



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 4 OF 2019**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION AND CERTIORARI AGAINST THE GANZE NG CDF COMMITTEE AND MP GANZE TOWNSHIP**

**AND**

**IN THE MATTER OF: THE CIVIL PROCEDURE RULES, THE NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND ACT 30 OF 2015 AND REGULATIONS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PHELISTER SAUTI KAHINDI.....1<sup>ST</sup> RESPONDENT**

**ONESMUS DZOMBO.....2<sup>ND</sup> RESPONDENT**

**ONESMUS FOLLENI.....3<sup>RD</sup> RESPONDENT**

**JIMMY JOHN KITSAO.....4<sup>TH</sup> RESPONDENT**

**PURITY KACHE NGOWA.....5<sup>TH</sup> RESPONDENT**

**REHEMA CHARO.....6<sup>TH</sup> RESPONDENT**

**TEDDY NGUMBAO MWAMBIRE.....7<sup>TH</sup> RESPONDENT**

**GANZE CONSTITUENCY NG-CDF COMMITTEE.....8<sup>TH</sup> RESPONDENT**

**AND**

**PATRICK KAZUNGU NGUMBAO.....EX-PARTE APPLICANT**

**Coram: Mwaure & Mwaure Waihiga Advocates for the Ex-parte Applicant**

**MMA Advocates LLP for the Respondents**

**JUDGEMENT**

**Introduction**

1. The Ex-parte applicant, by an application dated 11<sup>th</sup> June 2019 and accompanied by the Statutory Statement and Affidavit of Patrick Kazungu Ngumbao all dated and filed on the same day sought for:

- a. The application to be treated as urgent and for leave to be granted to the ex-parte applicant to institute judicial review proceedings.

b. Specifically the applicant sought for:

i. an Order of Certiorari to quash the purported proceedings of the Ganze Constituency National Government-Constituencies Development Fund (hereinafter 'NG-CDF') Committee ostensibly conducted on the 27<sup>th</sup> May 2019 and 3<sup>rd</sup> June 2019 and the decision arising therefrom dated 2<sup>nd</sup> June 2019 removing the ex-parte applicant as the chair of the Committee;

ii. an order of Mandamus compelling the NG-CDF Committee to follow the laid down procedure in the adjudication of disputes as provided by the NG-CDF Act 2015; and

iii. an order of Prohibition prohibiting the execution of the unlawful and illegal decision of the committee dated 27<sup>th</sup> May and 3<sup>rd</sup> June 2019.

c. That the granting of leave do operate as stay of the implementation and/or execution of the determination of the Ganze NG-CDF Constituency Committee issued on 3<sup>rd</sup> June 2019 removing the ex-parte applicant as chairman of the committee.

d. That costs of the application be in the cause.

2. By orders issued on 11<sup>th</sup> June 2019, the court certified the application urgent and directed that the ex-parte applicant file and serve a substantive application to the Respondents. The court further granted the leave to file and pursue the judicial review application and directed that the orders on leave operating as stay be argued in the hearing of the substantive application.

3. Subsequently, the ex-parte applicant filed a substantive application dated 18<sup>th</sup> June 2019 and supported by the initial documents filed at the leave stage. He sought for orders:

a. THAT an order of certiorari be granted to the ex-parte Applicant to remove into the high court and quash the purported proceedings the Ganze Constituency NG-CDF Committee ostensibly conducted on 27<sup>th</sup> May, 2019 and 2<sup>nd</sup> June, 2019 and the decision arising therefrom dated 2<sup>nd</sup> June, 2019, and quashing the unlawful decision of the Member of parliament Ganze and the NG-CDF Committee purporting to remove the ex-parte applicant as the chairman of the Committee

b. THAT an order of Mandamus be granted to the ex-parte Applicant to remove into the high court and compel the NG-CDF Committee Ganze Constituency to follow the laid down procedure in adjudication of disputes as provided for by the National Constituency Fund (NG-CDF) ACT 2015 Section 43 (13) and (14) as read with Regulation 8 to 19 of the NG-CDF regulations 2016.

c. THAT an order of Prohibition be granted prohibiting the execution of the unlawful and illegal proceedings and decision arrived thereto by the NG-CDF Committee Ganze Constituency dated 27<sup>th</sup> May and 2<sup>nd</sup> June 2019.

d. THAT the costs of be provided for.

4. In response to the application, the Respondents' filed affidavits dated 21<sup>st</sup> June and 19<sup>th</sup> July 2019 both sworn by Philister Kahindi, the Secretary of the Ganze Constituency NG-CDF Committee.

5. Thereafter, both parties filed their respective submissions with the Ex-parte Applicant filing theirs dated 8<sup>th</sup> July 2019 and the Respondents' dated 19<sup>th</sup> July 2019.

### **The Ex-parte Applicant's Case**

6. According to the Ex-parte Applicant, he was the Current chairperson of the Ganze Constituency NG-CDF Committee and that prior to his appointment as chairman he was employed as a committee member having applied for consideration in accordance with the CDF Act 2015 after the posts were advertised for application as being vacant. It was the Applicant's case that upon appointment as the chairperson he had always carried out his duties and mandate loyally.

7. He averred that on the 25<sup>th</sup> of May 2019 he was procedurally, unlawfully and arbitrarily informed orally by a clique of the committee members that he had been removed as that chairman of the committee while no meeting or notice had been called. That he was at risk losing his office due to a conspiracy between the Ganze Constituency NG-CDF Committee members and the 7<sup>th</sup> Respondent who is the MP Ganze Constituency having cooked a purported determination and proceedings.

8. He further averred that prior to the said resolution there has been misunderstandings between the Ex-parte applicant and the 7<sup>th</sup> Respondent who had on many occasions tried to forcefully and unlawfully force his way in the management of finances and payment of suppliers in accordance with the MP's wish and when the chairman (ex-parte applicant) resisted the illegal activities, there arose a hostility and bad blood between them when the 7<sup>th</sup> Defendant tried to force the resignation of the chairman.

9. It was further averred that the said 7<sup>th</sup> Respondent threatened that should the chairman fail to resign from his position he would ensure that he is forcefully removed as he was not cooperative. According to the Applicant, This was the reason the decision of 25<sup>th</sup> May 2019 was arrived at and purportedly adopted by the committee on 2<sup>nd</sup> June 2019.

10. According to the applicant, the impugned proceedings purportedly by the Ganze Constituency NG-CDF were home-made proceedings and report as there has never been a sitting involving the Applicant or as by the law provided particularly in the case of the removal of the chairman or any committee member as provided for under the **NG-CDF Regulations Sections 8 and 19** read with **Section 43 (2) (g) of the NG-CDF Act OF 2015**.

11. The applicant contended that he only learnt about the decision to remove him as chair after being orally informed on 27<sup>th</sup> May 2019 and later from the 7<sup>th</sup> Respondent who sent him by a text message indicating the resolution arrived at. The purported meetings were illegal as they were not chaired by the chairman as provided for under the NG-CDF regulations of 2016.

12. According to the applicant, the **National Constituencies Fund Act Section 43 (13) and (14)** as read with **Section 8** of the **NG-CDF regulations 2016** clearly provided for the procedure on how a member of the Constituency Committee and/or the chairman/office bearer is to be removed from office and any one or more of the following grounds have to be proved:-

- a. Lack of integrity;
- b. Gross misconduct;
- c. Embezzlement of public funds;
- d. Bringing the committee into disrepute through unbecoming personal public conduct;
- e. Promoting unethical practices;
- f. Causing disharmony within the committee; or
- g. Physical or mental infirmity.

13. It was contended that the ex-parte applicant was never given any notice and/or reason as to why the purported illegal actions were undertaken neither was he given a fair hearing before the resolution was made as provided for by the law.

14. According to him it was apparent on the face of the proceedings and the subsequent illegal determination that are purported to have taken place and in the course of manufacturing the decision to remove the ex-parte applicant from office, the committee members under the influence of the 7<sup>th</sup> Respondent forgot to realize the anomalies probably for reasons that their actions and subsequent determination were made in a hurry to achieve certain ends. The said anomalies cited by the Applicant were that on 27<sup>th</sup> May, 2019 the ex-parte applicant was informed of the purported decision to remove him orally despite having being no meeting to discuss the matter. Further, in a bid to try and regularize the purported illegal determination of the committee a meeting was called on 2<sup>nd</sup> June 2019 by the 7<sup>th</sup> Respondent and chaired by him and purported to make a finding and or resolution to remove the ex-parte applicant as the chairperson of the Ganze Constituency NG-CDF Committee. Additionally, the ex-parte applicant was never informed of the facts or reasons of his removal from office nor was he ever given an opportunity to defend himself as is provided for by the law. Furthermore, no formal notice of removal was ever served upon the Ex-parte applicant he was only informed vide a text message from the 7<sup>th</sup> Respondent. According to the applicant, a member of parliament had no role out rightly to interfere with the running of the NG-CDF Committee and his involvement and bulldozing of the committee actions are illegal. It was contended further that there existed no minutes on what transpired on the meetings because there was no meeting and that these aforementioned inconsistencies arose in the rush to "cook the report" in favour of a preferred beneficiary and the same ought to be quashed.

15. The ex-parte applicant contended that it was quite apparent that the process of removal was marred with obvious irregularities and illegalities and in utter contravention of the Law and as such the resolution cannot stand. The 8<sup>th</sup> Respondent's resolution that was to be implemented is a nullity as there was never a sitting as purported and the same is a doctored report with glaring illegalities and cannot stand.

16. It was the position of the applicant that a major injustice has been occasioned against him by parties who only sought self-gratification hence he sought the Honourable Court's intervention and assistance to achieve the ends of justice. He argued that otherwise he would suffer irreparably in loss and damages.

### **The Respondents' Case**

17. The Secretary of the NG-CDF Committee of Ganze Constituency replied to the application on behalf of all the Respondents. She stated that in her capacity as the Secretary of the Committee, she convened meetings in consultation with the Chairperson and Board, circulated notices and the agenda of any upcoming meeting or Ganze Constituency Committee. As such, she averred that she maintains close contact with the Chairperson of the Committee so as to ensure and facilitate communication amongst the members of the Constituency.

18. It was contended that the Ex-parte Applicant herein was appointed as the Chairman of the NG-CDF Committee in accordance with **Section 14** of the **National Government Constituency Development Fund Act, 2015 (The Act)**. That as the Chairperson of the said Committee, the Ex-parte Applicant was tasked with amongst other duties; presiding over the meetings of the Committee, in consultation with the Committee and the constituents coordinate development project proposals through periodic Ward level open form, then submit the proposals to the National Government Constituencies Development Fund Board for approval and attend to necessary planning, implementation, oversight and sustenance of the projects.

19. It was further averred that Section 44 (13) of the Act provided for the removal of a member of the Committee, including the chairperson on grounds of inter alia lack of integrity, gross misconduct, unethical practices amongst others. That the procedure for removal entails

lodging of complaint by a member, invitation of the person against whom a complaint has been lodged to defend the Complaint through written or oral hearing and subsequently and if satisfied that sufficient grounds exist for removal the, the Committee may vote to remove the person against whom a complaint was lodged and if at least five members resolve to remove the member, the Committee will issue a notice of removal.

20. It was further averred that on numerous occasions, the Committee had brought to the attention of the Ex-parte Applicant concerns regarding slow implementation of National Government Constituency Development Fund projects and that the Ex-parte Applicant had lost the confidence of the committee owing to the Ex-Parte Applicant's ineffectiveness and unilateral exercise of the decisions purportedly on behalf of the Committee.

21. It was also averred that on various occasions the Committee members tried to engage the Ex-parte Applicant in order to ensure efficiency and effective service delivery and project implementation, but the Ex-Parte Applicant was unforthcoming.

22. The case was put forth that the 7<sup>th</sup> Respondent as the Member of Parliament of Ganze Constituency and apprehensive at the pace of delivery of projects in the Constituency, attempted to intervene by engaging the Ex-parte Applicant in order to restore timely delivery of constituency projects in accordance with the Mandate of the Committee under the Act and the Constitution. That when the attempts by the 7<sup>th</sup> Respondent to resolve the issues amicably by engaging the Ex-parte Applicant failed, the 7<sup>th</sup> Respondent lodged a complaint before the Committee regarding the inefficiency and lack of integrity on part of the Ex-Parte Applicant.

23. It was averred that on receipt of the complaint lodged against the Ex-Parte Applicant, and in consultation with Committee members, the Secretary of the NG-CDF convened a special meeting in accordance with **Regulation 10(4) of the National Government Constituencies Development Fund Regulations of 2016 (the Regulations)**, with the other Committee members excluding the Ex-parte Applicant to deliberate on the complaint. It was pointed out that **Regulation 10(4)** provides that a member against whom the complaint is raised shall not to participate in the special meeting.

24. Going further, it was contended that at the aforesaid meeting, the members unanimously agreed that sufficient grounds regarding the Ex-Parte Applicant's misconduct were raised requiring the Ex-parte Applicant to respond. Subsequently, on 20<sup>th</sup> May 2019, the 1<sup>st</sup> Respondent issued the Ex-parte Applicant with a written notice summoning him to attend a meeting/hearing on 3<sup>rd</sup> June 2019 to address the allegations of gross misconduct against him. The said Notice from cited various allegations of gross misconduct as:

- a. Lack of cooperation from other NG-CDFCs
- b. Colluding with officer to disadvantage other regions in terms of resource distribution
- c. Abuse of office
- d. Suspicion of malpractice
- e. Lack of sharing information to other members
- f. Engaging in unethical practices
- g. Failure to embrace committee welfare

25. According to the Respondents, the Committee acted in accordance with the principles of Governance under Article 10 of the Constitution, Article 47 on fair administrative action and in accordance with Section 45 (14) of the National Government Constituencies Development Fund Act and the Regulations therewith.

26. Furthermore, it was averred that the Ex-parte Applicant was sufficiently notified, accorded an opportunity to be heard, and made aware of the nature of the allegations against him in accordance with Article 47 and 50 of the Constitution, Section 44 of the National Government Constituencies Development Fund Act, Regulation 10 of the National Government Constituencies Development Fund Regulations and Section 4 of the Fair Administrative Actions Act.

27. It was averred that on 3<sup>rd</sup> June 2019, the Ex-parte Applicant attended the hearing in order to present his defence to the complaints levelled against him. Having heard the allegations against him and the basis upon which they were founded, the Ex-parte Applicant stated that he would step down as the Chairman of the National Government Constituency Fund Committee. Thereafter, the Committee proceeded to unanimously replace Ex-Parte Applicant on temporary basis and appointed Mr Jimmy John Kitsao as the acting Chairman to allow efficient and effective delivery of services in accordance with principles of Good Governance.

28. The Respondent's maintained that the procedure and or / decision to temporarily replace the Ex-parte Applicant as Chairman of the Committee was taken in accordance with fair administrative action, right to fair hearing and in good faith. Further, the procedure followed by the Committee was in accordance with statutory provisions and the Regulations and was not in any way driven by ill will or bad faith as alleged.

29. It was further averred that as a representative of the Constituency, the NG-CDF Committee was an independent Committee and its authority to remove or replace a member on basis of violation of values and principles of Governance, was based on Constitutional and Statutory provisions, and not subject to influence.

30. It was further argued that the application for stay should not issue in the circumstances, as it would effectively stall the operations of a Statutory body established to facilitate implementation of projects by the National Government Constituencies Development Fund to the detriment of the constituents and therefore against public interest.

### **Ex parte Applicant's Submissions**

31. Having summarised the facts of the case, Counsel for the Ex-parte Applicant begun by pointing out that the Section 44(13) referred to by the Respondents' in their affidavits did not exist and that the relevant Section that dealt with the removal of a NG-CDF Committee member was Section 43(13) of the Act. It was submitted that under this Section, the grounds for removal from office were:

- a. Lack of integrity;
- b. Gross misconduct;
- c. Embezzlement of public funds;
- d. Bringing the committee into disrepute through unbecoming personal public conduct;
- e. Promoting unethical practices;
- f. Causing disharmony within the committee; or
- g. Physical or mental infirmity.

32. It was further submitted that as per the purported notice giving reasons for the removal of the ex-parte applicant, the grounds cited therein were not in consonance with those provided for under the law.

33. It was further submitted that from the look of the notice purportedly issued on 20<sup>th</sup> May 2019 and the minutes attached by the Respondent's as having been for the meeting that took place on the 3<sup>rd</sup> June 2019, it was clear that they were manufactured to suit the narrative of the Respondents but did not exist before the filing and service of the suit papers. That is was also clear that the replacement of the chair was a predetermined decision and the purported meeting without notice was therefore a formality to regularize an illegality.

34. It was further submitted that the ex-parte applicant deponed that he was never served with any notice and no resignation letter has been brought to the court hence the narrative of resignation was another cooked up story.

35. It was submitted that the law does not provide anywhere for an acting chairman. To this end any document purportedly signed by the said acting chairman was illegal and void.

36. Regarding fair hearing, it was submitted that the appointment and removal of the chair is provided under the law in **Section 43(13-14) of NG-CDF ACT 2015** and subsidiary regulations (**National Government Constituencies Development Fund Regulations 2016**) **section 8(1) and 19** respectively.

37. It was further submitted that **Section 20** of the regulations provide that the chairperson sought to be removed shall be given reasonable opportunity to be heard. Under **Sections 10 (2), (3) and (6)** of the regulations provides:

***"10 (2) A complaint against a member of a constituency committee (chairperson) shall be deposited with the National Government Constituency office.***

***10 (3) The complaint referred to in paragraph (2) shall clearly set particulars of the issues complained of.***

***10 (6) A copy of the complaint and any other grounds of removal shall be attached to the notice issued under paragraph (5)"***

38. It was further submitted that the notice was a separate document from the complaint. What was purportedly served as per the affidavit of Philister Kahindi was a notice. No reference has been made as to service of any complaint. A further look at the notice purportedly issued against the ex-parte Applicant, it is only a generalized notice that has no particulars at all as required by Section 10 (3).

39. It was submitted that no one could tell the origin of the complaint. It was further submitted that when the notice calls the chairman to answer an allegation of lack of cooperation without being specific at what point he did not cooperate and on what issue and why the complainant believes that the chairman was not cooperative and continues to give generalized allegations, this could not be said to be a fair notice.

40. It was further submitted that the minutes only captured that the chairperson was called to answer allegations of gross misconduct, and list some other allegations but fail to give proper and detailed particulars on who raised the allegations on:-what subject he failed to cooperate (other than in schemes to defraud the public by the member of parliament), what amounted to abuse of office, the suspicion of malpractice and what unethical practices he is purported to have engaged in. There therefore cannot be said to have been a fair hearing.

41. It was submitted that the ex-parte applicant's faulted the whole process on the basis that he was bulldozed out of office by text messages

and decisions made informally by a person who was not a member of the committee this being the 7<sup>th</sup> Respondent.

42. Citing **Sun Africa Hotels Ltd & 2 Others vs K.R.A and 2 Others Nairobi JR 404 of 2018** it was submitted that the instant case was one fit for the issuance of a stay order to arrest the illegalities perpetuated by the Respondents.

### **The Respondents' Submissions**

43. From the Respondents' advocate point of view the issues for determination were two-fold:

- a. Whether leave and or the orders sought by the Applicant should be granted to the Ex-Parte Applicant as prayed; and
- b. If (a) above is in the affirmative, whether such leave should operate as stay of the decision by the 8<sup>th</sup> Respondent.

44. On the first issue, Counsel submitted that the Constitution under **Article 23 (3)** provides that in any proceedings brought under a court may grant an appropriate relief, including Judicial Review. Furthermore, Article 47 of the Constitution codifies every person's right to fair and administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. It was submitted that it is trite law that judicial review remedies are discretionary in nature and the court exercises its discretion by analysing the procedure of the administrative body in arriving at a decision, and in assessing the available facts, make a determination on whether the reliefs sought are available to the Applicant. To buttress this principle reliance was placed on **Republic Vs Principle Secretary Ministry of Internal Security & Anor Ex-Parte Schon Noorani & Anor [2018] eKLR**.

45. It was further submitted that the court had come up with a threshold for determining whether or not to grant the reliefs under Judicial Review. To this end reference was made to **Republic vs Public Procurement Administrative Review Board & 2 others Ex-Parte Higawa Enterprises Limited [2017] eKLR** which adopted the decision of the Court in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. Further reliance was placed on **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited [2002] eKLR**.

46. Counsel then cited **Section 43** of the **National Government Constituencies Development Fund Act** for the process of the removal of a member of a Constituency. Further it was submitted that the **National Government Constituencies Development Fund Regulations** distinguish between the removal of a member and the removal of a Chairperson. It was submitted that **Regulation 10 (19)** provided that the Committee may remove the Chairperson or Secretary for failure to perform his duties outlined under the **Act or Regulation 8**.

47. It was further submitted that in furtherance to the provisions of Article 47 of the Constitution, the Regulations provided for the requisites of removing the Chairperson as follows: -

***"A Constituency Committee shall inform the Chairperson or Secretary of the reasons for the proposed removal, and shall give the Chairperson or Secretary reasonable opportunity to be heard".***

48. Consequently, it was submitted that the procedure of removal of a member outlined under Section 43 relates strictly to members and not to the Chairperson or Secretary. That whilst the Act provided that five votes are required to remove a member, two thirds of the total votes are required in the removal of a Chairperson in accordance with **Regulation 10 (20)**. Further, the Regulations under **Regulation 10 (21)**, provide that the person removed as Chairperson may continue to discharge the duties of a member.

49. The advocate for the Respondents' submitted that the interpretation of the Ex-Parte Applicant was erroneous. According to him, Regulation 10 (6) did not provide for the procedure of removal of chairperson. The quoted provision relates to removal of a member as provided under Regulation 5.

50. On the basis of the above, it was submitted that there was no requirement for a Complaint to be forwarded with a notice to a Chairperson. Regulation (20) only contemplated the issuance of a notice with reasons and a reasonable opportunity to be heard in accordance with Article 47 of the Constitution.

51. It was further submitted that the relevant provisions for removal of a Chairperson were Regulations 19, 20, 21 and 22 of the National Government Constituencies Development Fund Regulations. Accordingly, all other provisions under Regulation 10 only related to removal of a member contemplated under Section 43 of the Act.

52. The submission was made that the Ex-Parte Applicant, having been given a notice to respond under Regulation 20, attended the hearing before the Committee wherein he elected to step down from the position Chairperson but elected to remain as a Member in accordance with Regulation 10 (21).

53. It was further submitted that the Ex-Parte Applicant was duly notified of the hearing and the allegations levelled against him and accorded an opportunity to present his defence in accordance with the principles of natural justice and Fair Administrative action under Article 47 of the Constitution. That having being duly notified of the allegations and given an opportunity to present his defence, the Committee duly adhered to the right to fair hearing enumerated under Article 50 of the Constitution.

54. Counsel submitted that the Ex-Parte Applicant had not demonstrated how his rights were purportedly infringed. That it is trite law that in allegations of breach of fundamental rights and freedoms, the Applicant must present facts which when presented to Court demonstrate that there was such infringement. However, it was submitted that the Ex-Parte Applicant has only made generalized statements meant to persuade this Court to grant him an unfair advantage over the Respondents.

55. It was further submitted that from the foregoing, the procedure of removal of Chairperson is not enumerated under the Act as alleged by the Ex-Parte Applicant. It is only provided for under the Regulations making a clear distinction between the requirements of removal of a member and requirements of removal from the position of Chairperson or Secretary. Consequently, the requirements under Regulation 10 (6) did not apply in the present instance as alleged by Ex-parte applicant.

56. It was therefore submitted that the Ex-Parte Applicant was not entitled to the Orders sought.

57. Turning to whether Orders for Stay should issue in the circumstances, it was submitted that orders of stay in leave stage are not automatic and do not exist as a matter of right. The Ex-Parte Applicant must demonstrate that the decision is yet to be implemented, the judicial review proceedings would be rendered nugatory if stay is not granted and it is not against public interest.

58. It was submitted that once the decision subject to these proceedings was implemented and a member elected as acting chairperson and has been in that capacity since then, there was nothing for this Court to stay. It was further submitted that it was only in cases where the decision had not been implemented or where the decision had not been fully implemented that stay would be applicable. Reliance was placed on **Republic vs Cabinet Secretary for Transport & Infrastructure & 5 Others Ex Parte Kenya Bus Owners Association; George Philip M Wekulo vs Law Society of Kenya & Another; Sun Africa Hotels Ltd & 2 Others v Kenya Revenue Authority & 2 Others and Taib A. Taib Vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 758 of 2006.**

59. The Respondents' advocate then submitted that the Applicant must demonstrate that the judicial review proceedings would be rendered nugatory in the event the order for stay is not issued. It was submitted that the Ex-Parte Applicant did not stand to suffer any prejudice nor would the judicial review proceedings be rendered nugatory if the order for stay was not issued, as he was still a member of the Committee, with the right to attend meetings and vote on the agendas crucial to his representation of his group. He was therefore actively involved in the implementation of the projects within the Constituency.

60. It was submitted that an order for stay would effectively suspend the appointment of the acting Chairperson to the detriment of the Constituencies. This would amount to grave injustice to the beneficiaries of the Fund within Ganze Constituency and therefore against public interest. For these arguments, Counsel cited the decision in **Republic vs National Hospital Insurance Fund Management Board Ex-parte Patanisho Maternity and Nursing Home [2019] eKLR.**

61. In closing, it was submitted that the ex-parte applicant was not entitled to the Orders sought and that it was in the public interest that the orders for stay be denied.

62. The Respondents' prayed that the application be struck out with costs to them.

### **Analysis and Determinations**

63. I have taken time to fully appreciate the length and breadth of the opposing parties' arguments. Bearing in mind the facts of the case as well as the submissions of rival Counsel, it is clear that the bone of contention is the decision by the 8<sup>th</sup> Respondent made on 3<sup>rd</sup> June 2019, ousting the Ex-parte applicant from the position of chairperson of the Committee. The question this Court needs to answer was whether in making the impugned decision, the 8<sup>th</sup> Respondent acted in excess of its mandate and without due regard to the laid out law.

64. The purview of judicial review was a matter in issue in the case of **Pastoli vs Kabale District Local Government Council & Others [2008] 2 EA 300** where at pages 303 to 304 the court expressed itself thus:

***“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).***

***Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....***

***Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.***

***Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”***

65. The Court of Appeal in the case of **Municipal Council of Mombasa vs Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR** further discussed the parameters of judicial review as follows:

***“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard***

*before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”*

66. The Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) eKLR** however made emphasis of the fact that while **Article 47 of the Constitution** as read with the grounds for review provided by **Section 7 of the Fair Administrative Action Act** revealed an implicit shift of judicial review to include aspects of merit review of administrative action, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.

67. In **Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR** the Court stated that ‘23. *The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations.* In the instant case, the relevant Act is the **National Constituencies Fund Act of 2015 (the Act)** and its attendant Regulations the **National Constituencies Fund Act Regulations of 2016, (the Regulations)**.

68. The role of chairperson of the NG-CDF Committee is provisioned for under **Regulation 8** as follows: -

#### **8. Chairperson**

*(1) There shall be a chairperson of a Constituency Committee who shall be elected by members from among the persons referred to in section 43 (2) (b), (c), or (d), of the Act, and subject to regulation 6 (2) of these Regulations.*

*(2) The chairperson of a Constituency Committee shall—*

*(a) provide overall leadership to the Constituency Committee;*

*(b) approve the agenda of the Constituency Committee meetings;*

*(c) preside over meetings of the Constituency Committee;*

*(d) carry out consultations with the Officer of the Board seconded to the Constituency and other relevant stakeholders;*

*(e) ensure members and staff of the Constituency Committee are properly trained;*

*(f) encourage a culture of transparency and teamwork among the members of the Constituency Committee;*

*(g) be a signatory to the Constituency Fund Account; and*

*(h) co-ordinate the compilation of project status reports every six months.*

69. On the other hand, the process of the removal of the chairperson is contemplated under Regulation 8 is to be found in **Regulation 10 (19-22)**, these state: -

*19) A Constituency Committee may remove the Chairperson or secretary from their respective positions for failing to perform their functions, under regulations 8 and 9 respectively.*

*(20) A Constituency Committee shall inform the Chairperson or Secretary of*

*the reasons for the proposed removal, and shall give the Chairperson or Secretary reasonable opportunity to be heard.*

*(21) A Chairperson or secretary who is removed pursuant to paragraph (19) shall continue to discharge duties as a member of the Constituency Committee.*

*(22) At least two thirds of the total membership of a Constituency Committee shall be required to remove the Chairperson or secretary from office.*

70. As per Regulation 10(19), the chairperson may be removed for failing to perform their function under regulation 8. In the current instance, the evidence on the record points to the 8<sup>th</sup> Respondent issuing out a notice dated 20<sup>th</sup> May 2019. The said Notice cited various allegations of gross misconduct levelled against the ex-parte applicant as:

a. Lack of cooperation from other NG-CDFCs

b. Colluding with officer to disadvantage other regions in terms of resource distribution

- c. Abuse of office
- d. Suspicion of malpractice
- e. Lack of sharing information to other members
- f. Engaging in unethical practices
- g. Failure to embrace committee welfare

71. My reading of these allegations contained in the notice lead me to the conclusion that they meet the circumstances contemplated under Regulation 8. Though the ex-parte applicant contends he was never given notice and was only informed orally, the evidence tells a different story.

72. A crucial point made by the ex-parte applicant was that he was never accorded an opportunity to be heard and that the proceedings referred to by the Respondents never occurred and were in reality conjured up to rubberstamp an illegality. According to Regulation 10(20), aside from being given notice with the proposed reasons for removal, the Chairperson facing removal further had to be availed a reasonable opportunity to be heard.

73. A reasonable opportunity to be heard is the cornerstone of the right to fair administrative action and the right to a fair hearing. **Section 4(3)(b) of the Fair Administrative Action Act** provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision an opportunity to be heard and to make representations in that regard. As was held in **Republic vs. Chuka University Ex-Parte Kennedy Omondi Waringa & 16 Others [2018] eKLR**: -

*“175. The applicants also complained that they were never supplied with the proceedings of the Students Disciplinary Committee (SDC) which was subject of the appeal. The respondent never controverted this assertion. This, in my view, violated Section 4(3) (g) of the Fair Administrative Action Act which mandates that applicants must be given information, materials and evidence to be relied upon in making the decision or taking the administrative action.”*

74. **Onguto, J in Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016] eKLR** expressed himself inter alia as follows:

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

*“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...” [Emphasis supplied]*

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

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

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

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

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

*I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of “reasonable” action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of the Constitution. The court proceeding under Article 47 of the Constitution is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common law principles of judicial review are, in other words, not the only decisive factor. It may sound like stretching the precincts of traditional judicial review, but clearly by the Constitution providing for a “reasonable” administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review.”*

75. In the current case, by the Notice dated 20<sup>th</sup> May 2019, the 8<sup>th</sup> Respondent invited the Ex-parte applicant to the meeting held on 3<sup>rd</sup> June 2019. At this meeting, the members of the 8<sup>th</sup> Respondent levelled the allegations against the applicant. In response, the Ex-parte applicant chose to resign as chair. In contrast to the foregoing description is the allegation by the Ex-parte applicant that the said meeting never took place, that the resultant report was a pure forgery meant to validate an illegal action. Aside from these lofty allegations however, there is nothing else to show that the minutes of the meeting held on 3<sup>rd</sup> June 2019 and presented in evidence by the Respondents’ was an incorrect representation of the events that transpired.

76. Having been given a chance to respond to the allegations against him and choosing to resign instead, the ex-parte applicant cannot allege to have been denied a chance at a fair hearing.

77. Furthermore, as per Regulation 10 (22), at least two thirds of the total membership of a Constituency Committee shall be required to remove the Chairperson or secretary from office. Per the record of the minutes presented in court, this threshold was met.

78. As has been acquiesced to by both parties, the ex-parte applicant remains a member of the 8<sup>th</sup> Respondent, this is in line with Regulation 10(21) which provides that upon their removal, the chairperson or secretary so ousted shall remain a member of the HG-CDF Committee.

79. The picture emerging from the foregoing is that there was no illegality in the decision to oust the ex-parte applicant as the same had a basis in the law. No evidence has been adduced to show any irrationality on the part of the 8<sup>th</sup> Respondent in reaching the decision. The ex-parte applicant was given due notice of the allegations and when accorded the opportunity to respond, decided to resign instead. All the requirements under the relevant provisions of the law were followed in this instance. All that was required was for the ex-parte applicant to be given reasons for his ousting and be given a reasonable opportunity to be heard. This was satisfactorily done hence it is my view that there was no instance of procedural impropriety on the part of the Respondents.

80. The Ex-parte applicant has failed to convince the court of the need to interfere with the 8<sup>th</sup> Respondent’s decision. As such, the judicial review remedies sought cannot avail themselves to the ex-parte applicant.

81. In the upshot, the ex-parte applicant’s motion dated 18<sup>th</sup> June 2019 is dismissed in its entirety. The Respondent’s shall have the costs.

82. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2019.**

.....

**R NYAKUNDI**

**JUDGE.**