



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

JUDICIAL REVIEW & CONSTITUTIONAL DIVISION

MISC. CIVIL APPLICATION NO. 33 OF 2017

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

IN THE MATTER OF: ARTICLES 10, 47,50 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) OF THE LAWS OF KENYA

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT (NO. 6 OF 2015) OF THE LAWS OF KENYA

IN THE MATTER OF: THE AGRICULTURAL SOCIETY OF KENYA CONSTITUTION (REVISED 2013)

BETWEEN

MOHAMED A. MAALIM.....APPLICANT

AND

THE REGISTERED TRUSTEES OF

THE AGRICULTURAL SOCIETY OF KENYA.....1ST RESPONDENT

THE ELECTORAL COMMITTEE

AGRICULTURAL SOCIETY OF KENYA.....2ND RESPONDENT

THE CHIEF EXECUTIVE OFFICER OF THE

AGRICULTURAL SOCIETY OF KENYA.....3RD RESPONDENT

AND

ANISA ABDALA & 30 OTHERS.....INTERESTED PARTIES

RULING

The Application

1. Upon grant of leave to institute judicial review proceedings, the ex-parte applicant by way of a Notice of Motion dated 29th June, 2017 brought under Sections 8 and 9 of the Law Reform Act and Order 53 Rules 3(1) of the Civil Procedure Rules seeks the following orders:

a) An Order of Certiorari to remove to this Honourable Court to be quashed the decision of the 2nd and 3rd Respondents herein, disqualifying the Applicant from contesting for the post of branch committee, council member and branch chairman which was communicated on 17th March 2017 and confirmed through the decision of the 2nd Respondent issued on 18th April 2017 after the Applicant appealed.

b) An Order of Certiorari to remove to this Honourable court to be quashed the directive of the 3rd Respondent herein, through the

notice dated 1st March, 2017, issued appointing the 1st and 2nd Interested Parties to serve in the branch committee till December 2019 and 2020 respectively.

c) An Order of Certiorari to remove to this Honourable court to be quashed the directive of the 3rd Respondent herein, through the notice dated 1st March 2017 appointing 1st and 2nd Interested Parties to serve in the council of the society till December 2020 and 2019 respectively.

d) An order of certiorari to remove to this Honourable court to be quashed the election conducted during the special annual general meeting of the Coast Branch held on 17th March 2017.

e) An Order of mandamus to compel the Respondents to call for a fresh election of the Coast Branch to elect twelve (12) members of the Branch Committee and seven (7) members amongst the Branch Committee to serve in the Society council and amongst the council members so elected, one to serve as Coast Branch Chairman.

f) An Order of Mandamus to compel the Respondents to clear the Applicant to contest for the post of branch committee member, council member and branch chairman of the coast branch at the fresh elections to be held as per the Prayer No.(e) above.

g) An Order of mandamus to compel the Respondents to allow all paid up members during the year 2016 to take part in the fresh election and to vote their preferred candidates.

The application is premised on the grounds set out in the Chamber Summons and Statement of Facts dated 15th June 2017.

2. The Applicant alleges that he is a member of the Agricultural Society of Kenya Coast Branch for over 24 years having paid the annual membership subscription fee as required by the Society's Constitution.

3. The Applicant claims that pursuant to a notice issued by the 3rd Respondent on 1st March 2017 convening a Special Annual General Meeting on 17th March 2017 to vote in new officials, the Applicant presented his candidature for the post of branch committee member, council member and branch chairman having complied with all the necessary requirements.

4. The Applicant contends that on 17th March 2017 during the Special Annual General Meeting he was disqualified from vying for the aforementioned positions on the ground that he was not in the Society's good standing.

5. The Applicant alleges that on 25th March 2017 he lodged an appeal with the 2nd Respondent against the decision as the said decision was unfair, unreasonable and made in bad faith. Consequently, the 2nd Respondent rendered its ruling on the appeal on 18th April 2017 dismissing the appeal.

6. The Applicant alleges that the decision to disqualify him on the ground that he is not in a good standing with the Society is unfair as he has loyally served the Society and it is based on his good standing that he was appointed to the Coast Branch Caretaker Committee for a period of two years ending 31st March 2017.

7. The Applicant contends that he has no pending disciplinary case but cites a case in which he and other four members of the Coast Branch Committee were reprimanded by the Staff and Finance Committee on 30th March 2015 for calling off the Coast Branch Annual General Meeting. The Applicant, however, claims that the other members who were reprimanded being Salim Mazrui and Jeffer Kiti were allowed to vie, an indication of bias against the Applicant by the 3rd Respondent.

8. The Applicant claims that the 3rd Respondent had ulterior motives geared towards handpicking his preferred candidates for the Coast Branch. Further, the Applicant contends that the 3rd Respondent's ulterior motive is demonstrated by his action of clearing the 3rd-5th Interested Parties to vie and be elected into the branch committee while they did not meet the minimum requirements/qualifications provided under Article 38 of the Society's Constitution.

9. The Applicant contends that the notice issued by the 3rd Respondent on 1st March 2017 purported to restrict members' voting rights as it directed that for a member to vote he or she must have been a member of the Society for three consecutive years contravening Article 11 of the Society's Constitution and Rule 7(7) and (15) of the Society's Rules.

10. It is the Applicant's case that the Respondent's decisions infringe on his right to fair administrative action enshrined under Article 47 of the Constitution and the rights of other members to vote for their preferred candidate.

Responses

1st Respondent

11. The 1st Respondent responded to the application by way of Replying affidavit sworn by BATRAM M. MUTHOKA, the Chief Executive of the 1st Respondent and filed in court on 20th July, 2017. The 2nd and 3rd Respondents claimed that they were private entities who did not fall within the purview of Judicial Review. However, in the alternative they adopted the response of the 1st Respondent.

12. The 1st Respondent claims that the issues raised by the Applicant namely that the 1st and 2nd Interested Parties were not qualified to be appointed to the branch committee and restriction of members who had paid up subscriptions but had not been members of the society for three consecutive years from voting were fully determined or are pending in Mombasa High Court Miscellaneous Application No. 13 of 2017.

13. The 1st Respondents admits that the Special Annual General Meeting was held on 17th March, 2017 with the aim of electing branch committee members, council members and the branch chairperson. The 1st Respondent claims that during the meeting the members were informed that the Applicant had been disqualified from vying for the position of branch chairperson as he never served as a council member and he was not in good standing with the Society as there was a disciplinary case against him where he was found guilty and punished and as the record stood he had not appealed against the decision.

14. The 1st Respondent admits that the Applicant appealed against the decision to disqualify him from vying to the 2nd Respondent but the appeal was dismissed on the grounds that he had been reprimanded by the Staff and Finance Committee and a penalty meted out and an appeal was not lodged thus the penalty still existed; the decision to disqualify him at the Special Annual General Meeting had not offended the rules of natural justice as the 2nd Respondent had informed successful candidates of their candidature after the vetting; the matter of the 1st-2nd Interested Parties being directly appointed was the subject of proceedings in Mombasa Miscellaneous Application No. 13 of 2017; the Applicant did not mention the names of candidates who were purportedly unqualified for the positions for which they were elected thus the 2nd Respondent could not deal with this issue and the Applicant had not served as a council member for five years thus he was not qualified to be elected as a branch chairman.

15. The 1st Respondent contends that the decision to disqualify the Applicant was not unreasonable, biased, not made in bad faith and there was no ulterior motive behind the decision. Further, the 1st Respondent states that the Applicant's legitimate expectation to contest for various positions was not violated as the Applicant did not meet the requirements set out by the 1st Respondent's Rules.

16. The 1st Respondents states that Salim Mazrui and Jeffer Kiti, who were reprimanded with the Applicant were allowed to vie because they appealed against the verdict of the Staff and Finance Committee.

17. It is the 1st Respondent's case that the Applicant's claims are aimed at frustrating and sabotaging the 1st Respondent's operations.

1st to 5th Interested Parties

18. The 1st to 5th Interested Parties opposed the application by way of Grounds of Opposition dated 18th July 2017. The Interested Parties contend that the application is devoid of merit is frivolous and an abuse of the court process.

6th to 31nd Interested Parties

19. The 6th to 31st Interested Parties responded to the application by way of a replying affidavit sworn by MBARAK HAMID MBARAK on 18th July, 2017.

20. The 6th to 31st Interested Parties allege that on 1st March 2017 a notice was issued by the 2nd Respondent barring members who had membership of less than three consecutive years from voting in the Special Annual General Meeting of 17th March, 2017 contrary to Article 11 of the Society's Constitution and Rule 7(7) and (15) of the Society's Rules which state that members whose names appear on the register of members are eligible to vote subject to payment of annual subscription fee.

20. It is the 6th to 31st Respondents' case that the 2nd Respondent has devised non-existent constitutional amendments to curtail the members' right to vote.

Ex-Parte Applicant's Supplementary Affidavit

21. In response to the replying affidavits by the Respondents, the Applicant swore a supplementary affidavit filed on 24th July 2017.

22. The Applicant averred that the issues raised herein were not res judicata nor sub-judice as alleged by the Respondents. The Applicant admits that some of the issues raised herein were raised in Mombasa High Court Miscellaneous Application No. 13 of 2013 namely; the direct appointment of the 1st and 2nd Interested Parties and the barring from voting of members with less than three years in the society. However, the Applicant claims that these matters were not determined by the court as the substantive motion was never filed and the only issue that was determined with finality was the stay of Special Annual General Meeting of 17th March, 2017.

23. The Applicant claims that the requirement that for a member to be elected to the position of branch chairman, he or she must have served in the Council for at least five years, did not exist when the Applicant vied for the position as it was introduced at the national annual general meeting of the Society in Nairobi on 31st March 2017. Prior to the introduction of the requirement, the Applicant contends that for one to be considered for the position of branch chairman, one needed to have only served in the branch committee for a period of five years.

24. The applicant contends that the ground of disqualification that he lacked good standing with the society has no basis in the Constitution and Rules of the Society. Further, the Applicant claims that he was appointed to the Caretaker Committee two weeks after the alleged reprimand of 15th April 2015, an appointment which would not have been possible if the reprimand had caused him to have no good standing

with the society.

25. The Applicant reiterated that the 3rd to 5th Interested Parties were not qualified to vie for election as they had served in the branch sub-committees or branch committees for the period stipulated in the Society's Constitution.

1st Respondent's Further Replying Affidavits

26. The 1st Respondent responded to the 6th-31st Interested Parties' Replying Affidavit and the Applicant's Supplementary Affidavit by way of a Replying Affidavit sworn by JOHN KENNEDY OMANGA on 26th July, 2017 and another sworn by BATRAM MUTHOKA and filed on 22nd July, 2017.

27. The 1st Respondent claims that the amendments that locked out non-permanent members from voting were made in 2013 to Article 11 of the Society's Constitution way before the 6th to 31st Interested Parties joined the society. The 1st Respondent clarified that it is only incorporation of the amendments to the Society's Constitution that was made in 2017. Further, the 1st Respondent claims that the requirement that a member must serve in the council for a minimum of five years before one is elected branch chairman was contained in the Society's Green Book and Article 38 of the Society's Constitution and the requirement was not formulated in 2017.

28. The 1st Respondent claims that the issues raised by the 6th to 31st Interested Parties are similar to those raised in Mombasa High Court Miscellaneous Application No. 13 of 2017 filed by some of the Interested Parties which the Interested Parties failed to prosecute.

Submissions

29. The application was canvassed by way of written submissions. The Applicant filed his submissions on 14th August 2017, 1st Respondent, 2nd Respondent, 3rd Respondent and 1st-5th Interested Parties filed their submissions on 29th August 2017 while the 6th to 31st Interested Parties filed their submissions on 8th September, 2017. Submissions were highlighted in court on 2nd October, 2017.

Applicant's Submissions

30. **Mr. Orina**, Counsel for the applicant submitted that the Applicant was aggrieved by the decisions made by the 2nd and 3rd Respondents disqualifying him from vying for various electoral positions in the Society; allowing unqualified members to vie; directly appointing the 1st and 2nd Interested Parties without an election; clearing the 3rd to 5th Interested Parties to vie without meeting the requirements; and denying the 6th to 31st Interested Parties the right to vote.

31. **Mr. Orina** submitted that the disqualification of the Applicant was unreasonable and unfair and contrary to Article 47 of the Constitution. Counsel contended that the reason that the Applicant lacked "good standing" was unreasonable as the Society had no criteria for defining the term "good standing" and that this allegation flew in the face of logic as the Applicant had never been suspended or expelled from the society or barred previously from holding a position in the Society. Further, Counsel pointed out that the Applicant had been appointed to the Caretaker Committee for the period 2015-2017 thus the Applicant's standing in the Society was not wanting.

32. On the issues raised by the Respondents that the Applicant was reprimanded in 2015, **Mr. Orina** submitted that there was no rule of the Society that provided that a penalty for a reprimand would be barring a member from contesting for a position. Counsel argued that the Applicant had established a long history of good standing with the Society as he had been recognized by the Society for his long service and given accolades.

33. **Mr. Orina** submitted that the decision to disqualify the Applicant was biased. Counsel contended that the disqualification did not apply to other candidates (Salim Mazrui and Jaffar Kiti) who had also been reprimanded. Instead, these candidates were allowed to vie and were elected in the impugned election.

34. **Mr. Orina** submitted that the decision of the Respondents was tainted with ulterior motive and bad faith. Counsel argued that the Applicant was disqualified so as to enable the Respondents elect their preferred candidates. To support this assertion, Counsel submitted that the 1st and 2nd Interested Parties were directly elected yet the laws governing the Society did not make any provisions for direct appointment. Secondly, Counsel argued that the 3rd to 5th Respondents were elected despite being unqualified.

35. **Mr. Orina** submitted that there was a legitimate expectation that members of the society would be allowed to vote. Counsel contended that the amendment to lock out members of less than three years from voting was passed on 31st March 2017 and did not apply on 17th March 2017 when the impugned election was held.

1st to 5th Interested Parties

36. **Mr. Millimo**, Counsel for the 1st to 5th Interested Parties submitted that no cause of action arose against the 1st to 5th Interested Parties. Counsel contended that the decision that aggrieved the Applicant was not made by the 1st to 5th Interested Parties and therefore the suit against these Interested Parties should be dismissed.

3rd Respondent

37. Mr. Millimo also submitted that the 3rd Respondent was the Chief Executive Officer of the 1st Respondent. Therefore he was an employee or agent of the 1st Respondent. Counsel stated that there can be no cause of action against an agent when the principal is known. Therefore the Applicant ought not to have brought a suit against the 3rd Respondent either in the 3rd Respondent's personal capacity or official capacity.

2nd Respondent

38. Mr. Millimo further submitted that the 2nd Respondent is not a legal entity but an organ of the 1st Respondent which cannot sue or be sued in its own name. Therefore the suit as against the 2nd Respondent cannot be sustained.

6th to 31st Interested Parties

39. **Mr. Aziz**, Counsel for the 6th to 31st Interested Parties submitted that Article 11 of the Constitution of the Society provides that every member whose name appears in the register of members shall be required to pay the annual subscription fees and shall be entitled to vote in the Annual General Meeting and the Special General Meetings of the Branch and the Society. Counsel argued that as at the time of the impugned elections the 6th to 31st Interested Parties were fully paid up members of the Society who were entitled to vote without arbitrary denial of that right. Counsel stated that the 6th to 31st Interested Parties had a legitimate expectation that they would vote by virtue of being fully paid up members.

40. Mr. Aziz admitted that a notice was issued to members on 1st March 2017 notifying members that only members with membership of three consecutive years would be allowed to vote. This new requirement, Counsel contended, was derived from the Rules passed by the Council. Counsel, however, argued that the Constitution of the Society was superior to the Rules and any decision made contrary to the Constitution was void. Therefore at the time of the impugned election the Constitution allowed members with fully paid up subscriptions to vote.

1st Respondent

41. For the 1st Respondent, Mr. Millimo submitted that the 1st to 5th Interested Parties are not state organs or statutory bodies but are private persons without public administrative powers and therefore they cannot be brought under the purview of Judicial Review. Counsel contended that fair administration action is concerned with administrative justice in public administration wherein public administration is carried out by state organs and not private persons. To this end, Counsel argued that the 1st to 5th Interested Parties ought not to have been enjoined in this matter.

42. Mr. Millimo submitted that the decision to disqualify the Applicant from vying was not unreasonable. Counsel explained that in reaching the decision, the Respondents did not consider any irrelevant matters nor extraneous matters. Counsel contended that the Respondents relied on the Rules contained in the Society's Grey Book to reach the decision.

43. Mr. Millimo submitted that one of the conditions precedent for one to vie was that the members had to be of good standing. Counsel explained that for a member to be of good standing certain requirements had to be met including the member being a fully paid up member; a person of integrity; adhere to the requirements of Chapter Six of the Constitution, must not have committed a crime generally or against the society and must not have breached the rules and Constitution of the Society. Counsel submitted that while considering these requirements, the Respondents considered whether the Applicant had been reprimanded by the Society and whether the same had been appealed against. Counsel submitted that it was found that the Applicant had been reprimanded and no appeal was lodged against the reprimand. Therefore the Applicant was deemed not to have been of good standing.

44. Mr. Millimo submitted that the Applicant being a member of the Society had agreed to abide by all the rules of the Society including upholding integrity hence he cannot now claim that the criteria used to vet his suitability to vie, which is derived from the Society's laws, was unreasonable.

45. As to the issue of the Applicant being allowed to serve in the Caretaker Committee even after his reprimand, Counsel submitted that the Applicant had already been elected to the Committee prior to the reprimand thus he was allowed to continue serving in the Committee for the remaining two years pending the conduct of the elections.

46. Mr. Millimo submitted that the decision to bar the Applicant from vying was not marred with bias. Counsel contended that there were other members who were reprimanded together with the Applicant. Counsel explained that Salim Mazrui and Jaffer Kiti appealed against their reprimand hence they were allowed to vie in the election as the appeals were yet to be determined while Benjamin H. Kai and Mohammed Sheyba did not appeal and thus suffered the same fate as the Applicant. They were not allowed to vie. Counsel argued that this was a clear indication that the Respondents had acted fairly.

47. Mr. Millimo submitted that the Respondents did not act in bad faith or with ulterior motive in barring the Applicant from vying. Counsel explained that the 1st and 2nd Interested Parties were duly elected to their respective positions in accordance with the 1st Respondent's laws. Counsel contended that the 1st and 2nd Interested Parties were elected by members at the meeting and the decision of the members was not made in bad faith nor with ulterior motives. Counsel reiterated that the 1st and 2nd Interested Parties were qualified for the positions to which were elected and further that they were elected unopposed.

48. As to whether the decision was unfair as the Applicant was not informed of the decision prior to the election, Mr. Millimo submitted that Rules 2 (F) (7) of the Society provided that only successful applicants would be informed of their candidature upon scrutiny of the required

pre-conditions by the 2nd Respondent. Counsel suggested that since the Applicant had not met the pre-conditions set, he was not successful hence no communication was made about his candidature.

49. Mr. Millimo submitted that legitimate expectation as derived from the Society's Rules and Constitution was that if a member had satisfied all the conditions precedent for one to be allowed to contest then the member shall be allowed to contest. Counsel argued that there was no legitimate expectation that a member would be allowed to contest before any verification was made as implied by the Applicant.

50. As regards the legitimate expectation of the members with less than three years membership, Counsel submitted that the issue was resolved in Mombasa Judicial Review No. 13 of 2017 where the Court found that amendments had duly been made to the Society's Constitution disallowing such members from voting. Further, Counsel submitted that the Applicant herein and the 6th to 31st Interested Parties had not challenged the amendments made to the Constitution in this matter and even if they did, such an issue does not fall within the realm of Judicial Review.

The Determination

51. Having carefully considered the application and the submissions by Counsel, the following issues arise for determination:

- a) Whether the Respondents and the 1st to 5th Interested Parties fall within the purview of Judicial Review.
- b) Whether the Ex-Parte Applicant should be granted Judicial Review remedies of Certiorari and Mandamus.

a) Whether the Respondents and the 1st to 5th Interested Parties fall within the purview of Judicial Review

52. The Respondents submitted that the 2nd, 3rd Respondents and the 1st to 5th Interested Parties were not state organs or public bodies carrying out administrative powers thus they cannot be brought under the realm of judicial review. This claim was based on the contention that the 2nd and 3rd Respondents and the 1st to 5th Interested Parties were private persons while judicial review is concerned with the administrative action of state bodies. The Applicant did not respond to this issue.

53. Article 47 (1) and (2) provides as follows:

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

To give effect to this right, Parliament enacted the Fair Administrative Action Act. Section 3 of the Act provides;

3. (1) This Act applies to all state and non-state agencies, including any person-

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.(emphasize added)

54. The term "person" has been clearly defined under Article 260 of the Constitution to include a company, association or other body of persons whether incorporated or unincorporated.

55. The Respondents' main contention is that the 2nd and 3rd Respondents and the 1st to 5th Interested Parties are private entities who do not fall within the purview of Judicial Review. However, Section 3 of the Fair Administrative Action Act states that the Act applies to both state and non-state agencies. Does this mean that all state and non-state agencies can be subjected to judicial review proceedings? I would answer this in the negative. For such a state or non-state agency to fall within the realm of judicial review it must meet the preconditions set out in sub-section (1) of Section 3 of the Act which are that the person must be either exercising administrative authority, performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

56. In this case, the 3rd Respondent was responsible for the alleged decision that disqualified the Applicant from vying for the elective positions while the 2nd Respondent upheld the decision of the 3rd Respondent when it came before it on appeal. The 2nd and 3rd Respondents were carrying out quasi-judicial functions. It is these actions/decisions of the Respondents that the Applicant claims affected his legal rights under Article 47 of the Constitution. I find no reason as to why the 2nd and 3rd Respondents cannot fall within the purview of Judicial Review.

57. In the case of **Ernst & Young LLP v. Capital Markets Authority & Another [2017]Eklr**, Justice Mutivo expounded on access to judicial review for both public and private entities as follows:

“As can be seen, the entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. 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. An order of judicial review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3)(f). I strongly hold the view that court decisions should show strands of the recognition of the Constitution as the basis of judicial review.

In the case of Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex- Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK) the Court held that the applicant who described itself as a welfare society registered under section 10 of the Societies Act[61] with membership throughout the Republic of Kenya had, under the Constitution, locus to institute judicial review proceedings if the Respondents’ actions or inactions had adversely affected them or were likely to adversely affect them. The court however reverted to the old argument that private bodies are not amenable to judicial review, without inquiring whether the Respondent carried out a “quasi-judicial function” capable of adversely affecting the rights of the applicant. The applicant was denied judicial review on that basis, per incuriam...

Under the Constitution of Kenya, 2010 judicial review orders, in my view, are applicable against any private person, body or authority who exercises a judicial or quasi-judicial functions by which a right or fundamental freedom of a person has been or is likely to be adversely affected. The traditional jurisprudence of judicial review restricted the ambit of judicial supervision of procedures to situations where the functions classified as “judicial or quasi-judicial” had been performed by “a public authority.” Presently, Article 165(6) gives the High Court the powers of judicial review over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, 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.”

57. As to the 1st to 5th Interested Parties, Black’s Law Dictionary, 10th Edition defines the term “interested party” to mean a party who has a recognizable stake and therefore standing in a matter. I do agree with the Respondents that the 1st to 5th Interested Parties are private persons. However, it is important to question whether they have a recognizable interest in this matter. It is not disputed by any party that the 1st to 5th Interested Parties were elected to various positions in the 1st Respondent in the impugned election of 17th March, 2017. The process through which they were elected is partly the subject of these proceedings as the Applicant questions their qualification for the various positions. This being the case I do find that the 1st to 5th Respondents are properly enjoined as Interested Parties in this matter.

b) Whether the Ex-Parte Applicant should be granted Judicial Review remedies of Certiorari and Mandamus

58. The Applicant is seeking the orders of certiorari and mandamus to quash the decision of the Respondents disqualifying him from vying for various positions, and electing the 1st and 2nd Interested Parties to the branch committee and council and to compel the Respondents to call for a fresh election, allow him to contest and allow all fully paid up members to vote in the elections. In the case of **Cortec Mining Kenya Limited v. Cabinet Secretary, Attorney General & 8 others [2015] eKLR** the Court of Appeal discussed the judicial review remedies as follows:

“...certiorari issues to quash decisions for errors of law in making such decisions or for failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. The order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same.”

59. The Ex-parte Applicant submitted that the Respondents disqualified him from vying for the positions of Branch Committee Member, Council Member and Branch chairman on the ground that he did not have a good standing in the Society. The Ex-parte applicant contended that this decision was unreasonable, unfair, biased, made in bad faith with ulterior motive and in violation of his legitimate expectation.

60. On the ground that the decision was unreasonable, the Applicant submitted that the Society had no definition of what amounted to good standing. Further, the Applicant submitted that he had diligently served the Society for many years and had even been appointed to the Caretaker Committee of the Society and therefore he was in good standing with the Society.

61. The Respondents, on their part, contend that the Applicant did not meet the requirements provided in the Society’s Constitution and its Rules contained in the Green Book. Moreso, the Respondents explained that various conditions were analysed when determining whether the Applicant was of good standing and they found that the Applicant had been reprimanded by the Society and he did not appeal against the reprimand. To the Respondents, the reprimand meant that the Applicant was not in good standing with the Society.

62. According to the case of **Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1KB 223**, a decision is unreasonable if it defies logic or accepted moral standards that no sensible person applying his mind to the issue would arrive at such a decision. In this case, the 1st Respondent is a Society governed by its Constitution and other laws/rules. It is only logical that such a Society would set qualification requirements for its members who would want to vie for various electoral positions within the Society.

63. I have carefully read through a copy of the Green Book attached to the replying affidavit of **BATROMA M. MUTHOKA** filed on 20th July 2017. At page 12, Rule E provides that a member seeking to be elected as a Branch Chairperson must meet several conditions among them that he or she must not have been convicted of a criminal offence, should be below 70 years of age, have a University Degree or

alternatively have at least form four level qualification with the necessary skills and experience to run a large organization; served in the Branch Committee for at least 5 years; served in the Council for at least 5 years prior to the election; and be of good standing with the Society. It is important to note that the conditions are in respect to the position of Branch Chairman which the Applicant vied for.

64. The Society's Green Book does not offer a definition of the term "good standing". Be that as it may, was the definition assigned to the term while vetting the Applicant's candidature unreasonable? The Respondents claim that the Applicant was reprimanded by the Society and he never appealed against the reprimand. The Applicant does not dispute that he was reprimanded but argues that he was never suspended nor expelled as punishment. The Respondents in turn submits that the reprimand amounted to a gross misconduct. To my mind, the reason given by the Respondents for finding the Applicant not to have been of good standing is not unreasonable. The 2nd Respondent and 3rd Respondent did not act unreasonable. They did not consider extraneous or irrelevant issues in arriving at that decision.

65. The Applicant also alleges that the decision by the Respondents was biased, made in bad faith and with an ulterior motive. To support this assertion the Applicant submitted that the criteria used to disqualify him was not used against other candidates. In essence the Applicant claimed that there were other candidates, Salim Mazrui and Jaffar Kiti who had been reprimanded but were still allowed to vie for various elective positions. The Respondents admitted that Salim Mazrui and Jaffar Kiti had been reprimanded together with the Applicant. However, the Respondents contended that the two had appealed against the reprimands and the appeals were still pending thus they were allowed to vie.

66. Bias is the presence of an inclination/prejudice against a specific person. In this case, the Applicant purports that there was prejudice against him by the Respondents. However, the Applicant must not just claim bias; he must prove that there was actual bias. In my view, the circumstances surrounding the candidature of the Applicant are not similar to those of Salim Mazrui and Jaffar Kiti. The Applicant has not proved that he appealed against his reprimand nor has he disputed the assertion by the Respondents that Salim Mazrui and Jaffar Kiti appealed against their reprimands. The Applicant's only ground is that they were all reprimanded hence they should receive the same treatment. This cannot be the case if some of the individuals did appeal against the reprimand and the appeals are still pending. Therefore, the Applicant has no reason to claim that the Respondents were biased against him.

67. The Applicant has also claimed that there was an ulterior motive in the decision reached by the Respondents. The Applicant suggested that the motive was to impose candidates of the Respondent's choice on the members. Further, the Applicant claimed that the 1st and 2nd Interested Parties were directly elected which is not in line with the Society's laws, while the 3rd to 5th Interested Parties were unqualified yet they were elected.

68. It is trite law that judicial review does not look into the merits and demerits of a decision but rather the process by which the decision was reached. This was the position taken in the case of **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR**, where the Court observed as follows,

"To put the essence of this application in perspective, it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter..."

69. In this case, the Applicant contends that the 1st and 2nd Interested Parties were directly appointed which is not in line with the laws of the Society. The Applicant has however failed to cite the specific Rule or Constitutional provision of the Constitution of the Society that the Respondents offended. That notwithstanding, this court cannot delve into the correctness of the decision but can only question whether there was indeed ulterior motive in reaching the decision. During the Special Annual General Meeting held on 17th March, 2017, the aforementioned Interested Parties were directly elected to various positions. The members present did not protest the direct appointment of the 1st and 2nd Interested Parties. I would think that if the two were being imposed on the members, members present would protest their election. The only ground for the issue of ulterior motive is the imposition of officials by the Respondents but there is no evidence to substantiate this claim. This is also the position with regard to the 3rd to 5th Interested Parties whom the Applicant claimed were not qualified. This court cannot determine the eligibility of these Interested Parties to vie for the various positions as it would be tantamount to determining the correctness of the decision reached by the Respondents.

70. The Applicant claims that the Respondents violated his legitimate expectation. He claims that having met the requirements for qualification as a candidate there was a legitimate expectation that he would be allowed to contest in the elections. The Applicant, with the approval of this court cited the case of **Keroche Industries Limited v. Kenya Revenue Authority & 5 others [2007] eKLR** where the Court explained legitimate expectation as follows:

"Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way."

71. As I understand it, the expectation was that if a member had met all the requirements imposed by the Society's Constitution and Rules

with regard to a particular position, such a member would be allowed to vie for the position. In this case, the Applicant did not meet the condition imposed by the Rules of the Society that he should be of good standing with the Society. This being the case, it would not be possible for the Applicant to have a legitimate expectation that he would be allowed to vie despite not having good standing with the Society.

72. As to the legitimate expectation of the 6th to 31st Interested Parties that they would be allowed to vote in the elections as they had fully paid up memberships, this issue was determined in Mombasa Miscellaneous Application No. 13 of 2017 where I found that the amendments to the 1st Respondent's Article 11 of the Constitution were made procedurally. Therefore their right to vote was rightly take away by the Constitution. The decision in the said case can only be reviewed by way of an appeal.

73. For the above reasons, I do not find the application dated 29th June, 2017 by the Applicant to be merited. Accordingly no judicial review order can be issued. Costs to the Respondents.

74. On the issue of costs, it is my view that parties should meet their own costs given that they all belong to the same Society and costs in this case may overstretch their common patience.

Dated, Signed and Delivered in Mombasa this 11th day of July,

2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Aziz holding brief for Mr. Orina for the Ex-parte Applicant

Mr. Ochieng for Respondents

Mr. Kaunda Court Assistant