



**Republic v Registrar of Societies & another; Shiamala (Chairperson, Protective Guards Association of Kenya – PROGAK) & 2 others (Exparte Applicants); Otieno & 3 others (Interested Parties) (Application E153 of 2022) [2025] KEHC 1291 (KLR) (Judicial Review) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1291 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
APPLICATION E153 OF 2022  
JM CHIGITI, J  
FEBRUARY 27, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE REGISTRAR OF SOCIETIES ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JAIRUS KATERE SHIAMALA (CHAIRPERSON, PROTECTIVE GUARDS ASSOCIATION OF KENYA – PROGAK) ..... EXPARTE APPLICANT**

**SAMSON OMECHI ONG’ERA (SECRETARY, PROTECTIVE GUARDS ASSOCIATION OF KENYA – PROGAK) ..... EXPARTE APPLICANT**

**SERAH WAIRIMU NJENGA (TREASURER, PROTECTIVE GUARDS ASSOCIATION OF KENYA –PROGAK) ..... EXPARTE APPLICANT**

**AND**

**MOSES AGUTU OTIENO ..... INTERESTED PARTY**

**FELIX MBOLA ..... INTERESTED PARTY**

**CALEB OKUMU ..... INTERESTED PARTY**

**CECILIA LUKUNGA ..... INTERESTED PARTY**



## JUDGMENT

1. The application before this Court is dated 1<sup>st</sup> November 2022 where in the Applicant seeks the following orders: -
  1. An order of certiorari to move into this Honourable Court and quash the decision/order of the 1st Respondent dated 6th October 2022 alongside mediation report/ruling, albeit informal of arbitrarily interfering with the registration and management of the Society, Protective Guards Association of Kenya, SOC/81197, and disfranchising the Exparte Applicants' and members' statutory and constitutional rights to the subject Society.
  2. An order of prohibition to prohibit the 1st Respondent, her agents, employees, servants or whosoever acting on her instructions from interfering with operations and proper management of the Society, by way of enforcing the decision/order of the 1st Respondent dated 6th October 2022 alongside mediation report/ruling, in toto and in particular the removing, replacing, changing from record Forms A and B both dated 15/2/2022, and *the constitution* and register of members, changing officers or in whatever way altering the status of the Society, Protective Guards Association of Kenya, SOC/81197, as at 20th April 2022, when the Certificate was issued.
  3. An order of mandamus to compel the 1st Respondent to unconditionally Restore Forms A and B both dated 15/2/2022, and *the constitution* and register of members, if by any chance she has tampered, interfered and altered the lawful registration under SOC/81197 as intended in her purported mediation report/ruling, the status of the society, SOC/81197, must be restored and maintained as it were at 20/4/2022.
  4. That cost of this Application be provided for.
2. The application is supported by a Verifying Affidavit by Samson Omechi Ongera sworn on 19<sup>th</sup> October, 2022 and Statement of facts dated 19<sup>th</sup> October, 2022.
3. It is the Applicants case that Society, Protective Guards Association of Kenya, SOC/81197, was registered on 20<sup>th</sup> April 2022 pursuant to Section 10 of the *Societies Act* Cap 108 Laws of Kenya with the Exparte Applicants were/are duly registered Office Bearers of Protective Guards Association of Kenya, SOC/81197, since 20th April 2022.
4. It is posited that they are pioneers and the first registered Office Bearers of the Society trading as Protective Guards Association of Kenya, SOC/81197 and are engaged in gainful activities within the private security / protective industries after having following the due process of registration and due diligence.
5. According to them on 21<sup>st</sup> July 2022, the 2<sup>nd</sup> Applicant received a phone call from the 1<sup>st</sup> Respondent, instructing him to collect a complain letter from the 1<sup>st</sup> Respondent.
6. On 1<sup>st</sup> August 2022, the Secretary responded to the allegations carried by the letter dated 5<sup>th</sup> July, 2022, opposing and denying all the allegations contained in the said letter of complaint.
7. It followed the Applicants were invited for a consultative meeting vide a letter dated 23<sup>rd</sup> August, 2022, scheduled for 1<sup>st</sup> September 2022 on account that there is an existence of a dispute between/among the registered officers of the society, and in particular between the Chairperson and the Vice-Chairperson.



8. The meeting took place as scheduled and the 14<sup>th</sup> October, 2022 and they contend that members in attendance in the said meeting departed from the subject/notice as the said persons were not registered officers / the officials of the society, SOC/81197-PROGAK.
9. It is averred that they later received a letter dated 6<sup>th</sup> October 2022, from the 1st Respondent directing them to surrender the original certificate of registration of the society, Protective Guards Association of Kenya, SOC/81197 – R.54508, within seven (7) days.
10. It is their case that the letter dated 6/10/2022, had a purported undated mediation report/ruling but rather signed accordingly. The heading of the said report reads, “The Societies Act Cap. 108 Laws of Kenya and SOC/81197 Protective Guards Association of Kenya, The Registrar of Societies Report and Finding Following A Mediation Session Held On 1<sup>st</sup> September 2022 At the Office of The Registrar of Societies, Sheria House Nairobi.” The mediation report/ruling, communicated the following findings/directions: -
  - i. That the registration forms of the association availed at the Registrar of Societies by the Advocate were improperly prepared.
  - ii. That the registration of the society to stand but proper forms A and B and the constitution be availed by the complainants to replace ones on record.
11. The Applicants herein are apprehensive that:
  - a. the 1<sup>st</sup> Respondent’s actions and intended cause of action may indirectly suspend or cancel the registration society entry no. SOC/81197 contrary to the law as there is no provision for seven (7) days’ notice, for performance of any action under section 18 of Societies Act, Cap laws of Kenya (hereinafter referred to as the ‘the Act’.
  - b. the manner in which the 1st Respondent is moving, will disband a lawfully registered society and therefore irregularly, illegally and unlawfully remove duly registered officers of the society from office, the same move will further violate the sections 17 and 18 of the Societies Act Cap 108 Laws of Kenya.
  - c. the conduct of the 1<sup>st</sup> Respondent if not checked and quashed, will elevate and allocate herself non-existent powers, authority or/and jurisdiction to tamper and interfere with Forms A/B both dated 15<sup>th</sup> February, 2022, Constitution and List of members on record under SOC/81197, by removing, replacing or changing altering them in a manner contrary to section 9 of the Societies Act Cap 108 Laws of Kenya.
12. The Applicants argue that the 1<sup>st</sup> Respondent is divested of powers or authority or jurisdiction and/or capacity to remove, change, replace, swap or alter registration instruments and / or registered officers can only be removed, changed and replaced by members in a manner provided in their registered constitution or through a Court Order and that he 1<sup>st</sup> Respondent after registration of Protective Guards Association Of Kenya/SOC/81197, she became functus officio, on matters of registration entry no SOC/81197.
13. It is posited that the Respondents’ threatened act to tamper and interfere with lawful registration and proper management of SOC/81197 - Protective Guards Association of Kenya is real and in contravention of Article 36, 47, 50 of the Constitution of Kenya, 2010, read together with sections 17 & 18 of the Societies Act Cap 108 Laws of Kenya.
14. It is their case that the Respondents’ failure to comply mandatory rules of natural justice and by purportedly condemning the 3rd Applicant without calling her or affording her the opportunity to



be heard, and share with the Applicants the alleged members' complaints/documents and application made by the advocate who is not disclosed and or make full disclosure of other improper acts alleged to have been done by the Applicants, is a flagrant breach of their right to access to information.

15. The applicants filed submissions and supplementary submissions dated 5<sup>th</sup> November, 2022 and 22<sup>nd</sup> February 2023 respectively.
16. It is submitted that the all documents presented to the 1<sup>st</sup> Respondent during registration of PROGAK were properly prepared by the Exparte Applicants and all members of the proposed society and the same not been controverted by way of evidence, they are thus valid.
17. It is posited that sections 9 and 10 of Societies Act Cap 108 laws of Kenya provides for application and registration of a proposed society, section 11 of the Act provide grounds upon which application for registration of a proposed society can be refused before registration, section 12 of Societies Act Cap Laws of Kenya provides grounds upon which a registered society can be suspended or/and cancelled and that after registration of a society under section 10 of the Act, there is no provision under the Act, which provides for amendments to registration statutory forms.
18. The Applicants contend that that once the 1st Respondent has made a decision pursuant to the provisions of Section 10 of the Act, she becomes functus officio on matters registration of the society and any attempt by the 1st Respondent to go back to section 10 of the Act is unlawful and illegal as was held in *ICEA Lion General Insurance Co. Ltd v Julius Nyaga Chomba* [2020] eKLR, thus:-

“The Supreme Court of Kenya expounding on the doctrine of functus officio in *Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others* [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” [2005] 122 SALJ 832: “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

The court also relied on the holding in the case of *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550 to the effect that:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

19. It is also their submission that the 1<sup>st</sup> Respondent actions to remove and replace registered statutory Forms A & B dated 15/2/2022, suffer from lack of jurisdiction.
20. It is averred that 1<sup>st</sup> Respondent purported actions vide their letter dated 06/10/2022 and the so called undated mediation report were executed outside the provisions of sections 12, 18 and 31 of Societies



Act, Cap 108 Laws of Kenya. The Respondents are not sure of the actions under section 18 of the Act or/and don't know exactly the purpose of section 18 of the Act.

21. Section 18 of Act, provides-

“ 18. Disputes as to officers

- (1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.
- (2) If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.
- (3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.

22. It is posited that that the 1<sup>st</sup> Respondent acted ultra vires as it acted outside the mandate conferred upon the office by the Societies Act Cap 108 Laws of Kenya, therefore gross illegality was committed.

23. Reliance is placed in the case of Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya(Suing through its Chairman Robert Njoka Exparte Applicant [2019] eKLR.

24. Reliance is also placed in the case of Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR, the Court held inter alia: -

“ 11. An administrative decision is flawed if it is illegal. A decision is illegal if it: - (a) contravenes or exceeds the terms of the power which authorizes the making of the decision; (b) pursues an objective other than that for which the power to make the decision was conferred; (c) is not authorized by any power; (d) contravenes or fails to implement a public duty.

12. Statutes do not exist in a vacuum. They are located in the context of our contemporary democracy. The Rule of Law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the Rule of Law and other democratic fundamentals which Parliament has no power to exclude. The courts should therefore strive to interpret powers in accordance with these principles.

13. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the



rule of law. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the four corners of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

14. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.”
25. It is also their submission that Respondents have failed the test of oath of office to uphold the constitution and rule of law, by prompting unlawful acts even without any basis or prove of existence of the alleged dispute.
26. They vehemently oppose the entire contents deponed by Respondents' replying affidavit dated 15/11/2022 arguing that the same are misconceived, misplaced, contradictory, misleading and therefore self-defeatist.
27. Reliance is placed in the case of Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR, it was held that; -

“Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another where the court held as follows: - “the doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law

Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution and the relevant statutory provisions and applicable Regulations. The court is obliged not only to avoid an interpretation that clashes with the constitutional values, purposes and principles but also to seek a meaning that promotes constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.”

28. The Applicants contend that the alleged doctrine of good-faith is not applicable under the Societies Act, as the Act, provides express provisions to deal with different aspects which may arise therein.
29. They also place reliance on the case of John C. Chelanga v Minister for Lands & 3 others [2021] eKLR, it was held:-

“It is trite law that a court exercising judicial review jurisdiction is only concerned with the procedural propriety of a decision and not the merits. The court cannot be invited in a judicial review proceeding to act as an appellate court to reverse the decision of



the 1st respondent. This position was adopted by the court in *Associated Provincial Picture Houses, Ltd. v Wednesbury Corporation* [1947] 2 All E.R. 680. As a result, it is only in exceptional circumstances that the court can consider merits of a decision. These exceptional circumstances were enumerated by the learned Mumbi Ngugi J in *Republic v Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services (E.A) Limited* [2013] eKLR, while citing the *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* (supra) namely: “where the administrative body has acted outside its jurisdiction, has taken into account matters it ought not to have taken into account, or failed to take into account matters it ought to have taken into account; or that it has made a decision that is so unreasonable that no reasonable authority could ever come to it.”

30. The applicants posited that Under the provision of Article 156 of *the Constitution* of Kenya, the Attorney General is to represent the National Government in Courts except in Court Martials and to promote, protect and to uphold the rule of law and defend public interest. However, the Hon Attorney General is defending illegalities and lawlessness committed by the 1st Respondent who has glaringly and grossly violated *the constitution* and law by assuming a jurisdiction which she does not have at all.

### **1st and 2nd Respondents' case;**

31. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents oppose the Application through a Replying affidavit dated 15<sup>th</sup> November, 2022 sworn by Goretta Nyariki.
32. It is the Respondents case that an application for a name search was made by one Serah Njenga through a letter dated 11<sup>th</sup> August 2021 which provided the objective of the proposed Society as an association that mainly deals with security guards from the private sector.
33. The name search was approved on 18<sup>th</sup> December, 2022 through comments on the application for name search letter dated 11<sup>th</sup> August 2021 to register a society in the name. The Protective Guards Association of Kenya (PROGAK) and the Society was registered on 20th April 2022 under SOC/81197 in the name The Protective Guards Association of Kenya (PROGAK) and issued a certificate of Registration number R.54508.
34. They later received a complaint letter dated 5<sup>th</sup> July 2022 by PROGAK Vice Chairman Mr. Moses Otieno. whereby he alleged that the list of names of office holders that was submitted to the Office of the Registrar of Societies was unknown to him and that the said list had been forged by the Advocate Serah Wairimu Njenga, who is the 3<sup>rd</sup> Applicant and whom he had instructed to undertake the registration process.
35. They received a second complaint letter dated 13<sup>th</sup> June 2022 by PROGAK from Mr. Moses Otieno, reiterating that the office holders of the Society were strangers to him and instructions as to the office holders had not been adhered to by the 3<sup>rd</sup> Applicant in the instant suit before this court.
36. Mr. Samson Ong'era, who is the 2<sup>nd</sup> Applicant, responded through a letter dated 1<sup>st</sup> August 2022 stating that Mr. Moses Otieno fully participated in the registration process of the Society and that the complaints by him were baseless and unfounded as no law regulating the formation and registration of the societies was offended or violated and that further the complainant had not pleaded/pointed out that the operations of the formation of the Society did not comply with its constitution and the *Societies Act*.
37. Based on the foregoing, the 1<sup>st</sup> Respondent invited both parties to a consultative meeting that was scheduled for the 1<sup>st</sup> day of September 2022 via a letter dated 23<sup>rd</sup> August 2022 and the objective of the meeting was to allow both parties to be heard for the reasons of resolving the underlying issues in



- the registration of their Society and that all parties were afforded sufficient opportunity to defend their positions with a view of resolving the dispute.
38. It is posited that Respondents operates by the doctrine of good faith and relies on the information made to it by the members of the Society and does not interfere with the internal operations of the Society whatsoever.
  39. During the meeting held on 1<sup>st</sup> September, 2022 it was discovered from the information and documents that the originally intended list of officials and list of members as submitted by the 3<sup>rd</sup> Applicant that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants are not eligible to be members of the Society as they are not employed as private guards, offering services as private security guards, watchmen, bouncers, marshals, private security guards, and any other person who was previously engaged with previously engaged within the private protection industry in Kenya and additionally their names were not in the initially proposed list of officials of PROGAK.
  40. It is averred that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants chose to attend the meeting without a representative even though the letter indicated that they could attend with up to three representatives.
  41. According to the Respondents, the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants failed and/or refused to produce any evidence to show that they are eligible members as per the membership provision of the PROGAK's Constitution despite being prompted to do so by representatives of the 1<sup>st</sup> Respondent.
  42. It is their argument that they noted the professional misconduct by Advocate Serah Wairimu Njenga the 3<sup>rd</sup> Applicant who was instructed to register a society but altered the original documents of registration and further imposed herself as an official of the said society.
  43. It is averred that they communicated the findings of the consultative meeting via a report dated 21<sup>st</sup> September, 2022 with further directions that the registration of PROGAK stands but that proper registration documents should be availed to the Registrar to replace the ones that were irregularly filed by the 3<sup>rd</sup> Applicant.
  44. It is their case that the averments by the Applicants that the Respondents intended cause of action by indirectly suspending or cancelling the registration of the Society are unfounded as the 1<sup>st</sup> Respondent no intention of disbanding a lawfully registered society as per the directions and wishes of the Society members.
  45. It is also their case that 1<sup>st</sup> Respondent becomes functus officio once it has affected registration are unfounded as the issue for determination was that of the process of registration and that the 1<sup>st</sup> Respondent had been misled by the actions of the 3<sup>rd</sup> Applicant during the registration process.
  46. They argue that by dint of section 18 of the Registrar of Societies in fulfillment of her duties may order parties to produce evidence to ascertain the identity of the office holders.
  47. They further argue that the averments by the Applicants that the Respondents tampered and interfered with lawful registration and proper management of the Society are deceptive as the 1<sup>st</sup> Respondent is the custodian of all the files of Societies registered under the Act and that the registration process does not form part of the internal matters of a Society thus the Respondents did not interfere with the internal wrangles of the Society.
  48. The Respondent canvassed their application by way of written submissions dated 15<sup>th</sup> February, 2023.
  49. It submitted that the Applicants have failed to meet the requirements for a Judicial Review application as was held by the court in the case of Republic v Public Procurement Administrative Review Board oi 2 Others Ex Parte Rongo University [2018] eKLR. The court enunciated that the grant of orders



of certiorari, mandamus and prohibition is discretionary. In granting the orders, the court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

50. It is also their submission that the Applicants have not met the threshold in the in the court's finding in *Pastoli v Kabale District local Government Council oi Others* [2008] 2 EA 300.
51. They place reliance in the case of Republic *v Public Procurement Regulatory Authority & another; Auditor General & another (Interested Party) (Judicial Review 55 of 2022)* [2022] KEHC 10782 (KLR) and Republic v Kenya Revenue Authority & another, Shapi & 3 others (Exparte) (Judicial Review E038 of 2021) [2021] KEHC 401 (KLR) where it was held that judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at illegally, arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant.
52. The Respondents invoke Section 18 of the *Societies Act* that provides that:
- (1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar Is not satisfied as to the Identity of the persons who have been properly constituted as officers of the society. the Registrar may by order in writing. require the society to produce to him. within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the Institution of proceedings for the settlement of such dispute.
53. They contend that their letter dated 23<sup>rd</sup> August 2022 inviting members of the society for a consultative meeting was within their mandate by dint of Section 18 of the Act and that the Vice Chairperson of the Applicant Association and the 1<sup>st</sup> and 2<sup>nd</sup> Applicants and were given ample opportunity to exercise their rights to fair hearing as envisaged under Article 47 and 50 of *the Constitution* of Kenya 2010.
54. It is their submission that the Applicants failed to produce evidence ascertaining their identity even after multiple prompts by Officers from the Office of the Registrar of Societies.
55. The Respondents posit that the 1<sup>st</sup> Respondent is empowered through Section 31 of the Act to call for proper forms A and 8 together with *the constitution* of the society was well within its proper mandate as the registrar and regulator of the society. The section proves that that: -
- Where the Registrar has reasonable cause to believe that circumstances have arisen which render It expedient for the proper performance of his functions under this Act so to do. he may. by order in writing. require any registered society to furnish him with-
- a. a true and complete copy of its constitution and rules
- b) a true and complete list of its officers and members
56. It is the Respondents case that actions by the 1<sup>st</sup> Respondent were done in good faith and in the proper performance of her functions. They rely on the case of *Council of Civil Service Unions v. Minister for the Civil Service*, where it was stated that:

“illegality” as a ground of Judicial Review means that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it.”



57. In *Githu Muigai & another v law Society of Kenya & another* [2015] eKLR it was held: -
- “In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four comers of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority...”
58. The Respondents submit that Section 27 (1) of the *Civil Procedure Act* stipulates that an order for costs is given at the court's discretion and place reliance in *Scherer v Counting Instruments Ltd* [1986] WLR 615 where the English Court of Appeal set out the principles for the award of costs which are in essence not far distanced from our local jurisprudence.
59. The Respondents urge this court to dismiss the notice of motion dated 1<sup>st</sup> November, 2022 with costs.

**The Interested Parties case;**

60. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties in rebuttal of the instant application filed a Replying Affidavit dated 24<sup>th</sup> November, 2023 sworn by one Moses Agutu Otieno, the 1<sup>st</sup> Interested Party who is introduced as a private security guard number 2Pf.18525 working with KK Securities.
61. It is their case that they and other security guards decided to form a society to protect and advance their interests and welfare as security guards and pursuant to the same, Moses Agutu Otieno was chosen as the chairperson alongside other officials.
62. The Interested Parties (hereinafter referred to IPs) were introduced to the 3<sup>rd</sup> Applicant in the instant suit as an Advocate well conversant with Societies and would assist with the registration formalities and advisory and on 10<sup>th</sup> November, 2021 the members of the intended society at a meeting held along Dundori Road South B agreed that the name of the society be; Protective Guards Association Of Kenya-PROGAK and other proposed names were to be forwarded to the 3<sup>rd</sup> Applicant to them with the registration process.
63. They IPs contend that upon payment for the search and registration and following up on the same with the 3<sup>rd</sup> Exparte Applicant bearing no fruit prompted them to peruse the file at the Registrar of Societies where it was discovered that out of the list of persons they had presented to the 3<sup>rd</sup> Exparte Applicant, only Moses Agutu Otieno's name appeared on the list of officials as the Vice Chairperson and the other two being strangers to themselves. The 3<sup>rd</sup> Exparte Applicant had also imposed herself as the treasurer.
64. Discovery of the foregoing led to them writing two complaints to the Registrar of Societies dated 13<sup>th</sup> June, 2022 and 5<sup>th</sup> July, 2022.
65. A consultative meeting was called and held and the 3<sup>rd</sup> Exparte Applicant was not in attendance neither did she give reasons for her absence.
66. The Applicants were requested to provide details of their involvement in the security guard industry, which they failed to provide hence bringing questions to the Exparte Applicants' legitimacy as members and officials of the society.
67. The Interested Parties posit that the Applicants are intentionally misleading this Court in averring that the 1<sup>st</sup> Respondent has/may suspend or cancel the registration of the society entry no. SOC.81197 and the 1<sup>st</sup> Respondent clearly stated in its ruling that the society would remain registered and that only the Forms A and B and *the Constitution* would need to be availed to replace those on record.



68. They further argue that 1<sup>st</sup> Respondent is well within his authority to provide time limits on notice for performance of any action with regard to the resolution of any dispute presented to it by members of a society as its authority is envisaged in Section 12(E) & (G) and Section 31(1) of the Act.
69. The Interested Parties canvassed their application by way of written submissions dated 24<sup>th</sup> November, 2023.
70. It is their submission that the Applicants' Application of 1<sup>st</sup> November, 2022 is not ripe for jurisdiction by this Court and that their first port of call was an appeal within 30 days to the Cabinet Secretary as is expressly provided by statute and as such, this Court by allowing the Applicants' Application will be usurping the powers of the Cabinet Secretary conferred upon him by Statute and which the Applicants have not exhausted.
71. It is posited that the appeal before the Cabinet Secretary had not crystallized as the 1<sup>st</sup> Respondent had neither, refused to register, suspended or cancelled the society to warrant any appeal.
72. The Interested parties invoke Section 9 of the Fair Administrative Actions Act and Section 15 of the Society Act which has express provisions on appeal and provides as follows:
- 15 Appeal from order of refusal, cancellation or suspension
1. Any society aggrieved by the Registrar's refusal to register it, or by the cancellation or suspension of its registration under section 12 may—
    - a. in the case of a political party, appeal to the High Court within thirty days of such refusal, cancellation or suspension; or
    - b. in the case of any other society, appeal to the Cabinet Secretary within thirty days of such refusal, cancellation or suspension and the Cabinet Secretary shall consider, determine and communicate his decision on the appeal within ninety days of the appeal.
  2. A society aggrieved by the decision of the Cabinet Secretary under subsection (1)(b) may appeal to the High Court within thirty days of the decision.
73. They rely on the case of Republic v Commissioner of Cooperatives Development; Ex parte Paul Manwa & 3 others (supra) in arriving its decision cited the Court of Appeal case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR where the court held as follows;

“We see this as the crux of the matter in this and similar cases. 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 the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. 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 of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

“We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs' disputes had they filed them within the



church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits prematurely.

74. It is also submitted that the dispute is on the legitimacy of the purported office bearers and that the Applicants grossly violated the principles on registration of the society by inter alia registering a constitution which they themselves did not adhere to.
75. They contend that Sections 12 (1), 18 and 31 of the Act grant the 1<sup>st</sup> Respondent authority to deal with issues such as the one before the Court and that the ultimate consequence of noncompliance with orders of the Registrar is suspension or cancellation meaning that it is the last resort after all mechanisms to ensure compliance including recalling and/or the Surrender of the Original Certificate like in the instant case have failed.
76. It is posited that the allegation by the Applicants that after registration of a society the Registrar becomes functus officio is not only misconceived but contrary to the provisions of the *Societies Act*.
77. They place reliance in *In Republic v Jomo Kenyatta University of Agriculture and Technology Exparte Elijah Kamau Mwangi* [2021] eKLR the court in dismissing an Application for mandamus held that,  
“the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist,”
78. The Interested Parties contend that this Honorable court can only issue an Order of prohibition when the Exparte Applicants have provided grounds and disclosed the illegality, unreasonableness, abuse of power or procedural impropriety that has been committed by the institution or a body.
79. They place reliance on *Republic v County Assembly of Samburu Exparte Raphael Lemitin, Mark Lcharuni & Samburu Water and Sanitation Company; County Government of Samburu (Interested Party)* [2019] eKLR the court expressed itself thus;  
“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings”
80. In the case of *Anne Nduta Ruo v Director Public Prosecution & 2 others* [2022] eKLR in dismissing an application for judicial review observed that;  
“Court is mindful of the purpose of judicial review proceedings, which is to address defects in decision making processes by public bodies, and not to deal with the merits of the case. It therefore follows that where an Applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determinate the



merits of two or more different versions presented by the parties, the Court would not have jurisdiction in a judicial review proceeding to determine such a matter.”

...

“Judicial review is concerned with the decision-making process and not with the merits of the decision itself. Judicial review deals with the legality of decisions of bodies or persons whose decisions are susceptible to judicial review. A decision can be upset through certiorari on a matter of law if on the fact of it, it is made without jurisdiction or in consequence of an error of law. Prohibition restrains abuse or excess of power.”

81. It is their case that 1<sup>st</sup> Respondent acted within the powers and authority discretionary or express bestowed on her by the *Societies Act* and that the Applicants motion dated 1<sup>st</sup> November 2022 is contra-statute, lacks merit and should be dismissed with costs.
82. The Applicants filed further supplementary submissions dated 11<sup>th</sup> December, 2023 in response to the Interested Parties’ replying affidavit.
83. The Applicants in rebuttal submitted that the Interested Parties’ case, Replying Affidavit sworn and dated 24/11/2023 is outside the purview of this court’s jurisdiction as a Judicial Review Court. Further, Interested Parties’ case, written submissions dated 24/11/2023 are also misleading, misconceived and misplaced.

#### **Analysis and determination;**

84. Following are the issues for determination;
  - i. Whether this court has jurisdiction to determine the instant application.
  - ii. Whether the Applicants have made a case for the grant of leave to file for judicial review orders.
  - iii. Who is to bear costs.

#### **Whether this court has jurisdiction to determine the instant application.**

85. A decision made by a court of law without jurisdiction is a nullity ab initio. In this respect, I am guided by the case of Owners of Motor Vessel Lilian “S” v Caltex Oil [1989] KLR).
86. Section 8 of the *Societies Act* creates the Office of the Registrar of Societies who bears the responsibilities and powers to ensure that the affairs of registered societies are carried out within the confines of the law.
87. The Registrar has powers to hear and determine disputes under Section 18 of the Act and to carry out investigations into the affairs of a society either on its own motion or on a complaint lodged inter alia.
88. Unlike the Registrar of Societies, this court by dint of Article 165 (3) and (6) of *the Constitution* has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of *the Constitution*.
89. The bone of contention in the instant suit flows from letter dated 6<sup>th</sup> October 2022 by the Registrar of societies through her letter that directed that proper forms A and B and *the constitution* be availed to replace the ones on record.
90. In *Ashwander v Tennessee Valley Authority* [1936] 297 U.S 288, the US Supreme Court stated that courts should only decide cases which invite “a real earnest and vital controversy”.



Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

91. Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much-sought judicial time. The exception it must be noted exists where the court is allowed by law to offer advisory opinions. The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence.
92. The court in *John Harun Mwau & 3 Others –v- AG & 2 others* HCCP No. 65 of 2011 (unreported) stated as follows:

“We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret *the constitution* conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.”

93. In *Hon. Martin Nyaga Wambora v Speaker of County Assembly of Embu and 5 Others* HCCP No. 3 of 2014, the court observed as follows:

“It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.”

94. In *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & Another* HCCP 628 of 2014 [2015] eKLR, the court cited the case of *Patrick Ouma Onyango & 12 Others v AG & 2 Others* Misc. Appl No. 677 of 2005 wherein the court had endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise *American Constitutional Law*, 2nd Ed. as follows:

“In order for a claim to be justiciable as an article III matter, it must ‘present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted.’ In part, the extent to which there is a ‘real and substantial controversy is determined under the doctrine of standing’ by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself-an aspect of ‘the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of ‘ripeness’ which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of ‘mootness’ which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is



the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors.

In the instant suit, the Applicants cannot have their cake and eat it. They didn't obey with the Registrar. Even if we were to assume that on provision of the said Form A and B the Registrar while acting within her mandate dissolves the society, the Applicants will still have recourse to challenge the decision that the Registrar's will have arrived at through the internal mechanisms of appeal as is provided for the *Societies Act*."

95. In *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR it was held thus: -

"We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule.

[106]. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of* [2014] eKLR held:-[256].The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis."

96. Section 9 (3) The *Fair Administrative Action Act* 2015 states that:

"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 subsection (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.

97. In the *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425 the court had this to state;

"In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

98. The Applicants did not exhaust the available alternative dispute resolution mechanism before moving this court.They moved to this court on the basis of unfounded fear.

99. This suit is not ripe and they are bound by the doctrine of ripeness given that the Registrar of societies is a statutory outfit that has the capacity to deal with disputes like the one that the Applicants have brought before this court and I so hold.

100. The second issue collapses by the wayside as a result of the analysis and the determination of the first issue. The Applicant has not made out case for the grant of the orders sought.

101. The registrar of societies directives must be complied with.

Order;

The Application is struck out with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.**

.....



**J.M. CHIGITI (SC)**

**JUDGE**

