elections whether church or civic, are contestable issues and if the church is to be fair and to be seen to be fair to all the parties, it must have a very elaborate mechanism for resolving election disputes with an appeals structure. The court in the said case found that the dispute before it could be adjudicated by the court.

82. SHe also cited *Republic v Kenyatta University Ex parte Ochieng Orwa Dominic and 7 Others*[6] for the proposition that an applicant must demonstrate exceptional circumstances exempting it from the obligation to exhaust internal remedy before invoking the jurisdiction of the court. He argued that the internal mechanisms were invoked by way of objections to which were never heard. He added that even if an appeal was to be preferred to the fourth Respondent, it had already expressed an opinion on the matter. He further argued that the internal remedy would not be efficacious to address the breach of fundamental rights. In addition, he cited the possibility of objections on any appeals being presided over by the first Respondent, hence, a possibility of conflict of interests. Lastly, he contended that there is no provision for procedures in the Church Manual.

83. The applicants' position was supported by the 1st,2nd,3rd,4th,8th,9th,10th,11th,22nd and 24th Interested Parties Advocate. He argued that the matter was escalated to the NCSDAC, which wrote stating that the issue in question was a local church affair; hence, it could not intervene and further argued that the Church Manual does not oust this court's jurisdiction. To buttress his argument, he cited *Geoffrey Asanyo & Another v John Ngunyi & 2 Others*.

84. Counsel also argued that there are exceptions to the exhaustion principle[7] and urged the court to find that the forum would not address the dispute at hand because the fourth Respondent has already expressed its opinion on the mater. He also argued that the fourth Respondent sought the intervention of the County Commissioner to resolve the issue, and, that the mechanism would not produce the desired result and lastly, there is no provision and procedures for addressing disputes as per the local Church Manual.

85. The first and Second Respondent's counsel submitted that the Church Manual has provisions for escalation of disputes within the organizational hierarchy. He referred to section 9(2) of the FAA Act and cited *Republic v National Environment Management Authority*,[8] *Bethwell Allan Omondi v Telkom (K) Ltd (Founder) & 9 Others,*[9]*Turkana County Government & 20 Others v Attorney General & Others*[10] and *Speaker of National Assembly v Njenga Karume*[11] for the holding that where there is an alternative dispute resolution mechanism, it must be exhausted.

86. The fourth Respondent's counsel cited *Night Rose Cosmetics (1972) Ltd v Nairobi County Government and two Others*[12] which construed section 9(2) of the FAA Act[13] as mandatory. Counsel also relied on *Charles Lutah v Anglican Church of Kenya*[14] in which the court held that a petition had been filed in court prematurely after surpassing the dispute resolution mechanism.

87. The 5th, 6th, 7th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 23rd Advocate opposing the application submitted that this court is divested of jurisdiction under the doctrine of exhaustion of remedies. He argued that section 9(2) of the FAA Act derived from Article 47 of the Constitution forbids the High Court from reviewing decisions prior to exhaustion of alternative remedies unless a party applies for exemption under section 9(4) of the Act. To buttress his argument, he relied on *Republic v Kenya Revenue Authority, Commissioner for Investigations and Enforcement Department ex parte Centrica Investments**[15]**, which* held that the said provision is couched in mandatory terms. He argued that there are available, efficient and effective internal appeal mechanisms within the church system as stipulated in chapter 3 of the Church Manual.

88. The starting point in determining this issue is the Church Manual. Annexed to the second applicant's supplementary affidavit dated 19th February 2019 and marked GKO-5 is a copy of the Seventh-Day Adventist Church Manual, a document that describes the operation and functions of local churches and their relationship to denominational structures in which they hold membership. It expresses the Church's understanding of Christian life and church governance and discipline based on biblical principles and the authority of duly assembled General Conference Sessions. It *inter alia* prescribes the standards and practices of the church based on the principles of the Holy Scriptures. The principles are to be followed in all matters pertaining to the administration and operation of local churches. My understanding of the respective party's position is that it is common ground that the Church Manual governs the operations of the church. I will proceed from this premise.

89. Regarding resolution of disputes, chapter 3 of the Church Manual is relevant. It provides that *"when differences arise in or between churches and conferences or institutions, matters that are not mutually resolved may be appealed to the next higher organization. If the matter does not get resolved at this level, the aggrieved entity may appeal to successively higher levels of organization…"*

90. My understanding of the submissions by the contestants is that they both agree to the existence of a dispute resolution mechanism. The applicants' and the interested parties supporting the application argument, as I understood it is three fold. *One,* they argue they exhausted the mechanism and even cite a meeting before the Regional Commissioner, who incidentally is not an organ of the church. This in my view cannot be the forum contemplated in the Church Manual. The police involvement was triggered by complaint about the unauthorized closure of the church premises and posting of guards.

91. The applicants also argue that by presenting objections, which were not considered, they exhausted the mechanism. In all fairness, this cannot be the exhaustion referred to in the Church Manual, which includes escalating a dispute to the highest level.

92. They also argue that even if they appealed to the fourth Respondent, (the third Respondent in the amended application) he was already conflicted since had already taken a position that he cannot interfere with a local church process. They also argue that he was already biased, and by virtue of his position, he sat in other committees which compromised his impartiality. This argument sounds attractive. However, it falls on two fronts. *First,* it was possible to file a complaint and apply with cogent reasons for a members or members of the forum to recuse themselves, and, if dissatisfied with the decision, escalate it to the highest level. *Second*, such a ground it valid, can only be useful in an application to the court for exemption to the exhaustion requirement discussed in detail below.

93. It was argued that the said mechanism could not offer an effective remedy since they are citing violation of rights. Again, this argument looks attractive. But it fails on the ground that it can be a ground to support an application for exemption under exceptional circumstances, which I will address shortly. In any event, the applicants will be required to demonstrate that the grievances raise constitutional questions to warrant invoking court's jurisdiction. It is not enough to allege violation of constitutional rights. A constitutional question is an issue whose resolution requires the interpretation of a constitutional provision rather than that of a statute,[16] or in this matter the Church Manual. The issues raised in this case can be resolved by interpreting the facts and the Church Manual. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.[17] No argument to that effect was made before me nor do I find any. The invocation of violation of constitutional rights in this case is inappropriate.

94. The Respondents and Interested Parties opposing the application took a diametrically opposed position, which is, the applicants never exhausted the remedy, and hence this suit ought to be struck off.

95. 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. There are numerous decisions by our superior courts holding that this doctrine is now of esteemed juridical lineage in Kenya[18]as was felicitously stated by the Court of Appeal[19] in *Speaker of National Assembly vs Karume.*[20]

96. *Speaker of National Assembly vs Karume* (supra) was decided before the promulgation of 2010 Constitution. However, numerous Post-2010 court decisions have found the reasoning sound and adopted. Many post 2010 decisions have provided justification and rationale for the doctrine of exhaustion of remedies under the 2010 Constitution.[21] The following decisions will attest to this. In *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 others,*[22] the Court of Appeal provided the constitutional rationale and basis for the doctrine in the following words:-

> *"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.*"

97. In the *Matter of the Mui Coal Basin Local Community,**[23]*** the High Court stated the rationale for the doctrine in the following terms:-

> *"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..."*

98. From case law, two principles emerge. *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 polycentricism of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[24]*Second,* in exceptional circumstances, the court may find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

99. It is not in dispute that the Church Manual to which all adherents of the Seventh-Day Adventist Church subscribe to provides for a dispute resolution mechanism. The dispute emanated from the composition of the Nomination Committee, the subsequent nomination of the office bearers, and the adoption of the committees report. At the center of the dispute is elections. Irregularities were alleged in the manner the elections were held. There is no argument before me that the dispute fall outside the mandate of the dispute resolution forum(s) created by the Church Manual.

100. The question that requires further interrogation is whether the reasons cited by the applicants meet the exceptional circumstances requirement test. The applicants' counsel cited alleged violation of Articles 22, 27, 32, 36 and 47 of the Constitution and the F AA Act. This argument fails on two fronts. *First*, the FAA Act flows from Article 47 of the Constitution; hence, it has a constitutional underpinning. One cannon of constitutional construction is that provisions of the Constitution should to be construed in a holistic manner. As we construe the above provisions, one must bear in mind the provisions of Article 159 (c) of the Constitution, which provides for alternative dispute resolution.

101. More important, for a litigant to qualify for exemption to the exhaustion requirement, he must apply for exemption from the court under section 9(4) of the FAA Act and demonstrate the existence of exceptional circumstances. Section 9 (2) of the FAA Act 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*.

102. Also relevant is section 9(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 an applicant shall first exhaust such remedy before instituting proceedings under sub-section **(1).***

103. The word *shall* in the above provisions is worth noting. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[25]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[26] 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. This is because 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.

104. The duty of the court is 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. 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. I have stated in several decisions that 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.

105. It is established jurisprudence that 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.[27] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[28] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

106. A literal and 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.

107. What constitutes exceptional circumstances depends on the facts of each case[29] and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. The FAA Act[30] is heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance. I find that the following points from a leading South African decision relevant:-[31]

> *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.*

108. Perhaps, I can emphasize that 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.[32] These requirements have not been shown to exist in this case.

109. It is also important to point out that the FAA Act does not define 'exceptional circumstances.' However, this court 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. In all fairness, the reasons cited by the applicant cannot pass this elementary test.

110. It may be correct to acknowledge that 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.[33] Again, the applicants failed to distinguish their case from the disputes contemplated under the Church Manual. As stated earlier, it's not sufficient to cite constitutional provisions. The grievance must present a constitutional question that requires immediate court intervention.

111. 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. Differently put, the applicant's were under a duty to establish that the circumstances of this case are unique, very rare and fall outside the normal run expected in such disputes. A look at the grievances cited does not reveal anything rare, unique or outside leadership wrangles in such associations or election disputes which the mechanism cannot resolve under the Church Manual.

112. In any event, there was no argument before me that the appellate forum created by the Church Manual has developed a rigid policy, which renders the requirement for exhaustion futile. It has not been established that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the forum and the facts of this case suggests otherwise. It has not been shown that the mechanism is not effective nor has it been demonstrated that the *ex parte* applicant cannot obtain an effective remedy from the mechanism.

113. The second requirement under section 9(4) and upon which this case finally collapses is that on application by the applicant, the court may grant an exemption. My reading of the law is that 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 FAA Act. 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.[34] Section 9(4) of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances. No such application was made in this case before approaching the court.

114. The law as it stands is that Section 9(4) of the FAA Act postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine.

115. As demonstrated in the next issue, the impugned decision constitutes an administrative action as defined in section **2** of the FAA Act. It follows that 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.[35]

116. 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. 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.

117. The other 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.

118. The next question is whether the dispute resolution mechanism established under the Church Manual is competent to resolve the issues raised in this application. No serious argument was advanced before me to challenge the jurisdiction of the said mechanism to entertain the dispute. As concluded earlier, before me is a dispute between church members triggered by a disputed composition of a nominating committee, a nomination process and subsequent adoption of a report and election of Church Officials. To me this is a dispute appealable as provided in the Church Manual.

119. The above discussion leads me to an irresistible conclusion that this case offends section 9 (2) of the FAA Act. The applicants did not apply for an exemption, as the law requires nor have they satisfied the exceptional circumstances requirement under section 9(4) of the FAA Act. I find and hold that the applicant's application offends the doctrine of exhaustion of available remedies. Having so found, it is my conclusion that this court is divested of jurisdiction on account of the doctrine of exhaustion of internal remedies. On this ground, the applicant's application fails.

120. Having so concluded, I must point out that I am acutely alive that under section 9(4) of the FAA Act, the court may upon finding that a litigant has not exhausted the available dispute resolution mechanism remit back the case to the forum for the party to exhaust the mechanism. However, in the circumstances of this case, remitting the dispute back to the forum(s) created by the Church Manual will not serve any utilitarian purpose. This is because the persons nominated have since assumed office. They are not parties in this case and this court cannot properly directing itself to the law, grant any orders that will adversely affect persons who are not parties to the dispute before it.

121. Remitting the case back to the dispute resolution mechanism would inevitably amount to divesting all the persons who were elected the positions they are currently serving. The successful candidates assumed their respective positions. Certain rights have accrued in their favour. A determination that invalidates their nomination and election will deprive them their positions without giving them an opportunity to be heard.

122. In my view, the said persons were necessary parties to these proceedings. Accrued rights cannot be taken away[36] even by a judicial pronouncement without affording the affected persons the opportunity of being heard. Such a decision will have been arrived at in total breach of the rules of natural justice, and it would be unconstitutional and a mockery of justice. The Supreme Court of India in two celebrated cases settled the law in cases of this nature.[37] It was held, if a person challenges a selection process, the successful candidates or at least some of them are necessary parties. A person or a body becomes a necessary party if he is entitled in law to defend the orders sought.

The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum. The principle *audi alteram partem* has its own sanctity. That apart, a person or a body must have a legal right or right in law to defend or assail.

123. I find it appropriate to refer to the principle of natural justice as enunciated by the Supreme Court of India in.[38] I may profitably reproduce the same here below:-

> "*Natural justice has been variously defined. It is another name for common sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."*

And again:-

> "*Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed there under. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance...."*

124. The concept and doctrine of Principles of Natural Justice has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.

125. The Supreme Court of India put it succinctly when it stated:-[39]

> "*No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the… Code of Civil Procedure,…. provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner-plaintiff…..More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post..."*

126. The decisions cited above are graphically clear that where an election, selection or a nomination process is under challenge, there can be no shadow of doubt that the successful persons are necessary parties. As concluded above, the resolution of this issue determines this case, but, my finding notwithstanding, I will proceed to address the other issues.

b. Whether the applicant's case reveals a dispute amenable to Judicial Review

127. The *ex parte* applicants' counsel submitted that the applicants' case centres on infringement of their fundamental rights during the process of the elections of church officials. Counsel cited violation of Articles 22, 27, 32, 36 and 47 of the Constitution and sections 2(ii), 3(a)(c),4(1),7(1)(a),2(b)(c)(c)(d))f)(g)(h)(i))(j)(k)(l)(m)(n)(o),8,9&10 of the FAA Act. Citing *James Gacheru Kariuki & 22 Others v Kiambu County Assembly & 3 Others*[40] and *Re-ex parte President of the Republic of South Africa and Others*, counsel argued that judicial Review remedies have been entrenched in the Constitution and that the common law principles that provided for judicial review have been subsumed in the Constitution.

128. In addition, counsel cited Prof. James Gathii[41] and argued that the *ex parte* applicants brought these proceedings pursuant to Article 47 of the Constitution. Citing the definition of an administrative Action in section 2 of the FAA Act, counsel argued that the applicants have demonstrated that the impugned action is an administrative decision, that it infringed their rights and that the applicants are challenging the procedural improprieties, irregularities and malpractices of the impugned decision. He also cited *Geofrey Asanyo & Another v John Kiragu Ngunyi & 2 Others* (supra) for the observation that there is sufficient precedent to show that courts have determined such disputes while encouraging parties to resolve them amicably. He insisted that the applicants' alleged infringement of their rights and freedoms disclose a dispute that is amenable to judicial review.

129. The 1st,2nd,3rd,4th,8th,9th,10th,11th,22nd and 24th Interested Parties counsel supporting the application cited *Republic v Kenyatta University ex parte Ochieng Orwa Dominick and 7 Others*[42] in which the court held that Judicial Review is now entrenched in the Constitution and that the scope of judicial review has now been expanded. He also argued that religious matters /administrative actions by religious leaders are amenable to judicial review. To buttress his argument, he cited *East African Pentecostal Registered Trustees and*

1754 Others v Samuel Mugura Henry and 4 Others[43] in which the court held that where matters affecting legal rights are in issue or matters affecting Bill of Rights, courts cannot shut their eyes on such matters, and, that, the impugned decision infringes on their right to worship.

130. The first and second Respondent's counsel argued that there is an attempt by the applicant to bring its case under the FAA Act, and urged that this court cannot go to the nitty gritty of church doctrines, which is what is at the heart of the complaint. He cited *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and another,*[44] for the proposition that the general position taken by the judiciary is that matters relating to internal rules and governance of religious associations do not form part of its jurisdiction.

131. Counsel also cited *Highwood Congregation v Wall*[45]for the holding that review of decisions of voluntary associations, including religious groups, based on procedural fairness is limited for three reasons; *first*, judicial review is limited to public decision makers. *Two*, not all decisions are amenable to superior courts supervisory jurisdiction. Judicial Review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. *Third,* even where judicial review is available, the court will only consider only those issues that are justiciable.

132. He also cited *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston* ***[46]*** which held that the courts will interfere in the internal affairs of a self-governing organization in only two situations-where the organizations internal processes are unfair or do not meet the requirements of natural justice, and, where the aggrieved party has exhausted the organizations internal process.

133. Counsel for the fourth Respondent argued that ecclesiastical matters are amenable to judicial review. He relied *Republic v Registrar General & Another ex parte James Papa*[47] and *Republic v Registrar of Societies & 5 Others ex parte Ndungu Ngángá & 3 Others*[48] in which the court held that it will only interfere with internal church affairs if the constitution of the church is not followed.

134. In addressing the issue under consideration, it is important to bear in mind that the Constitution of Kenya, 2010, fundamentally changed the legal landscape in this country. Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the FAA Act. Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

135. The test is in the above definition is whether the impugned decision is an administrative action within the above definition and whether it affects the rights of the applicants.

136. From the submissions made by the parties, I find no contest that that this court has jurisdiction, in the wider sense, to superintend over the matter at hand in as far as a breach of the Bill of Rights is alleged. In fact, some of the authorities cited by the Respondents and Interested Parties opposing the application support this position. I also agree with the position that courts should not intervene in ecclesiastical matters. What appears to be in contention is whether the court has jurisdiction in the narrower sense, that is, power to enter into an inquiry into internal disputes among church members, or between the members and the church leadership, or as in this case, disputes arising from church elections. Differently put, whether courts are excluded from scrutinizing church disputes where violation of constitutional rights is alleged.

137. The right to access justice is guaranteed under Articles 48 of the Constitution. The right to enforce the Bill of Rights is protected under Article 22. The the authority of the court to uphold and enforce the Bill of Rights is provided under 23. The question that arises is whether a citizen citing violation or threat of violation of rights arising from a church dispute can obtain judicial review orders.

138. It is beyond argument that Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[49] Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations.

139. Order 53 of the Civil Procedure Rules, 2010 flows from sections 8 and 9 of the Law Reform Act.[50] These provisions are borrowed from the common law. The provisions provide for procedure for applying for judicial review and ground for judicial review. Section 12 of the FAA Act has imported these common law principles into the act.

140. It is also important to mention that Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others* ***[51]*** that *"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."* The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

141. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First,* parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights.

142. Our Constitution zealously protects the Bill of Rights and recognizes that a public body, or a private entity or even a citizen may violate fundamental rights. **Article 21(1)** spells out the duty of all persons to protect the Bill of Rights in the following terms: *"It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights."*

143. Confronted with the issue whether only public entities could be said to be in violation of fundamental rights, the court in *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*,[52] *observed as follows at para. 55;*

> "*Looking at the provisions of Articles 2(1), 19(3) and 20(1), I am certain that the Bill of Rights can be enforced as against a private citizen, a public or a government entity… The Bill of Rights is therefore not necessarily limited to a State Organ…"*

144. In *Isaac Ngugi v Nairobi Hospital & 3 Others,* [53]the Court had this to say:-

> "…*The Bill of Rights applies to all law and binds all State organs and all persons." The term 'person' includes a company, association or other body of persons whether incorporated or not such as the hospital, in accordance with Article 260 …"*

145. The South African Constitutional Court in *Motala & Another vs University of Natal*[54] remarked that:-

> "*It goes without saying that many of the entrenched rights are, by their very nature, exclusively 'vertical' in their operation. But many of them are, in my view, not. For the purpose of furnishing these reasons I need only say that I consider that the rights entrenched in sections 8(1), 8(2) and 32, which are the only entrenched rights in issue before me, are enforceable not only against the state or its organs as defined, but also against individuals, natural or juristic, who may be disposed to threaten them or interfere with the exercise of them."*

146. It must be obvious by now that the respondents cannot be allowed to wave a private individual card to bar this court, when properly moved for breach of fundamental rights and freedoms. It cannot be safe, in a progressive democratic society, to arrive at a finding that allows private entities to hide behind the cloak of 'privacy' to escape constitutional accountability. I think that it would be to accord a narrow, constricted interpretation to our supreme law, contrary to the canons of constitutional interpretation that have for ages infused our judicial system and which now find constitutional sanction under Article 259 to accede to such a proposition.[55]

147. *Second*, the right to access the court is now constitutionally guaranteed. All that an applicant is required to plead is a threat or violation of as Constitutional right. The grounds for judicial review are now enumerated in section 7 of the FAA. At this point, the court is not concerned with whether the case will succeed. It is a question of whether or not an applicant has the right to approach the court and an invitation to the court to review the legality or otherwise of the impugned decision.

148. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). *Fourth*, section **7** of the FAA provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

149. It is my view that court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public and private authorities involving a challenge to the legal validity of the decision.[56] I have severally stated that time has come for our courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

150. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

151. It is therefore my finding that all that an applicant is required to do is to demonstrate that the impugned decision violates or threatens to violate the Bill of Rights or violation of the Constitution. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail. Suffice to say that the *ex parte* applicants have in the recitals in the heading to their application invoked Articles 21 (1), 23 (3) (f), 25 (c), 27 (1), 47 (1), 49 (1) (d) & 50 (2) of the Constitution. They have pleaded that the impugned decision impinges of their fundamental rights. To me, such allegations are grounds for judicial review.

152. It is my conclusion that the impugned decision falls within the ambit of an administrative decision as defined section **2** of the FAA Act, a legislation that was enacted to give effect to Article **47** of the Constitution. To that extent, the application is well grounded on the law and the impugned decision is amenable to judicial review. However, as found in the first issue, the impugned decision/action being an administrative action within the meaning of section 2 of the FAA Act, the provisions of section 9(2)(3)(4) of the act apply. Hence, failure to exhaust the internal dispute resolution mechanism divests this court jurisdiction.

153. However, as explained in the next issue, the court can only review allegations of violation of fundamental rights or breach of the Church's Constitution but not ecclesiastical matters.

c. Whether the applicants have established a case for the court to grant the leave sought

154. Despite my finding of the first issue, I will proceed to determine the question whether the applicants established grounds for the leave sought because all the parties spared a lot of time an energy on this issue even though it was not among the issues the court directed the parties to address. However, it is understandable why the parties in their wisdom opted to address this issue because leaving it un addressed would have created a gap had the case survived the first issue.

155. The *ex parte* applicants' counsel submitted that the applicants have satisfied the test for grant of leave. He cited *County Government of Nyeri & Another v John Wachiuri t/a Githakwa Graceland & Wandumbi Bar & 50 Others*[57] for the holding that at the leave stage an applicant must show that he has sufficient interest in the matter, and, that, he is affected by the decision. He argued that the applicants have demonstrated that their right to worship has been infringed by the first and second Respondents, and that, the decision suffers from illegality, irrationality and unfairness.

156. The 1st,2nd,3rd,4th,8th,9th,10th,11th,22nd and 24th Interested Parties' Advocates argued that in a case citing violation of constitutional rights leave is not a pre-requite.

157. The first and second Respondent's advocate urged the court to decline the leave sought citing the following grounds that the principle party NCSDAC whose decisions and actions are challenged has not been enjoined in this case. He also argued that the applicants have not sued the first and second Respondents as representatives of NCSDAC. (In my view, these two grounds are not fatal omissions because they are curable by way of amendment).

158. *Third*, counsel argued the prayers sought have been overtaken by events, in that the prohibition seeks to stop presentation and reliance of a report which has already been acted upon. Citing *Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge*[58] counsel argued that an order of *prohibition* looks into the future and cannot be used to undo what has already happened. Counsel further argued that an order of *certiorari* will not serve any functional utility since the report has already been considered and adopted by NCSDAC, and the new office bearers have since taken up their respective offices. Lastly, counsel argued that judicial review is ill equipped to determine contested issues of facts, which require oral evidence to be proved.[59]

159. On the question of leave, the fourth Respondent's Advocate relied on *Sylvana M. Ntaryamira v Allen W Gichuhi & Another*[60] which held that the purpose of leave is to exclude frivolous applications and argued that the applicants application was filed prematurely.

160. The 5th, 6th, 7th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 23rd Advocates submitted that the application has been overtaken by events and cited *Evans Kidero v Speaker Nairobi City County Assembly Another*[61] for the holding that a court does not decide moot, hypothetical or academic issues. He also submitted that leave should not be granted where facts are contested and or where the facts do not support the application for leave. He cited *Kenya Revenue Authority & 2 Others v Darasa Investments Limited*[62]where the Court of Appeal held that judicial review remedies are not available in matters where facts are disputed.

161. The importance of obtaining leave in a Judicial Review application was eloquently stated by **Waki J** (as he then was) in the case of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others*[63] cited by the Respondent's counsel where the learned Judge said:-

> *" is to eliminate at an early stage any applications for judicial review which are either <u>frivolous, vexatious or hopeless</u> and secondly <u>to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration</u>. The requirement that leave must be obtained before making an application for judicial review is designed <u>to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived</u>.."(Emphasis added)*

162. In *Meixner & Another vs A.G,*[64] it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review <u>with a view to filtering frivolous applications</u> and <u>the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case.</u> Thus, the first step in the Judicial Review procedure involves the mandatory **<u>"leave stage."</u>** At this stage, an application for leave to bring Judicial Review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*.

163. The above decisions and the jurisprudence on the question of grant of leave represents the correct legal position. However, the cases cited were determined before the promulgation of the 2010 Constitution. Order **53** of the Civil Procedure Rules, 2010, is borrowed from Sections **8** and **9** of the Law Reform Act.[65]These provisions are premised on the common law Jurisdiction governing Judicial Review remedies and procedure for applying for Judicial Review orders.

164. The question is, whether under the 2010 Constitution, a person requires leave to approach the court. The entrenchment of the right to access the court in the Constitution opened the doors to access justice. This is captured by the phrase *"Justice is open to all, like the Ritz Hotel*"[66]attributed to a 19th Century jurist. Article **22** of the Constitution guarantees the right to institute court proceedings to enforce the Bill of Rights. Article **23** grants the court the authority to uphold and enforce the Bill of Rights.

165. Article **48** guarantees the right to access court while Article **258** provides that every person has a right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. I need not mention the supremacy of the Constitution over all other laws and its binding nature decreed in Article **2.**

166. Additionally, Article **47** provides for the right to a fair Administrative Action. To give effect to Article **47**, Parliament enacted the Fair Administrative Action Act.[67] Section **2** of the act defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Article **23 (3)** provides the remedies the Court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article **22,** the court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation

and *an order of Judicial Review*.

167. Considering the above constitutional provisions and in particular the right to access justice, the question that arises is whether a citizen citing violation of constitutional rights or challenging an administrative action or a decision requires the leave of the court to apply for Judicial Review Orders. Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that:- *(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."*

168. All laws must conform to the Constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act[68] and Order **53** of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed[69] *"All statutes must be interpreted through the prism of the Bill of Rights."* This statement is true of decisions made by public or private bodies. The resultant decision must be interpreted through the prism of Article **47** of the Constitution and the FAA Act.

169. It is correct to state that Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where it held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others* (Supra) where the court emphasized that there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

170. The right to access the court is now constitutionally guaranteed. This makes the requirement for leave unnecessary. An order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3) (f). As stated earlier, Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the Courts to control the exercise of public power are now regulated by the Constitution.

171. The right to approach the court received a seal of constitutional approval, courtesy of Article **48** of the Constitution. This in my view rendered provisions of the law that require a litigant to seeks courts leave to commence Judicial Review proceedings obsolete. I hoist high the constitutional provisions cited above which guarantee access to justice. Accordingly, I am unable to uphold the argument that the applicant has not established grounds for the court to grant them the leave sought, because Articles 22, 23, 48 and 258 of the Constitution do not require a person to seek courts leave before approaching the court.

Disposition

172. Having held that the applicants failed to exhaust the dispute resolution mechanism provided under the Church Manual, the conclusions becomes irresistible that this suit offends the provisions of section 9 (2) of the Fair Administrative Action Act and the doctrine of exhaustion of remedies.

173. The upshot is that the *ex parte* applicants' amended application dated **18th** February 2019 is hereby dismissed with no orders as to costs.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this 8th day July of 2019.

John M. Mativo

Judge.

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[1] Act No. 4 of 2015.

[2] NOTE: Dr. Kinara was named as the third Respondent in the original application, but his name was omitted in the amended application.

[3] The third Respondent, Dr. Kinara only appears in the original application. His name was not included in the amended application.

[4] NOTE: There is no fourth Respondent in the amended application. This confusion was never explained.

[5] HCCC No. 317 of 2015.

[6] {2018} e KLR.

[7] Citing *Republic v Kenyatta University Ex parte Ochieng Orwa Dominic & 7 Others* {2018} e KLR.

[8] {2011} e KLR.

[9] {2017} e KLR.

[10] {2016} e KLR.

[11] {2008} 1 KLR 425. Counsel also cited *Damian Belfonte v The Attorney General of Trinidad and Tobago* CA 84 of 2004, *Republic v Kenyatta University ex parte Ochieng Orwa Domnick & 7 Others* {2018} e KLR and *Republic v Kenya Revenue Authority, Commissioner Ex parte Keycorp Real Advisory Limited* {2019}e KLR.

[12] {2018} e KLR.

[13] Act No. 4 of 2015.

[14] {2017} e KLR.

[15] {2019} eKLR.

[16]http://www.yourdictionary.com/constitutional-question.

[17]Justice Langa in *Minister of Safety & Security v Luiters*, {2007} 28 ILJ 133 (CC).

[18] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[19] Ibid.

[20] {1992} KLR 21.

[21] Ibid.

[22] {2015} eKLR.

[23] {2015} eKLR.

[24] Ibid.

[25]*Dr Sanjeev Kumar Tiwari*, *Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[26] Ibid.

[27] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[28] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[29] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[30] Act No. 4 of 2015.

[31] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[32]See *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)*2010 (4) SA 327 (CC) para 39, Mokgoro J

[33] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[34] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[35] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[36]*Railway Board v. C.R. Rangadhamaiah* {1997)} 6 SCC 623

[37]*Prabodh Verma vs. State of U.P* {1984} 4 SCC 251 and *Kumar Dingal vs. State of W.B* {2009} 1 SCC 768

[38] *Canara Bank vs. Debasis Das* {2003} 4 SCC 557

[39]In *J.S. Yadav vs State of U.P. & Anr*. {2011} 6 SCC 570, at paragraph 31.

[40] {2017}e KLR.

[41]The Wing-Tat Lee Chair of International Law at Loyala University Chicago School of Law, in his book, *The Contested Empowerment of Kenya's Judiciary 2010-2015: A Historical Institutional Analysis*.

[42] JR App No. 201 of 2018.

[43] {2015} e KLR.

[44] {2015}ZACC 35.

[45] [2018} 1 SCE 750.

[46] 2011 ONCA 728.

[47] {2014} e KLR.

[48] {2018} e KLR.

[49] Article 47(1) of the Constitution of Kenya, 2010

[50] Cap 26, Laws of Kenya.

[51] *2000 (2) SA 674 (CC) at 33.*

[52] Petition No. 65 of 2010 {2013} eKLR.

[53] Nairobi Petition No. 407 of 2012 {2013} eKLR.

[54]{1995} 3 BCLR 374

[55] See constitutional petition number 160 of 2013

[56] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[57] {2016} e KLR.

[58] Civil App No. 266 of 1996.

[59] *Seventh Day Adventist Church East Africa Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another* {2014}e KLR and *R v West Sussex County Council ex parte Wenman & Others{1993} ALR 145 also 24 HLR.*

[60]{2016}e KLR.

[61] {2018} e KLR.

[62] {2018} e KLR.

[63] Mombasa HCMISC APP No 384 of 1996.

[64]{2005} 1 KLR 189

[65] Cap 26, Laws of Kenya.

[66] Sir James Matthew, 19th Century jurist.

[67] Act No. 4 of 2015.

[68] Cap 26, Laws of Kenya.

[69]Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and [2000]