



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 126 OF 2019**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS UNDER ARTICLE 10**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS UNDER ARTICLE 35**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS UNDER ARTICLE 38**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS UNDER ARTICLE 43**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL**

**FREEDOMS UNDER ARTICLE 47**

**BETWEEN**

**GAD OMONDI OPIYO.....PETITIONER**

**VERSUS**

**PETER KIBINDA, SCRUTINEER.....1<sup>ST</sup> RESPONDENT**

**ROBERT KARIUKI, SCRUTINEER.....2<sup>ND</sup> RESPONDENT**

**JULIUS KIBWAGE, SCRUTINEER.....3<sup>RD</sup> RESPONDENT**

**EMMA MILOYO, THE PRESIDENT OF**

**THE ARCHITECTURAL ASSOCIATION OF KENYA.....4<sup>TH</sup> RESPONDENT**

**JACOB MWANGI, THE CEO OF**

**THE ARCHITECTURAL ASSOCIATION OF KENYA.....5<sup>TH</sup> RESPONDENT**

**INFOTRACK RESEARCH AND**

**CONSULTING LIMITED.....6<sup>TH</sup> RESPONDENT**

CREATIVE DIGITAL LAB LIMITED .....7<sup>TH</sup> RESPONDENT  
MUGURE NJENDU.....8<sup>TH</sup> RESPONDENT  
ARCHITECTURAL ASSOCIATION  
OF KENYA (AAK) .....APPLICANT/9<sup>TH</sup> RESPONDENT

## RULING

### APPLICANT'S APPLICATION

1. The Applicant's / 9<sup>th</sup> Respondent through an application dated 30<sup>th</sup> October 2019 seek the following orders:-

*a) Prayer No. 1 spent.*

*b) That there be a stay of all proceedings herein pending arbitration.*

*c) That the dispute between the parties be referred to arbitration.*

*d) That the Applicant / 9<sup>th</sup> Respondent be at liberty to apply for such or other orders and or direction as this Honorable Court may deem fit and just to grant in the circumstances.*

*e) That the costs of this application be provided for.*

2. The application is supported by an Affidavit of Wilson Mugambi and supported by several grounds on the face of the application inter alia; that by a ruling of this Court delivered on 24<sup>th</sup> October 2019 the Applicant was enjoined in this suit as a necessary party; that a timetable for filing of documents was given for the Petition herein; that the dispute herein relates to a dispute between AAK and Petitioner on the management of AAK elections held on 25<sup>th</sup> March 2019 for the position of President; the Petitioner seeks the orders inter alia; **"A declaration that the AAK elections held on the 25<sup>th</sup> March 2019 for the position of President of AAK were irregular and unconstitutional and therefore null and void."**

3. It is urged by the Applicant that the elections are governed by AAK's Constitution and By-Laws 2018 Amendments. That Clause 1.70 of the AAK's Constitution and By-Laws 2018 Amendment provides for arbitration in case of a dispute between the Associates and any of its members, persons or organizations.

4. It is further stated that the Petitioner had not exhausted the dispute resolution provision provided for before instituting the present proceedings. The Applicant contend that it is imperative that the dispute between the parties herein be referred to arbitration and that there be a stay of these proceedings, pending the said arbitration to save this Honorable Court's judicial time.

5. Briefly the dispute herein relates to management of elections for the Governing Council held on 25<sup>th</sup> March 2019 which the Petitioner/Applicant alleges were **"marked by massive irregularities thereby subjugating the democratic will of the members"**.

### PETITIONER'S RESPONSE

6. The Petitioner is opposed to the Application dated 30<sup>th</sup> October 2019 and in doing so filed grounds of opposition dated 8<sup>th</sup> November 2019 setting out the following grounds of opposition:-

*a) That this Honorable Court indeed has jurisdiction to entertain this Petition as it raises serious constitutional and human rights issues emanating from the mismanagement of the electoral process of the Architectural Association of Kenya, which issues can only be adequately addressed by a court specially constituted to adjudicate upon constitutional issues.*

*b) That the Constitution of Kenya is the supreme law of the land and a litigant whose constitutional rights and fundamental freedoms have been threatened and/or violated and/or infringed must be granted audience before the Courts.*

*c) That the application is an afterthought and is time barred as pre-trial directions have already been taken.*

*d) That the Constitution of the Architectural Associate of Kenya does not provide for any dispute resolution mechanisms over disputes arising out of an election process.*

*e) That further, the Guidelines for the Conduct of Election of Officer Bearers of the Association have no provision for a dispute resolution mechanisms.*

*f) That the Constitution only provides for a dispute resolution mechanism for disputes between individual members and the Architectural Association of Kenya as a whole whereas the dispute in the Petition herein is primarily between the Petitioner and*

*different individuals who have been sued in their individual capacities.*

## **ANALYSIS AND DETERMINATION**

7. I have very carefully considered the Applicant's / 9<sup>th</sup> Respondent's application dated 30<sup>th</sup> October 2019, affidavit in support and the Petitioner's grounds of opposition dated 8<sup>th</sup> November 2019, as well as the parties rival submissions and from the above the following issues arise for consideration:-

*a) Whether the dispute should be referred to Arbitration?*

*b) Whether the matter is ripe for Court's action?*

### **A. WHETHER THE DISPUTE SHOULD BE REFERRED TO ARBITRATION?**

8. **Section 6(1) of the Arbitration Act** provides as follows:-

***“Section 6(1) - A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings refer the parties to arbitration unless it finds –***

***(a) That the arbitration agreement is null and void, inoperative or incapable of being performed, or***

***(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”***

9. The AAK is a private society founded in 1967 which among other things co-ordinates the activities of professionals within the built and natural environment in Kenya and promotes professional integrity and directs the members of the association in all matters of professional practice. Its Governing Council is elected biennially by its members by means of a popular ballot conducted in accordance with By-laws 12.1.d-f. It is the elections which took place on 25<sup>th</sup> March 2019 that has resulted to this Petition before this Honorable Court.

10. The AAK has a Constitution that provides for guidelines on all matters in relation to the association activities. It is contended by the Applicant that one of the issues that it provides for is a clear guideline for, a dispute resolution.

11. Under **Section 17.0 of the AAK Constitution** it provides as follows:-

***“In case of a dispute between the Association and any of its members or any other person or organizations, the dispute shall be referred to an arbitration panel of 3 persons appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch), one of whom shall be an Advocate and the other two shall be Corporate Members of the Association.***

***In cases where Contract documents and other legal documents have empowered the President of the Association to nominate an arbitration panel, the President, or in his absence the Vice-President, shall do so on behalf of the Association, in consultation with the Governing Council.”***

12. From the provisions of **Section 17.0 of the AAK Constitution**, quoted herein above, the following must be satisfied before dispute is referred to arbitration under the **AAK Constitution**:-

***a) The dispute is between the Association and any of its members.***

***b) The dispute is between the Association and any other persons or organization.***

13. In the instant Petition the dispute is clearly between a member and the Association. The elected officials whose election is being contested in the Petition are all members of the Architectural Association of Kenya which is the Statutory body mandated to regulate professionals engaged in the built and natural environment in Kenya. The only people who are not members of AAK in the Petition are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents; who had been given the mandate to conduct the election by the 9<sup>th</sup> Respondent. From the aforesaid it is clear that the election was purely an internal affair of AAK.

14. On consideration of **Section 17.0 of AAK Constitution** and the above undisputed facts it is clear that the **AAK constitution** has a provision for internal disputes resolution mechanism which is available, efficient, and effective, which the Petitioner could have considered before invoking the jurisdiction of this Honourable Court.

15. The **AAK Constitution** clearly regulates disputes between a member or members of the Association and the Association or between a member or members of the Association and the Governing Council and it has well laid down procedure for resolution of the disputes. The Petitioner as a member of AAK Association is bound by the **Constitution of AAK** and had an obligation to exhaust the dispute resolution provisions provided for before instituting the present proceedings.

16. **Section 3 of the Arbitration Act** defines an arbitration agreement as follows:

**“an agreement by the parties to submit to arbitration all or certain disputes which have arisen or may arise between them in respect of a defined legal relationship whether contractual or not.”** (Emphasis mine)

17. Further **Section 10 of the Arbitration Act** provides for minimal and specific instance of intervention or no interference by courts in matters that concern arbitration unless provided for in the **Act** as was enunciated in the case of **Kenyatta International Convention Centre (KICC) v. Greenstar Systems Limited [2018] eKLR** where the Court held:

**“Indeed, Section 10 of the Arbitration Act, No. 4 of 1995 expressly stipulates that: “Except as provided in this Act, no court shall intervene in matters governed by this Act.”**

18. The Petitioner submit the infringement of his constitutional rights is not a dispute contemplated under the AAK clause contained in **AAK Constitution** and that there is no dispute between the parties with regard to the matter agreed to be referred to Arbitration. It is urged the Petitioner in the Petition seeks redress of denial, violation and infringement of his fundamental freedoms and rights under **Articles 10, 35, 38, 43 and 47 of the Constitution**, which rights can only be enforced by the Honorable Court. The Petitioner states clearly that he challenges the election conducted on 20<sup>th</sup> March 2019 which related to the breach of the Petitioner’s Constitutional Rights.

19. The Petitioner contend that the High Court has wide jurisdiction conferred upon it by **Article 165(3) of the Constitution** and **Article 22** which grants every person the right to institute court proceedings alleging violation or threat of violation of a right or fundamental freedom. The Petitioner further contend that **Article 23 of the Constitution** gives the High Court jurisdiction in accordance with **Article 165 of the Constitution**, to hear and determine applications for redress of violations, infringement or threat of violation or infringement of constitutional rights.

20. There is no dispute in this matter that **Section 17.0 of AAK Constitution** clearly states that in case of a “dispute” between the Association and any of its members or any other person or organizations, the dispute shall be referred to arbitration. The Section do not differentiate or limit the types or kinds of disputes to be referred to arbitration. The dispute in this case relates to election process conducted on 25<sup>th</sup> March 2019. This is a dispute between the Association and the Petitioner herein. The dispute is subject to be submitted to arbitration having arisen between the Association and its members. This is in my view not a matter in which it can be stated that only the High Court has jurisdiction to determine the same. Further in view of a clear provision of a statute. I find that the first port of call is arbitration; I find that until the matter is dealt with before the arbitration, this Court cannot purport to have jurisdiction to deal with the matter, as court of first instance.

#### **B. WHETHER THE MATTER IS RIPE FOR COURT’S ACTION?**

21. In the **Petition No. 94 of 2019 Mark Ndung’u Nduhia Vs. The law Society of Kenya & 15 Others**, this Court noted that-

**“It is a settled principle that “Ripeness” of a matter is something that must be ventured into before a Court proceeds to analyze and determine a matter before it on merits; and more so where there exists available, efficient and effective internal disputes resolution mechanisms with the Association which the Petitioner could have had recourse to before invoking the Court’s jurisdiction.”**

22. The **AAK Constitution** provides for alternative Dispute Resolution Mechanism that must be resorted to before instituting a Petition or a suit before a court. The Petitioner did not seek a resolution of the subject matter herein, before the Dispute Resolution Mechanism provided for under AAK Constitution before moving to file this Petition before this Court. I cannot find that the Petition herein “**ripe**” for Court’s action for failure on part of the petitioner to exhaust the Procedure and Process set out under **Section 17.0 of the AAK Constitution**.

23. In the case of **Wanjiru Gikonyo and 2 Others vs. The National Assembly of Kenya and 4 Others (2016) eKLR**, Hon. Justice L. Onguto referred to the case of **Jesee Kamau and 25 others vs the Attorney General, Misc. Application Number 890 of 2004** where the court stated –

**“In some cases, the constitutional ripeness of the issues presented depends more upon a specific contingency needed to establish concrete controversy rather than upon general or underlying facts. For example, litigants alleging that a government action has affected an unconstitutional taking without just compensation before the issue is deemed ripe.”**

24. This Court is alive of the fact that there are instances where parties can seek exemption from the obligation to exhaust alternative dispute resolution mechanisms. It is however noted that in the instant Petition, the petitioner did not seek such exemption; nor have the Petitioner demonstrated exceptional circumstances or proved exceptional circumstances why the petition should be entertained by this Honorable Court before the alternative dispute resolution mechanisms provided for are exhausted.

25. **Article 159 (2) (c) of the Constitution** enjoins this Court to promote alternative forms of dispute resolution involving even dispute resolution mechanisms.

26. It is further noted that under **Section 9 of the Fair Administrative Action Act**, the provisions of **Article 159 (2) of the Constitution** is emphasized and thus enjoining the courts to promote alternative forms of dispute resolution including reconciliation; mediation; arbitration and traditional disputes resolution mechanisms.

27. The Applicant to buttress the above proposition sought reliance in the case of **Francis Mwangi Muturi & 2 Others vs. Kanja Njeru & 2 Others (2009) eKLR** where the Court stated :-

**“As members of KANU, the Plaintiffs as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are beholden to their KANU Constitution. They**

**ought therefore to have referred this dispute to arbitration as per their constitution instead of rushing to court. I do not agree with the submissions of Mr. Muhoho that much as KANU constitution talks of internal dispute resolution mechanisms that alone does not divest this court from hearing and determining the dispute. The need to invoke internal dispute resolution mechanisms within KANU is couched in mandatory terms. The Plaintiffs have no alternative but to comply. In my view courts of law should be reluctant to interfere with the running and management of societies and private member clubs unless of course there is a breach of rules of Natural Justice or the said clubs and or societies act outside their mandate.”**

28. Similarly in the case of **Council County Governors Vs. Lake Basin Development Authority & 6 others (2017) eKLR** Hon. Justice Mativo in a Constitutional Petition held thus:-

**“I have no doubt that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2) (c) of the Constitution, the court is obligated to promote these modes of alternative dispute resolution. A court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the court and leave the parties to pursue the alternative remedy.”**

29. Further in the case of **Jennifer Shamalla vs. Law Society of Kenya & 15 Others (2017) eKLR** it was held:-

**“It has been said time without number that whatever an Act of Parliament provides for a clear procedure or mechanisms or redress, the same ought to be strictly followed.”**

30. It is clear that in view of the Constitutional provisions and the Applicant’s Constitution as well as the authorities submitted herein, that, a Court should be reluctant to review decisions made in the declaration of election results prior to party exhausting, the alternative remedies provided under the laws of AAK Association. I am of the view that it is imperative that the dispute between the parties in this Petition be referred to arbitration and there be stay of these proceedings pending the arbitration. The fact that the Petition raises constitutional issues and/or serious issues, I find that by itself, does not give this court jurisdiction to hear and determine the Petition herein, without the parties having complied with clearly set out conditions as regards, settling internal disputes or without there existing exemption from obligation to exhaust alternative dispute resolution mechanism as provide by the law.

31. In the South African Constitutional Court it held in a matter between **Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others [32]** that – as stated in **Constitutional and Human Rights Division Petition No. 280 of 2017. Council County Governors Vs. Lake Basin Development Authority & 6 Others (2017) eKLR;**

**“Jurisdiction is determined on the basis of the pleadings, [33] ...and not the substantive merits of the case... In the event of the Court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the application has chosen to invoke the court’s competence. While the pleadings – including tin motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim..., one that is to be determined exclusively by ... (another court), the High Court would lack jurisdiction...”**

32. In the instant petition the Petitioner invites the court to issue orders restraining declaration of the Association election result of election held on 25<sup>th</sup> March 2019. The issues can and should be resolved by the mechanisms provided under the AAK constitution. The Applicant in support of this provision once again referred to the **HC Pet. No. 94 of 2019 Mark Ndung’u Ndumia vs. The Law Society of Kenya & 15 Others**, where this Court stated that:-

**“This Honourable Court should not move into the arena of dispute between the parties and interfere in the internal running and management of affairs of societies and their members. The parties are under obligation before moving the court to exhaust all alternative dispute resolution mechanisms as per their constitution and regulations.”**

33. The upshot is that the Applicant’s / 9<sup>th</sup> Respondent’s application dated 30<sup>th</sup> October 2019 is meritorious and the same is granted in the following terms:-

**a) An order be and is HEREBY issued that there be stay of all proceedings herein pending arbitration.**

**b) That the dispute between the parties herein be and is HEREBY referred to arbitration.**

**c) The Applicant / 9<sup>th</sup> Respondent be at liberty to apply for such or other orders and/or directions at this Honorable Court which may deem fit and just to grant in the circumstances.**

**d) Costs be in the cause.**

**Dated, Signed and Delivered at Nairobi on this 5<sup>th</sup> day of November, 2020.**

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**J. A. MAKAU**

**JUDGE**