



**Hirbo v University of Nairobi Independent Electoral Commission  
& another (Judicial Review Application E034 of 2025)  
[2025] KEHC 3838 (KLR) (Judicial Review) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3838 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**JUDICIAL REVIEW**

**JUDICIAL REVIEW APPLICATION E034 OF 2025**

**RE ABURILI, J**

**MARCH 25, 2025**

**BETWEEN**

**DIBORA ZAINAB HIRBO ..... APPLICANT**

**AND**

**UNIVERSITY OF NAIROBI INDEPENDENT ELECTORAL  
COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**UNIVERSITY OF NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By the Originating Motion dated 19<sup>th</sup> March 2025 brought under the provisions of the *Fair Administrative Action Act*, 2015 and the new Fair Administrative Action Rules, 2024 as well as the University of Nairobi Student’s Association UNSA Constitution, among other provisions of the law, coupled with Articles 22, 23,38,47,50 and 165 of the *Constitution* of Kenya 2010, the applicant Dibora Zainab Hirbo seeks from this court the following orders:

1. Spent
2. Spent
3. Spent
4. That upon the hearing and determination of this suit, an order of certiorari be granted and/or issued to remove into the High Court and quash the decision of the Respondent’s communicated via email on 18<sup>th</sup> March 25, 2025 at 9.19pm;



5. That upon the hearing and determination of this Motion, the Honourable Court be pleased to grant permanent orders in the nature of mandamus compelling the 1<sup>st</sup> Respondent, the UNSA Independent Electoral Commission, to clear the Applicant to vie for the position of Chairperson of the University of Nairobi Students' Association (UNSA);
  6. That the Honourable Court be pleased to grant any further relief deemed just and necessary to uphold the Applicant's rights and protect the integrity of the electoral process;
  7. Costs of this Application be provided for.
2. The application is predicated on the grounds on the face of the Originating Motion and supported by the affidavit sworn by the applicant, Dibora Zainab Hirbo, reiterating in her depositions, the aforesaid grounds which are captured in this judgment.
  3. The applicant also filed a further and supplementary affidavit during the case management process leading to the expeditious hearing which took place only yesterday the 24<sup>th</sup> march, 2025 and this court had to burn the midnight oil to write this judgment owing to the impending elections due on 26/3/2025 and which are under challenge by the applicant seeking to participate in the said elections.
  4. The applicant's case as derived from her grounds, deposition and annexures exhibited to her affidavits is that she is a duly registered student at the University of Nairobi under Registration No. E35/3553/2022 and is the current vice President of UNSA.
  5. That she meets all the qualifications to vie for the position of Chairperson as per the UNSA Constitution as per Clause 8 of the 3<sup>rd</sup> schedule. She deposed that she complied with all the candidacy requirements including attending disciplinary proceedings commenced against her on 6<sup>th</sup> and 13<sup>th</sup> March 2025 respectively after which the disciplinary minutes were forwarded to the legal office for proof reading before being signed by the Vice Chancellor who is yet to sign the said minutes.
  6. The applicant asserts and deposes that despite the matter having been substantially concluded, the (Respondent) (not indicated which respondent) falsely claimed that the disciplinary case remains pending and has used those baseless assertions to disqualify the Applicant.
  7. She asserts that the delay in processing and submitting the disciplinary minutes for signature is an administrative lapse attributable to the legal office and is beyond her control hence she should not be punished for inefficiencies of the Respondent's processes.
  8. Further, that following the disciplinary process which was concluded, her Faculty Dean cleared her, being the Chairman of the Faculty's Disciplinary Committee, on 14/3/2025 hence the alleged pending Disciplinary case is legally untenable.
  9. The applicant annexed copy of the clearance form duly signed by her Faculty Dean. She deposes that the disciplinary case was concluded on 6<sup>th</sup> & 13<sup>th</sup> March 2025 wherein she was acquitted of the charges, as per the annexed complaint sheet claiming that she committed verbal insults (assault) on Council Members with intention to cause actual bodily harm without any form of provocation and a hearing notice.
  10. That following the decision to disqualify her from vying for chairman's position as received on 18/3/2025, she made an appeal to the Independent Electoral Commission of UNSA but was yet to receive any formal response which response was later received on 21/3/2025 during the pendency of this case reiterating the earlier decision to disqualify her and added another reason for disqualification that her clearance by the Faculty Dean was unprocedural because as at that time, there was a pending disciplinary case that went through the disciplinary proceedings, and she was found her guilty, and that



- consequently, the Faculty of Education had recalled the clearance dated 14/3/2025 in the letter dated 21/3/2025 hence the Independent Electoral Commission affirmed its decision on disqualification.
11. The applicant laments that her political rights under Article 38 of the Constitution were violated and so was her right to fair administrative action under Article 47 of the Constitution. She deposes that the decision by the Respondent was unfair, unjust and discriminatory.
  12. The Respondents filed grounds of opposition and Replying affidavit dated 24/3/2025 vehemently opposing the application and all the prayers sought in the Originating Motion contending that the application offends Section 9(2) of the Fair Administrative Action Act on exhaustion of remedies, which Section mirrors Rule 23, Schedule 3 of the University of Nairobi Rules and Regulations Governing Students Election, 2017.
  13. It was contended that the applicant had not exhausted the initial mechanisms for appeal or review hence the application before this court was bad in law, premature, incompetent, defective and ought to be struck out with costs.
  14. Further, that Schedule 3 Rule 10 of the above stated Regulations disqualified the applicant for UNSA nomination to the 2025 Council nomination election as she was proved to have contravened the University of Nairobi Students' Code of Conduct (Revised 2021) when on 6<sup>th</sup> & 13<sup>th</sup> March 2025 respectively, the Faculty Disciplinary Committee heard, considered and concluded the disciplinary case against her in accordance with the Regulations and verdicts rendered to the effect that she was:
    1. Compelled to write a letter of apology to the University Council;
    2. Be restricted from accessing the Council Chamber 19<sup>th</sup> Floor of UON Towers or any such venue/place declared for that purpose;
    3. Be restricted from accessing and or contacting any member of the University Council;
    4. Required to write an undertaking to the Vice Chancellor to keep peace;
    5. Strongly warned to desist from any form of indiscipline while at the University.
  15. It was contended that the purported clearance by the Faculty Dean was found to be unprocedural, irregular, null & void ab initio for want of compliance with Article 10(f) of the UON-UNSA Constitution (Revised 2021) and that the said clearance had been recalled hence the applicant stood disqualified for UNSA 2025 Council nomination elections.
  16. In the Replying affidavit sworn on 24/3/2025 by Dr. Kenneth S. Ombongi, the Chairperson of the UON Independent Electoral Commission, the 1<sup>st</sup> Respondent, it was deposed, relying on various Articles of the UNSA Constitution including Article 10 which provides for the composition of the Student's Council; the qualifications and requirements to contest for the position of Chairman of the UNSA as prescribed under Rule 8 of Schedule 8; Rule 10 of Schedule 3 on disqualification for election at the time of elections and more particularly, Rule 10(f), where the student is proven to have been in contravention of the Constitution of Kenya, 2010, the Students' Association Constitution, the Universities Act and Regulations in the Students' Code of Conduct, 2012, then such student or candidate would be disqualified from vying to be elected.
  17. That pursuant to the Faculty Students' Disciplinary Committee established under Sections 27.1(b) as read with Section 31,34, 35 and 38 of the Students Code of Conduct, on 14/3/2025, the IEC took note of the fact that there was a Faculty DC meeting on 6<sup>th</sup> and 13<sup>th</sup> March 2025 which considered seven counts of charges against the applicant and found her guilty of all the charges as per the Faculty



Disciplinary proceedings minutes marked KAO-1 upon which the verdict was as stated above as extracted from the grounds of opposition.

18. Further, it was deposed in contention that the applicant was yet to comply with the verdicts as itemized above hence she was not qualified. It was deposed that only the IEC was mandated to verify and clear prospective student leaders for the Council nomination and elections exercise, not the Faculty Dean who cleared her yet there was a pending disciplinary case against her and that upon advice, the said Dean had since recalled the clearance in question on 21/3/2025.
19. Further deposition was that her entire team had not been cleared for the reasons given and on diversity & inclusivity, one had to follow Articles 8(e) 9(3) (d), 14(b) of Schedule 3:1(b) and 20(4) of the UNSA Constitution and Rules & Regulations Governing student's elections, bearing in mind the 13 Faculties/Campuses hence the question of diversity was not a new criterion for nomination.
20. It was deposed that after verification of documentation of the Team Purpose Members, led by the applicant herein, it was found that they all did not meet the criteria as described in paragraph 32 of the Replying affidavit and that the applicants' nomination was not absolute but subject to the Rules and Regulations governing nominations. The Respondents contended that the application herein was an abuse of court process as no constitutional issues were present to warrant judicial review orders sought.
21. In the further and supplementary affidavits sworn by the applicant, she maintained that she had written an appeal as provided for in Rule 23 of Schedule 3 and the verdict rendered on 21/3/2025; that existence of the disciplinary case was not a ground for her disqualification under Rule 10 Schedule 3 of UON Rules and Regulations Governing Students Election, 2017 (Regulations); that she was not accorded a fair hearing before a recall of the clearance by the Faculty Dean and that neither was she given any reasons for the recall noting that the very Faculty Dean was the Chair of the Disciplinary Committee hence he knew if there were any pending disciplinary cases against the applicant.
22. In the supplementary affidavit, the applicant contended that the 8 charges referred to by the Respondents were an afterthought after the 1<sup>st</sup> charge was dismissed by the Disciplinary Committee on 6<sup>th</sup> March 2023; which charges were subsequently brought too late in the day, contrary to clause 34 of the UON Students' Code of Conduct (Revised 2021). That there was no inquiry conducted by the Security Department within 3 days of receiving the complaint hence, the prosecution of the applicant 7 months after the alleged misconduct on 2/8/2024, was evidence that the Respondents were determined to eliminate the applicant by using the made up charges.
23. The applicant accuses the Respondents of weaponizing the disciplinary procedures against her, more so, bringing up those charges during nomination period and only a week to elections, an indication of bad faith against her and hence, the illegality. She concluded that the said charges were a paraphrase of the occurrence of the 2/8/2024 after the first Disciplinary Complaint was dismissed and that the Respondents were punishing her and subjecting her to double jeopardy.
24. The application was heard by way of oral submissions with the respective parties Counsel submitting and entirely relying on material that I have reproduced above. Her counsel Mr. Abuga emphasized on her depositions and added that the applicant was in any event never given the reasons for recalling her letter of clearance issued to her by her Faculty Dean and neither were the reasons for dismissing her appeal given. He relied on the case of Council of Civil service v Minister for Civil Service as cited in Chief Magistrates' Court at Kibera & another [2022] eKLR. Counsel maintained that the applicant was cleared after the disciplinary charges levelled against her were dismissed on 6<sup>th</sup> March, 2025. Further, that the charges were brought during the nomination week with the sole intention of eliminating her from the nominations and election process.



25. The applicant's counsel submitted that the new charges were unlawful as they never followed section 34 of the Students' Code of Conduct on the procedures and processes for disciplinary proceedings hence the decision of the 1<sup>st</sup> respondents should be quashed as it was made malafides.
26. On exhaustion of remedies, the Supreme Court Case of Republic v IEBC ex parte Super Alliance [2018] was cited and a submission made that there are exceptions to the exhaustion rule and that in this case, there were special circumstances necessitating exemption from the obligation to exhaust the internal dispute resolution mechanisms by way of appeal. That the applicant had filed an appeal which was not successful and that this court has to evaluate each case and make orders in the interest of justice, noting that elections were due to be held in 48 hours of the time of hearing of this case. The applicant urged this court to quash the decision of the 1<sup>st</sup> applicant disqualifying her as Chairman to participate in the forthcoming elections.
27. Opposing the application, in submissions, the respondents' counsel reiterated the grounds of opposition and depositions in the affidavit sworn by Dr Kenneth Ombongi emphasizing that the applicant had violated the exhaustion principle as espouse in section 9(2) of the *Fair Administrative Action Act* and Rule 23 Schedule 3 of the *Constitution* Regulations governing student elections that in any event, the letter written was just a letter and not an appeal in the prescribed form.
28. On disqualification still, it was submitted that the applicant having been found guilty of violations of the Students Code of Conduct and having failed to write apology and write an undertaking to the Vice Chancellor to keep peace and restrict self from access the Council Chambers or members of the Council whom she had been accused of verbally assaulting by insulting them, she could not be cleared for nomination.
29. It was submitted that the applicant attended disciplinary proceedings on 13/3/2025 at 10.00am before the Disciplinary Committee, pleaded to the charges and never raised any objection or claim of victimization hence the claim of victimization or weaponization via disciplinary proceedings was an afterthought, emphasizing that the verdicts were just soft warnings to be of good behavior to a student.
30. On the clearance by the Faculty Dean, Mr. Omondi Counsel for the respondents submitted that the role of the Faculty Dean was to clear the student on academic record not on misconduct, which latter was to be done by the 1<sup>st</sup> respondents after verifying students that were vying for leadership through elections. Counsel submitted that the clearance by the FACULTY Dean was therefore null and void for want of mandate.
31. It was submitted that the applicant and her team members were all disqualified including the Vice Cahir whose academic record was found incomplete by the Faculty Dean, the Treasurer and PWD representative came from the same Faculty yet the Rules provide for diversity as per the UNSA Constitution Preamble and Articles 10 and 252 of the *Constitution*. That UON was a national University that adheres to those Constitutional Principles. That a team comprises 7 members and that if any one member does not meet any of the criteria set, then they are given the opportunity to get a replacement. That in this case, the Team Purpose was given an opportunity which they did not utilize.
32. It was submitted that there were other teams that had not been cleared hence there was no victimization as alleged by the applicant. Further submission was that the charges were not manufactured as they bore specific provisions of the Students Code of Conduct.
33. On exhaustion of remedies, it was submitted the Articles 22 and 23 of the UNSA Constitution provides for Arbitration of disputes and that no special circumstances had been demonstrated to warrant exemption. He emphasized that the Dean was only to clear the academic record and that in



any case, the nominations had ended on 21/3/2025 hence it will be in vain to clear the applicant after the fact.

34. In the rejoinder by Mr. Abuga counsel for the applicant, it was submitted that the Rules do not describe how an appeal should look like and that the applicant 1<sup>st</sup> respondent received a letter and never raised the issue of form. Counsel relied on Article 159 of the Constitution on form not to be elevated above substance.
35. On the disciplinary proceedings, he submitted that the disqualification was on pending disciplinary case not concluded case and that the proceedings in question violated Article 50(2)(a) of the Constitution of Kenya, 2010 which guarantees and accused person the right to be presumed innocent until the contrary is proved. Further, that the charges were brought the same day and she was required to plead, with no Enquiry report being filed by security department as required in the Rules at Clause 34.
36. It was submitted that the Dean had the mandate to clear on any pending disciplinary case and one of the details in the clearance form and that there was no hearing before the recall of the clearance by the Faculty Dean hence he did not go beyond the mandate.
37. Counsel submitted that the other issues concerning the team members were rectified hence, once the issue of the applicant is sorted, everything would be okay.
38. On whether the application was overtaken by events, it was submitted that this court has wide powers including overturning of presidential elections in order to remedy a wrong and not to allow an injustice to prevail otherwise it would set a dangerous precedent noting that the 1<sup>st</sup> respondent's disqualification was not in the UNSA Constitution.

### **Analysis and Determination**

39. I have considered the pleadings, depositions and submissions by both the applicant's and Respondents' Counsel who have with industry and working under strict timelines and time constraints, made it possible for the expeditious hearing of this matter and therefore this Court had to endeavor, under the same conditions, to write and render this decision one way or the other.
40. The main issue, with many ancillary questions to be resolved in this case is whether the applicant's case is merited for the Judicial Review orders sought to issue.
41. The commencement point is the jurisdiction of this court in Judicial Review proceedings. This question of jurisdiction has many facets and is not a mere technicality. It goes to the root of the matter for, without jurisdiction, the Court can do no more than down its tools and do no more.
42. The jurisdiction of this court in Judicial Review proceedings is derived from Article 165(6) and (7) of the Constitution which confers on this court supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. In the exercise of the said supervisory jurisdiction, this court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
43. Article 47(1) & (2) of the Constitution guarantees every person of the applicant herein the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. And if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



44. the Constitution consistently uses the term person and goes ahead to define who the person is under Article 260 as including a company, association or other body of persons whether incorporated or unincorporated. This begs the question of whether the 1<sup>st</sup> Respondent is an incorporated or unincorporated body and therefore having the capacity to sue and be sued in its own name.
45. The 1<sup>st</sup> Respondent is the UNSA Independent Electoral Commission. The UNSA Constitution establishing the body and Section 41 of the Universities Act, 2018 revised do not provide for the incorporation of the Independent Electoral Commission which mirrors the Country's Independent Electoral and Boundaries Commission, a Constitutional Commission, established under Article 248 (2) (c) of the Constitution under Chapter Fifteen, raising legal question of whether the 1<sup>st</sup> Respondent has the capacity, in this case, to be sued in its own name as is the case herein.
46. To answer that question, I will explore some judicial precedents before reaching my conclusion. In *Finmax Community Based Group & 3 others v Kericho Technical Institute* [2021] eKLR COA ELD (CORAM: OUKO (P), MUSINGA & J. MOHAMMED, JJ.A.), the Court of Appeal held that the 1<sup>st</sup> appellant is an unincorporated association and therefore in law is not a legal personality with the capacity to sue or to be sued. The learned Judges observed as follows:

“For a long time, courts have held that such bodies could not sue or be sued.

However, with the advent of the 2010 Constitution, this position appears to have changed. Article 260 which is the Interpretation section of the Constitution defines “a person” to include;

“... a company, association or other body of persons whether incorporated or unincorporated”. (Own emphasis).

As regards institution of court actions, Article 50, dealing with issues of fair hearing gives;

“(1) Every person .... the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

It would seem, from the foregoing, that an association like the 1<sup>st</sup> appellant is “a person” who may institute proceedings and also be sued.

However, the question today is not whether unincorporated entities may commence action or how actions against them may be commenced, but rather, the manner of commencing proceedings. It is equally also settled that they cannot maintain an action or actions brought against them in their names.

Proceedings on their behalf or against them can only be through the registered officials, whose particulars, names and capacity must clearly be indicated in the suit. See *Grace Mwenda Munjuri vs. Trustee of the Agricultural Society of Kenya* [2014] eKLR.

In this appeal, the 1<sup>st</sup> appellant, being an unincorporated organization, had no capacity to be sued in its own name. The respondent could only institute the suit as against named officials.

Titles like Chairman, secretary or treasurer cannot be used as those are not legal persons against whom orders may be executed by the successful party in the proceedings.



For the reasons we have given, this appeal succeeds. We accordingly allow it by setting aside the judgment and order of the High Court made on 24<sup>th</sup> March, 2015 and amended on 22<sup>nd</sup> April, 2015 and substitute it with an order dismissing the respondent's suit."

47. In *Geoffrey Asanyo & another v John Kiragu Ngunyi & 13 others* [2015] eKLR, The Court stated as follows:

"That finding would be sufficient to dispose of the petition. But I am minded to comment on the locus of the petitioner. The respondents have submitted that the petitioner lacks standing to sue in its name. Under Article 260 of the *Constitution*, a person is defined to include a company, association or other body of persons whether incorporated or unincorporated. Article 258 of the *Constitution* on the other hand provides that every person has the right to institute legal proceedings claiming that the *Constitution* has been contravened or threatened with violation. There is a fairly identical provision in Article 22 dealing with enforcement of the Bill of Rights. The petitioner was registered as a self-help group on 28<sup>th</sup> December 2009 by the Ministry of Gender, Children and Social Development. That fact is common ground. It is thus beyond dispute that the petitioner is an unincorporated association. To that extent, it is entitled to bring a constitutional petition.

However, it can only bring the proceedings through its registered officials. The reason is simple: the petitioner is not a distinct legal person independent of its members. It cannot then maintain an action in its name or be sued as such. See *Kituo cha Sheria vs John Ndirangu Kariuki and another Nairobi*, High Court petition 8 of 2013 [2013] eKLR. In *Kipsiwo Community Self Help Group v Attorney General & 6 others t Eldoret*, High Court E&L Petition 9 of 2013 (unreported) the court was confronted with a similar problem. Munyao J delivered himself as follows-

"It would seem therefore, from a reading of Article 22 and the definition provided in Article 260, that a company, association or other body of persons whether incorporated or unincorporated, may institute proceedings asserting a violation of a right in the Bill of Rights.

I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the *Constitution* allows unincorporated bodies to sue, does not vest such bodies with legal capacity and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued."

I have then reached the conclusion that quite apart from the merits of the petition the petitioner has no legal standing to institute the present proceedings in its own name. The action is thus incurably defective and incompetent. I have



already found that the petitioner has failed to discharge the onus of proof that the respondents have violated any of its rights under the *Constitution* or the international instruments cited by the petitioner. It follows as a corollary that the Court cannot issue any of the declarations or reliefs sought in the petition.”

48. In the Ugandan Court of Appeal decision Civil Reference No. 11 of 1999 in *Uganda Corporation Creameries & another v Reamaton Ltd*, the Court held:

“It is a well-known principle of law that courts adjudicate on issues which actually exist between litigants and not academic ones.”

49. A similar position was adopted in the earlier case of *Saaka Saaka Community Internally Displaced Persons Group v Ministry of State for Special Programmes & another* [2014] eKLR.

50. In the *Kipsiwo Self Help Group* case, the latter was found to have no capacity to institute action in its own name. The court was clear that a person recognized in law had to sue on behalf of members of *Kipsiwo Self Help Group* and such members had to be named and identified with precision. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order.

51. The Court of Appeal in *Kenya Power & Lighting Co Ltd –vs- Benzene Holdings Ltd t/a Wyco Paints* (2016) eKLR, in discussing the institution of suits by non-juristic persons stated thus:

“This principle was emphasized as long ago as 1923 by Bankes LJ in *Banque Internationale De Commerce*(supra), which was subsequently in 1959 cited with approval by Templeton, J of then Supreme Court of Kenya in *Fort Hall Bakery Supply Co V Fredrick Muigai Wangoe* (1959) EA 474, who said:

“The party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence. A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed.’

52. In *Republic v Kenya Association of Music Producers (KAMP) & 3 others Ex- Parte Pubs, Entertainment and Restaurants Association of Kenya (PERAK)* [2014] eKLR, it was contended that ex-parte Applicant is an organization registered under the *Societies Act*, Cap 108, Laws of Kenya as a welfare organization and hence is not a juristic person capable of suing or being sued in its own name and therefore lacks the requisite locus standi to sustain the proceedings herein. Consequently, it was contended that the leave that was granted herein was granted to the wrong “person”. The other issue for determination was whether judicial review remedies can issue against the 1st Respondent, Kenya Association of Music Producers described as a Collective Organization by the applicant.

53. The Court concluded that a judicial review order cannot be issued against the 1st and 2nd Respondents in the manner in which they are sought in the application.



54. Applying the above judicial pronouncements to this case, the applicant before this Court, Dibora Zainab Hirbo a student at the University of Nairobi (Registration Number E35/3553/2022) and the current Vice President of the University of Nairobi Students' Association (UNSA), has filed the present application against the University of Nairobi Students Association's Independent Electoral Commission and the University of Nairobi seeking an order of Certiorari quashing the 1<sup>st</sup> respondent's decision, communicated via email on 18<sup>th</sup> March 2025 at 9:19 p.m., and an order of Mandamus compelling the 1<sup>st</sup> respondent to clear her to vie for the position of Chairperson of UNSA.
55. Electoral Commission, is established under Article 13 of the UNSA Constitution 2017 (Amended 2021), which outlines the creation, structure, and functions of the Commission. However, the UNSA Constitution does not provide for the incorporation of this Commission, raising the critical legal question of whether the 1<sup>st</sup> respondent has the capacity to be sued in its current form.
56. In determining the capacity of the University of Nairobi Students Association's Independent Electoral Commission (UNSA-IEC) to be sued, it is essential to examine the constitutional framework, particularly Articles 22 and 260 of the Constitution of Kenya, 2010, and their legal implications on unincorporated bodies.
57. Article 22 of the Constitution provides that every person has the right to institute court proceedings for the enforcement of rights and fundamental freedoms under the Bill of Rights. Specifically, Article 22(1) states that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened.
58. On its face, this provision seems to grant broad access to the courts. However, the critical question is whether an unincorporated body, such as the UNSA-IEC, qualifies as a "person" with the capacity to sue or be sued directly under Article 22.
59. From the judicial pronouncements right from the Court of Appeal which bind this court as cited above, it follows that while Article 260 recognizes unincorporated bodies as "persons" for constitutional purposes, it does not automatically confer legal personality on such bodies for purposes of legal proceedings. Legal capacity, which includes the capacity to sue or be sued, remains subject to additional legal and procedural requirements. Even with the expansive definition of "person" in Article 260, Kenyan courts have clarified that unincorporated bodies generally lack legal personality and cannot independently sue or be sued. This is because legal personality, which confers the ability to hold rights, incur obligations, and engage in legal proceedings independently, is typically reserved for incorporated entities, such as registered companies, societies, or state agencies.
60. Unincorporated bodies can only participate in legal proceedings through specific procedural mechanisms, such as representative suits under Order 1 Rule 8 of the Civil Procedure Rules, which provides that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued on behalf of all persons so interested.
61. With all the above in mind, I have no hesitation to find and hold that the application herein against the 1<sup>st</sup> Respondent is incompetently filed before this court and must be struck out in limine consequently, the 1<sup>st</sup> Respondent collapses and is hereby struck out. I must clarify that albeit the parties never submitted on this point, the court cannot play ignorance on such a serious point of law that would embarrass it.
62. Even assuming that I am wrong on the aspect of the legal standing to sue and be sued in its own name on the part of the 1<sup>st</sup> respondent as held above, the question is whether the Originating Motion has merit.



63. On whether I can delve into the merits having found the application against the 1<sup>st</sup> respondent to be incompetent and therefore amenable for striking out on that ground alone, the Court of Appeal in *Ndiara Enterprises Ltd v Nairobi City County Government* [2018] eKLR had this to say after the Judge found that it had no jurisdiction on account of exhaustion of remedies but went on to determine the merits of the case in judicial review proceedings:

On the authority of *Owners of the Motor Vehicle "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, which the Judge had in mind and cited, the High Court was bound to lay down its tools the moment it held that it lacked jurisdiction. We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings.

Though the High Court could have left it at that, it went further to consider why the order of mandamus to compel the respondent to approve its plans for the construction of a perimeter wall could not be granted to the appellant in the instant case.

64. On the merits of the claim against the 2<sup>nd</sup> respondent, University of Nairobi (UON) is a body corporate and capable of being sued because it is established under the *Universities Act* Cap 210 of Kenya and the UON Charter. The question is, what cause of action has been established against the 2<sup>nd</sup> Respondent?
65. From the Originating Motion pleading, the 2<sup>nd</sup> Respondent is not even named as a party. It is only named in the supporting affidavit and apart from being listed as party, nothing even in the deposition by the applicant makes reference to the 2<sup>nd</sup> Respondent. Only the subsequent affidavits now seem to accuse the 2<sup>nd</sup> Respondent of failing to close the disciplinary proceedings against the applicant and off course, conducting disciplinary proceedings against her at the eleventh hour without giving the applicant a fair hearing.
66. However, what is before this court for determination is not the lawfulness or otherwise of the disciplinary proceedings. It is a challenge to the applicants' disqualification from vying for the position of Chairperson of UNSA, and alleged pending disciplinary proceedings and later, verdicts arising from those disciplinary proceedings.
67. This court cannot be diverted to determine the lawfulness or otherwise of those disciplinary proceedings since there is no prayer before this court seeking to quash those proceedings. The prayer is for quashing the decision to disqualify the applicant by the 1<sup>st</sup> respondent on account of pending disciplinary proceedings against her. I however agree with the applicant that under Clauses 8 & 10 of the UNSA Constitution, pendency of disciplinary proceedings alone cannot be a reason for her disqualification and therefore I would fault the 1<sup>st</sup> respondent assuming that it was a suable party.
68. Onto other merit questions, on the Respondents' allegations that the applicant was convicted of violating the Students' Code of Conduct, again, that may be so, as per the new material availed by the 1<sup>st</sup> respondent. However, as at the time of disqualifying the applicant, the IEC was clear and that is the reason used to disqualify her, that she had a pending disciplinary case. The issue of violation of SCC did not arise and therefore that alleged violation cannot be used against her to further buttress her disqualification.
69. On clearance by the Faculty Dean, which was recalled, I find no merit in the argument by the Respondents that it was unlawful and outside the mandate of the Faculty Dean who could only clear her on academic record because the clearance form was clear that the Faculty Dean was to clear her in other details including whether there was a pending disciplinary case. But as I have stated above, pendency of a disciplinary case is not one of the grounds for disqualification.



70. Onto the other merit questions and other grounds for disqualification of Team Purpose and therefore the applicant herein from vying, the Vice Chair was stated to have incomplete academic records. It was incumbent upon the applicant to demonstrate that ground was baseless by either having the Vice Chair of her team being enjoined to these proceedings or him swearing an affidavit to counter that allegation. In his submissions, Counsel for the applicant asserted that the issue of the Vice Chair was settled. That was a submission from the bar. The Vice Chair has his stake in the nomination process, impending elections and therefore this case. It was upon him to clarify the issue, with evidence, knowing that he is joined at the hip with the applicant herein and that his disqualification would adversely affect the candidature of the whole Team.
71. The same situation applies to the Third category of Team purpose. The applicant claimed that the criteria used on diversity is new and meant to exclude and eliminate her from vying. However, my reading of the UNSA Constitution provides for inclusivity and diversity, at Articles 8(e)- “Article 8: Guiding values and principles of the Association The Association shall, in its operation be guided by the following values and principles: (a) Patriotism and national unity, (b) Good governance and accountability transparency, (c) Integrity and transparency, (d) Gender equity; (e) Inclusivity and diversity, (f) Respect for the rule of law; 9(3) (b),(d),- 9(3) Duties of Members Every member shall: a) Comply and abide by the letter and spirit of this Constitution; b) Shall strive to promote non-discrimination and inclusivity; d) Promote cultural, racial and religious diversity of the members of the Association;14(b) d) Promote cultural, racial and religious diversity of the members of the Association; and Schedule 3:1(b) and 20(4). Those are also values in the preamble of the UNSA Constitution. See preamble “PROUD of the diversity of backgrounds and cultures of members, united by a common purpose and aspirations, GUIDED by the national values and principles of governance, principles of leadership and integrity and general principles of elections as spelt out in Articles 10,81 and Chapter 6 of the Constitution of Kenya 2010.”
72. Additionally, the deposition that the Treasurer of the Team, Ms. Catherine Olga Makalama and the PNA representative, Ms. Faith Pendo Ndaa were from the same Faculty of Health Sciences was not controverted. The guidelines on requirements for nomination at page 70-77 must be read together with the requirements under the UNSA Constitution and not in exclusion. In addition, the applicant being the current serving Vice Chairman of UNSA, must have read and understood the requirements under the UNSA Constitution.
73. In the said Guidelines at page 71 No. 11, on both pages, “each team should demonstrate diversity in terms of Faculty, Campus and approved academic programmes.” The guidelines apply for both nominations requirements for Student Counsel and campus Student’s Association. They are dated 12/3/2025.
74. Further, in the Ruling of this court dated 2/3/2025 where the applicant was seeking for interim reliefs, this court did observe inter alia, that the applicant had not addressed the concerns raised against her running mate as having incomplete academic record as confirmed from the Faculty Dean FASS. It was therefore expected that when responding to the fierce opposition raised by the Respondents, she would clarify that issue so that it is settled.
75. I even referred to Part IV on Elections and qualification for nominations which among other requirements or qualifications, is a verified academic status confirmed by the Academic Dean. If this issue was resolved, there is no reason for the applicant not demonstrate before this court with evidence that she had indeed settled the issue and that her running mate had been cleared. I also referred to Rule 11(k) where, a disqualification or withdrawal of one member of the team, the entire team got disqualified.



76. There is no material placed before this court to show that the aspiring Team Purpose met all the qualifications for nomination, even excluding the question of whether the applicant had a pending disciplinary case and as stated earlier, this case is not about the merits or otherwise of the disciplinary proceedings against the applicant.
77. On exhaustion of remedies, the Respondent contended that Rule 23 provides for exhaustion of internal disputes resolution mechanisms by way of Appeal and this is fortified by Section 9(2) of the Fair Administrative Action Act as read with Article 159(2) (c) of the Constitution.
78. The applicant however, provided this court with evidence of an appeal by way of a letter and I am in agreement with her that the form of the appeal was immaterial. It is the substance that matters. Furthermore, that appeal was considered and the verdict rendered when this matter was in court, on 21/3/2025, affirming the decision of 18/3/2025 and adding one more ground, that she had been disciplined and found culpable of various charges which discipline bordered on violation of Students Code of Conduct.
79. I therefore cannot fault the applicant for not exhausting internal dispute resolution appeal mechanisms. This court in the Ruling of 21/3/2025 also acknowledged that the applicant had indeed invoked the internal appeal mechanisms albeit no verdict had been communicated to her by 21/3/2025 when the nominations were closing.
80. I must clarify, nonetheless, that section 9(2) of the Fair Administrative Action Act must be read with section 9(3) and (4) and the sections are clear that a party wishing to be exempted from the obligation of exhausting the internal appeal or review mechanisms, they must apply for such exemption and demonstrate the exceptional circumstances warranting such exemption. The first prayer in the application for judicial review application would be that of exemption so that that aspect is dealt with on merit before the rest of the prayers can be considered. This is because exhaustion doctrine is such an important principle and requirement that Article 159 (2) (c) of the Constitution mandates courts to promote Alternative dispute resolution mechanisms. See *Ndiara Enterprises Ltd v Nairobi City County Government* [2018] eKLR.[CoA].
81. On whether the application is overtaken by events, the nomination having closed on Friday, I do not think so. This court would still make appropriate orders had it found that the applicant had demonstrated that her entire team met all the requirements for nomination.
82. On the whole, I find that the applicant has not established that she is entitled to the judicial review orders sought. More specifically, she has not demonstrated that her entire team purpose was qualified to be nominated to contest in the forthcoming elections scheduled for 26<sup>th</sup> March, 2025
83. Accordingly, I find the Originating motion dated 19<sup>th</sup> March, 2025 has no merit. It is hereby dismissed.
84. On costs, I find that the applicant is a student. The 1<sup>st</sup> Respondent is not suable in its own name. The claim is incompetent against it. As against the 2<sup>nd</sup> respondent, there was no cause of action disclosed to warrant judicial review orders, these not being proceedings challenging disciplinary action against the applicant. I order that each party shall bear their own costs of this case.
85. This Judgment which is handwritten due to time constraints as I only heard the parties yesterday 24<sup>th</sup> March, 2025 until late in the evening, to be typed forthwith.
86. This file is closed.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 25<sup>TH</sup> DAY OF MARCH, 2025**



**R.E. ABURILI**  
**JUDGE**

