REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 311 OF 2019

REPUBLIC.....APPLICANT

AND

THE NON-GOVERNMENTAL ORGANIZATIONS.....RESPONDENT

AND

PHILIP OPIYO SADJAH.....1ST INTERESTED PARTY

DIANA NEKOYE SIFUNA.....2NDINTERESTED PARTY

STELLA WANJIRU NDERITU.....3RD INTERESTED PARTY

SONIA THEODERA RASUGU.....4TH INTERESTED PARTY

CAROLINE ACHIENG ODUOR.....5THINTERESTED PARTY

MERCY NDUKU.....6TH INTERESTED PARTY

AND

LINDA BONYO.....1ST*EX PARTE* APPLICANT

HUSTON MALANDE.....2ND *EX PARTE* APPLICANT

DECLAN MAGERO.....3RD*EX PARTE* APPLICANT

JOHN KALUVU.....4TH *EX PARTE* APPLICANT

RICHARD KAKUNGA WAMBUA.....5TH*EX PARTE* APPLICANT

JUDGMENT

Introduction

1. Youth Agenda, is a Non-Governmental Organization (herein after referred to as the Organization) registered under the provisions of the Non-Governmental Organization Act[1](herein after referred to as the Act). The factual matrix leading to these proceedings is essentially uncontroverted or common ground. For example, there is no contest that leadership wrangles in the Organization and disputed elections led to the establishment of a Care taker Board comprising of a Chairperson, secretary, and Board Members who are the Interested Parties in these proceedings. It is common ground the leadership wrangles, the disputed election results, the appointment and registration of a Caretaker Board and the Respondents refusal to register the applicants as the duly elected officials of the Organization which triggered these proceedings.

2. The Respondent, the Non-Governmental Organizations Coordination Board, is a statutory body established under section **3 (1)** of the Act. It is a body corporate with perpetual succession and a common seal capable in its corporate name of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; (c) receiving, borrowing and lending money; (d) entering into contracts; and (e) doing or performing all such other things or acts necessary for the proper performance of its functions under the Act, which may lawfully be done or performed by a body corporate.

The applicant's case

3. The applicant's case is that the Organization's elections committee conducted elections of new officials on the **6th** March 2019. They state that the said elections were not conclusive due to a tie in the vote for position of Chair. Additionally, they state that the Committee called for a repeat poll on the **7th** March 2019 after which it released the results of the newly elected officials. Further, they state that at a meeting held on the **21st** March 2019 ratified the elections and endorsed the newly elected officials but the Respondent refused to effect the changes citing a complaint by some members of the Organization who challenged the election results.

4. The applicants maintain that the Respondent called three meetings between the newly elected officials and the complainants, on the **16th** August 2019, **30th** August 2019 and on **10th** September 2019, but the complainants failed to attend. The applicant's complaint is that the Respondent refused to register the change of officials to enable the Organization to effectively carry out and execute its various mandates including changing its bank signatories, a failure which forced them to apply for leave to institute Judicial Review proceedings in Misc. Application No. 269 of 2019 to compel the respondent to register the newly elected officials, but before the application for leave could be heard, the Respondent unilaterally effected the changes by registering a Caretaker Board.

5. The applicants contend that by refusing to register them and instead registering a Caretaker Board, the Respondent breached the organization's Constitution. They also claim that they were never informed about the said developments nor were they afforded an opportunity to be heard. They contend that the Respondent never satisfied itself whether the minutes calling the meeting were duly signed or dated, or whether the notice calling the alleged meeting was valid and whether the said meeting had the power to elect Board members of the Organization.

Legal foundation of the application

6. The applicants contend that the Respondent acted in bad faith, that it was openly biased against them, and in usurping the functions of the organization's Board, the Respondent acted arbitrarily, *ultra vires* and contravened Article **47** of the Constitution and the Fair Administrative Action Act[2](herein after referred to as the FAA Act). Further, the registration of the caretaker Board was arrived at in a manner contrary to the Organization's Constitution, hence, the decision is irrational and unreasonable and a breach of their right to legitimate expectation.

Prayers sought

7. As a consequence of the foregoing, the applicants pray for: -

> *a.* ***AN ORDER OF CERTIORARI*** *to quash the Respondent's decision made on the* ***26th*** *September 2019 purporting to register Caretaker Board Members for the Youth Agenda.*
>
> *b.* ***AN ORDER OF MANDAMUS*** *to compel the Respondent to register the Officials and Board Members of the Youth Agenda, duly elected and ratified by the Board at a meeting held on the* ***21st*** *March 2019.*
>
> *c. Costs of this suit; and*
>
> *d. Any other remedy that the court deems fit and just.*

Respondent's Replying Affidavit

8. The Respondent's reply as contained in the replying affidavit of Mercy Cherutoh Soy, the Respondent's Legal Officer dated **6th** November 2019 is that the applicants are former board members of the Organization who were relieved of their duties at the Special General Meeting held on the **16th** of August 2019 for being dysfunctional and unable to resolve the challenges bedeviling the organization. She deposed that the core dispute is the identity of the fully paid up members as provided in the organization's Constitution. She averred that prior to the applicants' removal, the members had prompted them during an AGM held on the **28th** of June 2019 to address the operational and governance challenges within **21** days failure to which a caretaker board would be constituted to address the same issues.

9. M/s Soy deposed that the interested parties are members of the Caretaker Board constituted at the Special General Meeting held the **16th** of August 2019 and confirmed through the Respondent's letter dated **26th** September 2019. She deposed that the challenges facing the organization were centered on leadership whereby board members and the Organization's members could not agree on the outcome of the elections held on the **6th** of March 2019. She deposed that the election committee called for a repeat poll on the **7th** of March 2019 stating that the elections held on the **6th** March 2019 were flawed since the previous chairperson who had resigned participated in the voting process, but shortly after the Board received the election returns a complaint from a section of the members regarding the outcome of the elections was filed. She deposed that the complainants recognized a different chairperson as having been duly elected and not Linda Bonyo, the first applicant.

10. She deposed that the Board communicated its observations to the organization regarding the different election outcomes and asked the

organization to streamline the same and give the correct position of the election so as to effect the change of officials. M/s Soy deposed that it is wrong and misleading for the applicants to allege inaction on the part of the respondent when there is clear correspondence that demonstrates that the respondent tried to resolve the dispute. Further, she deposed that there is an attendance sheet demonstrating that the former board members and the interested parties were invited to canvass and present their case before the Regulator for consideration.

11. She deposed that the annual general meeting of the members where the motion to have a Caretaker Board installed was validly constituted. Additionally, she deposed that the Respondent had in a meeting held with the applicants and former board members pointed out the lack and need of honorary council as stipulated in the organization's Constitution and in the Special General Meeting held on the **16th** of August 2019. She averred that the Respondent has since recognized the Organization' caretaker board as per the Special General Meeting of **16th** August 2019 and it wrote to the organization's bankers in order to facilitate the operations of the organization. She deposed that the Respondent considered the documentation presented before it, the history of the organization and its role as the Regulator. Further, she deposed that the Respondent's mandate includes regulation, facilitation and coordination of the activities of Non-governmental organizations which must be done as per the law and best interests of the organization, and that the Respondent acted in good faith.

12. She averred that the applicants previously wrote to the organization's Bankers asking it to freeze the organizations' accounts, and that they previously moved to court in Judicial Review Misc. Application No. 269 of 2019 seeking leave to institute JR orders of *mandamus* to compel the Respondent to register them as the board members of the organization despite a date having been agreed upon for a joint meeting with the regulator for purposes of mediating and resolving the disputes.

13. She deposed that the Respondent has not contravened Article **47** of the Constitution, and that the applicant's case has been overtaken by events since it registered the change of officials. Lastly, she deposed that this case is a clear abuse of court processes and a waste of this court's time and should be struck out.

Interested Parties' Replying Affidavit

14. Phillipe Opiyo Sadjah, swore the Replying Affidavit dated **8th**November 2019 on behalf of himself and the other Interested Parties. He deposed that he is a dully and fully paid up Corporate Member of the Organization and the Caretaker Board Chairperson, while Diana Nekoye Sifuna, the second Interested Party is the Board Secretary and Chief Executive Officer and Stella Wanjiru Nderitu – the 3rd Interested Party, is the Caretaker Board Treasurer. Further, Sonia Theodora Rasugu, the 4th Interested Party is a caretaker board director, Caroline Oduor, the 5th Interested Party is a caretaker board director while Mercy Nduku– the 6th Interested Party is a caretaker board director.

15. Mr. Sadjah deposed that the Organization's Constitution provides for the establishment of a board of **11** persons and appointment of new board members by the sitting board among persons nominated by the member organizations and honorary council provided that the Board's secretary informs members and Honorary Council in writing of the need to nominate a person whenever a vacancy or vacancies arise in the board, and that fully paid up members are be eligible to nominate one person only.

16. He deposed that the Constitution provides that the Board's Secretary shall forward the nominated names and such names of any other applicant to the Board which shall make the appointments from the forwarded names, and that the Board may from time to time and at any time appoint any person, in case of a vacancy or by way of addition to the Board, provided that the prescribed maximum is not exceeded and provided also that the proposal to appoint any new member of the Board shall be set out in a formal resolution forming part of the notice convening the Board Meeting.

17. Further, Mr. Sadjah deposed under the Constitution, a Board Member serves for a term of **3** years from the date of appointment and is eligible for re-appointment and the Board is responsible for *inter alia* making and implementing organizational policy. Additionally, he deposed that the organization is governed by the Board manual.

18. Mr. Sadjah deposed that the first applicant was appointed as a Board Member of the Organization on **6th** October, 2016, and, contrary to the organizations Constitution, she failed to disclose her interests in several institutions like the Baruch Press and Publishers Limited which she was actively pushing to be awarded business by the Organization. Further, he deposed that as at as at **14th** September, 2017 the Board had confirmed that despite trading and having done several businesses with the Organization, she failed to disclose that she was a director at the Baruch Press and Publishers Limited together with her husband. He deposed that her interest at whatever cost was to become the Chairperson of the Board in order to advance selfish interests thereby causing a power struggle in the organization's leadership.

19. He also deposed that the **4** persons proposed by the first applicant, namely, the 2nd to 5th applicants joined the organization as Board Members and that the applicants failed to disclose material facts to this court. Also, she deposed that the application is mischievous, ill-conceived and a blatant abuse of court process. Further, he deposed that on the **1st** March, 2019, the Board agreed to conduct elections on the **6th** March, 2019 and eligible members participated. Additionally, he deposed that the Respondent as the Regulator tried to resolve the dispute and that it could not effect changes with a form that was not properly executed by all the officials of the Organization.

Applicant's further affidavit

20. **Linda Bonyo,** swore the further affidavit dated **18th** November 2019. She deposed that the Organization is a body bound by its constitution and all members must adhere to the Constitution which vests upon the Board the sole responsibility of appointing new members of the Board. She deposed that the Constitution provides the process of convening a general meeting of the Organization and the purpose for which that general meeting can be convened and that it does not provide that a general meeting can be convened for purposes of removing members of the Board.

21. Additionally, she deposed that the organizations Constitution provides that before a Board Member can be removed, such a person must

be given a fair and reasonable opportunity to answer and defend himself/herself, and that the Special General Meeting never gave the serving Members an opportunity to respond to the allegations against them.

Applicant's advocates submissions

22. The applicant's counsel submitted that the organization's Constitution does not provide for a Caretaker Board elected by the general assembly of members, hence, by registering the interested parties as Caretaker Board members, the Respondent contravened the Organization's constitution. Further, he argued that the Interested Parties cannot purport to hold office as Caretaker Board members contrary to the constitution.

23. Further, counsel submitted that the general meeting of members does not have the power to remove Board members. He referred to Article **13 (2.1)** of the Constitution and argued that it does not provide the power to remove a serving Board member, a power he submitted is vested in the Board by Article **9** section **3 (c)**. He argued that the said provision provides that before a member of the Board is removed, he must be accorded an opportunity to be heard and the rules of natural justice must be adhered to. He argued that the purported removal of serving Board members was done contrary to the rules of natural justice and in breach of Articles **47** and **50** of the Constitution.

24. He described the Respondents act of calling the parties for a mediation terming as illegal, unprocedural and against fair administrative action and cited *Republic v Non-Governmental Organizations Coordination Board Ex-Parte Evans Kidero Foundation**[3]*** which held *inter alia* that *a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at***.** He argued that the manner in which the Respondent arrived at the decision is unprocedural and unlawful and that the decision to register the Caretaker Board members is alien to the Organizations' constitution.

25. Counsel submitted that the Respondent's refusal to register the applicants as Board members is not legally justifiable nor is it grounded on the organization's Constitution. He argued that Article **13** of the constitution sets out the process of convening a general meeting of the organization and the purpose for which that general meeting can be convened and that it does not mention that a general meeting can be convened for purposes of removing members of the Board.

26. He submitted that the said meeting acted *ultra vires* the constitution by purporting to exercise powers it did not have, and, that the Agenda of the said meeting did not include removal of the Board members nor did it set out any allegations against them nor did it afford them an opportunity to respond. He cited *Commission on Administrative Justice v Insurance Regulatory Authority & another**[4]*** which held that in order to succeed in a judicial review application, an applicant must demonstrate that the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or that a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

27. He relied on *Republic v Non-Governmental Organizations and Co-ordination Board ex parte Kalonzo Musyoka Foundation**[5]*** in support of the proposition that *an administrative action cannot be said to be procedurally fair when the process of arriving at it is shrouded in mystery. He argued that the manner in which the Respondent arrived at the impugned decision is unlawful, unprocedural and breaches the rules of natural justice.* He argued that once it has been established that an administrative body has not followed the due process in arriving at its decision, then the courts are empowered to quash the decision and ensure the law is complied with.

Respondent's advocates submissions

28. The Respondent's counsel submitted that the Respondent adhered to the provisions of Article **47** of the Constitution and the FAA Act. Counsel argued that the applicants have not disputed having been called to attend several meetings to resolve the dispute, and that the Act and the Regulations provide for procedures to be followed where there is a change of an Organizations officials. He cited Regulation **22** which prescribes the form to be used to effect changes which must be submitted duly signed within **14** days from the date of the changes and submitted that the Respondent could not accept the changes effected on **21st** March 2019 because the relevant form was not executed as the law requires, and by rejecting an irregular form the Respondent acted within the law.

29. Counsel argued that the Respondent made efforts to have the dispute resolved amicably, and that all the parties were accorded an opportunity to be heard. Counsel argued that the Petition for disbanding the Board was supported in line with the organization's Constitution and the Board was disbanded after affording the members an opportunity to resolve the dispute within **21** days.

30. The Respondent's counsel argued that the issues raised in this case revolve around an election dispute relating to the rightful person who won the elections held on **6th** March 2019. He cited *Republic v Judicial Service Commission*[6] which held that the remedy for judicial review is not concerned with merits of a decision but the decision-making process. Counsel argued that the applicant is hoodwinking the court to determine an election dispute.

31. Further, counsel cited *Republic v Kennistgton Edmond de Polignac*[7] and argued that the applicant failed to disclose the reasons why the Respondents appointed a caretaker board and the role the Respondent played in resolving the dispute.

The Interested Parties' Advocates' submissions

32. The Interested Parties' counsel submitted that the applicants omitted to annex documents showing that the first applicant was the chairperson as at the time of filing this suit. Counsel also argued that at a Board meeting held on **1st** of March, 2019, it was agreed that elections be held on the **6th** March, 2019 during which the officials were validly elected.

33. Counsel submitted that the Respondent was guided by the law and Regulations which prescribe that a dully filled and executed Form be

submitted to effect changes and argued that the applicant is asking this court to rely on an un signed form. He submitted that the changes were done in line with the law and that the applicant has failed to demonstrate violation of constitutional rights. Counsel also argued that Article **IX 3(b) (iv)** of the Constitution provides for removal of Board Members and that the Petition to disband the dysfunctional Board was processed in line with the Organization's Constitution and the Board was disbanded after according the members an opportunity to resolve the dispute within **21** days. He argued that a caretaker Board was formed in the interim to oversee smooth running of the Organization in line with the Constitution and the Organization's Board Manual and all the outgoing officials consented and signed the Notice of Change of Office Bearers – Form **13**.

34. Counsel relied on a passage from ***Halsbury's Law of England*** [8] **which states that *certiorari* is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist; and that the court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining; lastly, that the discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.**

35. **Counsel argued the dispute relates to** who was elected the chairperson on **6th** March, 2019, which require the court to make a determination on disputed issues of fact. He argued that such a determination is outside the province of judicial review jurisdiction. Counsel made reference to paragraph **3** of the applicant's verifying affidavit in which the applicant averred that the elections were not conclusive due to a tie in the vote for the position of Chair because there was no outright winner and that an ineligible person voted and the vote was nullified by the elections Committee which is a contested issue of fact, and argued that the applicant is inviting this court to determine disputed facts which involve merit review.

36. Additionally, the Interested Party's counsel submitted that in a Judicial Review case, an applicant has a duty of candour, to make a full and frank disclosure of all material facts to his or her case[9] and that the applicant's contention that she was at all material times the Board's chair is misleading and that the applicants failed to disclose who won the elections held on **6th** March 2019.

37. Lastly, counsel for the Interested Party submitted that the applicant failed to disclose to this court that the alleged change of officials of **21st** March, 2019 could not be undertaken by the Respondent because the statutory Form **13** as set out in the First Schedule was not dully executed in line with the law and as such the Respondent could not act on an irregular form to effect the alleged changes. In the circumstances, counsel argued that no illegality was committed.

Determination

38. **First,** I will address the question *whether this is a "civil dispute" disguised as a Judicial Review application*. Closely tied to this issue is the question whether the applicants are inviting this court to engage in a merit review. Also relevant is the question whether the germane dispute disclosed in this suit is an election dispute, and if so, whether it falls within the scope of judicial review jurisdiction.

39. In order to contextualize and effectually address the above questions, at the risk of repeating myself, it is necessary to highlight the core facts presented by the parties.

40. The applicants in the founding affidavit contend that the Organization's elections committee conducted elections of new officials on the **6th** March 2019, but the said elections were not conclusive due to a tie in the vote for position of Chair. It is the applicants' case that a repeat poll was held on the **7th** March 2019 which yielded the new elected officials who were ratified at a meeting held on the **21st** March 2019, but the Respondent refused to effect the said changes citing a complaint by some members of the Organization who challenged the election results.

41. By their own admission as captured above, the applicants admit that the elections they base their claim on were challenged. Notwithstanding the said admission, they accuse the Respondent of refusing to register the changes. The applicants contend that the Respondent breached the organization's Constitution. It is the applicants' position that the Respondent never satisfied itself whether the minutes calling the meeting were duly signed or dated nor did it confirm whether there was a proper notice calling for the alleged meeting and whether the said meeting had the power to elect Board members of the Organization.

42. The Respondent's counter argument as far as I distil it from its Replying affidavit is that the applicants are former board members of the Organization who were relieved of their duties at the Special General Meeting held on the **16th** of August 2019 by the members for being dysfunctional. The Respondent maintained that a Special General Meeting held the **16th** of August 2019 established the Caretaker Board and that the challenges facing the organization revolved on leadership whereby board members and members could not agree on the outcome of the elections held on the **6th** of March 2019.

43. Additionally, the Respondent maintains that the election committee called for a repeat poll on the **7th** of March 2019 stating that the elections held on the **6th** March 2019 were flawed since the previous chairperson who had resigned participated in the voting process, but soon after receiving the election returns, a complaint was received from a section of the members challenging the outcome of the elections. It is the Respondents position that the annual general meeting where the motion to have a caretaker board installed was valid.

44. The Interested Parties cited instances of conflict of interest on the part of the first applicant, and maintained that the elections were held on the **6th** March, 2019 and eligible members participated. They maintained that the Respondent could not effect changes presented by the applicants because they submitted an improperly executed form.

45. From the above summary, it is clear the applicant's case essentially presents contested issues of facts. It is basic to law that Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. For the facts presented by the applicants and the counter responses to be proved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make

conclusions.[10] This position has been up held in numerous court decisions. In *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo*[11] it was held:-

> *"55. It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."(Emphasis supplied)*

46. It is common ground that Judicial review looks into the legality of the dispute and not contested matters of evidence. The version presented by the applicants disclose hotly contested issues of facts. To resolve the diametrically opposed positions, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction. For example, the applicant states that the elections were not conclusive due to a tie in the vote for position of Chair. This is an issue of fact which can only be proved or disapproved by way of oral evidence. The applicants also state that a repeat poll was held on the **7th** March 2019 which yielded the new elected officials who were ratified at a meeting held on the **21st** March 2019. They state that the Respondent refused to effect the said changes citing a complaint by some members of the Organization who challenged the election results. If by the applicants' own admission, the results of the elections were challenged, the invitation to this court to grant the orders sought will have the effect of endorsing contested election results without resolving the dispute by way of hearing evidence.

47. The grounds cited by applicants' amount to inviting this court to determine contested facts without hearing evidence. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. The core issue is the validity of the applicant's elections and or the validity of the Caretaker Board appointed at the Special General Meeting. The applicants are asking this court to compel the Respondent to register them as officials of the Organization, yet it acknowledges that the election results were disputed.

48. Issuing a compelling order is tantamount to endorsing the validity of their elections. How can this court issue such an order which has the effect of determining the *bona fide* officials without hearing oral evidence? How can this court fault the Respondent when it states that the applicant's elections were contested and a series of meetings called to resolve the dispute yielded no results? How can this court fault the Respondent's decision without addressing the validity of the diametrically opposed election results without hearing evidence on the validity of the elections including the legality of the contested Special General Meeting? This case falls totally outside the province of Judicial Review jurisdiction. It is simply a misconceived shortcut designed to obtain orders in an otherwise civil dispute. At the centre of the dispute is the question which of the two groups should be in office. Differently put, at the core dispute is the validity of the contested elections. The validity of the elections results is essentially a matter to be resolved by way of evidence, which is the province of a civil court. I am fortified by *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & another*[12] which held that: -

> *"…Where the determination of the dispute before the court requires the court to make a determination on disputed issues of fact that is not a suitable case for judicial review since judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the Civil Procedure Act does not apply. It is governed by sections 8 and 9 of the Law Reform Act being the substantive law and Order 53 of the Civil Procedure Rules being the procedural law…." (Emphasis added)*

49. I also find comfort in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[13]:-

> *"…It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the court to determine the merits of two or more different versions presented by the parties the court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant..."*

50. The above excerpts capture the position with sufficient clarity. Judicial Review does not deal with contested issues of facts which requires parties to adduce evidence and be cross-examined. Indeed in *Republic v Registrar of Societies & 3 Others ex parte Lydia Cherubet & 2 others*[14] the court decried the practice of bringing claims through Judicial Review which require the court to embark on an exercise that calls for determinations to be made on merits which in turn requires evidence to be taken to decide issues of fact.[15] This judicial review application does not raise any judicial review grounds at all. It does not raise either the traditional common law judicial review grounds or the expanded grounds of judicial review listed in section **7** of the Fair Administrative Action Act.[16] This court abhors the practice of parties converting every issue in to a constitutional question or a judicial review ground and filing ordinary civil suits disguised as constitutional Petitions or judicial review applications when in fact they do no not fall anywhere close to violation to constitutional Rights or breach of the known judicial review grounds. On this ground alone, this case collapses.

51. *Second,* I will address the question whether the applicants are challenging the merits of the decision. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

52. Judicial Review is about the decision-making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to

ensure that it has been lawfully exercised.

53. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. This position was appreciated in *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* ***[17]*** which held that judicial review applications do not deal with the merits of the case but only with the process.

54. *Minister for Immigration and Citizenship v SZJSS* ***[18]*** reaffirmed the proper role of courts in reviewing administrative decisions. It held that "courts should not delve into the merits of administrative decisions on the ground that the decision-maker did not give 'proper, genuine and realistic consideration' to the evidence before it — the weighing of evidence, and the preference for some evidence over other, is a matter for decision-makers, not for courts exercising supervisory jurisdiction." The court affirmed what was said by Brennan J [19] that *"the merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."* The court then considered the origins of the phase 'proper, genuine and realistic consideration,'[20] and noted that those comments related to the exercise of discretionary power in accordance with a rule or policy, without having regard to the merits of a particular case. The court also cited, with approval, Basten JA's warning[21] concerning the language of 'proper, genuine and realistic consideration':-

"That which had to be properly considered was 'the merits of the case'. Taken out of context and without understanding their original provenance, these epithets are apt to encourage a slide into impermissible merits review."(Emphasis added)

55. Back at home, the Court of Appeal in *Energy Regulatory Commission v S G S Kenya Limited & 2 others* ***[22]*** cautioned against *"delving into the merits of the decision as one would do when dealing with an appeal."* My reading of the issues raised by the applicants is that they are clearly distinguishable from legality. They involve a merit review.

56. *Third,* the applicant's counsel questioned the powers of the Special General Meeting to appoint a Caretaker Board. This argument is attractive, but it collapses on the simple ground that Article **X111 (3) (a)** provides for Special General Meetings "for any specific purpose." The phrase "for any specific purpose" is broad enough to cover the Agenda discussed and passed including the creation of the Caretaker Board. In any event, as was held in *Republic v Business Rent Tribunal & 3 Others ex parte Christine Wangari Gachege*[23] a tribunal or statutory body has jurisdiction to error and the mere fact it errs in the course of its inquiry on merits is not a ground for quashing the decision by way of judicial review as opposed to appeal. The court went on to state that it is only an appellate court that is empowered to re-evaluate the evidence, and, that, whereas a decision may be overturned by way of an appeal it does not necessarily qualify as a candidate for judicial review,[24]and, that, the court cannot substitute its judgment for that of an authority. (Emphasis supplied).

57. *Fourth,* Regulation **22** of *Non-Governmental Organizations Co-ordination Regulations, 1992* provides for change of officers or title of officers as follows: -

> *(1) Where there is any change of officers or of the title of any office of a registered Organization, notice in Form 13 set out in the First Schedule* ***shall*** *be given to the Board within fourteen days of the change and the notice* ***shall*** *be signed by three of the officers of the Organization.*
>
> *(2) Any registered Organization which fails to give notice as required by paragraph (1) of any change of officers or of the title of any office of the Organization shall be guilty of an offence.*

58. Much as the applicant invites the court to fault the Respondent for failing to register them as officials, they carefully avoided bringing themselves within the province of the above Regulation. On the contrary, there is evidence that the form contemplated under the above provision which was presented by the applicants was not properly signed. I am unable to fathom why or how the applicants now implore this court to unleash the writs of *certiorari* and *mandamus* when it is evident that the basics have not been satisfied. In this case, the requisite form was not properly signed.

59. The word "shall" appear twice in Regulation **22(1)** and once in Regulation **22(2).** The duty of the courts of justice to try to get at the real intention of the Constitution, legislation or Regulation by carefully attending to the whole scope of the provisions. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

60. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[25] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[26] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory. The word shall does not appear in the above Regulation thrice for cosmetic purposes. A proper construction of the above Regulation leads me to the conclusion that it is mandatory. Had the drafter intended otherwise, he could have deployed the word *"may"* which is permissive.

61. The applicants pray for the writ of *Mandamus*. An order of *Mandamus* will issue to compel a person or body of persons who has failed to perform a duty to the detriment of a party who has a legal right to expect the duty to be performed.[27] Simply put, *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. In *Republic v County Secretary, Nairobi City County & Another ex parte Tom Ojienda & Associates*[28] I discussed in detail the tests for granting an order of *Mandamus.* At the risk of repeating what I said in the said case, the eight tests for *Mandamus* were set out in *Apotex Inc. vs. Canada* (*Attorney General*),[29] discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[30] These are:-

There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

I. *A prior demand for performance;*

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) *No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

62. The applicants did not meet the requirements of Regulation **22.** This failure means that that they do not satisfy the above tests. Simply put, the applicants have not established the existence of public legal duty to act since the Respondent cannot act on an invalid Form **13.** In absence of a valid form, it cannot be said that the applicants have established a duty owed to them. Additionally, if the basics are not fulfilled as stated above, it cannot be said that there is a clear right to the performance of that duty. Put differently, the applicants have not satisfied all the conditions precedent to warrant the writ of *mandamus*. It cannot be said by any imagination that the applicants have established an express refusal, or an implied refusal to perform a public duty. On the contrary, there exists an equitable bar to the relief because the Respondent cannot act against the Regulations. Lastly, on a balance of convenience, *mandamus* should be declined.

63. As was stated in *Republic v National Water Conservation & Pipeline Corporation & 11 Others*,[31] once a judicial review court fails to sniff any *illegality*, *irrationality* or *procedural impropriety*, it should down its tools. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[32] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' The question here is whether the decision maker struck a balance fairly and reasonably open to him.[33]

64. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it**[34]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[35] It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." As was held in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others**[36]*** :-

> *"The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock**[37]** as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. … Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him*."

65. The question is whether the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the law. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently. Here is a case where the applicants failed to comply with the above cited Regulation and now, they desire to carefully evade the wrath of the said Regulation by seeking an endorsement from this court effectively asking the court to shut its eyes and ignore the Regulations. The applicants invite the court to fault the Respondent for adhering to the said Regulation and open a door for them to be registered. I decline the said invitation and hoist high the requirements set out by the law and the Regulations enacted thereunder. Differently put, there is nothing to show that a different decision maker confronted with the same set of facts and evidence and properly addressing his mind to the law could have arrived at a different decision.

66. I also find and hold that the impugned decision passes the rationality test. I profitably borrow the words of Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others **[38]*** *who* summarized the law as follows: -

> *"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

67. In applying the test of rationality, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the materials made available and the conclusion arrived at.[39] Applying the law as enunciated to the facts before me, I find and hold that the refusal to register the applicants viewed from the lens of the applicable law is rationally connected to the purpose of the statute. Differently put, the refusal is reasonably justifiable in the circumstances. It passes the rationality test.

68. *Next,* I will address the argument that the impugned decision is tainted with bias. I cannot think of a better articulation of the concept of bias and or bad faith than the exposition rendered in *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee*[40] thus: -

> *"The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact."(Emphasis added)*

69. Bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations. The courts have repeatedly stressed that the bias rule must take account of the particular features of the decision-maker and wider environment to which the rule is applied.

70. The Supreme Court of Canada explained that "the contextual nature of the duty of impartiality" enables it to "vary in order to reflect the context of a decision maker's activities and the nature of its functions."[41]There are many similar judicial pronouncements, which stress that the bias rule is context sensitive. At the same time, however, the courts have adopted a single test to determine applications for bias --that of the fair minded and informed observer.[42] This fictitious person provides a vessel in which the courts can impart as little or as much knowledge as is required to provide context. In many cases, the courts imbue the fair minded and informed observer with remarkably detailed knowledge and considerable understanding and acceptance of decision-making.

71. The High Court of Australia explained, *"Bias, whether actual or apparent, connotes the absence of impartiality."* A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.[43] A claim of apprehended bias requires a finding that a fair-minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent," "imputed," "suspected" or "presumptive" bias. [44]

72. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the *actual* views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the *possible* views and behavior of the decision-maker.[45] Each form of bias also requires differing standards of evidence.[46] A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased. Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. In the absence of an admission of guilt from the decision-maker, or, more likely, a clear and public statement of bias, this requirement is difficult to satisfy.[47] A claim of apprehended bias requires considerably less evidence. A court need only be satisfied that a fair minded and informed observer *might* conclude there was a real *possibility* that the decision-maker was not impartial.[48]

73. The Supreme Court of Kenya expressed the same view in *Hon. Lady Justice Kalpana Rawal v Judicial Service Commission & Anther*[49] citing Professor Groves M. in *"The Rule Against Bias"*[50] where it stated that-*"… claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand."*

74. In formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."[51]The standard is one of a "real danger" as opposed to a "real likelihood" or "real suspicion." The House of Lords also affirmed that the fair-minded observer would take account of the circumstances of the case at hand.[52] Whether the allegation relates to actual or apprehended bias, it is a serious matter, which strikes to the validity and acceptability of a decision. Actual bias has been applied in the following two fact-situations:-(a) where a decision maker has been influenced by partiality or prejudice in reaching a decision; and (b) where it has been demonstrated that a decision maker is actually prejudiced in favour or against a party.[53]

75. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the decision maker might be disposed towards one side or another in the matter in court. Case law shows that it is difficult to prove actual bias, [54] apparently because of the subjectivity attendant upon it. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.[55]

76. The current double reasonableness test, which commenced its journey in the Supreme Court of Canada[56] and then travelled through the High Court of Australia,[57] is so called because it translates into a two-stage requirement of reasonableness. It is a refinement of sorts of the formulation by the late Professor De Smith in his rationalisation of the real likelihood test as "based on the reasonable apprehensions of a

reasonable man."[58] There must be an apprehension of bias that must be reasonably entertained. That is the first stage. In the second stage, the apprehension must be one held by a reasonable person, someone who need not have interest in the outcome of the matter other than the general interest shared by the public in the fair administration of justice. The fulfilment of this general interest is mainly a pre-occupation with a fair administration of justice; a concern that justice is not only done but is manifestly and undoubtedly seen to be done.

77. In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.[59] As formulated, the test is: "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the decision maker has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and submissions of counsel.

78. The greatest defence to allegations of this nature is that the act must have been performed in good faith. The act complained of must have been done in the performance or intended performance of a duty or authority under the enabling act or by-law passed under it. The words "good faith" must be read in the context of the act. When one speaks of good faith in the performance of a duty or statutory authority, one must look to the nature of the duty or statutory authority to determine what is reasonable and what is not. This contextual approach can lead to very subjective judgments. If there is clear evidence of an intention to act illegally or outside the scope of authority, dishonestly or with malice, in other words, a blatantly dishonest exercise of power, then a party cannot rely on the good faith defence. However, to lose the immunity of “good faith” involves more than negligence or an error in judgment. If there is an honest attempt to give effect to the law, the good faith defence should prevail. The Supreme Court of Canada in *Chaput v. Romain*[60] described the "honest belief" distinction as follows:-

“*What is required in order to bring the defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did.”*

79. The contrast is an act of such a nature that it is wholly unauthorized and where there exists no colour for supposing that it could have been an authorized one. In such a case there can be no question of good faith or honest motive. The words "good faith" must be read in the context in which they are found. Acting in good faith presumes exercising a judgment which is either made in good faith or in bad faith. If it is made in good faith, the statutory immunity applies. If it is made in bad faith, the statutory immunity does not apply.

80. Applying the tests discussed above to the facts and circumstances of this case, I find and hold that the allegation of bias cited in this case cannot pass the above tests. The material before me does not suggest bad faith or a reasonable possibility of ill motive or bad faith in making the decision. Bad faith is a serious allegation which attracts a heavy burden of proof.[61] I see no bad faith in the circumstances of this case. The applicants’ assault on the refusal to register them founded on bad faith and or bias collapses.

Conclusion

81. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at in excess of jurisdiction, arbitrarily, capriciously, *mala fides* or in breach of natural justice. This position was best explained in *Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others:-*[62]

“*The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.” [Emphasis mine]*

82. A reading of the enabling statute and the Regulations leaves me with no doubt that it imposes a general duty upon the Respondent to perform the impugned decision. It confers a discretion upon the Respondent as to the mode of performing the duty. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant’s own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or has violated the law or committed a criminal offence or where a remedy would impede the authority’s ability to perform its functions, or where the judge considers that an alternative remedy could have been pursued.

83. The orders sought have the potential of impeding the Respondent from lawfully performing is functions. The reverse is the real danger of this court falling into the trap of electing officials of an organization thereby imposing officials on the organization. Emphasizing the discretionary nature of judicial review remedies, the court in *Republic v Judicial Service Commission ex parte Pareno*[63] held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons where the a public body has done all that it can be expected to do to fulfil its duty. In the instant case the Respondent on not less than three occasions attempted to have the dispute resolved amicably but the warring factions ignored. The Respondent declined to Register the applicants because there was a complaint challenging their election. It declined to act on an improper Form 13. Simply put, the Respondent did all what was expected of it in the circumstances. The court can withhold judicial review orders where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised.[64]

84. I only need to rely the Court of Appeal decision in *Makupa Transit Shade Limited & Anor vs. Kenya Ports Authority & Another*[65] to show that the order of *Mandamus* sought by the applicants in this case is wholly underserved: -

"What of the Order of mandamus" The general rule is that the issuance of mandamus is limited to where there is specific legal remedy for enforcing it or the alternative legal remedy is less convenient, beneficial and effectual. ***[66]*** *Its scope against public bodies is limited to performance of a public duty where statute imposes a clear and unqualified duty to do that act*. ***[67]*** *However if the duty is discretionary as to its implementation, then mandamus cannot dictate the specific way the decision will be exercised*. *Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.* ***[68]*** *…The applicant in addition has to show that it has a legal right to the performance of the legal duty by the party against whom it issues."*

85. The applicants pray for a writ of *certiorari*. *Certiorari* is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no one need respect it. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds. No material has been presented before me to show that the decision is tainted with illegality or procedural impropriety to warrant the writ of *certiorari*.

86. This is not a proper case for the court to unleash any of the judicial review orders sought. The upshot is that the applicant's substantive application dated **28th** October 2019 is totally unmerited. The same is fit for dismissal. Accordingly, I dismiss the applicants' application dated **28th** October 2019 with costs to the Respondent and the Interested Parties.

Orders accordingly

Signed, Dated and Delivered electronically at **Nairobi** this **29th** day of **September** 2020.

John M. Mativo

Judge

---

[1] Act Number 19 of 1990.

[2] Act No. 4 of 2015

[3] {2017} e KLR

[4] {2017} e KLR

[5] {2018} e KLR.

[6] Misc. App No. 1025 of 2003.

[7] {1971} 1 KB 486.

[8] 4th volume II page 805 paragraph 1508.

[9]Citing ***Republic v P,*** **JR 696/2009,** *Republic v Kenya National Federation of Co-Operatives Limited ex Parte Communications Commission of Kenya and Hussein Ali & 4 Others v Commissioner of Lands, Lands Registrar & 7 Others (Citations not provided).*

[10] Counsel cited *Republic vs Land Registrar Taita Taveta District & Another* {2015} eKLR

[11] {2015} e KLR.

[12] {2014} e KLR.

[13] {2014} e KLR.

[14] {2016} e KLR.

[15] Counsel also cited *Seventh Day Adventist Church vs Nairobi Metropolitan Development* {2014} eKLR in which a similar position was held.

[16] Act No. 4 of 2015.

[17] {2014} e KLR.

[18] {2010} HCA 48.

[19] In *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36.

[20] Which has its source in certain observations by Gummow J in *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291.

[21] In *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45].

[22] {2018} eKLR.

[23] {2014} e KLR.

[24] Citing *East African Railways v Aviation Sefu Dar es salaam* HCCA No. 19 of {1973} EA 327.

[25] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[26] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[27] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[28] {2019} e KLR.

[29] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[30] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

[31] {2015} eKLR.

[32] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[33]Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd,* {1995} 1 All ER 129 (HL) at 157.

[34] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[35] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[36] {2004} ZACC 15*;* 2004 (4) SA 490 *CC* at 512, para 44.

[37] {1976} UKHL *6; {1976}* 3 All ER 665 *at 697*{1976} UKHL *6; ,* {1977} AC 1014 *at 1064.*

[38] 2000 (4) SA 674 *(CC)* at page 708; paragraph 86.

[39] *Trinity Broadcasting (Ciskei) v ICA of SA* 2004(3) SA 346 (SCA) at 354H- 355A Howie P

[40] {1995} B.C.J. 1763.

[41] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477.

[42]*Minister for Immigration and Multicultural Affairs Ex p Jia* (2001) 205 CLR 507 at 539, 551, 584 (distinguishing the standards expected of government ministers compared to other decision-makers); *Bell v CETA* (2003) 227 DLR (4th) 193 at 204-207 (distinguishing between the standards expected of courts and tribunals); PCCW-HKT Telephone Ltd v Telecommunications Authority [2007] HKCFI 129; [2007] 2 HKLRD 536 at 549 (distinguishing between an administrative authority and a tribunal); *Allidem Mae G v Kwong Si Lin* [2003] (HCLA 35/2002) at [39] (noting that the bias rule "must bear in mind the specific characteristics and actual circumstances of the Labour Tribunal").

[43] *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [37]- [39] (CA).

[44] *Anderton v Auckland City Council* [1978] 1 NZLR 657 at 680 (SC NZ); *Australian National Industries Ltd v Spedley Securities Ltd (in Liq)* (1992) 26 NSWLR 411 at 414 (NSW CA); *Re Medicaments and Related Classes of Goods (No 2)* [2000] EWCA Civ 350; [2001] 1 WLR 700 at [38] (CA).

[45] Groves, M. ***"The Rule Against Bias"*** **[2009] UMonashLRS 10**

[46] Ibid

[47] *See*, eg, *Sun v Minister for Immigration and Ethnic Affairs* [1997] FCA 1488; (1997) 151 ALR 505 at 551-552 (Fed Ct, Aust); *Gamaethige v Minister for Immigration and Multicultural Affairs* [2001] FCA 565; (2001) 109 FCR 424 at 443 (Fed Ct, Aust). *See also* Porter v Magill [2001] UKHL 67; [2002] 2 AC 357 at 489 where Lord Hope accepted that proof of actual bias was "likely to be very difficult".

[48] This expression of the bias test was suggested by the English Court of Appeal in Re Medicaments and Related Classes of Goods (No 2) [2000] EWCA Civ 350; [2001] 1 WLR 700 at 711 and adopted by the House of Lords in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The Australian test, which is explained below, also adopts an objective assessment and will be satisfied if there is a "possibility" that the decision-maker might not be impartial: *Ebner v Official Trustee* [2000] HCA 63; (2000) 205 CLR 337 at 345.

[49]Supreme Court No. 11 of 2016.

[50] {2009} U Monash LRS 10.

[51] [1993] UKHL 1; [1993] AC 646 at 670.

[52] Porter v Magil [2001] UKHL 67; [2002] 2 AC 357.

[53] See *McGuirk v University of New South Wales* 2010 NSWADTAP 66 paras 9 and 11; *PCL Constructors Canada Inc v IABSORIW Local No 97* 2008 CanLII 39763 (BCLRB) para 1.

[54] On the contrary, Burns and Beukes Administrative Law 303-304 think it is the other way round. For them, it is generally "a simple matter to identify actual bias since the administrator will reflect a closed mind to the issues raised." In their view, "a reasonable suspicion of bias or perceived bias is rather more complex"

[55] Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; Granpré J, *Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393. *Vakuata v Kelly* 1989 167 CLR 568 (HCA) is another example. The trial judge had made statements critical of the evidence given by defendant's medical experts in previous cases. The Australian High Court held that although no case of actual bias was made out against the judge, the remarks made by him would have excited in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him

[56] In Committee for Justice and Liberty v National Energy Board 1978 68 DLR (3d) 716 735 de Granpré J laid down what has become the trademark of public adjudication in modern Canada when he stated that: "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. … That test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.' Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?"

[57] In *Livesey v NSW Bar Association* 1983 151 CLR 288 293-294, the previous "high probability" test was supplanted by the reasonable apprehension test.

[58] De Smith Judicial Review 230

[59] *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire*; In *Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (Re Sapire).

[60] {1955} S.C.R. 834.

[61] *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576 (Finn J. at 587).

[62] Civil Appeal No. 266 of 1996 {1997} e KLR.

[63] {2004} 1 KLR 203-209

[64] See *Anthony John Dickson & Others vs. Municipal Council of Mombasa*, Mombasa HCMA No. 96 of 2000.

[65] {2015} e KLR.

[66] See *Halsbury Laws of England* 4th ed. Vol. 1. Para 89.

[67] See *Manyasi v. Gicheru & 3 Others, [2009] KLR 687.*

[68] See *Halsbury's Law of England, 4th Ed Vol. 1*