



REPUBLIC OF KENYA



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**Havi & 3 others v Suyianka & 17 others (Civil Appeal E096 of 2021)
[2022] KECA 931 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KECA 931 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E096 OF 2021
HM OKWENGU, KI LAIBUTA & RN NAMBUYE, JJA
AUGUST 19, 2022**

BETWEEN

**NELSON HAVI 1ST APPELLANT
CAROLYNE KAMENDE 2ND APPELLANT
HERINE KABITA 3RD APPELLANT
ESTHER ANG'AWA 4TH APPELLANT**

AND

**LEMPAA SUYIANKA 1ST RESPONDENT
CALISTOUS SHIFWOKA 2ND RESPONDENT
TOM KOPERE 3RD RESPONDENT
FELIX NDOLO 4TH RESPONDENT
SOFIA RAJAB 5TH RESPONDENT
MELBA KATSIVO 6TH RESPONDENT
LAW SOCIETY OF KENYA 7TH RESPONDENT
MERCY WAMBUA 8TH RESPONDENT
GEORGE OMWANSA 9TH RESPONDENT
ROSELINE ODEDE 10TH RESPONDENT
ALUSO INGATI 11TH RESPONDENT
CAROLYNE MUTHEU 12TH RESPONDENT
FAITH ODHIAMBO 13TH RESPONDENT
BERNARD NGETICH 14TH RESPONDENT**



BETH MICHOMA	15 TH RESPONDENT
NDINDA KINYILI	16 TH RESPONDENT
RIZIKI EMUKULE	17 TH RESPONDENT
CAUCUS OF LSK BRANCH CHAIRPERSONS	18 TH RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (J. Ngaah, J.) dated 26th February, 2021 in HCCC. JR No. E005 of 2021)

JUDGMENT

1. This is a 1st appeal from the Ruling and Order of the High Court of Kenya at Nairobi (J. Ngaah, J.) dated 26th February 2021 in HCCC JR No. E005 of 2021, and given in determination of a preliminary objection to an application for leave to institute judicial review proceedings touching on the affairs of the Law Society of Kenya (the Society).
2. The Law Society of Kenya is established under section 3(1) of the [Law Society of Kenya Act](#), 2014 (the Act) with the functions and objects set out in section 4 to (n) of the Act, which include: representing, protecting and assisting members of the legal profession in Kenya in matters relating to the conditions of practice and welfare; and facilitating the realisation of a transformed legal profession that is cohesive, accountable efficient and independent; and with power to do all things necessary for the proper and effective achievement of its objects, and for the performance of its functions.
3. Section 15 of the Act establishes the organs of the Society, which include the general meeting, the Council, the Secretariat and the branches. The Council is the governing body of the Society with executive authority and power, inter alia, to convene ordinary general meetings and special general meetings of the society, and to administer the affairs of the Society in the discharge of its functions, and in the realisation of its objectives. In this regard, the Council is a repository of power, which presupposes compliance not only with the substantive, formal and procedural conditions laid down for its performance, but also with implied requirements governing the exercise of discretion.
4. In principle, it is incumbent upon the organs of the society to discharge their functions and exercise their powers in compliance with Article 47 of the Constitution (with respect to the right to fair administrative action), the provisions of the [Fair Administrative Action Act](#), 2015 (the FAAA), and the Act. Simply put, all statutory powers conferred on the Society and its organs must be exercised fairly, reasonably, in good faith, and for the purpose for which they were granted.
5. The factual background of the present appeal is that, in exercise of its statutory functions, the Council convened, and notified members of the Society of, a special general meeting (the SGM) scheduled to be held on 18th January 2021 at 11.00 am. partly in-person and virtually due to the then prevailing COVID-19 pandemic, which necessitated strict compliance with a raft of public health measures, regulations and directives forbidding large public gatherings.
6. According to the respondents, 3,000 or so members of the Society registered to participate in the SGM virtually by way of Zoom Webiner platform, while another 200 members attended the SGM in person at the Society’s Gitanga Road offices. Contrary to the respondents’ expectations, the 1st appellant (Nelson Andayi Havi), the then President of the Society, allegedly excluded all the online attendees, including the respondents, from actively participating in the deliberations and the decision-making process, and from voting on any of the issues comprising the day’s agenda of the Society, including



the election of candidates to the Elections Board for the election of the female member representative to the Judicial Service Commission, and for the election of members of the Advocates Disciplinary Committee.

7. Dissatisfied with the conduct of the Society's SGM under the stewardship of the appellants, the 1st to 6th respondents filed a Chamber Summons dated 21st January 2021 in the High Court of Kenya at Nairobi (Judicial Review Division), being Judicial Review Application No. E005 of 2021. Their application was made under sections 7, 8, 9, 11 and 14 of the FAAA, sections 8 and 9 of the [Law Reform Act](#), and Order 53 of the Civil Procedure Rules, 2010 seeking leave to apply for judicial review orders of: prohibition restraining the appellants and their subordinates or agents from implementing any of the resolutions passed at the SGM of 18th January 2021; certiorari to bring to the court and quash the proceedings of the SGM in issue; and mandamus compelling the appellants to place the agenda of the SGM before members of the Society at the statutory annual general meeting (AGM) scheduled for March 2021 pursuant to section 30 of the Act, or at a properly convened and fairly conducted SGM, as the case may be, and to facilitate online polling on all items of the agenda and resolutions proposed to be passed at the meeting. . In the interest of harmony within the Society, they urged the court to order that each party bears their own costs.
8. The respondents' Chamber Summons was anchored on 15 grounds set out on its face, and which may be summed up into three thematic grounds, namely: that the respondents had an arguable claim for judicial review; that they should be exempt from first exhausting the Society's internal remedies; and that leave do operate as stay pending hearing and determination of their substantive Motion.
9. The Summons was also supported by the annexed affidavit of Lempaa Suyianka (the 1st respondent's) sworn on 21st January 2021 on his own behalf and on behalf of the 1st to 6th respondents. In it, he narrates in detail the manner in which the impugned SGM was conducted to their prejudice, details which we need not replicate here, save to note that their grievance mainly centered on the alleged exclusion from active participation at the AGM; denial of the opportunity to vote; bias on the part of the appellants in the manner in which members were treated; and expansion of the agenda beyond the items previously notified for the purpose of the SGM.
10. In further support of the application, the 11th respondent (Aluso Ingati) also swore a supporting affidavit on her own behalf and on behalf of the 9th and 12th – 17th respondents on 29th January 2021. According to Ms. Ingati, the impugned SGM was conducted in violation of [the Constitution](#), the FAAA, the [Law Society of Kenya Act](#), and the Law Society of Kenya (General) Regulations. She takes issue with the manner in which the SGM was conducted; the alleged illegal amendment of the agenda; and the alleged illegal variation of the members' resolution passed during the July 23rd 2020 AGM.
11. Mathew Nyabena (the Chairperson of the 18th respondent (Caucus of the LSK Branch Chairpersons – the Interested Party), filed a replying affidavit essentially challenging, inter alia, the manner in which the SGM in issue was convened and conducted. He decried the alleged irregularities with regard to the members' inability to actively participate in the proceedings; the improper procedure to amend the agenda; and the purported vacation of previous resolutions passed in the absence of the 1st appellant. According to him, failure to invoke the Society's internal dispute resolution mechanisms was excusable in the unique circumstances of the case as contemplated by Regulation 96 of the Society's General Regulations. He urged the court to remit the matters in contention to the then forthcoming AGM.
12. In response, the 1st appellant (Nelson Andayi Havi) filed a replying affidavit sworn on 30th January 2021 denying the 1st to 6th respondents' claims. According to him, the respondents' Chamber Summons was incompetent; and that the court had no jurisdiction to entertain the same on the grounds set out in the Notice of Preliminary Objection dated 30th January 2021 annexed thereto and filed therewith.



He prayed that the appellants' preliminary objection be heard and determined in priority to the respondents' Summons. So did the 4th appellant (Esther Ang'awa), who likewise filed a Notice of Preliminary Objection dated 3rd February 2021 on the same grounds.

13. In her replying affidavit sworn on 31st January 2021 and filed in opposition to the 1st – 6th respondents' application, the 2nd appellant (Caroline Kamende Daudi) deposed that the respondents' application was brought as a class action on behalf of allegedly aggrieved, but unnamed members attending the 7th respondent's SGM; that the respondents, who had not provided evidence of attendance, had no locus standi to institute the proceedings; that the omnibus relief sought in the application with respect to all resolutions passed at the SGM cannot be granted by the court; that the impugned resolutions were not specified, nor were the persons against whom the prohibitory orders were sought identified; that, in so far as the orders sought were designed to impede the discharge by the Society of its statutory mandate, the respondents' application was frivolous, vexatious and an abuse of the judicial process; that the court had no jurisdiction to prohibit a statutory body from performing its duties, or to compel it to perform such duties in a particular manner; that she was wrongfully joined in the proceedings in which members who passed the impugned resolutions were not joined; that the ex parte applicants ought first to have exhausted the internal dispute resolution mechanisms as mandated by Regulations 95 and 96 aforesaid; and that the application for leave must fail.
14. On her part, the 3rd appellant (Herine Akoth Kabita) opposed the respondents' application and filed a replying affidavit sworn on 1st February 2021. She states, inter alia, that members of the Society attended the SGM both virtually and physically; that those attending physically were not "carefully chosen by the 1st [appellant]" as claimed; that the agenda was amended by resolution moved and adopted on the floor of the house; that all members in attendance at the SGM were accorded the opportunity to express their views and vote thereat; that the orders sought in the respondents' application were calculated to derail the then ongoing forensic and statutory audit of the Society's financial affairs; that it was in the interest of the members of the Society that all resolutions passed at the SGM be implemented; and that the respondents' application did not merit the orders sought.
15. The 1st and 4th appellants' preliminary objections were raised on the following grounds: that copies of the decision(s) and proceeding(s) in respect of which leave was sought to commence judicial review proceedings had not been lodged before the court in compliance with Order 53 Rule 7(1) of the Civil Procedure Rules, and that failure to do so had not been satisfactorily explained; that the respondents had not invoked and/or exhausted the alternative dispute resolution mechanisms available to them under Regulations 95 and 96 of the Law Society of Kenya (General) Regulations, 2020; that the respondents had not pleaded and/or particularised the common law grounds for judicial review, namely illegality, irrationality and procedural impropriety, and/or any of the statutory grounds set out in section 7 of the FAAA; and that the orders of prohibition and certiorari were intended to enable the respondents to unlawfully, and without justifiable cause, curtail and direct the Society in the performance of its constitutional functions under Article 171(2) (f) of *the Constitution*, the statutory functions set out in sections 16, 19, 25, 30, 31, 32, 33 and 36 of the Act, and the administrative functions under Part VIII of the Law Society of Kenya (General) Regulations, 2020.
16. In support of the 1st – 6th respondents' application, learned counsel (Mr. Ochiel J. Duddley) filed written submissions dated 24th January 2021. On their part, the 1st and 4th appellants filed written submissions dated 31st January 2021 while the 3rd appellant filed hers dated 1st February 2021, all in support of their preliminary objection, and in opposition to the 1st -6th respondents' application.
17. Upon hearing the parties, and having considered their respective pleadings and rival submissions, the learned Judge dismissed the 1st and 4th appellants' preliminary objections. On the 1st issue as to whether



failure to annex copies of the decision(s) and proceeding(s) in respect of which leave was sought to commence judicial review proceedings was fatal to the 1st to 6th respondents' application, the learned Judge held that it was not.

18. On the authority of this Court's decision in *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR, the learned Judge concluded that failure to annex copies of the impugned decision or proceedings to the application for leave to apply for judicial review was not fatal to the application. Neither was such omission fatal to the substantive Motion itself. Accordingly, he declined to sustain the preliminary objections on that score.
19. On the 2nd issue as to whether the respondents were exempted from exhausting the alternative dispute resolution mechanisms available to them under Regulations 95 and 96 of the Law Society of Kenya (General Regulations), the learned Judge was of the considered view that the 1st – 6th Respondents' case was one that merited the exemption contemplated in section 9(4) of the *FAAA*. According to him, such exceptional circumstances existed as would fairly and reasonably exempt the respondents from the statutory requirement to first exhaust the Society's internal dispute resolution mechanisms before instituting the judicial review proceedings in issue.
20. On the 3rd issue, the learned Judge rejected the Appellants' contention that the 1st – 6th Respondents had not pleaded the common law prerequisites for grant of judicial review remedies, namely illegality, irrationality, and procedural impropriety in addition to the statutory grounds set out in section 7 of the *FAAA*.
21. Finally, the learned Judge rejected the appellants' contention that the orders of prohibition and certiorari in respect of which leave was sought were calculated to unlawfully, and without justifiable cause, impede and direct the Society in the performance of its constitutional and statutory functions. In view of the forgoing, he dismissed the 1st and 4th appellants' preliminary objections with no orders as to costs.
22. Aggrieved by the Ruling of Ngaah, J., the appellants have come to this Court on appeal on 10 grounds set out in their Memorandum of Appeal dated 2nd March 2021, and on the basis of which they urge the Court to: allow the appeal; set aside the order made by the High Court on 26th February 2021 in Nairobi High Court *Judicial Review Application No. E005 of 2021 – Lempaa Suyianka & 5 Others vs. Nelson Havi & 14 Others*; dismiss the Chamber Summons dated 21st January 2021 filed by the 1st – 6th respondents; and order that the costs of the appeal be borne by the 1st – 6th respondents.
23. According to the appellants, the learned Judge erred in law: in holding that there was a competent application before him for leave to commence judicial review proceedings of certiorari in the absence of copies of the impugned decision(s) and proceeding(s); in holding that there was a competent application before him for leave to commence judicial review proceedings of certiorari notwithstanding failure on the part of the 1st – 6th and 8th respondents to satisfactorily account for their failure to lodge the impugned decision(s) and proceeding(s) in court; in exempting the 1st – 6th respondents' claim from the dispute resolution mechanism under Regulations 95 and 96 of the Society's (General) Regulations when no, or any, sufficient grounds for such exemption had been pleaded and established; in misinterpreting and misapplying the decision in *Independent Electoral and Boundaries Commission vs. National Super Alliance & 6 Others* [2017] eKLR to the question before him, and thereby arriving at an erroneous decision; in failing to consider, and to be bound by, judicial precedent on the question of exhaustion of alternative dispute resolution mechanisms and jurisdiction in so far as the internal affairs of the Society are concerned; in holding that there was no conducive atmosphere at the Society to enable the settlement of the 1st – 6th respondents' claim through the dispute resolution mechanism under the Society's (General) Regulations; in misinterpreting and misapplying the decision in *Fleur*



Investments Ltd vs. Commissioner, Domestic Taxes [2018] eKLR to the question before him, and thereby arriving at an erroneous decision; in holding that the question of an arguable case for purposes of grant of leave had been conclusively dealt with in the Ruling of Pauline Nyamweya, J. made on 22nd February 2021; in granting the 1st – 6th respondents exemption from the requirement to exhaust the alternative dispute resolution mechanisms under the Society’s (General) Regulations without hearing the appellants thereon, and in disregard of the above-mentioned order of Pauline Nyamweya, J; and in granting the 1st – 6th respondents leave to commence judicial review proceedings without hearing the appellants on the grounds upon which the request for leave was opposed, and in holding that it was unnecessary to do so.

24. In support of the appeal, M/s. Havi & Co. (for the 1st appellant), M/s. Kamende D. C. & Co. (for the 2nd appellant), M/s. Kiarie, Kavita, Kihinyo & Associates (for the 3rd appellant) and M/s. Ang’awa & Co. (for the 4th appellant) filed their joint written submissions dated 19th March 2021. Mr. Ochiel J. Duddley (learned counsel for the 1st – 6th respondents) filed his written submissions and digest of authorities dated 26th March 2021, while M/s. Mucheru Law, LLP (for the 18th respondent) filed their submissions dated 29th March 2021. In addition, learned counsel highlighted their respective submissions orally when the appeal came for hearing before us on 12th October 2021 on the GoTo Meeting virtual platform.
25. We need to point out at the onset that, this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited vs. West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle vs. Associated Motor Boat Co.* [1968] EA p.123.
26. In *Selle’s* case (*ibid*), the Court held:

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
27. Having carefully considered the respective pleadings and submissions of the parties, we form the considered view that the appeal before us stands or falls on our finding as to: whether failure on the respondents’ part to exhibit the impugned decisions or proceedings rendered the 1st – 6th respondents’ application for leave to institute judicial review proceedings fatally defective; whether the 1st – 6th respondents’ case demonstrated the existence of exceptional circumstances that exempted them from first exhausting the Society’s internal dispute resolution mechanism; whether the 1st – 6th respondents’ application aforesaid disclosed sufficient grounds to merit leave to institute judicial review proceedings; whether the said application was made in bad faith; and what orders ought we to make in determination of the appeal, including orders as to costs.
28. With regard to the first issue, the Appellants relied on the decisions in *Republic vs. Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPPRA)* [2013] eKLR, *Republic vs. Kenya Power & Lighting Company Limited & Another* [2013] eKLR and *Republic vs. The Land*



Adjudication and Settlement Officer Tigania & Others [2020] eKLR, contending that the decisions sought to be challenged by certiorari ought to have been exhibited.

29. In this regard, Order 53 of the [Civil Procedure Rules](#) makes provision for application for judicial review. Rule 1 Reads:

[Order 53, rule 1.]

“ 1. Applications for mandamus, prohibition and certiorari to be made only with leave

1. No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
2. An application for such leave shall be made ex parte to a judge in chambers, and shall be accompanied by —
 - a. a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought; and
 - b. affidavits verifying the facts and averment that there is no other cause pending, and that there have been no previous proceedings in any court between the applicant and the respondent, over the same subject matter and that the cause of action relates to the applicants named in the application.
3. The judge may, where leave denotes stay, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
4. The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise:

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

30. We find nothing on record to suggest that the 1st – 6th respondents’ application for leave pursuant to Order 53 Rule 1(1) was not in compliance with sub-rule (2), which sets out the form of the application and the specific documents by which it must be accompanied. It is instructive that this rule does not mandate an applicant to exhibit copies of the impugned decision or proceedings at this early stage in the proceedings.



31. In *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR, this Court pronounced itself on the matter thus:

“ 104. In this appeal, we have considered the submission by the 6th Respondent and the reasoning by the trial court in declining to find that the 1st Respondent’s application was fatal for failure to attach the decision to be quashed. The legal issue for our determination is whether there are exceptions to the general rule that the decision to be quashed must be attached. In our considered view, the exceptions include when leave is granted by the trial court to lodge the decision before the final determination of the case. This is the exception revealed by the decisions in amongst others *Ashraf Savani & Another -v- Chief Magistrate’s Court Kibera & 4 Others* [2012] eKLR and *Republic -v- The Commissioner of Lands ex-parte Lake Flowers Limited Nairobi HCMISC App. No. 1235 of 1998* and *Republic -v- Chairman District Alcoholic Drinks Regulation Committee & 4 Others Ex-Parte Detlef Heier & Another* [2013].

105. In the present appeal, the record shows that the 1st Respondent neither attached the decision to be quashed nor applied for leave to attach the same. The trial judges observed that it was not in dispute that a decision had been made by the Appellant to adopt direct procurement method. It is our considered view, that the learned judges did not err in observing that a decision had in fact been made by the Appellant and the court did not err in failing to strike out the Application as incompetent for failure to attach the decision to be quashed. The record shows that there was no dispute that a decision had been made and that the decision existed; there was no dispute as to the nature of the decision. In our view, depending on the peculiar circumstances of each case where it is clear, uncontested and definite that a decision has been made and the nature of the decision is not disputed, a court can either take judicial notice of the decision or the parties can by consent record the nature of the decision. In such cases, the need to attach or produce the decision to be quashed can be waived. We are of this view cognizant of the provisions of Article 159 (2) (d) of *the Constitution* which enjoins courts to administer justice without undue regard to technicalities.”

32. To our mind, Order 53 Rule 7 of the *Civil Procedure Rules* does not require that the order sought to be quashed by Orders of Certiorari be attached to the application for leave. It only requires that a copy of such an order be lodged with the courts Registrar verified by an affidavit before hearing of the substantive Motion in which the validity of the decision, order or proceeding is the subject of challenge.
33. From our reading of Order 53 Rule 7(1) of the *Civil Procedure Rules*, we find that, even though a party challenging the validity of an order or decision seeking to have the same quashed by orders of certiorari may attach the impugned decision or order to the verifying affidavit sworn to verify facts in the statutory statement in the application for leave, a party who fails to do so when seeking leave may still do so at a later stage; provided that a copy of the said order or decision verified by affidavit is lodged with the courts Registrar before hearing of the Notice of Motion for Judicial Review. Otherwise, the applicant is only required to give to the court a satisfactory reason as to why this has not been done.
34. While the requirement to attach to the affidavit the decision that an Ex-parte Applicant wishes to challenge is crucial, considering that the High Court ought to determine whether such a decision was arrived at either in excess or without jurisdiction, irrationally or unreasonably, or otherwise in breach of



the rules of natural justice. In the absence of the impugned decision or an explanation to the satisfaction of the court of its absence, an Application for an order of certiorari would not be granted.

35. That said, we hasten to add that that is an issue which can only be determined during or after the hearing of the substantive Motion. The issue cannot be raised as a preliminary point of law considering that, under Order 53 Rule 4(2) of the *Civil Procedure Rules*, the court may allow the Ex-part Applicants to file further affidavits to deal with any new matters arising out of the affidavits of any other party to the Application, including the need to exhibit the impugned decision or proceeding. It must be borne in mind that the requirement to exhibit a copy of the impugned decision, order or proceeding is suitably designed to ensure that the court before which the substantive Motion is filed has, before it, the subject of judicial scrutiny. Accordingly, we find that the preliminary objection on this account was raised prematurely and must, therefore, fail.
36. That leads us to the 2nd issue as to whether the 1st – 6th respondents’ application fails on account of failure to exhaust the Society’s internal dispute resolution mechanisms in accordance with Regulations 95(1) and 96(1) of the *Law Society of Kenya (General) Regulations* as read with section 9(2) of the FAAA, 2015. The appellants’ case is that the application must fail on this account. On the other hand, the 1st – 6th and 18th respondents have made a compelling case for exemption pursuant to section 9(4) of the FAAA.
37. Though desirable as the first port of call and as the preferred mechanism for dispute resolution, Regulation 95(1) of the Society’s (General) Regulations is discretionary in terms, and attempts to soften the mandatory provision of section 9(2) of the FAAA in proper cases to which section 9(4) by which parties are exempted from the requirement to exhaust internal dispute resolution mechanisms on account of exceptional circumstances. The Regulation reads:

“ 95. Negotiation, conciliation & mediation

1. Parties to a dispute referred to in regulation 96(1) may attempt to reach settlement by—
 - a. negotiation;
 - b. conciliation; or
 - c. mediation.”

38. Regulation 96(1) goes further and provides for arbitration in certain cases:

“ 96. Arbitration

1. Where a dispute arises—
 - a. relating to the exercise of the mandate or the management of the affairs of the Society, a branch or a chapter; or
 - b. relating to the rights of a member against any other member or the Council, branch executive or chapter committee, the aggrieved party shall—
 - i. refer the dispute in writing to the secretary, where the dispute concerns the national office of the Society; or



- ii. refer the dispute in writing to the branch secretary of the relevant branch where the dispute involves an issue or a party at the branch level.”

39. Having clearly narrated the sequence of events leading to the acrimony that characterised the SGM, and the alleged impropriety of the manner in which it was conducted, including the alleged exclusion from deliberations and voting by a section of the Society’s membership in attendance virtually, the 1st - 6th respondents made out a case for judicial scrutiny of the validity and fairness of process leading to the impugned decision. In our considered view, any attempt to shut the door to the seat of justice by denying them leave to seek judicial review on the grounds that they failed to submit to the Society’s internal dispute resolution mechanisms would be insensitive to the exceptional circumstances prevailing before, during and after the SGM. It is common ground that the Society’s leadership and sections of its membership were embroiled in deep-seated disagreements on various policy, administrative and constitutional issues which were not suited for amicable resolution by the mechanisms contemplated in the Regulations. To our mind, the matters in contention required judicial intervention as sought by the 1st – 6th respondents.
40. We need not overemphasise the fact that, even though Regulations 95(1) and 96(1) of the Society’s (General) Regulations provide for internal mechanisms for resolution of disputes among members and Branches of the Society, or between the Branches inter se, alternative dispute resolution mechanisms are, in principle, voluntary. That explains the use of the word “may” in Regulation 95(1). Be that as it may, section 9(4) of the *fair Administrative Action Act* exempts parties from such internal dispute resolution mechanism in exceptional circumstances.
41. Section 9 of the *FAAA* reads:
- “9. Procedure for judicial review
 9.
 - (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
 2. The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the



obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

42. It is in such cases as are contemplated in sub-section (4) that this Court in *Fleur Investments Limited vs. Commissioner of Domestic Taxes & another* [2018] eKLR had this to say:

“ 23. ... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

24. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. See *Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC MISC. APPL. No. 81 of 2002* [2002] 1 KLR 486; [2008] 2 KLR (EP) 393. If the discretion is used arbitrarily and unreasonably, the court may step in to remedy the situation.”

43. As was also held by this Court in *Republic vs. Commissioner of Co- Operatives, Kirinyaga Tea Growers Co-operative & Savings & Credit Society Ltd.* [1999] 1 EA 245, “... it is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith.” If not, judicial intervention presents the only recourse for those who seek fair administrative action in matters which they hold dear. Moreover, judicial review at the instance of a vigilant people constitute the most substantive and effective tool by means of which judicial scrutiny guarantees due process in the administration of justice.

44. The only question that remains to be answered in determination of the 2nd issue, and on our reading of section 9(4) of the *FAAA*, is what constitutes exceptional circumstances. To our mind, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. For instance, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile, such circumstances may be said to exist, and indeed existed in the present case.

45. In reaching that conclusion, as we hereby do, the learned Judge observed that the record as put to him disclosed: that the Society’s leadership comprising the appellants was involved in deep-seated internal wrangles; that the leadership was also in seemingly irreconcilable conflict with the general body of members of the Society; and that the atmosphere prevailing at the SGM as demonstrated by the appellants’ conduct thereof was such as to make alternative dispute resolution by means of the Society’s internal dispute resolution mechanisms unforeseeable. Accordingly, he correctly formed the view that exceptional circumstances existed to merit exemption from that requirement.

46. In conclusion, we find as a fact and hold that section 9(4) of the *FAAA* was properly invoked in the circumstances of the present case; circumstances that were out of the ordinary and that rendered it inappropriate for the court to require the 1st – 6th respondents first to pursue internal remedies in



accordance with Regulations 95 and 96 of the Society's (General) Regulations. In our view, the then prevailing circumstances were such as to require the immediate intervention of the court rather than resort to the applicable internal dispute resolution mechanisms (see *Republic vs. JP. Maiywo & 2 others sued as the Executive Director, Treasurer and Secretary respectively of Central Kenya Conference (CKC); Moses Nyankuru & 23 others (Interested Parties) Ex parte Humphrey Nguma Macharia & another* [2019] eKLR. In view of the foregoing, we are satisfied that the reasons advanced in the 1st – 6th respondents' application for leave to institute judicial review proceedings merit exemption from the requirement of section 9(2) of the FAA in accord with sub-section (4). Accordingly, we find nothing to fault the learned Judge on this account.

47. As to whether the 1st – 6th respondents failed to plead or particularise the common law grounds for judicial review, namely: illegality, irrationality and/or procedural impropriety, the learned Judge correctly found that those grounds were specifically pleaded in the 1st – 6th Respondents statutory statement of facts dated 21st January 2021. In addition, the 1st – 6th respondents had also pleaded constitutional grounds which, in the Judge's view, went beyond the usual common law and statutory grounds upon which an application for judicial review orders may be anchored (see *Independent Electoral and Boundaries Commission (IEBC) vs. National Super Alliance (NASA) Kenya & 6 Others* (supra). That settles the 3rd issue about which we need not say more.
48. On the 4th issue as to whether the 1st – 6th respondents' application was mala fides, we do not hesitate to conclude that, far from it, it was not. We find nothing to suggest that the same was calculated to impede or forestall the effective discharge of the Society's functions as claimed by the appellants. Neither were they busybodies armed with misguided or frivolous complaints. To the contrary, their application was, in our considered view, intended to guarantee due process in the manner of performance by the appellants of their respective duties as the Society's leadership team. Accordingly, we are satisfied that the 1st – 6th Respondents had demonstrated that the judicial review orders sought were not only merited, but were also intended to guarantee due process in the administration of the affairs of the Society for the benefit of its members.
49. In view of the foregoing, we reach the inescapable conclusion that the appellants' preliminary objection fails. Moreover, this is an interlocutory appeal arising from the exercise of the trial court's discretion in declining to sustain the Appellants' preliminary objection. In so doing, we take to mind the settled principle that an appeal does not normally lie from the exercise of a trial court's discretion, but that where one does arise, an appellate court will interfere only if it be shown that the discretion was exercised injudiciously. In *Mbogo & Another vs. Shab* [1968] EA p.63 where at p.96, the Court stated:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”
50. Having considered the record of appeal, the respective submissions of the parties, and relevant authorities, we find that the appeal before us fails. Accordingly, we hereby order and direct that:
 - a. the appeal be and is hereby dismissed;
 - b. the Ruling and Order of the High Court of Kenya at Nairobi (J. Ngaah, J.) dated 26th February 2021 in HCCC JR No. E005 of 2021 be and is hereby upheld; and



c. the 1st – 6th and 18th respondents’ costs of the appeal be borne by the appellants.

This judgment has been delivered in accordance with **Rule 34 (4)** of the Court of Appeal Rules 2022, **Nambuye JA** having retired from service.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

