Republic v Board of Directors Stima Dt Sacco Society Ltd & another; Cecilia Mung'wele (Exparte Applicant) (Miscellaneous Application E024 of 2024) [2024] KEHC 3266 (KLR) (Judicial Review) (22 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3266 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS APPLICATION E024 OF 2024

JM CHIGITI, J

MARCH 22, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

BOARD OF DIRECTORS STIMA DT SACCO SOCIETY LTD ..... 1ST RESPONDENT

STIMA DT SACCO SOCIETY LIMITED ..... 2ND RESPONDENT

AND

CECILIA MUNG'WELE ..... EXPARTE APPLICANT

RULING

1. The Ex Parte Applicant moved the court by way of a Notice of Motion dated 6th day of March 2024 wherein she invokes Sections 7,8,9, 10 and 11 of the *Fair Administrative Action Act*. She seeks the following orders:

    1. That this Honorable Court be pleased to grant the ex parte Applicant an order of Certiorari to remove into this court and quash the decision of the 1st Respondent made on 1st day of March 2024 and communicated to the ex parte Applicant by the Vice Chairperson one Eng. Rosemary Oduor on the 1st day of March 2024 to irregularly and illegally remove the ex parte Applicant as a director of the 2nd Respondent and a member of the 1st Respondent and further declare her ineligible to vie as a director of the 2nd Respondent in the upcoming elections.

2. That this Honorable Court be pleased to grant the ex parte Applicant an order of Certiorari to remove into this court and quash the recommendation of the Nomination Committee of 1st Respondent made on 29th February 2024 stating that the ex parte Applicant is not eligible to be a director since she doesn't have shares of KES 1,000,000/-.

3. That this Honorable Court be pleased to grant the ex parte Applicant an order of Certiorari to remove into this court and quash the Invitation for Applications for nomination to six (6) positions of the Board of Directors of the 2nd Respondent made on the 1st day of March 2024 by the 2nd Respondent, which invitation included the current position held by the ex parte Applicant.

4. That this Honorable Court be pleased to grant the ex parte Applicant an Order of Mandamus to remove to this court and compel the Nomination Committee of 1st Respondent to include KES 2,000/- per month from the 1st day of February 2020 in its computation of the value of shares held by the ex parte Applicant.

5. That this Honorable Court be pleased to grant the ex parte Applicant an order of Mandamus to remove into this court and compel the 1st Respondent to recognize the ex parte Applicant as a director in the Board of Directors of the 2nd Respondent thus a member of the 1st Respondent.

6. That this Honorable Court be pleased to grant the ex parte Applicant an order of Prohibition to remove into this court and prohibit the 1st Respondent from barring the ex parte Applicant from assuming the office the director of the Board of the 2nd Respondent.

7. That costs of this Application be provided for.

2. It is predicated on the affidavit of Cecilia Mung'wele and such further grounds to be adduced at the hearing hereof. And further by the grounds that;

a. On or about 15:00 Hours of the 1st day of March 2024, the 1st Respondent, on a special board meeting, made a decision declaring the position of the ex-parte Applicant, as director of the Board of the 2nd Respondent, vacant.

b. The resolution to discuss the eligibility of the ex parte Applicant to hold the position of a director in the Board of the 2nd Respondent was not among the agenda of notice calling the Special Board Meeting. This resolution was clandestinely circulated during the meeting in form of Appendix 1. After discussing agenda 2 of the meeting, the Secretary of the Board requested the ex parte Applicant to leave the meeting because she was conflicted, to which request the ex Parte Applicant complied.

c. The ex parte Applicant was requested to leave the meeting so that Appendix 1 could be discussed since she was conflicted.

d. On or about the 1st day of March 2024 at 21:04 Hours, the Vice Chairperson of the 1st Respondent called the ex parte applicant and informed her that the 1st Respondent had made a decision during the earlier meeting held on 1st March 2024 to declare her seat vacant and that further she is not be eligible to be a director of the 2nd Respondent.

e. The ex parte applicant inquired further from the said Vice Chairperson about the said decision, which deliberations of the 1st Respondent when the decision was made, she was not privy to and the Vice Chairperson informed the ex parte Applicant that the 1st Respondent said

that the ex parte Applicant does not have shares of Kenya Shillings One Million Only (KES 1,000,000/-) required for one to be a director.

f. On or about the 1st day of March 2024, the 2nd Respondent issued an Invitation calling upon interested persons to submit application for nomination to the six (6) positions of the directors of Board of the 2nd Respondent. The 6 positions included one position currently held by the ex Parte Applicant, which the 1st Respondent had declared vacant on the 1st day of March 2024.

g. The ex parte applicant contends that when she joined the 2nd Respondent as a member, through a check off issued on or about the month of February 2020, she instructed the 2nd Respondent to be deducting the sum of Kenya Shillings One Hundred Thousand (KES 100,000/-) per month. Out of the deducted sum, she instructed the 2nd Respondent to utilize the sum of Kenya Shillings Two Thousand (KES 2,000/-) towards building up her share capital with the 2nd Respondent, while the remaining Kenya Shillings Ninety-Eight Thousand (KES 98,000/-) was used to build her deposits but the 2nd Respondent arbitrarily stopped remitting the KES 2,0000/- without her authority nor notice to her.

h. The ex parte Applicant further contends that the said action of stopping the deduction and remittance of the KES. 2,000/- by the 2nd Respondent was not done with her authorization and her monthly contributions of KES 2,000/- had they been remitted and considered by the Nomination Committee of the 1st Respondent would have enabled her to have built up the requisite shares of KES 1,000,000/- threshold argued by the 1st Respondent.

i. It is the ex parte Applicant's claim that the action of the 1st Respondent to unilaterally and arbitrarily pass judgment against her was irregular, illegal and malicious as the Nomination Committee of the 1st Respondent failed to consider the order given to the 2nd Respondent to deduct KES 2,000/- from monthly check off of the KES 100,000/- to build the share capital of the ex parte Applicant.

j. It is the ex parte Applicant's claim that the action of the 1st Respondent to unilaterally and arbitrarily pass judgment against her was irregular, illegal and malicious as she was neither given proper and sufficient notice nor accorded reasonable opportunity to be heard and defend herself at the meeting where this decision was made.

k. It is therefore in the interest of justice that the ex parte Applicant be granted the judicial review orders sought herein in order for this Honorable Court to reign in on the arbitrary, illegal, irregular and malicious actions and decision of the 1st Respondent herein which have not been in her best interest.

l. The ex parte Applicant contends that she has aptly demonstrated that the said actions and decisions as taken by the 1st Respondent against her present a classic case of her rights, as espoused in the Bill of Rights being threatened and at risk of being trampled upon.

m. There are laid down procedures in law which the 1st Respondent ought to have applied by giving the ex parte Applicant notice of the charges levelled against her, a reasonable opportunity to participate during the deliberations of the issues presented to the detriment of her position and a chance to defend herself before a decision was rendered.

n. No prejudice will be meted upon any party if and when the orders so sought herein are granted as they have been sought in furtherance of the rule of law and protection of the ex parte Applicant's rights, just as any other citizen from being trampled upon.

3. The Application is opposed by the Respondents by way of the Notice of Preliminary Objection dated 12th day of March 2024 on the following grounds;

   a. The Honorable Court's lack of jurisdiction by virtue of the provisions of Section 76 of the *Co-operative Societies Act*;

   b. The Honorable Court's lack of jurisdiction by virtue of the provisions of Sections 7(1)(b) and 9(2) of the *Fair Administrative Action Act* No. 4 of 2015; and

   c. The application being fatally dective as it offends the mandatory provisions of Order 53 of the Civil Procedure Rules 2010 by being accompanied by a Supporting Affidavit.

4. That is what comes up for hearing and determination. Parties filed and exchanged written submissions in e following terms.

The Ex Parte Applicant's Case

5. The ex parte Applicant is of a strong persuasion that the notice of preliminary objection is misplaced.

6. The applicant concedes that Section 76 of the *Co-operative Societies Act* provides that any dispute arises concerning the business of a cooperative society shall be handled by the tribunal as established by the said Act.

7. It is the applicant's case that however this suit does not relate to a debt due from the 2nd Respondent.

8. The applicant moved this Honorable Court to ascertain and enforce his rights as member and a Director of Stima DT Sacco Society Limited which have been threatened and indeed violated by the decisions and actions of the Respondents.

9. As a result of this, the Applicant argues that Section 76(2) does not apply to her since it sets out the list of the anticipated disputes as;

> " a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
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> a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
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> a claim by a Sacco society against a refusal to grant or a revocation of license or any other due, from the Authority."

10. Section 7(1) of the *Fair Administrative Action Act* provides as follows: -

> " Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-
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> A court in accordance with section 8; or
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> A tribunal in exercise of its jurisdiction conferred in that regards under any written law."

11. According to the Ex-parte applicant, the Respondents misinterpreted this section.

12. It is the Applicants case that Section 7 (1) of the *Fair Administrative Action Act* gives any person aggrieved by an administrative action or decision an opportunity to approach either the court or a tribunal for review.

13. The said section does not confer exclusive jurisdiction on a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

14. In line with this argument, the Constitutional rights of the right to a fair administrative action of the ex parte Applicant have been violated by the Respondent. Article 23 of *the Constitution* and Section 7(1)(a) of the *Fair Administrative Action Act* clothe this Honourable Court with Jurisdiction to hear this matter.

15. Reliance is placed in the case of Republic v Baringo North Sub-County Alcoholic Drinks Regulation Committee Ex parte Applicant Daniel Chelagat t/a Chemchem Distributors & another [2021] eKLR, where Hon. Justice J.M Bwonong'a made a sound lengthy finding as such;

> " 17. It also follows that the ex parte applicants rightly sought and were granted leave by this court to challenge the refusal to renew their licences.
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> I find as persuasive the decision of the court in Mohamed Ali Baadi & Others v. Attorney General & 11 Others [2018] eKLR a four-judge bench of the high court (Nyamweya, Ngugi, taden & Mativo, JJ.) stated as follows:
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> > "94. While our jurisprudential policy is to encourage partiesto exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See theSpeaker of National Assembly vs James Njenga Karume [41]), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara vs Gambia [42] it was held that:
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> > > "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."
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> 18. The submissions of counsel for the Respondent that the ex parte applicants did not exhaust the internal dispute resolution mechanism that is provided for under section 17 (1)of the Baringo County *Alcoholic Drinks Control Act* 2014 and that it also offends the provisions of section 9 (2) and (3) of the FAAA is devoid of merit for the following reasons. First, the respondent cannot rely on their wrong doing that is failing to communicate and serve upon the ex parte applicants the refusal decision of Baringo North Sub-County Review Committee within the stipulated time of 14 days from the time it was made. Second, the respondent was acting contrary to section 18 of the Baringo

County *Alcoholic Drinks Control Act* 2014; which allows grants an aggrieved person the right to seek any other legal remedy. Section 18 of the said act reads:

> "The right to request for review under section 17 does not prohibit a person from seeking any other legal remedy person may have."

19. Third, it is a cardinal rule of law that no person should be allowed to benefit from his wrong doing. Fourth, it is contrary to public policy for the respondent being the Government to adopt a litigation strategy that has the effect of unnecessarily increasing the monetary costs and other resources; which is contrary to the oxygen principle that is embodied in section1A and 1B of the *Civil Procedure Act* (Cap 21) Laws of Kenya.

20. In short, the raising of the preliminary objection by the Respondent based on its ineffective enforcement of its laws and contrary to the provisions of its laws is repugnant to the common sense of a reasonable villager in Baringo County. It also has the effect of commercially crippling litigants by increasing litigation costs."

The applicant argues that Section 9(4) of the *Fair Administrative Action Act* provides that;

> "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."

16. The ex parte Applicant was presented with an exceptional circumstance whereby she lost her seat in the 1st Respondent board arbitrarily and against the provisions of Article 47 (1)and (2) of *the Constitution* which are echoed in section 4 of the *Fair Administrative Action Act*. The ex parte Applicant was not presented with prior and adequate notice of the decision by the Respondents; she was not accorded a right and reasonable opportunity to defend herself against the impugned decision. In fact, the ex parte Applicant was informed of this decision at 21:04 Hrs, 4 hours past the reasonable working hours.

17. Immediately the Respondents made the arbitrary and illegal decision against the ex parte Applicant declaring her ineligible to hold her position as a member of the Board of the Respondents, a notice was issued inviting persons interested to fill the said position and a near date for the Annual General Meeting (23rd March 2024) was fixed where formal appointment to the said position are to be made. This ultimately locked the ex parte Applicant out completely.

18. The Applicant invites the Honourable Court to ask this question, was the ex parte Applicant who: (i) was not given adequate prior notice of the decision declaring her ineligible to hold her position; (ii) who despite learning this decision in form of an Appendix I which was clandestinely circulated in a meeting without notice and discussed in her absence; (ii)who had requested for a reasonable opportunity to be heard and disregarded; (iv)whose position in the Board of the Respondents has been advertised for people to apply in a span of less than 24hrs; expected the said same body to hear her at all? Our humble answer is No.

19. In Republic cabinet Secretary for Petroleum & Mining & 2 others Ex parte Dennis Ruto Kapchok (Suing on his Behalf and on behalf of the Citizens of Tamkal, Kiwawa, Alale, Ortum Sebit, Pusel and Chepchoi, Iyon Iyang River, Marich and Endough in West Pokot County; County Government of

West Pokot & another (Interested Parties) [2019] eKLR set the pace for not having an omnibus and literal interpretation that existence of alternative mechanisms for resolving a dispute should oust the Honorable Court's jurisdiction to determine a matter on merit. He opines that;

> " 26. It appears then that the mere existence of provisions for alternative dispute resolution per se in a statute do not automatically and fully oust the jurisdiction of this court to handle a dispute once lodged before it by an applicant in the form of judicial review as in this case. This court has jurisdiction notwithstanding such provisions. In addition, the suitability and expedition inherent in that procedure or lack thereof are matters this court is entitled to consider in determining whether it should address the dispute and make determination thereof."

20. Further, in the case of Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly [2022] eKLR, Hon. Lady Justice Maureen Onyango made the following finding;

> " 38. As observed by the Court in the case of Republic v National Environment Management Authority Ex parte Sound Equipment Ltd, (supra), and as provided in Section 9(4) of the *Fair Administrative Action Act*, there are exceptions to the exhaustion rule in exceptional circumstances.
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> 39. In Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance(NASA) Kenya & 6 others [2017] eKLR, the Court while asserting that exceptions to the doctrine of exhaustion requirement will be decided on a case-by-case basis, held that;
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> > "As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it."
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> 40. Further in Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR the Court of Appeal while determining whether a litigant can be exempt from the doctrine of exhaustion held thus, "Whereas courts of Law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

21. On the third limb it is the Exparte applicants case that Order 53 of the Civil Procedure Rules 2010 provides for provisions relating to Application for Judicial Review. It is the Applicant's considered submission that the Respondents have misdirected themselves to the said provisions in alleging that a Substantive Application shall not be accompanied by a Supporting Affidavit.

22. Having stated that, it is worth noting that rules and laws are read together with others in order to give proper interpretation and enforcement.

23. Order 51 of the Civil Procedure Rules 2010 provides for rules that apply generally to all applications filed in court. In the same breath, Order 51 rule 4 provides as follow: -

> " Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."

24. The above provision qualifies Order 53 rule 3 of the said Rules which provide that Substantive Applications shall be by Notice of Motion. In any event, Order 51 rule 10(2) provides that;

> " No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

25. It is the Applicant's submission that the instant Notice of Preliminary Objection is frivolous and only calculated to waste judicial time and increase judicial costs which naturally should be borne by the Respondents. A very close date for the society's Annual General Meeting has been set and the Ex part applicant had no choice but to seek quick redress; and instead of addressing the issues at hand as a result of their decisions and actions, the Respondents want to play to the gallery and deny the ex parte applicant both the right and opportunity to be heard.

Respondents' Case

26. The Respondents' Preliminary Objection is based on the provisions of Section 76 *Co-operative Societies Act*, Section 7 and 9 of the *Fair Administrative Action Act* 4 of 2015 and Order 53 of the Civil Procedure Rules. Section 76 of the *Co-operative Societies Act* provides that:

> " If any dispute concerning the business of a co-operative society arises—
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> among members, past members and persons claiming through members, past members and deceased members; or
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> between members, past members or deceased members, and the society, its committee or any officer of the society; or
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> between the society and any other co-operative society, it shall be referred to the Tribunal."

27. Reliance is placed in the case of Adero Adero & another v Ulinzi Sacco Society Ltd [2002] eKLR this Honourable Court held that the High Court had no jurisdiction to hear and entertain disputes between a SACCO and its members over the affairs of a SACCO, thus,

> 'the subject matter of the suit was a dispute between a registered Co-operative society and its members, the dispute should not have been filed in the High Court by dint of the provision of Section 76 of the Co operative *Societies Act*, 1997. The forum with jurisdiction was the Co-operative Tribunal'

28. According to the Respondent, the instant case is a dispute by the Ex Parte Applicant, a member, against the 2nd Respondent- the Sacco over the affairs of the 2nd Respondent, therefore this Honourable Court lacks jurisdiction to entertain it.

29. On the application of Section 76(2), we submit that the statute is couched in conjunctive non-exhaustive statement: "A dispute for the purpose of this section shall include... a claim by a member,

past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not.".

30. It is their case that disputes related to debts owed by a Sacco or its members or former members is among some of the disputes that can be presented to the Co- operatives Tribunal. This would be different if the said proviso was worded, "A dispute for the purpose of this section means…".

31. This is informed by the fact that the Ex Parte Applicant seeks (Prayer No.2) for an order of Mandamus to compel the 1st Respondent to include KES 2,000 per month from 1 February 2020 in its computation of the shares held by her which amounts to a demand due from a co-operative society, whether admitted or not, thus should have been referred to the Tribunal.

32. The 2nd Respondent's business includes taking of members' deposits to compute share capital or savings; thus the instant dispute is one concerning the business of a co-operative society under Section 77 (1) of the Act, as was held in the case of Bingwa Sacco Society Ltd v Quickline Auctioneers & another [2017] eKLR when determining what needs to be referred to the Co-operatives Tribunal.

33. It is their case that the Co-operative Tribunal was well suited to entertain her said grievance, before filing the instant proceedings in the High Court.

34. Section 7 (1)(b) of the *Fair Administrative Action Act* provides that

> " Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or
>
> a tribunal in exercise of its jurisdiction conferred in that regard under any written law."

35. Section 9 (2) of the Fair Administrative Action provides that:

> " the High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."

36. The argument that this court lacks jurisdiction is further anchored in Clause 14.0 of the Electoral Policy which provides for Election Dispute Resolution, which was available for the Ex Parte Applicant to resort to however she chooses not to and instead approached this Honourable court with material non-disclosure and proceeded to receive orders. Reliance is further placed in the case of Geoffrey Muthinja & another v Samuel MugunaHenry & 1756 others [2015] eKLR the Court of Appeal upheld the doctrine of exhaustion as follows as follows:

> " 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 fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution...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."

37. The Respondent also relies on the case of the Speaker of the National Assembly vs. Karume Civil Application No. Nai. 92 of 1992 which was cited with approval in the case of Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013the Court held thus:

> "...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures." [Emphasis]

38. An ex parte Applicant who wishes to be exempted from the requirement to adhere to and exhaust statutory mechanisms of dispute resolution is bound to not only disclose, at leave stage, the existence of the alternative dispute resolution mechanism but also demonstrate the suitability of the judicial review process over alternative process.

39. In Republic vs National Environmental Management Authority [2011] Eklr where the Court of Appeal stated thus:

> 'The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it – see for example R V. Birmingham City Council, Ex Parte Ferrero LTD. Case. The learned trial Judge, in our respectful view, considered these strictures and came to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect, we agree with the Judge...

40. The Respondent predicates the call to uphold the Preliminary objection in the case of Kenya Medical Practitioners Pharmacists and Dentists' Union v County Secretary, Taita Taveta County Government & 3 others [2021] eKLR where the Judicial review proceedings were struck out as the Applicant failed to exhaust the existent internal procedures. The Court particularly placed reliance on Section 9 (2) of the *Fair Administrative Action Act*.

41. On another front, the Respondent advances an argument under Order 53 Rule 3 of the Civil Procedure Rules provides for the filing of a Substantive Judicial Review Application upon the grant of leave:

> 'When leave has been granted to apply for an order of mandamus, prohibition of certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.'

42. According to them, the substantive application should be filed by a Notice of Motion only. However, in the instant case, the said substantive motion is accompanied by an affidavit sworn on 6 March 2024.

43. In Republic v Commissioner of Value Added Tax Ex-Parte Iron Art Limited [2012] eKLR the Court held that

> "I hasten to add however that in Judicial Review proceedings, the Notice of Motion does not require to be supported by any affidavit. Order 53 Rule 3 of the Civil Procedure Rules does not require that the substantive Notice of Motion be filed together with a supporting affidavit. Order 53 Rule 4 only requires that the Notice of Motion be served together with the statutory statement and that affidavits accompanying the application for leave be supplied to the persons served upon demand. In my view, an affidavit filed in support of an application for judicial review is unnecessary and is superfluous."

Analysis and determination:

44. This court has to determine two issues;

    1. Whether or not it has jurisdiction to hear this case.

    2. Whether the application offends the mandatory provisions of Order 53 of the Civil Procedure Rules 2010 by being accompanied by a Supporting Affidavit.

Whether this court has jurisdiction to hear and determine this case.

45. In the Supreme Court of Kenya Petition No. 19 (E022) Of 2020 Agnes Wachu Wamae & 97 Others Vs Barclays Bank of Kenya Limited the court made a finding that in the case of Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors (1969) EA 696, cited with approval by this Court in Hassan Ali Joho Case (supra) are settled that;

> "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

46. In the case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR, [36] The Supreme Court made binding finding that Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional

role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coramnon judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd [1989] KLR 1, "jurisdiction is everything.

47. The parties made heavy rival submissions around the issue of the jurisdiction of the court. However both parties referred the court to bulky content of their respective cases. Being a preliminary objection this court will only address its mind to the law lest it compromises the merits of the substantive Notice of Motion.

48. In the Petition 14, 14a, 14b, & 14c of 2014(consolidated) Communication of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR. Borrowing from the Constitutional Court of South Africa in S V Mhlungu, 1995 (3) SA 867 (cc) and Supreme Court of USAshwander v Tennessee Valley Authority 297 US. 288, 347, (1936) The Supreme Court adopted the general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. In essence, civil disputes should be determined in civil courts, criminal matters in criminal courts and the Court would not decide a constitutional question which was properly before it, if there are some other basis upon which the case could have been disposed of.

49. Section 9 (1) of the Act provides an avenue for a party aggrieved by an administrative action to without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*. This, is subject to exhausting all other available remedies. Section (9) (2) provides in mandatory terms that;

> "The High Court or a subordinate court under subsection shall not review an administrative action or decision under this Actunless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."

50. Section 9 (3) of The Fair Administration Action Act provides 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 undersub-section (1)."

51. Section 76 of the *Co-operative Societies Act* provides that any dispute arises concerning the business of a cooperative society shall be handled by the tribunal as established by the said Act. It is however worth noting that the Section 76(2) goes ahead to explicitly list the anticipated disputes as;

> " a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or
>
> a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
>
> a claim by a Sacco society against a refusal to grant or a revocation of license or any other due, from the Authority."

52. In order to determine the issue of jurisdiction, this court has looked at Clause 60 of The By-Laws Of Stima Deposit Taking Savings And Credit Co-Operative Society Limited (Amended February 2022).The same stipulates that any disputes arising out of these By-laws or concerning the business of the Society and its members shall be referred to the Tribunal.

53. Clause 14.0 (a) of The Electoral Policy provides The County Co-operative Officer is mandated to settle all disputes that may arise during the elections. However, disputes that arise after election, including those that touch on the declaration of results and petitions, shall be settled by the Board of Directors within Fourteen (14) days.

    b) Nevertheless, disputes related to a nomination process have to be dealt with before the date of nomination, while those related to the election process have to be dealt with before election moment.

54. The foregoing alternative dispute resolution mechanisms were available to the Ex Parte Applicant.

55. In her submissions, The Exparte Applicant conceded that Section 7 (1) of the *Fair Administrative Action Act* gives any person aggrieved by an administrative action or decision an opportunity to approach either the court or a tribunal for review.

56. According to the Applicant the said Section does not confer exclusive jurisdiction on a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

57. The Applicant admits in her submissions that the Tribunal has jurisdiction to determine disputes like the one before this court. However, she does not inform the court why she elected to move the High Court as opposed to the Tribunal. She does not argue that she denied access to the Tribunal.

58. She did not express any concerns that she would not get a fair hearing before the Tribunal. She chose to approach this Honourable court without disclosing to the court that there was an alternative redress avenue.

59. Section 9 of the Fair Administrative Actions Act (hereafter "the FAA Act") provides for the procedure for judicial review as follows:

> " Subject to subjection (2) a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a Subordinate Court upon which original jurisdiction is conferred pursuant to Article 22 (3) of *the Constitution*.
>
> The High Court or a Subordinate Court under sub section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
>
> 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.

A person aggrieved by an order made in exercise of the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal."

60. In the case of Adero Adero & another v Ulinzi Sacco Society Ltd [2002] eKLR this Honourable Court held that the High Court had no jurisdiction to hear and entertain disputes between a Sacco and its members over the affairs of a Sacco, thus,

'the subject matter of the suit was a dispute between a registered Co-operative society and its members, the dispute should not have been filed in the High Court by dint of the provision of Section 76 of the Co operative *Societies Act*, 1997. The forum with jurisdiction was the Co-operative Tribunal'

61. In order for the court to exercise its discretion to exempt the exparte Applicant from the obligation to exhaust any remedy under Section 9 (4) of the Fair Administrative Actions Act the Exparte Applicant must demonstrate that there are exceptional circumstances and the court must be moved through an application by the applicant.

62. The Ex parte Applicant did not move the court nor seek for under Section 9 (4) of the Fair Administrative Actions Act orally or otherwise.

63. In the case of Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura [2019] eKLR and held as follows;

> " While, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved — including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it."

64. The applicant has moved this court because there is a dispute and not otherwise.

> " It is my finding and I so hold that this suit should not have been filed in the High Court by dint of the provision of Section 76 of the Co operative *Societies Act*, 1997. The forum with jurisdiction was the Co-operative Tribunal'.
>
> This court lacks jurisdiction to determine this suit. Without jurisdiction a court has no power to make one more step".

Disposition;

65. Having arrived at the finding that this court lacks jurisdiction, this court must down its tools. I lack the jurisdiction to deal with the other issue before this court.

Order

1. The Notice of Preliminary Objection dated 12th day of March 2024 is upheld.
2. The suit is struck out with costs.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2024

.....

CHIGITI. J (SC)

JUDGE

(This ruling is delivered during the Court recess pursuant to the consent of the parties owing to the fact that the AGM is slated for 22.3.24 and due to the statutory obligations around the elections)