



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**JUDICIAL REVIEW APPLICATION NO. 2 OF 2016**

**(AS CONSOLIDATED WITH JUDICIAL REVIEW APPLICATION NO. 1 OF 2016)**

**IN THE MATTER OF: APPLICATION FOR ORDERS OF CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF: COMPANIES ACT CAP 486 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: KIAMBU CHIEF MAGISTRATE'S COURT CIVIL SUIT NO 290 OF 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**GEOFFREY KARIUKI NJUGUNA**

**ESTHER WANJA NGANGA**

**PETER MWAURA KAMAU**

**JULIUS MWANGI KURIA.....EX PARTE APPLICANTS**

**GEORGE NDERITU KAGUORA**

**JOYCE RUKARIA GITAU**

**RICHARD NJOGU NDUNGU**

**VERSUS**

**THE RESIDENT MAGISTRATE'S COURT AT KIAMBU.....RESPONDENT**

**AND**

**DR. SAMUEL THINGURI WARWATHE.....1ST INTERESTED PARTY**  
**BEATRICE WAIRIMU KAMAMIA.....2ND INTERESTED PARTY**  
**KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY**  
**(KNCCI) LIMITED.....3RD INTERESTED PARTY**

**AND**

**KENYA NATIONAL CHAMBER OF**  
**COMMERCE & INDUSTRY - KIAMBU COUNTY**

**(Through Samuel Wahome Waweru the**

**Chief Executive Officer).....4TH INTERESTED PARTY**

**HANNAH WAIRIMU NGANGA.....5TH INTERESTED PARTY**

**STEVE MAINA KANJA.....6TH INTERESTED PARTY**

**PETER MUIGAI KANGERE.....7TH INTERESTED PARTY**

**HUDSON KAMAU CHEGE.....8TH INTERESTED PARTY**

**PAUL KAHIGA NGARUIYA.....9TH INTERESTED PARTY**

**PETER KIONGO THOMAS.....10TH INTERESTED PARTY**

**PETER KURIA WARWATHE.....11TH INTERESTED PARTY**

**JOAN WANGECHI KINYANJUI.....12TH INTERESTED PARTY**

**PETER NDUNGU MACHARIA.....13TH INTERESTED PARTY**

## **JUDGMENT**

### **A. INTRODUCTION AND BRIEF HISTORY**

1. This case has had more than its share of legal drama. Most of this drama is documented in two rulings already delivered in this case both before and after its consolidation -- on 29/07/2016. These two rulings give a comprehensive procedural history of the case and I do not propose to repeat it here.

2. For all the high octane legal drama and multiplicity of parties, the case presents a fairly common fact pattern and a routine legal question. The single issue in the case is whether a magistrates court had jurisdiction to entertain and make rulings in Kiambu CMCC No. 290 of 2015. If the answer to that question is in the negative, then this Court must bring the two rulings already made in that matter – on 15/03/2016 and 03/06/2016 – to this Court and issue a certiorari quashing them. Contemporaneously, the Court must issue a prohibition directed at the Magistrate's Court prohibiting it from proceeding with the case. It follows that certain consequences would flow from these findings. Of course, if the Court had jurisdiction then the rulings by the Learned Magistrate in CMCC No. 290 of 2015 will remain intact.

3. The undisputed facts in this case are as follows. Dr. Samuel Thinguri Warwathe is one of the Interested Parties in this Judicial Review (hereinafter, I will refer to him simply as “Dr. Warwathe”) filed suit,

together with a Ms. Beatrice Wairimu Kamamia in Kiambu CMCC No. 290 of 2015. The six substantive prayers in that suit were as follows:

1. *“That Honourable court be pleased to issue an order declaring the letter dated 14th January 2015 and signed by the respondents and convening a meeting on behalf of Kenya National Chamber of Commerce and Industry Kiambu County to be in contravention of memorandum and articles of association of Kenya National Chamber of Commerce and Industry.*
2. *THAT this Honourable court be pleased to issue permanent injunction against the respondent from convening and or holding any meeting to discuss the plaintiffs and or any other business of Kenya National Chamber of Commerce and Industry Kiambu County*
3. *THAT this Honourable court be pleased to make a declaration that the Defendants have no powers to represent and/or Act on behalf of the Kenya National Chamber of Commerce and Industry Kiambu County in Contravention of the memorandum and articles of association.*
4. *THAT this Honourable court be pleased to issue an Order directing the 7th Defendant to surrender in his possession all goods of trade belonging to the of Kenya National Chamber of Commerce and Industry Kiambu County*
5. *THAT this Honourable court be pleased to make a declaration that the plaintiffs and members the governing council who replaced the defendants are the bonafide officials of the Kenya National Chamber of Commerce and Industry Kiambu County following the annual General meeting held on 31st January 2015.*
6. *THAT this Honourable court direct the Manager Equity Bank – Kikuyu to effect changes in the KNCCI Kiambu County bank account NO. 0570299704215. The new signatories should be Dr Samuel Thinguri Warwathe, Beatrice Wairimu Kamamia and Hannah Wairimu Nganga.*
7. *That costs be provided for.”*

4. What emerges from the Complaint filed in the suit, is that there was a fierce leadership dispute at the Kenya National Chamber of Commerce and Industry – Kiambu County Chapter (KNCCI-Kiambu). It is common among the parties that the *Ex Parte* Applicants were members of the KNCCI – Kiambu County at least until 31/01/2016. (See Complaint in CMCC No. 290 of 2015 at para. 22; Dr. Warwathe's Witness Statement at para. 19; Dr. Warwathe's Supporting Affidavit deposed on 23/10/2015 at para. 20; Notice of Motion dated 23/10/2015 – prayer 6 thereof; Statement of Defence at para. 3; Witness Statement by Richard Njogu Ndungu on behalf of the *Ex Parte* Applicants as Defendants in CMCC No. 290 of 2015 at para. 3; Letter dated 09/07/2012 by the Registrar of Companies confirming the officials of KNCCI-Kiambu County following the elections held on 22/03/2012.

5. On or about 15/01/2016, the *Ex Parte* Applicants appear to have authored a letter purportedly requisitioning for a meeting of the Governing Council of KNCCI- Kiambu County. That meeting was to be held on 17/01/2016 at the Wida Highway Motel. This letter became the flashpoint of the leadership wrangles at KNCCI- Kiambu County.

6. Dr. Warwathe who, it is common, the Chairman of KNCCI-Kiambu County and Beatrice Kamamia, who, again it is common, the Vice-Chairperson responded to that letter by filing Kiambu Civil Suit No. 6 of 2015 challenging the legality of the meeting and certain other subsequent actions taken by the *Ex Parte* Applicants. That suit was dismissed on a technicality (failure to take out summons) and paved way for a new suit by Dr. Warwathe and Ms. Kamamia to wit Kiambu CMCC No. 290 of 2015 which is the subject of these Judicial Review Proceedings.

7. Meanwhile, the *Ex Parte* Applicants had gone ahead hammer and tongs with their plans outlined in their letter dated 15/01/2016. Treating that letter as a valid requisition for a meeting under the Articles and Memorandum of Association of KNCCI, they proceeded to hold a meeting on the declared date –

17/01/2016. Naturally, at that meeting, which Dr. Warwathe and Ms. Kamamia did not attend, the Governing Council passed a resolution purportedly suspending Dr. Warwathe and Ms. Kamamia as Chair and Vice-Chair respectively.

8. Meanwhile, not to be outdone, Dr. Warwathe and Ms. Kamamia organized, and presided over, a meeting of their own on 31/01/2016. Quite predictably, at that meeting, all the *Ex Parte* Applicants were replaced as members of the Governing Council.

9. That set the stage for Kiambu CMCC No. 290. I have reproduced the prayers in that suit above. Contemporaneously with the main suit, Dr. Warwathe and Ms. Kimamia took out a Notice of Motion seeking interim relief. Strongly resisted by the *Ex Parte* Applicants, that Notice of Motion Application is the one that produced the ruling and orders that are impugned in the current proceedings. The orders by the Learned Magistrate pursuant to his ruling dated 15/03/2016 were as follows:

10. Subsequently, a follow-up Application by Dr. Warwathe and Ms. Kimamia alleging disobedience of the Court orders followed. The orders given pursuant to that second Application are also impugned here.

### **B. THE QUESTION FOR DETERMINATION**

11. The singular question for determination is whether the Learned Magistrate had jurisdiction to entertain the suit in Kiambu CMCC 290 of 2015. The objection to the Learned Magistrate's jurisdiction is two-pronged:

a. First, the *Ex Parte* Applicants argue plainly that only the High Court has jurisdiction to deal with any controversy touching on a company by virtue of the provisions of the Companies Act.

b. Second, the *Ex Parte* Applicants maintain that the exercise of jurisdiction by a Court of law in the circumstances was premature anyway since the Articles and Memorandum of Association of KNCCI obligates members to first file any such dispute before the dispute resolution mechanism provided thereunder. That did not happen here and, therefore, the *Ex Parte* Applicants argue, the Courts cannot exercise jurisdiction unless and until aggrieved parties exhaust the dispute resolution mechanism so provided.

12. It is important at this stage to make clear what is not at issue in this case and is therefore not up for determination in this judgment: the validity of the elections held (or planned to be held) on 17/03/2016 or on 11/07/2016. This judgment might have ramifications for those elections but their validity is not one of the issues for determination herein. It is imperative to expressly make this point clear because much of the submissions by the 4th to 13th Interested Parties seek to address this issue. These Interested Parties are obviously interested in inoculating the elections held on 11/07/2016 (and, conversely, impugning any elections held on 17/03/2016): they were elected officials of KNCCI- Kiambu County in the former elections. However, the narrow question for determination in this case is simply whether the Learned Magistrate had jurisdiction to hear Kiambu CMCC No. 290 of 2015. Conversely, the *Ex Parte* Applicant have directed a lot of their ammunition to the elections of 11/07/2016 impugning its validity. Again, this judgment does not directly speak to the validity of those elections.

13. To my mind, this suit can be satisfactorily be disposed off by answering three sub-issues:

a. Did the Magistrates Court have jurisdiction to entertain Kiambu CMCC No. 290 of 2015 by virtue of the provisions of the Companies Act?

b. Was the suit pre-mature by dint of the Exhaustion Requirements in the Articles and Memorandum of Understanding of KNCCI?

c. Is the present suit *sub judice*?

d. Can the Order of Prohibition be issued in the Case?

14. Before delving into these four issues, I propose to deal with a preliminary matter raised by Counsel for the 5th to 13th Interested Parties: They urged me to dismiss the application for being premature, incompetent and incurably defective for failure to comply with the mandatory provisions of the law.

15. The complaint is that the *Ex Parte* Applicants failed to serve the Learned Resident Magistrate who heard Kiambu CMCC No. 290 of 2015 as the presiding officer of the Court whose decision is impugned. The Interested Parties argue that serving the presiding officer of the Court whose decision is question with the Notice of Motion is mandatory under the provisions of Order 53, Rule 3(2).

16. The Interested Parties maintain that failure to serve the Presiding Officer is fatal. It is not enough, they say, that service was effected on the Chief Registrar of the Judiciary.

17. It is not contested that the Learned Trial Magistrate who presided over Kiambu CMCC No. 290 of 2015 was not served with the Notice of Motion. The question is whether such service is essential or required where, as here, it is not disputed that the Chief Registrar of the Judiciary has been duly served. I do not think that such service, despite the text of Order 53, Rule 3(2) is necessary. The need for service is to give notice to the parties concerned that a suit has been filed. In the case of a magistrates court, it is generally considered sufficient to serve the Chief Registrar of the Judiciary with the Court Process. It is the Chief Registrar who then, in consultation with the Chief Justice and the Judicial Service Commission where necessary, decides if there is sufficient interests in the Judiciary for it to be represented in the proceedings. The Presiding Officer of a particular court will never take up the official position of defending or conceding a suit such as the present one.

18. To this extent, therefore, I find that the insistence on this pettifogging technical requirement that is still in our rule books is elevating rule formalism to a rarefied sphere in complete contrast to the Constitutional commandment in Article 159 of the Constitution that courts should endeavour to administer justice in accordance with substantive justice and without due regard to technicalities. In the specific case of judicial review, this Constitutional admonition is given specific statutory content in the Fair Administrative Action Act of 2015 which, at section 10 enacts that: "An application for judicial review shall be heard and determined without undue regard to procedural technicalities."

19. I am more fortified in my views in this particular case because the parties to this case appeared severally before me for directions on the hearing of the Notice of Motion. I gave several rulings on preliminary issues – two of which were substantive, considered rulings on several aspects of the case. At the directions stage, none of the parties indicated that there was any other party essential to the case who needed to be served even though that was one of the issues that was explicitly canvassed before the Notice of Motion was set down for hearing. Consequently, the late invocation of the technical rule in Order 53, Rule 3(2) can be nothing more than an attempt to torpedo the hearing of the Notice of Motion on its merits.

### **C. DOES THE COMPANIES ACT OUST THE JURISDICTION OF THE MAGISTRATES' COURTS IN THE DISPUTE?**

20. Counsel for the *Ex Parte* Applicants argued that KNCCI is a Company limited by guarantee as that term is defined in section 3(1) of the Companies Act. Further, *Ex Parte* Applicants argue, the "Court" is defined in the same section in the following terms: "the Court" means (unless some other court is specified) the High Court.

21. The *Ex Parte* Applicants submit, therefore, that it is only the High Court which has requisite Statutory Jurisdiction to deal with matters/disputes pertaining to relating to /touching on a company, and in particular a company limited by guarantee such as Kenya National Chamber of Commerce And Industry (KNCCI) Limited.

22. In faulting the Magistrates Court for taking on Kiambu CMCC No. 290 of 2015, the *Ex Parte* Applicant cited the eternal words of Nyarangi in *Owners of the Motor Vessel Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1* thus:

*If the jurisdiction of an inferior court or tribunal(including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction....*

23. They also cited a recent Supreme Court decision ***In the Matter of Advisory Opinions of the Supreme Court under Article 163 (3) of the Constitution – Constitutional Application No. 2 of 2011***. Here, the Supreme Court in citing with approval the ***Lilian S Case*** stated:

*The Lilian S case [1989] KLR1 establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.*

24. While reminding this Court that lack of jurisdiction is one of the core reasons this Court can review the decision of a lower court or tribunal, the *Ex Parte* Applicants cited ***Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001*** where the court of Appeal held:

*"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters..."*

25. They similarly cited ***East Africa Railways Corp. Vs Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327*** for the same proposition. In that case the Court remarked thus:

*"It has been recognized for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. .... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of Superior Courts to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..."*

26. The *Ex Parte* Applicants argue that it is not in dispute that Kiambu CMCC No. 290 of 2015 pertains to issues/dispute touching a Company. The 1st& 2nd Interested Parties and the *Ex Parte* Applicants are all members of Kenya National Chamber of Commerce & Industry, a Company Limited by Guarantee incorporated as such under the Companies Act. That Company's composition is underpinned and or premised on the Memorandum and Articles of Association incorporating it. The Kenya National Chamber of Commerce & industry is devolved into County level within the territory of Kenya. The *Ex Parte* Applicant, therefore argues that the KNCCI, its members, and all operations and or transactions thereto are underpinned in the germane statutory regime - the Companies Act, 2015 and the Memorandum and Articles of Association of the Company. Since the Companies Act, 2015 donates Jurisdiction to the High Court and not the Magistracy Courts, the *Ex Parte* Applicant argues that it follows that the Learned Magistrate thus acted in excess of his Jurisdiction in dealing with dispute in Kiambu CMCC No. 290 of 2015.

27. It is common among all the parties that only the High Court has jurisdiction to hear and determine any

disputes touching on company law matters by virtue of section 3 of the Companies Act, 2015. That position is so self-evident that no further analysis and comment is required.

28. It must mean, therefore, if the dispute between the *Ex Parte* Applicants and the Interested Parties (including Dr. Warwathe and Ms. Kamamia) relates to a company law matter i.e. KNCCI, the appropriate forum for its ventilation would be the High Court and not the Magistrates Court.

29. So what is the nature of the dispute between the parties? The Interested Parties are united in arguing that the dispute between them and the *Ex Parte* Applicants is not a dispute related to a company. They reach this remarkable position by arguing that the *Ex Parte* Applicants are simply no longer members of KNCCI. According to the Interested Parties, the *Ex Parte* Applicants ceased being members on 31/01/2016 when a resolution of the Governing Council of KNCCI-Kiambu County divested them of membership. The Interested Parties further argue that this divestment of membership was proper and legal by virtue of Article 8 of the Articles and Memorandum of Association of KNCCI which permits the Governing Council to have such authority.

30. If the *Ex Parte* Applicants were no longer members, the Interested Parties argue, then it follows that the dispute between them and the Interested Parties was not a dispute related to a company. Consequently, logic would have it, the Magistrates Court had jurisdiction.

31. So, the question turns on the membership of the *Ex Parte* Applicants.

32. On my part, it is my view that the question of cessation of membership is a red-herring. That is, indeed, the dispute between the Interested Parties and the *Ex Parte* Applicants: it is disputed whether the meeting held on 31/01/2016 was regular and legally called because the *Ex Parte* Applicants claim that by the time it was called, Dr. Warwathe and Ms. Kamamia were no longer Chair and Vice-Chair respectively of KNCCI-Kiambu County. If the regularity of the meeting that purportedly divested the *Ex Parte* Applicants of membership is contested, then it cannot be the resolutions of that impugned meeting magically and talismanically are able to grant jurisdiction to the Magistrates Court. This would be a most remarkable outcome.

33. If the Interested Parties position is taken to its logical conclusion, then, to grant jurisdiction to the Magistrates Court in matters of Company law, all a Plaintiff has to do is to plausibly claim that the Defendant has ceased to be a member. This would be an absurd proposition as it would amount to giving the Plaintiff a veto in the determination of the starting point of the litigation.

34. Here, as aforesaid, the question of membership is one of the contested issues. The question of the regularity of the meetings held on 17/01/2016 and 31/01/2016 as well as the consequential elections held in July, 2016 are all contested. These are, therefore, all questions for determination by the Court that will eventually hear the matter substantively. The position held by the Interested Parties that since in their view membership of the *Ex Parte* Applicants ceased on 31/01/2016 therefore the matter is no longer one involving a company is untenable.

35. In any event, two other pointers indicate that the dispute indisputably involves a controversy related to KNCCI-Kiambu County. The first one is the revelation in the Complaint and original pleadings by Dr. Warwathe and Ms. Kamamia in Kiambu CMCC No. 290 of 2015 that one of the main reliefs they sought was the quashing of a Notice of the meeting of 17/01/2016 and a declaration that such a meeting was illegal – and, conversely, an inoculation of the meeting held on 31/01/2016. Therefore, some of the actions Dr. Warwathe and Ms. Kamamia wanted invalidated were, by their own admission, undertaken when the *Ex Parte* Applicants were members of the Governing Council. It is noteworthy that these impugned actions triggered by the letter authored by the *Ex Parte* Applicants styled as a requisition for a meeting is the main issue in Kiambu CMCC No. 290 of 2015. It is, therefore, ingenuous to say that the dispute did not involve company matters.

36. Further, if there was ever any doubt that the suit involved a dispute about the affairs of KNCCI-Kiambu County, that doubt is put to flight by the nature of the prayers sought by the 1st and 2nd

Interested Parties in their Notice of Motion dated 23/10/2015 which spawned the impugned ruling and order. Two of the prayers in that Application dissolve any doubts. The Interested Parties asked the Court for prayers:

(2) That [the] Honourable Court be pleased to issue an order declaring the letter dated 14th January, 2015 and signed by the Respondents [*Ex Parte* Applicants] and convening a meeting on behalf of Kenya National Chamber of Commerce and Industry – Kiambu County to be in contravention of the Memorandum and Articles of Association of [the] Kenya National Chamber of Commerce and Industry.

(3) That this Honourable Court be pleased to issue [a] permanent injunction against the Respondents [*Ex Parte* Applicants] from convening and/or holding any meeting to discuss the Plaintiffs and/or any other business of Kenya National Chamber of Commerce and Industry – Kiambu County.

37. These prayers, without more, are a clear indication that the 1st and 2nd Interested Parties perceived this to be a dispute involving the affairs of KNCCI-Kiambu County to which the Memorandum and Articles of Association of the company would be implicated.

38. The third pointer to the unmistakably corporate nature of the dispute is the fact that the original Judicial Review matter was filed by the National Office of KNCCI. While there was an unsuccessful attempt to withdraw that suit subsequently, it gives an indication that the National Office, at the very minimum, considered the *Ex Parte* Applicants to be members of KNCCI-Kiambu County.

39. Having come to the conclusion that Kiambu CMCC No. 290 of 2015 at the very least involved determination of membership of the *Ex Parte* Applicants in KNCCI-Kiambu County, it follows that the Magistrate's Court did not have jurisdiction to hear and make any orders in the matter.

#### **D. WAS THE COURT CASE PREMATURE BY VIRTUE OF THE DISPUTE RESOLUTION MECHANISM IN THE KNCCI'S CHARTER DOCUMENTS?**

40. Further, the *Ex Parte* Applicants argue that as members of the KNCCI, the parties to Kiambu CMCC No. 290 of 2015 were bound by the governing document - the Memorandum and Articles of Association. They further argue that Article 175 of the Memorandum and Articles of Association Kenya National Chamber Of Commerce And industry (KNCCI) Limited clearly stipulates that there is a Dispute Resolution Committee which shall have "Jurisdiction to decide disputes between members of the Chamber and that such dispute shall be determined by way of arbitration." Article 192 of the same Memorandum & Articles of Association further stipulates that "Notwithstanding the foregoing provisions on dispute resolution, a party is entitled to seek injunctive or interim or conservatory measures from a court of competent jurisdiction. Recourse to court otherwise than as set out in this Article shall be available to the aggrieved party only after the dispute resolution mechanism herein above stated has been exhausted."

41. The *Ex Parte* Applicants argue, as they did before the Learned Trial Magistrate, that the Dr. Warwathe and Ms. Kamamia were obligated to first present their dispute to the Dispute Resolution Committee and pursue arbitration under Articles 175-192 of the Memorandum and Articles of the KNCCI Limited before coming to Court.

42. The *Ex Parte* Applicants further submit that a court should down its tools and or decline to grant/make any orders where there is an alternative remedy available and or provided for on priority. In this regard, the *Ex Parte* Applicants cited the Court in the case of ***Speaker of the National Assembly v Karume [1990-1994] EA 549***. In that case, the court was emphatic that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed. The *Ex Parte* Applicants argue that the general principle of law is that is only in exceptional case that the court will entertain a dispute in the face of such an alternative dispute remedy. They further argue that there are no exceptional circumstances in the instant case to

warrant circumvention of the arbitration procedure or remedy.

43. The *Ex Parte* Applicants, therefore, argue that It is a prerequisite that before approaching the court for relief, the aggrieved party must first exhaust the stipulated primary dispute resolution mechanism. The mechanism had not been exhausted as the 1st& 2nd Interested party invoked the respondent's jurisdiction directly instead. The action was/is premature. In ***Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Mugna Henry & 1756 Others [2015] eKLR***, the Court of Appeal observe that

*It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be last for a of last resort and not the first port of call the moment a storm brews within churches as is bound. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the constitution which commands Courts to encourage alternative means of dispute resolution.*

44. The Interested Parties response to this argument is that while they concede that the Article 175 of the Memorandum and Articles of Association of KNCCI would have obligated them to first channel the dispute to the Dispute Resolution Committee, that only applies to “disputes between members of the Chamber, disputes between a member and the National Governing Council or a County Governing Council or other officer thereof.” The interested Parties argue, however, that the *Ex Parte* Applicants had ceased being members and that therefore Article 175 did not apply. It was, therefore, appropriate for the 1st and 2nd Interested Parties to go to Court on the dispute between them and the *Ex Parte* Applicants.

45. I have already analysed above why the Interested Parties' arguments on cessation of membership as a ground to grant the Magistrates Court jurisdiction is problematic. Here, the same argument is deployed to oust the jurisdiction of the Dispute Resolution Mechanism provided for in the Memorandum and Articles of Association of KNCCI. The reasoning is problematic for the same reason: membership is contested and is an issue and, therefore, an assertion by one of the disputants that their adversary is not a member is not enough to oust the jurisdiction of the Dispute Resolution Committee.

46. In any event, this particular issue is probably already *res judicata*: Justice Msagha Mbogholi ruled in HCCC No. 157 of 2015 that the dispute belonged, first, to the Dispute Resolution Committee and that the disputants could only approach the Court after they had exhausted this mechanism. The Judge ruled so after perusing the pleadings, no doubt appreciating the nature of the dispute between the parties and forming the opinion that the dispute belonged to the Dispute Resolution Committee in the first instance.

47. Having come to this conclusion about the Dispute Resolution Mechanism, however, it behoves me to point out that this would not be an appropriate ground for Judicial Review – and that if this was the sole ground urged to exercise Judicial Review, I would have declined to do so. This would be an appropriate ground for preferring an appeal to the refusal by the Learned Magistrate to stay the suit until the exhaustion of the local dispute resolution mechanism – but it would, certainly, not be a ground for Judicial Review. As the *Ex Parte* Applicants readily realise, the Dispute Resolution Mechanism provided for in the Memorandum and Articles of Association of KNCCI do not oust the jurisdiction of the Courts; it merely provides for an alternative means of resolving the dispute which must be exhausted before the dispute can be considered ripe for determination by the Court. Hence, a Court that fails to properly appreciate this principle and deploy it accordingly is not acting in excess of jurisdiction but commits an error of judgment. Such an error can only be rectified on appeal as it goes to the merits of the decision – and not by way of Judicial Review.

#### **E. IS THE MATTER HEREIN SUB JUDICE AND THEREFORE IMPROPERLY BEFORE THE COURT AS A JUDICIAL REVIEW APPLICATION?**

42. There are three other objections to the current suit which the Interested Parties have raised which I propose to deal with briefly.

43. First, Dr. Warwathe has argued that this matter is *sub judice* in view of pending appeal (from the rulings and orders of the Learned Magistrate in Kiambu CMCC No. 290 of 2015 as well as a separate suit filed by the *Ex Parte* Applicants in Milimani High Court HCCC No. 157 of 2016). The latter suit challenges the replacement of the *Ex Parte* Applicants as officials of KNCCI-Kiambu County at the meeting held on 31/01/2016.

44. Dr. Warwathe has cited, in his aid, remarks by the Court in ***Jorim Owino Nyamor & Another v Kenya Airways Ltd [2013] eKLR*** to the effect that: “to file a new suit such as herein is a multiplicity of suits and such actions must be stopped as this only serves to increase costs and waste judicial time.”

45. With respect, I think this argument misunderstands the doctrine of *sub judice*. Here, it is Dr. Warwathe who filed Kiambu CMCC No. 290 of 2015 in a court which the *Ex Parte* Applicants insist had no jurisdiction. When that Court issued orders, it was open to the *Ex Parte* Applicants to do one of two things: challenge the orders of the Court in a Judicial Review proceedings (as they have done here) or file an appeal against the decisions and orders of the Learned Magistrate raising lack of jurisdiction as one of the grounds. Both avenues are perfectly legal and regular for the *Ex Parte* Applicants to take. Of course, they cannot maintain both courses of action – one will be rendered *res judicata* by the other one.

46. As to the existence of the High Court matter, in my view, it does not at all divest the *Ex Parte* Applicants of the right to challenge jurisdiction of the Court that issued the orders which benefited the Interested Parties in Kiambu CMCC No. 290 of 2015. Indeed, one could argue that they approached the Court they believed had proper jurisdiction in the matter. The High Court matter filed by the *Ex Parte* Applicants will determine substantively some of the issues in disputes among the parties here. As a suit, the present proceedings will not determine any matters in dispute among the parties. The only issue this suit will determine is whether the Court in Kiambu CMCC No. 290 of 2015 had jurisdiction to entertain the case. It cannot be said that the subject matter of the two suits

#### **F. CAN THE REQUESTED ORDER OF PROHIBITION ISSUE IN THIS CASE?**

48. One of the prayers included in the *Ex Parte* Applicants? Notice of Motion dated 03/08/2016 is the following:

Prohibition prohibiting the 1st Interested Party and/or any other person purportedly elected during the purported repeat elections conducted on the 11th July, 2016 in respect to KNCCI Kiambu County Branch from assuming office and/or being registered as officials of KNCCI-Kiambu County Branch.

49. The Interested Parties object to the availability of this particular on two separate grounds. First, they argue that it cannot be available because it was not one of the prayers for which leave was sought, and for which the Interested Parties had appropriate notice of. The Interested Parties argue that the *Ex Parte* Applicants introduced the Prohibition order after the leave stage and they complain that this is a “belated attempt to bypass the clearly set down procedures.”

50. In this regard, the 1st Interested Party cited to me the decision by Odunga, J., in ***Republic v Chairman, Higher Education Loan Board & Another Ex Parte Stephen Onyango Odebero [2014] eKLR*** where the Learned Judge stated that:

*It is however clear that the orders that the Ex Parte applicant sought in the substantive motion were not those very same orders he specified in his statement. Accordingly, the orders sought by the applicant in the Motion are not the ones for which leave was sought and granted and that renders the application incompetent. Judicial Review proceedings are special proceedings and a party who applies for the same ought to bring himself or herself within the ambit of the same.*

51. The Interested Parties are correct that a party cannot introduce a brand new prayer at the Notice of Motion stage in Judicial Review Proceedings. Such a prayer would be procedurally infirm.

52. However, I have looked at the *Ex Parte* Applicant's Chamber Summons dated 08/07/2016. The *Ex Parte* Applicants explicitly requested for, and were granted leave to apply for an order of "prohibition directed at the Respondent and the Interested Parties prohibiting conduct, carrying out, or supervising or organizing repeat elections of KNCCI-Kiambu County Branch on 11th July, 2016."

53. It is possible that it escaped the Interested Parties' mind that there are two Judicial Review matters which were, by ruling and order of the Court dated 29/07/2016, consolidated. The first Judicial Review Application (No. 1 of 2016), it is true, did not have the prayer for prohibition. However, the second one (No. 2 of 2016) had this prayer as reproduced above.

54. It therefore follows that the order for prohibition was not procedurally infirm as alleged by the Interested Parties.

55. However, it does not follow that the orders for prohibition are available in this case. The second salvo fired by the Interested Parties at the order for prohibition is that it is unavailable where the event complained about has already taken place: an order for prohibition cannot prohibit that which has already taken place as there is nothing to prohibit.

56. The Interested Parties cited Nyamu, J.A. for this trite proposition. In ***R v Vice-Chancellor Jomo Kenyatta University of Agriculture and Technology [2008] eKLR***, the Learned Judge of Appeal held thus:

*The third prayer is for an order of prohibition to prohibit the respondent, his servants, agents or employees from unprocedurally and unlawfully terminating the employment of the Applicants as staff members of the said university. In the view of the Court, the third prayer is highly belated and overtaken by events. Ordinarily, prohibition is an order of the High Court issued to prevent a decision that is yet to be made. In the case before the Court, there is nothing to be prevented as the decision was made more than one and a half years ago.*

57. Similarly, the Court of Appeal, in ***Ismael Mboya & 2 Others v Mohamed Haji Issa & Another [2011] eKLR*** expressed itself thus:

Prohibition orders look to the future and prohibit what is intended to happen before it is done, but it cannot be issued to affect what has already been done. In the case of the subject of this appeal, the Judge fell into an error when he purported to make an order to bar the registration of the appellants by the Registrar of Societies when the officers had already been registered.

58. So it is here. The Prohibitory Order is aimed at elections which were held on 11/07/2016. It has been overtaken by events. The elections were held, officials elected, and they assumed office. A prohibitory order cannot act on a past event. As this Court cannot act in vain, this specific order will not be granted.

59. There is another reason why the order for prohibition might be inapposite in this case. It does not flow from the impugned decisions which are the rulings and orders of the Learned Magistrate in Kiambu CMCC No. 290 of 2015. The decision to hold the elections, while related to the matters canvassed in Kiambu CMCC No. 290 of 2015, is a separate decision by some of the Interested Parties whose regularity is not before this Court on Judicial Review. Indeed, there are serious questions whether Judicial Review would be available to prohibit the Interested Parties, who are not public bodies, to take the contemplated actions.

## **G. DISPOSITION AND ORDERS**

60. Having considered all the issues in the Consolidated Notice(s) of Motion and having ruled on the several matters as I did above, the following orders commend themselves:

a. An order for Certiorari shall issue directed to the Resident Magistrates Court at Kiambu removing into this Court and quashing any of the decisions/rulings/orders made by Learned Hon.

S.K. Arome, Resident Magistrate, in Kiambu CMCC No. 290 of 2015, and, in particular the rulings and orders made on 15/03/2016 and 03/06/2016.

b. An order for prohibition shall issue directed at the Honourable Learned Resident Magistrate presiding over Kiambu CMCC No. 290 of 2015 prohibiting him from proceeding with the hearing or any proceedings of whatever nature in that case.

c. Every party to the current suit shall bear their own costs. This is because, in my view, the multiplicity of the parties and the polycentricity of the issues involved in the case made these particular proceedings necessary. It is hoped that the parties will, with the benefit of this decision attempt to resolve their differences amicably and outside the court room as contemplated in the Memorandum and Articles of Association of KNCCI.

**Dated and delivered at Kiambu this 3<sup>rd</sup> Day of February, 2017.**

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**JOEL NGUGI**

**JUDGE**