



**Republic v Registered Trustees of the Anglican Church of Kenya, Diocese of Maseno East Parish & another; Odago & 13 others (Exparte); Oyare & 15 others (Interested Parties) (Judicial Review Application E044 of 2023) [2024] KEHC 7734 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7734 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
JUDICIAL REVIEW APPLICATION E044 OF 2023**

**RE ABURILI, J  
JUNE 28, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE REGISTERED TRUSTEES OF THE ANGLICAN CHURCH OF KENYA,  
DIOCESE OF MASENO EAST PARISH ..... 1<sup>ST</sup> RESPONDENT**

**RT REV BISHOP JOSHUA OWITI OUMA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**TOM ODAGO ..... EXPARTE**

**MESHACK JAMASAI ONYANGO ..... EXPARTE**

**ERICK OKEYO ..... EXPARTE**

**CHARLES DICKENS OKOTH ..... EXPARTE**

**NEHEMIAH ANYANGE ONYANGO ..... EXPARTE**

**SIMEON ONYANGO ..... EXPARTE**

**JOHN AGO ..... EXPARTE**

**LEONARD AMOYO ..... EXPARTE**

**GEORGE ODHIAMBO ..... EXPARTE**

**CAROLYNE JUMA ..... EXPARTE**

**GORDON NGESO ..... EXPARTE**

**CAROLYNE OPIYO ..... EXPARTE**

**WASHINGTON OROWO ..... EXPARTE**



**ABSOLOM AORO ..... EXPARTE**

**AND**

**THE VEN NICHOLAS OTIENO OYARE ..... INTERESTED PARTY**  
**LAY CANON REUBEN K ODHIAMBO ..... INTERESTED PARTY**  
**THE REV BEENARD OTIENO OWUOR ..... INTERESTED PARTY**  
**LAY CANON GORDON NJANYONG' ..... INTERESTED PARTY**  
**THE REV APOLLO OKATCH KIRIKO ..... INTERESTED PARTY**  
**THE REV MALACHI O NYAWARA ..... INTERESTED PARTY**  
**THE REV ZEPHANIAH OKELLO ..... INTERESTED PARTY**  
**THE REV NICHOLAS OMONDI ODIEMBO ..... INTERESTED PARTY**  
**THE REV EVELYNE OBIMBO ..... INTERESTED PARTY**  
**THE REV LEONARD ODHIAMBO OJWANG ..... INTERESTED PARTY**  
**ELIZABETH OTIENO ..... INTERESTED PARTY**  
**DOROTHY ONYANGO BONYO ..... INTERESTED PARTY**  
**FREDRICK AKELLO OWITI ..... INTERESTED PARTY**  
**MARGARET NYAMUOK ..... INTERESTED PARTY**  
**JOSEPH OTIENO MUGA ..... INTERESTED PARTY**  
**WILLIAM OPIYO ONDORO ..... INTERESTED PARTY**

**RULING**

1. The Exparte Applicants herein through the law firm of MMD Advocates with leave of court obtained on 23<sup>rd</sup> November, 2023 vide Kisumu HC Judicial Review Case No. E042 of 2023, filed the Notice of motion dated 27<sup>th</sup> November, 2023 seeking orders:
  1. That orders of declaration that the respondents unilateral and arbitrary decision through the 2<sup>nd</sup> respondent to proceed with the elections of the Standing Committee of the Synod members on 24<sup>th</sup> August, 2023 in the 3<sup>rd</sup> Ordinary Session of the Synod is unlawful, illegal, unreasonable, biased, violates natural justice, the rule of law, the right to fair administrative action, section 5 of the *Judicature Act*, sections 4 of the *Fair Administrative Action Act* and Articles 38(2) & 38(3) (b) & (c), 47 and 81 (e) of *the Constitution* of Kenya;
  2. That orders of certiorari to call, remove, deliver up to this honorable Court and quash the outcome of elections of the Standing Committee of the Synod Members held on 24<sup>th</sup> August, 2023 by Show of Hands Voting during the 3<sup>rd</sup> Ordinary Session of the Synod;
  3. That Orders Of Prohibition to restrain the 1<sup>st</sup> to 16<sup>th</sup> Interested Parties from dealing with the matters of the Church and making decisions by virtue of the elections held on 24<sup>th</sup> August 2023 by Show of Hands Voting During the 3<sup>rd</sup> Ordinary Session of the Synod;



4. That orders of mandamus directing the Respondents to conduct fresh elections of the Standing Committee of the Synod by secret Ballot;
  5. That this honourable Court do grant any other or further relief that it may deem fit to grant including but not limited to exemption under section 9(4) of the Fair Administrative Actions Act;
  6. That the costs of this application be provided for.
2. The application was predicated on the grounds on the face thereof and the Verifying affidavit as well as the statutory statement and annexures to the affidavit.
  3. The exparte applicants lament that the respondents used Show of Hands Voting method during the 3<sup>rd</sup> Session of the Synod, instead of the recognized Secret Ballot method, contrary to the legitimate expectation of the applicants, members of the Church.
  4. Further, that the said decision of the 2<sup>nd</sup> respondent to allow voting by Show of Hands was made on the floor, which was irrational and unreasonable and an abuse of discretion in the election process and failed the test of fairness as there was open coercion, improper influence, open intimidation, corruption, favoritisms and manipulation with a view to disadvantaging some contestants in order to attain predetermined outcomes of ensuring that those he supported were elected thus the election was illegal as it promoted his personal interests.
  5. The exparte applicants claimed that the actions complained of are contrary to the Constitutional provisions cited and bring into disrepute the Church as it is against the Anglican Church of Kenya, Maseno East Constitution Adopted on 9<sup>th</sup> April, 2018 taking effect on 21<sup>st</sup> may, 2018 and *the Constitution* Adopted on 14<sup>th</sup> February 2018 taking effect on 16<sup>th</sup> March, 2018.
  6. The statutory statement of facts filed and the verifying affidavit bring out in very detail, the actual cause of action by the exparte applicants against the respondents.
  7. Upon the respondents being served with the Notice of motion for substantive orders, they filed a Notice of preliminary objection dated 28<sup>th</sup> March, 2024 hence this ruling.
  8. Initially, only the respondents filed written submissions in support of the preliminary objection and as the court was writing the ruling, an application was filed to arrest the ruling. The court had to stay the delivery of the ruling and as the parties consented to the submissions by the applicant to be incorporated in the ruling, thus the delay in the delivery of the ruling from 14//2024 to this 28<sup>th</sup> June, 2024.
  9. The preliminary objection is two- fold namely:
    - i. That the issues raised by the Applicants are of civil nature and are not subjects of judicial review, as they do not raise constitutional questions.
    - ii. The Plaintiffs are yet to exhaust all the available remedies thus the suit is premature, wrongly instituted and fatally defective.
  10. In support of the preliminary objection, the respondent filed written submissions and argued that the preliminary objection meets the threshold in the Mukisa Biscuit Manufacturing Company Ltd V West End Distributors Ltd [1969]] EA 696. That the preliminary objection raises a pure point of law. Further reliance was placed on the Supreme Court decision in IEBC V Jane Chepernger & 2 others [2015]e KLR.



11. On the first limb, it was submitted that the statutory statement of facts is wrongly canvassed as a judicial review as opposed to a civil suit. that it raises contentious issues which need to be proved in court and subjected to set up standards of proof in civil cases.
12. That as the application seeks to challenge the conduct of elections, the mode of decision making on method of voting, the supervisory roles played by the respondent all of which require cross examination of witnesses and cannot be ascertained on a balance of probabilities requiring evidence to be adduced in court and cross-examination of the witnesses. Reliance was placed on the cases of Republic v Zacharia kahuthu & another; Johanes Kutuk Ole Meliyo & 2 others [2020] eKLR; Republic v NTSA & 10 others Exparte James Maina Mugo[2015]e KLR.
13. According to the respondents, the statutory statement and orders sought relate to validity of the elections conducted on 24<sup>th</sup> August 2023 which makes the matter a contentious one, which issue the court in the above cited case of R v Zacharia Kahuthu declined to resolve.
14. The respondents counsel further relied on SDA Church of East Africa v PS, Ministry of Nairobi Metropolitan [2014]eKLR and submitted that the court held that judicial review was ill equipped to deal with contested facts.
15. Counsel submitted that judicial review proceedings are unique and that they are sui generis mode of dispute resolution focused on the analysis of administrative action, promotion of procedural and substantive justice in arriving at a decision rather than the merit as has been determined in various cases including Humphrey Makokha Nyongesa v CMA & 2 Others [2018]e KLR and Municipal Council of Mombasa v R and another [2002]eKLR. Counsel for the applicant therefore urged this court to dismiss this application for judicial review.
16. On the second ground that all available local remedies had not been exhausted, reliance was placed on section 9 of the *Fair Administrative Action Act*, reproduced which provision recognizes first and foremost, the resort to internal dispute resolution mechanisms before approaching the court whenever parties are aggrieved by administrative actions. Reliance was placed on *CMA v CIANO & another [2023] e KLR CoA CA 314 of 2018*. In that regard, it was submitted that the Church Constitution provides for internal dispute resolution mechanisms and therefore this court's jurisdiction is ousted to hear and determine the application challenging the elections or how they were conducted as pleaded above. reliance was further placed on *Speaker of the National Assembly v James Njenga Karume [1992] eKLR* and *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 175 others [2015]e KLR* where the courts held that they ought to be the last resort where there are clear procedures for redress of any particular grievance prescribed by *the Constitution* or by an Act of Parliament. Further reliance was placed on *Mui Coal Basin Local Community & 15 others v PS Ministry of Energy & 17 Others [2015]e KLR* which espouses the same principles of exhausting alternative dispute resolution mechanisms before resorting to Court.
17. In this case, it was submitted that besides failure to exhaust the available remedies, the applicants had not made any application to seek exemption or to by-pass the exhaustion of local remedies, and demonstrating exceptional circumstances. reliance was placed on *Republic v Zacharia Kahuthu (supra)* which case was quoted extensively. It was submitted that any such by pass undermines Article 47 of *the Constitution* and cannot be deemed to be a procedural technicality as was held in the *Republic v Zaharia Kahuthu* case as well as the *APA Insurance Co. Ltd v Vincent Nthuka [2018] e KLR*, citing Article 159(2) (d) of *the Constitution*. It was further submitted that this application undermines Article 159(2) (c) of *the Constitution* as it seeks to by-pass the internal modes of dispute resolution created under the Anglican Church of Kenya Diocese of Maseno East Constitution.



18. Opposing the Preliminary objection, the applicants' counsel filed written submissions which arrested the delivery of the ruling in this matter on 14<sup>th</sup> June, 2024. In the submissions dated 11<sup>th</sup> June, 2024, it was submitted that the ground that "The issues raised by the Applicants are of civil nature and are not subjects of judicial review, as they do not raise constitutional questions" is misconceived in respect to the Application herein for the reason that judicial review does not deal with constitutional issues but the decision-making process.
19. It was submitted that the Applicants herein are challenging the decision-making process by the Respondents and not the merits or the results of the election. That the Applicants herein are challenging the decision to proceed with Voting by Show of Hands.
20. Further, that contrary to the Respondents' submissions that the Statutory Statement herein raises contentious issues that should be subjected to standard of proof in civil suits, it was submitted that the issues raised herein are of procedural and not substantive nature to require taking of evidence. That the applicants are not asking the Court to do an examination of merits of the process leading to the decision but make a determination on the decision-making process itself.
21. The applicants termed the Respondents as dishonest to submit that in judicial review, parties do not present evidence before the Court. To the contrary, that it is the evidence in the parties' respective affidavits that the court uses to come to a determination on the legality of the decision-making process.
22. It was submitted that in the present application, there is no need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make its determination, as affidavit evidence by way of rebuttal to the allegations by the Respondents would suffice.
23. Counsel submitted that the issue for determination before the Court is simple: why the Respondents resorted to voting by Show of Hands when the same is not prescribed for in the Church'; Constitution as a mode of voting especially in view of the fact that *the Constitution* provides that the Bishop is to elected by secret ballot? (see Canon V(5)(g) of *the Constitution* of the Anglican Church of Kenya Diocese of Maseno East (adopted on 9<sup>th</sup> April 2018 which became effective on 21<sup>st</sup> May 2018). Therefore, it was argued that the Application herein is dealing with the legality of the decision.
24. It was submitted that there are no disputed facts in the Application herein and that the only facts that are before the Court when the Preliminary Objection was filed were those presented by the Applicants. Therefore, where there are no alternative facts presented by the Respondents, the Respondents cannot argue that there are contented facts herein? Reliance was placed on the earlier cases cited by the respondent in Republic v Zacharia Kahuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); and Johaness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another [supra].
25. It was therefore submitted that the Respondents have erroneously relied on the case of Republic v Zacharia Kahuthu & another (Sued as Trustees and on Behalf of and as Officials of the Kenya Evangelical Lutheran Church); Johaness Kutuk Ole Meliyio & 2 others (Interested Parties) Ex parte Benjamin Kamala & another [2020] eKLR because the facts in the two cases are distinct and thus the said judicial authority cannot be relied on in this case.
26. It was submitted in disagreement with the respondents' proposition that all matters in respect to elections cannot be subjected to judicial review. It was the applicants' view that each case has been looked at on its own merits and peculiar facts. That while in the cited judicial authority the Court was asked to consider "(a) the validity of the nomination process, (b) the validity of elections and its outcome, and; (c) the suitability or otherwise of the candidates who were elected" (see para 58 of Zacharia Kahuthu



- (supra) this Court is being asked to determine whether it was proper and legal for the decision maker, the Respondents, to decide that the Voting should proceed by way of Show Hands and whether he had powers to make such a decision based on the Church's Constitution.
27. The applicants cited Para 3.1.3 of the Statutory Statement which states that the decision to Vote by Show of Hands was on the floor of the House and was made unilaterally and arbitrarily. Further, that at para 3.1.5. of the Statutory Statement, the Applicant states that there was no reason or justification for the Respondents to proceed with Voting by Show of Hands and the 2<sup>nd</sup> Respondent deciding so he was abusing his discretion and it was a fraudulent exercise of power. At para 4.1.1 of the Statutory Statement the Applicant to proceed by Voting by Show of Hands without informing the Applicants and other church members beforehand was contrary to Article 47 of *the Constitution* and Section 4 of the Fair Administrative Actions Act and a submission made that the above raised issues do not require cross-examination of evidence and a rebuttal by way of an affidavit by the Respondents would suffice, which issues are distinct to those raised by the Applicants in Zacharia Kahuthu (supra). It was submitted that a judicial authority is an only an authority to similar facts and where the facts re distinct and different then the judicial authority cannot be relied on or applied thereto.
  28. Counsel urged this Court to refuse to fall for the general term being used by the Respondents of "the validity of the elections" and look at this case on its facts and find them to be distinct from Zacharia Kahuthu (supra) as what is at play in this case is the administrative decision to proceed with the elections by Show of Hands which has resulted in the grievances forming the basis of the Applicants,' Application, and dismiss the Preliminary Objection.
  29. On the second ground raised by the respondent in support of their preliminary objection that the Applicants have failed to exhaust the available internal remedies, it was submitted that the respondents failed to point out, where, in the Church's Constitution, a Disciplinary Committee is provided for or where the Synod's work has been stated to be to receive, investigate and resolve disputes.
  30. It was therefore submitted in contention that the respondents raised false and bald assertions (no basis in fact or law), meant to defeat this case that has been brought in good faith by aggrieved members of the church.
  31. Further, it was submitted that even if the Church Constitution provides that the Synod can resolve the dispute herein, which the applicants deny, the Applicants could not approach it in view of the fact that it is the members of the Synod elections that is being challenged herein and therefore they cannot be the accused/impugned persons and judges of their own case, which would go afoul the whole purpose and tenets of natural justice.
  32. It was submitted that Cannon XV of the Church's Constitution provides that the trial of a bishop shall be in accordance with Cannon XVII of the Church's Constitution. Cannon VXII of the Church's Constitution provides for trial of Archbishops and Bishops. That the requirements under Cannon VXII(1), in order to bring a charge against a bishop, like the 1<sup>st</sup> Respondent, bar mere members of the church, like the Applicants herein, from bringing a charge or claim against the Bishop with finality. That only the clergy have the right to bring a claim against the Bishop before the church, and that therefore this Court cannot countenance such impediment to the church members getting justice, as the maxim states; 'no injustice should go unpunished if it can be corrected by courts of justice.'
  33. Further submission was that as the purported internal dispute resolution mechanism is unavailable, ineffective and inadequate as regards the resolution of the dispute herein as brought by the church members against their Bishop, this suit falls within the confines of exceptional circumstances that will exempt the applicants from exhausting the purported internal dispute resolution mechanisms. Reliance was placed on the case of Republic v Firearms Licensing Board & another Ex parte Boniface



Mwaura [2019] eKLR at para 50 thereof on factors to be taken into account in deciding whether exceptional circumstances exist which are- whether the internal remedy is effective, available and adequate.

34. That an internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in *the Constitution* and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct and that an internal remedy is adequate if it is capable of redressing the complaint.
35. It was submitted that the fact that any charge against a bishop has to be made by the clergy effectively closes of the applicants herein from ever getting a remedy in their claim herein and that as the purported internal dispute resolution mechanism does not offer any prospect of success and cannot be objectively approached to resolve the dispute, this court has jurisdiction to hear and determine the matter before it.
36. Further submission was that the applicants being of good faith did write letters to the Archbishop in order that he may intervene in the matter but he instead ignored their plight, them being mere members of the church. This court was invited to look at the demand letters dated 19<sup>th</sup> September and 23<sup>rd</sup> October 2023 where the applicants sought for the resolution of the matter before bringing the same to court. (See pages 168 to 172 of the Applicants' Bundle of Documents).
37. On the argument at para 22 of the Respondents' submission that the Applicants have not sought to be exempted from the requirements of exhausting internal remedies, it was submitted that this is misguided since prayer 5 in the substantive motion clearly seeks exemption by the Court.
38. The applicants urged this court to dismiss the preliminary objection as filed and argued and proceed to hear the merits of the substantive Notice of motion.

### **Analysis and determination**

39. I have considered the respondents 'preliminary objection as filed and argued vide the respondent's and the applicants 'written submissions. I have also considered the pleadings by the applicant on what is sought before this court.
40. The main issue for determination is whether the Preliminary Objection dated 28<sup>th</sup> March, 2024 by the respondents meets the fundamental threshold of a preliminary objection.
41. The commencement point is to understand what a preliminary objection is, although this court is not spawning a new definition. The Black's Law Dictionary defines a Preliminary Objection as:

“In a case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary...”
42. The above legal preposition has been made explicit in the locus classicus case of Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd. [1969] E.A. 696 where Lord Charles Newbold P. stated that a proper preliminary objection constitutes pure points of law and went on to first warn against parties raising preliminary objections that are not warranted and stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection.

A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

43. In *Attorney General & Another – Versus - Andrew Mwaura Githinji & another* [2016] eKLR, it was stated as follows:
- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
  - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
  - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
44. A preliminary objection can be brought at any time at least before the final conclusion of the case. Thus, all facts remaining constant, a preliminary objection should be filed at the earliest opportunity so as to pave way for the smooth management and determination of the main dispute in a matter.
45. Having defined and explained what a preliminary objection is, ideally, the next question is whether the preliminary objection as raised on the two grounds meets the threshold laid bare in the cited cases above.
46. On the first attack of the application, the respondents contend in their preliminary objection that the statutory statement of facts is wrongly canvassed as a judicial review as opposed to a civil suit. That it raises contentious issues which need to be proved in court and subjected to set up standards of proof in civil cases after cross examination. In support of this contention, the respondents’ counsel relied on several decisions of the superior courts.
47. I have reviewed the decisions cited and I observe that they were all judgments delivered after merit consideration of the Judicial Review Applications placed before the superior Courts, with each party being given the opportunity to ventilate their respective positions.
48. In none of those decisions of *Zachariah Kahuthu and R v National Transport and Safety Authority* and the Court of Appeal decision in *SDA Church v PS Ministry of Nairobi Metropolitan Services* were preliminary objections considered and determined like in this case presently before me. What that means is that a matter that can be argued in the main case and exhausted on merit is different from a matter that is terminated at a preliminary knock out stage. There learned Judges in the cited cases did not consider the applications to have been dead on arrival but delved deep into each of the issues raised and determined the merits thereof.
49. In addition, the arguments in support of the preliminary objection in the instant case concern a statutory statement of facts which is alleged to be raising contentious issues that require cross examination. The question is, are the disputes that normally and ordinarily bring two or more parties before courts not contentious? For this court to determine whether the statutory statement raises contentious issues requiring evidential proof of the standard in civil cases, it has to examine that statutory statement of facts and analyze each of the contentious issues therein, on its merit before arriving at the conclusion that the material raised therein require cross examination like in civil suits, which is not the case with Judicial Review proceedings.



50. In the case of *Omondi & Another v National Bank of Kenya Ltd & 2 Others* [2001] KLR 579, it was held that it is forbidden for counsel to take, and the court to purport to determine a preliminary objection on contested facts or in the exercise of a judicial discretion.
51. The facts herein are contested. The court has the duty to examine the statutory statement of facts as contested on its merits and determine whether or not it raises issues which are contested requiring proof through cross examination. That examination cannot be undertaken via a preliminary objection. This is because the issues as raised in the first ground, from the detailed submissions, are very argumentative and not those which settle the dispute between the parties hereto by merely pressing the preliminary button. Those disputed facts have to be ascertained through a full hearing of both parties and settled, to set the record straight.
52. Therefore, since a Preliminary Objection cannot be raised on disputed facts as the disputed facts can only be resolved at the full hearing of the notice of motion and not at this stage, it is my finding that to delve into the arguments placed before me by both parties will be, in effect, to determine the merits of the Notice of motion and not to determine a pure point of law.
53. Accordingly, I find and hold that the first ground does not meet the threshold of a preliminary objection as espoused in the *Mukisa Biscuit Manufacturing Co. Limited Case*. I therefore decline to uphold the arguments by the respondent in support of the first ground of the preliminary objection.
54. On whether the second ground of the Preliminary of Objection that the applicant has not exhausted the available internal dispute resolution mechanisms before approaching this court and that there is no application seeking for exemption from resorting to internal dispute resolution mechanisms as stipulated in section 9 of the *Fair Administrative Action Act* meets the threshold for a preliminary objection on a pure point of law determining the exparte applicant's Notice of Motion in limine, This court is alive to the mandatory provisions of section 9 of the *Fair Administrative Action Act* as cited and the dictates of Article 159 (2) ( c) of *the Constitution* which mandates the courts to promote and encourage the use of alternative dispute resolution mechanisms. I am also alive to the many judicial pronouncements on this subject, including my own decisions which have been venerated by the Court of Appeal.
55. In *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR, the Court of Appeal stated as follows concerning exhaustion of remedies:

(34) It is trite that where *the Constitution* or statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with *the Constitution* or statute. In *Secretary, County Public Service Board & another vs. Hulbhai Gedi Abdille* [2017] eKLR this Court expressed itself as follows:-

"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

What then is the consequence, if any, of the respondent's failure to invoke the alternative remedies?

(35) As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court



can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this Court in *Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others* [2017] eKLR and *Kenya Revenue Authority & 5 others vs. Keroche Industries Limited -Civil Appeal No. 2 of2008*. Perhaps, that is the reason why the legislator under Section 9(4) of the *Fair Administrative Action Act* stipulated 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." [Emphasis added]

Our reading of the above provision reveals that contrary to the appellants contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.

(36) Did the respondent 's case fall within the exception? The principles which a court should consider in determining whether a case falls within the exception are settled. This Court in *Republic vs. National Environmental Management Authority- Civil Appeal No. 84 of2010*,\_set out the said principles as follows:

"...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 ..."

56. The question in this case is, what and which available internal dispute resolution mechanisms did the respondent identify to this court for the applicants to resort to within the Church Constitution annexed by the applicant and which particular clause of that Church Constitution provides for dispute resolution mechanisms? I have not been shown any such provision to appreciate the contention that the applicants have violated the doctrine of exhaustion of remedies. On that ground alone, the second ground raised in the preliminary objection fails to meet the threshold of a preliminary objection.

57. On the second limb of this second ground that in any event, the applicants did not file any application seeking for exemption from resorting to the internal dispute resolution of the dispute herein, I observe that one of the prayers in the Notice of motion dated 27<sup>th</sup> November, 2023 being prayer number 5 reads as follows:

“ 5. That this Honourable Court do grant any other or further relief that it may deem fit to grant including but not limited to exemption under section 9(4) of the *Fair Administrative Action Act*.”

58. The section provides that for one to be allowed to resort to court to challenge an administrative action where there are established internal dispute resolution mechanisms, then they must seek an exemption from court on an application. In this case, the applicant has made a prayer for exemption. There is no requirement that that prayer can only be made in a separate case file prior to filing of the application for judicial review.

59. Furthermore, the Court of Appeal in the above case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* [2018] eKLR, was clear that even without an application for exemption to resort



to internal dispute resolution mechanisms, the High Court or the subordinate court may on its own motion exempt a party from resorting to the internal dispute resolution mechanisms. The court would be guided by factors such as: “what was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

60. Additionally, in the application by way of Chamber Summons for leave to apply, filed vide HC Judicial Review Application No E042 OF 2023 dated 23<sup>rd</sup> November, 2024, the Exparte applicant in prayer No. 5 sought for similar orders of exemption.
61. In my ruling delivered on 23<sup>rd</sup> November, 2024, I did at paragraph 5 state as follows:
  - “ 5. Albeit it has not been stated whether there are available dispute resolution mechanisms in the Church Constitution, the Exparte applicants herein seek leave for orders of Declaration that those elections were a nullity, Certiorari to quash the elections and Prohibition to prohibit the 1<sup>st</sup> to 16<sup>th</sup> Interested Parties from continuing to carry out the duties of the Church as well as mandamus to direct and compel the respondents to carry out fresh elections of the Standing Committee of the Synod by way of Secret Ballot.”
62. As observed in the above quoted paragraph, there was no known or disclosed internal dispute resolution mechanism within the Church subject of these proceedings which the applicant by passed. For that reason, it is my humble view that no such exemption was and or is necessary.
63. Accordingly, I find that there is no proof at this stage of the violation of the doctrine of exhaustion of remedies.
64. In the end, I find that the respondent’s preliminary objection on both grounds is not merited, it is hereby declined and dismissed. Costs shall be considered in the main Notice of motion.
65. The respondents are now granted leave to file and serve a replying affidavit to the Notice of motion within ten days of today upon which the applicants will have 14 days of date of service to file and serve a further affidavit if need be, together with written submissions. The respondents will then have 10 days of date of service to file and serve a supplementary affidavit if need be, together with written submissions. Mention on 23/9/2024 to confirm compliance and to fix a judgment date.
66. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF JUNE, 2024**

**R.E. ABURILI**

**JUDGE**

