REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

HCJR/E003/2020

REPUBLIC.....APPLICANT

VS

ZACHARIA KAHUTHU & ANOTHER (SUED AS

TRUSTEES AND ON BEHALF OF AND AS OFFICIALS

OF THE KENYA EVANGELICAL LUTHERAN CHURCH).....RESPONDENT

AND

JOHANESS KUTUK OLE MELIYIO & 2 OTHERS..INTERESTED PARTIES

AND

BENJAMIN KAMALA & ANOTHER.....*EX PARTE* APPLICANTS

JUDGMENT

Introduction

1. The factual matrix which triggered these judicial review proceedings is partly uncontroverted. For example, it is common ground that the Kenya Evangelical Lutheran Church (herein after referred to as the Church) is a Society within the meaning of section **2** of the Societies Act[1] (herein after referred to as the Act). The Church is exempted from registration under section **9** of the Act. Pursuant to the said section, it was issued with Certificate of Exemption from Registration Number 1760 dated **30th** November 1991.

2. It is uncontested that on **17th** and **18th**December 2019, the Church held its **25th** General Assembly at Taveta Lutheran Church in Taveta Town. It is admitted that elections were held in the said assembly and the first and second Interested Parties, namely, Johanes Kutuk Ole Meliyio and Lennox Kombe Mwarandu were elected as the Presiding Bishop and Assistant Bishop of the Church respectively.

3. I find no contest that a section of the church membership were dissatisfied with the election results prompting the second Respondent to register an election dispute with the third Interested Party, namely, the Registrar of Societies, an officer appointed in accordance with section **8** of the Act to perform the duties and exercise the powers imposed and conferred upon his office by the said Act.

4. Aggrieved by the outcome of the said elections among other grievances cited later, the applicants herein, two members of the church, namely Benjamin Kamala and Elizabeth Ayungu, pursuant to this courts' leave granted on **14th** May 2020 moved this court vide Notice of Motion dated **16th** July 2020 seeking several orders against the Respondents, namely; Zachariah Kahuthu and Rev. Luke Nzioki Mwololo, both sued as trustees and on behalf of and as officials and members of the National Executive Council of the Church (herein after referred to aa NEC). The Bishop elect and his deputy, Johaness Kutuk Ole Meliyio and Lennox Kombe Mwarandu are named as the first and second Interested Parties respectively, while the Registrar of Societies is named as the third Interested Party.

5. The applicants seek the following orders from this court, namely: -

a. An order of injunction pursuant to section 11(1)(i) of the Fair Administrative Action Act, barring the Respondents, whether directly by themselves or their agents, or through the National Executive Council of the Kenya Evangelical Lutheran Church, or any other agent or organ of the National Executive Council of the Kenya Evangelical Lutheran Church from installing, handing over to or consecrating the first and second Interested Parties into the offices of Bishop and Assistant Bishop respectively.

*b. A **Declaration** in terms of section 11(2) of the Fair Administrative Action Act that the election of the first and second interested parties into the offices of Bishop and Assistant Bishop respectively held on 18th and 19th December, 2019 was not free and fair and is, therefore, a nullity.*

*c. A **Declaration** that the legislative and constitutional timelines set for the filing of election returns and installation of the first and second Interested Parties as Bishop and Assistant Bishop, respectively, have lapsed, and any such installation or consecration into office is ultra vires and an illegality.*

*d. A **Declaration** that the first and second Interested Parties have the duty to handover the affairs of their current offices and particularly financial accounts and the National Executive Council of the Kenya Lutheran Church has a corresponding duty to hold the first and second Interested Parties accountable before installing or consecrating them into office.*

*e. **An order of Prohibition** do issue to forbid and prohibit the Respondents and the Third Interested Party from presenting or receiving, respectively, any returns, or accepting, keeping or maintaining any records showing the first and second Interested Parties as the Bishop and Assistant Bishop of the Kenya Evangelical Lutheran Church.*

*f. **A prohibitory injunction** in terms of section 11(2)(c) of the Fair Administrative Action Act barring the first and second Interested Parties from exercising the powers and functions of or holding themselves out as the Bishop and Assistant Bishop of the Kenya Evangelical Lutheran Church on the basis of the elections held on 18th and 19th December, 2019.*

g. An order in terms of section 11(2)(c) of the Fair Administrative Action Act directing the Respondents through the National Executive Council of the Kenya Evangelical Lutheran Church to arrange and undertake a fresh all-inclusive, fair and peaceful elections of Bishop and Assistant Bishop.

*h. **That** the Court do issue such further and other reliefs that the Honourable Court may deem just and expedient to grant.*

The applicants' case

6. The applicants' case is that the elections held on **17th** and **18th** December 2019 in which the first and second Interested Parties were elected as Bishop and Assistant Bishop respectively were marred by grave irregularities which impeded the exercise of free will of the electoral delegates. They contend that the elections were undertaken in an atmosphere of fear and tension, hence they were a sham, not free, not fair and not credible, and no candidate can be said to have been validly elected.

7. They state under the Constitution of the Church, the Bishop and the assistant Bishop ought to have been installed into office within six months of the elections, which period lapsed on **17th** June 2020 and that the first and second Interested Parties are yet to be installed into office. They state that due to irregularities which marred the 2019 Church elections, the Church or its administrative organs were unable to certify any candidates as having been duly elected as Bishop or Assistant Bishop. As a consequence, they state that the Church did not file returns with the Registrar of Societies within **14** days provided under the Act.

8. They state that the Church, through its Secretary General, the second Respondent registered an election dispute with the third Respondent vide a letter dated **17th** January 2019 on grounds that the elections were unfree, unfair, a sham and Members were deprived the chance to contest various offices. Additionally, the applicants state that the NEC failed to put in place a candidate qualification criteria and procedure for nomination and selection of candidates that was free, open, transparent, determinate, definite and ascertainable.

9. They contend that the first Interested Party was handed over an account with a credit deposit of Kshs. 3.4 Million, out of which only Ksh. 2.7 Million has been transferred to a special account but the balance thereof has been the subject of endless promises. Also, they state that that the first Interested Party has impeded external audit of 3 units of the church. Further, they state that external auditors faced hostility in an attempt to audit the Jerusalem Parish for the period 2016-2018 and a partial audit revealed a loss of Kshs. 1.8 Million.

10. Additionally, the applicants state that the Jerusalem Parish under the first Interested Party undertook a construction in an untransparent manner. They contend that for over two years the said parish operated without a competent accountant, and that the first Interested Party declined to formally hand over before leaving the position of assistant Bishop. They state notwithstanding the unresolved issues relating to the first Interested Party's leadership and the disputed elections, a plan was afoot to instal him as the Bishop, and before lodging Form H with the Registrar of Societies. They contend that handing over the society to officials who have not been registered with the Registrar of Societies is an illegality.

11. Further, the applicants state that the Respondents' decision to proceed with the consecration of the first and second Interested Parties without complying with the requisite policies and procedures or without affording the congregants including the applicants the opportunity to participate in the process is irrational, unconstitutional, illegal, improper and that it was arrived at in bad faith and in breach of the principles of fair administrative action. Lastly, they state that they will suffer injustice and irreparable loss if the installation proceeds.

The Respondents' Response

12. Rev. Luke Nzioki Mwololo, the second Respondent swore the Replying Affidavit dated **5th** August 2020 on behalf of himself and the first Respondent in support of the applicant's case. He averred that he is the Secretary-General of the Church and its registered trustee and secretary to the NEC while the first Respondent, Zachariah Kahuthu was the Bishop of the Church at the time of filing this suit and the chairman of the church and the NEC.

13. He averred that on **2nd** November, 2019, the NEC met in Nairobi to *inter alia* propose candidates to vie for the positions of the Bishop and the Assistant Bishop respectively. He deposed that under Regulation **1 (2)(c)** and **(2)(d)(i)** of the Church's Constitution, the NEC proposes between two and four persons to vie for the position of the bishop and assistant bishop respectively. He deposed that the NEC proposed the Rev. Gideon Mang'oka and Rev. Johannes Ole Meliyio, the 1st Interested Party herein to vie for the position of the Bishop. Additionally, he deposed that the church Constitution does not provide for persons aspiring for the office of the Bishop or the Assistant Bishop to apply for the said positions because under the Constitution, only the NEC proposes persons for the two offices.

14. Rev. Mwololo deposed that on the **17th** and **18th** December 2019, the church held its General Assembly at the Taveta Lutheran Church in Taveta town, but on arrival, the officials and the delegates found a contingency of security officers stationed at the venue. He deposed that he noted strangers among the delegates among them a Mr. Moses Sikuta, advocate and after the day's business, the first Respondent, as the Chairman of the NEC convened an emergency sitting of the NEC to consider (a) an inflammatory e-mail authored by a Rev. Lucas Tapwai circulated to a section of the church membership excluding the sitting officials of the church, and (b) to inquire who had requested for security officers, and, (c) why there were strangers in the meeting. Rev. Mwololo averred that the above e-mail was authored by a staunch supporter of the first Interested Party alleging that there were plans not to hold the General Assembly; that the first respondent did not want to leave office; and that there would be violence in the General Assembly.

15. Further, he deposed that on **18th** December, 2019, the security personnel reported to the venue prompting him and others to proceed the Taveta Police Station to enquire why there were police officers in the meeting and that the officer in charge told them Mr. Moses Sikuta, advocate claiming to be representing some unnamed members of the church had requested for police and a permit to hold a meeting at the same date and venue. Rev. Mwololo deposed that the law firm of Ding'i & Ding'i Advocates acting for an unnamed church members had asked for security officers to be deployed at the meeting yet the officers of the church had not given such instructions. He averred that the same law firm had written to the third Respondent requesting for a copy of the church

constitution.

16. He deposed that they informed the police that theirs was a peaceful church gathering hence they did not require any security personnel, but the officer informed them to go in peace and that the police officers would be deployed to the venue if the need arose. He deposed that Rev. Gideon Mang'oka informed him that on **18th** December 2019 as the meeting was proceeding, he received a threatening call from Moses Sikuta advocate stating that if the elections did not proceed, he would mobilize media houses to cover the event.

17. He averred that upon consulting the first Respondent and other senior church leaders, it was resolved that it was prudent to allow the elections to proceed to avoid a flare up, and the first and second Interested Parties were elected as the Bishop and the Assistant Bishop respectively. Further, he deposed that the elections though seemingly peaceful were not free and fair because- (a) candidates for the positions of the Bishop and the Assistant Bishop do not apply for the positions nor are they vetted but they are proposed in a sitting of the NEC. (b) that Members not proposed by the NEC have no opportunity under the constitution to apply to be considered. (c) that the Church constitution doesn't have provisions and mechanisms to vet and interview those selected as candidates for the elections for the Bishop and the Assistant to the Bishop. (d) that the constitution of the church doesn't have provisions and mechanisms for members to object to the persons proposed as candidates to the elections of the Bishop and the Assistant to the Bishop. (e) that there were external forces and influences deployed at the elections to create fear, intimidation and to coerce church officials, and, (f) that a candidate for the position of the Bishop is supposed to be a blameless person which is not the case in the subject elections.

18. Rev. Mwololo deposed that the Respondents were prevailed by church members to investigate who was behind the happenings at the general assembly and the NEC was to make a decision. He deposed that on **13th** January, 2020, the Respondents received a letter from the chairman of the Transition Committee, a sub-committee of the NEC that had been tasked to oversee the transition demanding that returns be filed with the third Interested Party or the *ad hoc* Transition Committee of the NEC would proceed to file them.

19. Rev. Mwololo deposed that the Respondents reply was that the said committee had no powers to file the returns, a function statutory ordained to the sitting officials. He deposed that the Respondents reported the dispute to the third Interested Party seeking his intervention under sections **17** and **18** of the Act because the elections were a sham and did not meet the legitimacy test, but they have never received any response. He deposed that in January, 2020 they learnt that a supporter of the first Interested Party was behind all what transpired in the aforesaid meeting.

20. He deposed that he scheduled a meeting for **4th** April 2020 to internally resolve the dispute but on **1st** April, 2020, the government imposed restrictions on movements into and out of Nairobi making it impossible to hold meetings. Additionally, he deposed that from May to June, 2020, the Respondents were under pressure from a one Rev. Balozi Mrutu, the Chairman of an *ad hoc* committee of the NEC tasked with planning the leadership transition and a Mr. Lucas Matiko to install the Interested Parties disregarding:- (i) that it was impossible to organize such a monumental event due to the Covid-19 menace; (ii) the existence of movement restrictions would lock out hundreds of persons from attending the event. (iii) that it was not possible to convene a sitting of the NEC to consider the report and the plans of the Transition Committee.

21. Rev. Mwololo deposed that on **4th** June, 2020 he wrote to NEC members informing them that the planned installation would be postponed due to the prevailing health and safety conditions and movement restrictions, but pressure intensified from the Chairman and the Secretary of the Transition committee and the first Interested Party to proceed with the installation. Further, he deposed that Rev. Balozi Mrutu and Lucas Matiko, (the chairman and the secretary of the *ad hoc* Transition Committee) and the first Interested Party usurped and arrogated to themselves powers they did not have and sidelined the other members of the Transition Committee and the existing officers of the church by :- (a) taking over the role of communicating with persons in and out of the church, a role constitutionally vested upon the Respondents; (b) decided the installation date disregarding the outstanding matters against the first Interested party; (c) sending out invitations for the planned installation; and, (d) taking over the entire installation process, a task not allocated to them by NEC or the church. He deposed that the Respondents and a large constituency of the church and other leaders and officers of the church did not participate in the illegal installation conducted by persons not recognized under the church constitution.

22. Further, he deposed that the chairman and the secretary of the Transition Committee and other persons illegally installed the first and second Interested Parties in total breach of the church constitution because the church administration and its leadership were totally sidelined contrary to Regulation **1 (2)(d)(vii)** of the Church constitution which dictates that the installation into office of the

bishop shall be conducted by the outgoing bishop or by a dean nominated by the General Assembly assisted by other deans.

23. Further, he deposed that the installation was conducted in secrecy and it was attended by few persons invited by the first and second Interested Parties. Additionally, he deposed that the installation was conducted by Bishops Dr. Fredrick Shoo and Dr. Rev. Solomon Masangwa from the Evangelical Lutheran Church in Tanzania in total disregard of the Church constitution. Additionally, he deposed that the ceremony started before **8am** and ended before **9am** which was not the time indicated in the invitations thereby locking out many people. He averred that the electoral process was carried out in a casual, oppressive and irregular manner, it lacked credibility, transparency, inclusion, fairness and freedom.

24. Rev. Mwololo averred that sometimes in February, 2019, the church engaged external auditors to audit its **14** administrative units, including Jerusalem Parish which was under the leadership of the first Interested Party who is yet hand over its operations. He deposed that it was the duty of the first Interested Party as the pastor in charge to ensure that the parish books of accounts are ready for auditing and to avail the required books. Rev. Mwololo deposed that upon learning that the installation was planned for **12th** July, 2020, he wrote to the first Interested Party asking him to prepare a comprehensive handing over report before his installation, but he refused to do.

25. He averred that an emergency sitting of the Standing Committee of the NEC convened on **27th** June, 2020 and **8th** July, 2020 to deliberate on the first Interested Party's handing over resolved that the first Interested Party hands over the affairs of the Jerusalem Parish, but this is yet to happen and that the first Interested Party has failed to satisfactorily answer the grave concerns raised about his integrity. Lastly, Rev. Mwololo averred that the first Interested party has jeopardized the image of the church by condoning lack of integrity, accountability and transparency.

First and second Interested Parties Replying Affidavits

26. Mr. Johness Kutuk Ole Meliyio, the first Interested Party swore the Replying Affidavit dated **4th** August 2020 on behalf himself and the second Interested Party. He deposed that this suit is aimed at curtailing their efforts to assume their elective positions despite adherence to the proper procedures. He deposed that judicial review is not the proper process to challenge elections because oral evidence cannot be adduced and be put to test by way of cross-examination.

27. Further, he deposed that the applicant's suit offends the mandatory doctrine of exhaustion of internal dispute resolution mechanism espoused in Article **23** of the Church constitution. He deposed that the issues raised in the instant application do not fall within the purview of Judicial Review to warrant this courts adjudication as they are private issues of domestic nature. Additionally, he deposed that the suit is incurably defective and incompetent for lack of authority to swear on behalf of the second applicant thus flouting mandatory provisions of Order **1** Rule **13** of Civil Procedure Rules, 2010.

28. Mr. Ole Meliyio, deposed that the first applicant is a foreigner (Tanzanian) who was never present during the elections hence his averments are grounded on hearsay and ought to be disregarded while the second applicant suffers memory loss hence her capacity to sue is questionable. He averred that during General Assembly held on **17th** and **18th** December 2019 he was duly elected as the Presiding Bishop of the Church while the second Interested Party was elected as the Vice Presiding Bishop. Further, Mr. Ole Meliyio averred that the applicants never raised any issue regarding the elections but only raised the same upon instituting this suit, and that the elections were conducted in accordance to Article **10 (6)** and Article **32** Regulation **(a) (2)** of the church Constitution and he won with over **90%** or over 2/3 required votes.

29. He deposed that the requisite process were followed, namely, that they were among the names that were nominated by an the Independent Select Committee of the NEC and they were presented to the NEC meeting on **4th** May 2019 and upon being evaluated, they met the threshold for the positions of Presiding Bishop and Vice Presiding Bishop as confirmed by the minutes of the NEC meeting held **7th** of July 2019, over six months before the General Assembly which afforded sufficient time for objections to be raised. Additionally, he deposed that their names were announced throughout the Church more than two months before the scheduled General Assembly. Further, he deposed that they were elected by more than two-thirds of members present and voting.

30. Mr. Ole Meliyio deposed that the applicant's annexures marked as **BK-2** described as financial audit by Board of Trustees, Jerusalem Parish have no evidential value as there is no such body within church. Also, he deposed that the said documents are undated, unsigned, unstamped and the Parish Council Members wrote a disclaimer on **28th** July 2020. He deposed that the allegation that the elections were marred with irregularities are based on rumors, conjecture and ulterior motives.

31. Further, Mr. Ole Meliyio deposed that the difficulties in ascending to their elected offices can be attributed to the second Respondent's deliberate action or inaction to forward their names to the third Interested Party for registration. He deposed that the Respondents were served with a letter by the transmission Committee to forward the election returns to the third Interested Parties but the Respondents opted to file a defamatory letter to the registrar in total disregard of the church constitution and the Act. Additionally, he deposed that after the Respondents abdicated their duty, the Church Transitional Committee in conformity with the Church Constitution forwarded the names of the first and second Interested Parties to the third Interested Party for registration on the **23rd** July 2020.

32. He averred that whereas Regulation **10** of the Constitution provides that they be installed within six (6) months after elections, the same is not couched in mandatory terms but it gives room for flexibility where circumstances permit thus the installation done on **12th** July 2020 conformed with the Church constitution and the standing committee resolution of **27th** June 2020.

33. Mr. Ole Meliyio deposed that on the **11th** July 2020, the first Respondent indicated to the visiting Bishops that he was indisposed and he voluntarily signed a letter authorizing Archbishop Most Rev. Dr Fredrick O. Shoo, the Chair of Lutheran Communion of Central and East Africa and the head of Evangelical Lutheran Church of Tanzania, (Bishop Dr Solomon Massangwa, Bishop Dr Jacob Mameo Ole Paolo), to consecrate and install them on **12th** July 2020 in fulfilment of the Lutheran Doctrine (See letter marked "JK-8.")

34. He averred that the Dean Rev. Balozi Mrutu of Central District and the Chair of the Church Transition committee in fulfilment of Article **32** Rule **(a) (2) (vii)** installed them assisted by all Church Deans, Pastors and members of NEC in the full glare of Lutheran faithful and the public. Further, he deposed that on the **12th** July 2020 at around **8:30** a.m., the second Respondent accompanied by a contingent of police officers led by Inspector Richard Arap Kandie and Police Commissioner Abas Diba from Jogoo Police Station stormed Jerusalem Cathedral where the Holy and Apostolic service of their consecration and installation was taking place to arbitrary and illegally stop the event but it turned out that he had misled the said police and they left with him for questioning.

35. He deposed that the retired Presiding Bishop, Zacharia Wachira Kahuthu has blatantly breached mandatory Regulation **10 (a) (2)** which requires one to serve for not more than three terms of four years each having been in office since 1991 as head of Church, a period of **29** years as Presiding Bishop and still he did not intend to vacate office. Additionally, he deposed that the first and second Respondents rein has been marked by high handedness eliciting demonstrations and accusations of mismanagement of church assets and accusing the leadership of Bishop Zakaria Kahuthu Wachira of dictatorship and opaqueness in the management of the church's assets hence the reason why the first and second Respondent don't want changes in the office.

36. Mr. Ole Meliyio averred that pursuant to Article **10** of the Constitution, only the General Assembly has the final decision regarding all matters concerning leadership thus the Respondents or the applicants have no powers to invalidate elections. He deposed that the second Respondent as shown by annexture KN-12 is the Deputy Secretary-General and not the Secretary-General as mis-represented by the applicants. Further, he deposed that Rtd. Bishop Kahuthu without the authority of the General Assembly single-handedly appointed the second respondent as Secretary-General in breach of Church Constitution and the Act, and despite his term having ended on **18th** December 2019, he signed the said letter.

37. He averred that as admitted by the applicants, he was nominated by the NEC as per the Constitution and that the applicants never raised objections. Further, he deposed that annexures marked as **BK-3**, **BK-5**, **BK-8,** and **BK-9** purported to be minutes are unsigned, undated and unstamped hence they are of no evidential value. Further, he deposed that the audit by Ochako and Associates is a nullity as they were handpicked by the second Respondent in blatant violation of Article **10 (15)** of Church Constitution.

38. Additionally, he deposed that the averment that the meeting was fast-tracked is preposterous as it was convened over six months after the elections and the applicants and Respondents were in attendance and due to COVID-19, it was virtually held through zoom to beat set constitutional deadlines and threshold. He also deposed that whereas Regulation **1(2) (d)(viii)** is not couched in mandatory terms, a notice was issued for the installation and the provision does not require the attendance of all members but requires it to be done in compliance of the Church constitution.

39. He deposed that police services were sought because the congregants were alarmed by the second respondent's inflammatory and derogatory remarks made at Ngatu congregation of Olkeriai Parish on the Sunday **8th** December 2019 prior to the General Assembly and that no one was threatened. He averred that the congregants and church safety is paramount and involvement of the

law enforcement was necessitated by threats from the then office bearers. Also, he deposed that the Rtd. Bishop Zacharia and the Respondents were using vulgar and threatening language. Lastly, Mr. Ole Meliyio deposed that he was duly vetted, that he qualifies to be elected, and that all relevant notices were issued for the elections and no one was turned away during elections thus the applicants' claims are not legitimate.

Third Interested Party's Replying Affidavit

40. Maria Goretti Nyariki, an advocate of the High Court of Kenya, a Principal State Counsel and Ag Registrar of Societies at the office of the Attorney General swore the Replying affidavit dated **5th** August 2020 in opposition to the applicants' case. She deposed that she is in charge of the Societies Section and she is conversant with the matters pertaining to the registration and regulation of societies under the Act and conversant with the matters giving rise to these proceedings.

41. She averred that the church is registered under the Act, and that the third Interested Party does not intermeddle with internal affairs of societies but only intervenes after a complaint is lodged under section **18** of the Act. She deposed that the Interested Party received a complaint letter on **17th** January 2020 from the Secretary of the Society citing various complaints regarding the elections held on **17th** and 1**8th** December 2019. She averred that the letter alleged that the first Interested Party Mr. Johaness Kutuk Meliyio was elected as the Chairperson of the Society in elections held under circumstances that constituted misrepresentation, propaganda, intimidation, fear mongering and veiled threats.

42. Additionally, she deposed that the said letter requested the third Interested Party to intervene in the dispute under section **18** of the Act. She averred that the third Interested Party wrote to the society on **3rd** February 2020 requesting the Chairperson to respond to the complaint, but to date the third Interested Party is yet to receive a response. As a result of the foregoing, she deposed that this suit is pre-mature because the issues raised are pending determination before the third Interested Party, and that by filing this suit the applicants have by passed a clear procedure for redress provided under the Act.

Respondents' further affidavit

43. Rev. Luke Nzioki Mwololo, the second Respondent swore the further affidavit dated **2nd** September 2020 in reply to the first and second Interested Parties' Replying Affidavit. He deposed that the Respondent acted within the law by notifying the registrar about the dispute, and that completing and submitting Form H is a statutory function of the elected officials but not the newly elected officials. He denied that the first Respondent was indisposed as alleged and averred that they did not participate in the consecration and installation because on **11th** July, 2020 they were served with suit papers in this case and a letter cautioning them that the consecration and installation would be contemptuous. Further, he deposed that they were not involved in the planning of the consecration, instead they we were treated as bystanders and spectators. Further, he averred that he signed the note marked as annexure JK-8 through coercion.He averred that under Regulation **1(a)(2)(vii)** of the Church constitution, installation of a bishop is done by his predecessor or a serving dean in the church assisted by other deans, and that the first Respondent had no powers to delegate or permit persons not mandated by the church constitution to perform the installation and consecration.

44. Rev. Mwololo deposed that the impugned consecration was stealthily done before 9 am, the time that had been officially communicated and that no resolution was passed by the General Assembly as required under Regulation **1(a)(2)(vii)** appointing the Rev. Balozi Mrutu to install the first and the second Respondents into office. He deposed that the consecration and installation of the Interested Parties was done by unauthorized persons, that the first Interested Party is yet to hand over the affairs of his former thus creating an unacceptable precedent that a member of the clergy can ignore church policies and regulations without facing any consequences.

45. Further, he deposed that the church auditors were never hand-picked but were appointed competitively. He averred that this case is not about the suitability of the auditor or how they were appointed and that such considerations cannot override weighty issues of financial accountability and transparency raised in this suit. Lastly, Rev. Mwololo deposed that the Respondents did not procure or request for any security in the Annual General Meeting nor did they apply for any permit.

Applicant's supplementary affidavit

46. Benjamin Kamala, the first applicant swore the supplementary affidavit dated **25th** August 2020 in reply to the Replying Affidavits filed by the Interested Parties. He deposed that the first and second Interested Parties have not demonstrated the

alternative dispute resolution mechanisms they are referring to. He averred that Article **23** of the Church Constitution only refers to disputes between a pastor and his parish members and has nothing to do with the leaders in the highest offices of the Church. Lastly, he averred that the applicants approached this court after attempting to resolve the matter internally and that the allegation that the second Interested Party is mentally unstable is not backed by medical evidence.

Determination

47. I have carefully considered the diametrically opposed positions presented by the parties and the written and oral submissions made by their respective advocates. I find that the issues discussed below distil themselves for determination. I now proceed to address the said issues sequentially.

48. *First*, is the issue whether this case is a "civil dispute" disguised as a "Judicial Review application." Despite the fact that this case can stand or fall on this issue, the applicants' counsel Mr. Kimuli did not address it at all. In order to put the issue under consideration into proper perspective, it is necessary to highlight the pith and substance of the applicants' case. In this regard, I cannot think of a better way of doing it than reproducing a few paragraphs from the applicants' verifying affidavit sworn by Rev. Luke Mwololo:-

*4.**That** the purported elections were marred by grave irregularities, and were carried out in an atmosphere of fear and tension, all attributable to the first Interested Party. The elections were, therefore, a sham, not free and fair, and not credible. The irregularities were so grave that they impeded the exercise of the free will of the electoral delegates with the consequence that no candidate could be said to have been validly elected out of such a process.*

Dispute

*6.**That** due to the irregularities that marred the General Assembly of the Church and particularly the 2019 Church elections, the National Executive Council of the Church, as the highest administrative organ of the Church, was unable to certify any candidate as having been duly elected Bishop or Assistant Bishop.*

*7.**That** as a direct consequence of the irregularities that affected the outcome of the 2019 elections, the Church did not file with the Registrar of Societies, the Third Interested Party, the returns of the elections within 14 days as required by the Societies Act. …*

*8.**That** instead, the National Executive Council of the Church… registered an election dispute with the Registrar of Societies through a letter dated 17th January, 2019. In the letter shown to me, the second Respondent stated that the elections of the first and second Interested Parties were not free and fair and were a sham. …*

*9.**That** from the outset, the National Executive Council of the Church failed to put in place a candidate qualification criterion and procedure for nomination and selection, of candidates that was free and fair, open, transparent, determinate, definite and ascertainable.*

*10. **That** over and above failing to afford a fair chance to members of the Church to seek high office, the National Executive Church Council through their omissions, nominated the first Interested Party for election to the office of the Bishop of the Church, knowing very well, or having reasons to believe that he was not suitable or qualified for that office and as such cannot be installed to that office due to the following reasons:-*

a. South C Congregation's Money

b. Impeding the Carrying out of External Audit

c. Church Construction Without Contract or Proper Records

d.Failure to Engage an Accountant, Book Keeper or Treasurer

e. Handing Over

49. The nub of the above averments is that the applicants are challenging the validity of the subject elections. They are also questioning the suitability of the elected persons. They are impugning the election process and the nomination process. They are aggrieved by the first Interested Parties conduct during his previous office. They are assaulting his character and integrity. They also arguing that the Bishop and the assistant Bishop were not installed within 6 months as the Constitution provides. It is their case that due to irregularities which marred the elections, the Church was unable to certify any candidates as having been duly elected. They contend that the Church did not file returns with the Registrar of Societies within **14** days as required by the Act, and that NEC failed to put in place a candidate qualification criteria and procedure for nomination and selection of candidates that was free, open, transparent, determinate, definite and ascertainable.

50. The applicants claim that the first Interested Party failed to account for church funds. They accuse him of impeding external audit on 3 units of the church. They allege a loss Kshs. 1.8 Million attributed to the first Interested Party. They argue that he undertook a construction in an untransparent manner. They complain that he operated without a competent accountant for two years. He is accused of failing to hand over before leaving his previous position. They allege Form H was signed by unauthorized persons. Lastly, they contend that the congregants were deprived the opportunity to participate in the process hence they will suffer injustice and irreparable loss if the installation proceeds.It is these arguments that the applicants have presented as a judicial review proceeding.

51. Mr. Waweru, counsel for the Respondents saw nothing wrong with applicants' case as far as the issue under consideration is concerned. Supporting the applicant's case, he submitted that the General Assembly was held in a tense environment because there was police presence throughout the meeting and an inflammatory e-mail had been circulated to a section of the delegates and church leadership. He described the elections as shambolic. He argued that no person can be said to have been validly elected because the elections were a sham, and that a parallel General Assembly had been requisitioned at the same venue and that the police and other strangers in the meeting were not invited by the church officials. He cited alleged calls to a one Rev. Gideon Mang'oka demanding the elections to proceed if not the media would be invited to cover the event which he argued was intimidating.

52. Mr. Waweru further argued that the second Respondent was under duress and coercion from the supporters of the first Interested Party to ensure the installation proceeded regardless of the pending dispute and the complications caused by the Covid-19 pandemic. He argued that the installation was null and void, and, that, under the Act, some duties and functions are vested on the duly elected officials to ensure there is good order, hence non-office holders cannot arrogate to themselves powers of the society's officials. He argued that the General Assembly did not nominate any dean to conduct the installation as required by the Constitution, hence, the installation was illegal.

53. Mr. Dingi, counsel for the first and second Interested Parties was of a different view. He argued that elections cannot be challenged by way of judicial review. He cited *Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others,*[2] *Municipal Council of Mombasa v Republic and Another*[3] and *Republic v Kenya Revenue Authority exparte Yaya Towers Ltd*[4] in support of the proposition that judicial review is only concerned with the decision-making process, and not merits of the decision. He argued that the grounds cited in the application are that the elections were sham, failure to install the Bishop and his assistant within six months, alleged administrative dissatisfaction with elections outcome and lack of integrity. He relied on *Republic v Registrar General & 2 others Ex-parte Thomas Asiago & 2 others*[5] for the holding that resolving such issues requires oral evidence which is within the purview of civil litigation. Additionally, he relied on *Republic v Minster of State for National Heritage &Amp; Culture & Amp; 2 Others Ex-Parte National Council of Non-Governmental Organizations &Amp; Another*[6] which addressing a similar dispute held that since some parties did not agree with the elections and the suit challenged the election results, the court had no jurisdiction to deal with the merits of the elections. He argued that the applicants are inviting this court to determine the merits of the election process and the eligibility of the first and second Respondents which are matters of evidence. Mr. Dingi submitted that in Judicial Review proceedings, the court exercises special jurisdiction which does not permit examination of merits of the process leading to the decision. He relied on *Mohammed Maalim v. Registered Trustees of the Agricultural Society of Kenya.*[7]

54. Nevertheless, Mr. Dingi submitted that the first and second Interested Parties have demonstrated how they were elected in accordance to Article **10 (6)** and Article **32** Regulation **(a) (2)** of the Constitution whereby they overwhelmingly emerged victorious with over 90% or over 2/3 required votes. He argued that the first Respondent was present during the elections and he took minutes as the secretary and that the returning officer, a German Missionary Rev. Johannes Loflller relayed the results to the Respondents in full glare of the General Assembly in accordance Article **32, R.1, (a) (d) (v)** of the Constitution without any contestation. He urged the court to decline jurisdiction citing *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.*[8]

55. From the grounds in support of the application summarized earlier and the excerpts reproduced from the applicants' verifying

affidavit, it is clear that the applicants are challenging the validity of the elections held on **17th** & **18th** December 2019. They describe the elections as a sham. They say the elections were not free and fair. They challenge the eligibility of the candidates and the nomination process. As alluded earlier, they are citing integrity issues against the candidates. Sincerely, the said allegations require evidence to be proved on a balance of probabilities. This cannot be done in a judicial review proceeding.

56. It is elementary 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 above facts to be proved or disapproved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions.[9] This position has been up held by our superior courts on numerous occasions. In *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo*[10] it was held: -

"55. … 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)

57. Judicial review looks into the legality of the dispute not contested matters of evidence. To reconcile the diametrically opposed positions presented in this case, it is necessary for the court to hear oral evidence, which is outside the scope of judicial review jurisdiction. Further, as stated later, determining the said issues will involve a merit review, a function that is outside the purview of Judicial Review jurisdiction.

58. The applicants are simply inviting this court to determine contested issues of facts without hearing evidence. This court cannot do so. It is a dangerous invitation to this court to determine a strictly civil dispute without hearing evidence. The core dispute as stated above is: - (a) the validity of the nomination process, (b) the validity of elections and its outcome, and; (c) the suitability or otherwise of the candidates who were elected. How can this court determine issues of fact without hearing oral evidence" 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. The validity of the elections is essentially a matter to be resolved by way of evidence, which is the province of a civil court hearing a challenge on the validity of the elections and the subsequent installation of the elected persons. The applicants ought to have filed a civil case as opposed to judicial review proceedings.

59. I am fortified by *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another*[11] 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)

60. Also relevant is *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[12] which held 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.*** *..."(Emphasis added)*

61. The above excerpts illuminate the legal position with sufficient clarity and settle the issue at hand. In *Republic v Registrar of Societies & 3 others ex parte Lydia Cherubet & 2 others*[13] 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.[14] On this ground alone, the applicant's case collapses.

62. *Next,* I will address the issue whether this court is divested of jurisdiction to entertain this case by virtue of the doctrine of exhaustion of remedies. Put differently, the question here is whether this case offends the doctrine of exhaustion of remedies.

63. Mr. Kimuli, the applicants' counsel submitted that the Church Constitution has no provisions governing how the questions raised in this case can be expeditiously, adequately and conclusively addressed. He argued that the remedies sought are stopping the installation of the first and second Interested Parties as Bishop and Assistant Bishop respectively; a declaration that the elections were not free and fair, a declaration that time lines for filing returns with the third Interested Party and installation of the first and second Interested Parties had lapsed, a declaration that the first and second Interested Parties have an obligation to hand over the affairs of their current offices, especially the financial accounts, and an injunction barring the first and second Interested Parties from holding themselves out as Bishop and Assistant Bishop on the basis of the flawed elections.

64. Mr. Kimuli submitted that first and second Interested Parties objection based on the issue under consideration is misconceived, has no merit and the same ought to fail because there were no local remedies capable of resolving the matters before this court. He argued that the local remedies available, (whether through the Church administration or through the office of the Registrar of Societies), were not feasible because the applicants learnt about the planned installation less than four days before its scheduled date. He submitted that the only relief available is from this court. He argued that the Interested Parties do not propose any other reasonable and fair option of resolving the dispute. He maintained that there is no reasonable procedure of resolving the matters raised in the church constitution or any law. He cited **Article 47** of the Constitution which provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

65. Mr. Kimuli acknowledged the pending dispute before the third Interested Party but argued that no action has been taken by the third Interested Party, and that the third Interested Party cannot issue the injunction orders sought. He submitted that had there been a local remedy or procedure that would adequately address the applicants' concerns and offer a solution expeditiously, that path would have been taken. He relied on *Mohammed Ali Baadi & Others v Attorney General & 11 Others**[15]*** which held that-*"…a remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of no-exhaustion of local remedies will, therefore, be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case...."*

66. Mr. Kimuli submitted that the requirement to exhaust any remedy, is not cast in stone. He added that this court is clothed with the discretion, jurisdiction and power to exempt the obligation to exhaust any remedy. He cited section **9 (4)** of the Fair Administrative Actions Act[16](herein after referred to as the FAA Act) which provides that: -

"(4) Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

67. Mr. Kimuli placed further reliance on *Republic v The Commissioner of Lands Ex parte Lake Flowers Limited* [17] which held that availability of other remedies is not a bar to the granting of the judicial review relief and *John Fitzgerald Kennedy Omanga v The Postmaster General Postal Corporation of Kenya & 2 Others**[18]*** which held the even though judicial review is a remedy of last result, an applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Lastly, Mr. Kimuli submitted that the Interested Parties ought to have cited the procedures that would have conclusively resolved the questions raised in this case if at all they were persuaded that there were such remedies. He argued that Article **23** of the Church Constitution deals with matters between Pastors in a parish while sub Article **4** expands the application of the section to matters between a pastor and his parish members.

68. The Respondents' counsel Mr. Waweru supported the applicants' position. He submitted that even though the Respondents lodged a dispute with the third Interested Party on **17th**January, 2020 under Section **18** of the Act, they did not receive a response to their complaint. He argued that they only saw the third Interested Party's reply in these proceedings' contrary to section **50** of the Act which provides that every order, notice, summons or other document issued under the act shall be validly served on a society, if it is sent by registered post addressed to it at its registered postal address.

69. Additionally, Mr. Waweru argued that section **18** of the Act provides that if the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society

to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.

70. Mr. Waweru submitted that the Church constitution does not have express provisions on how disputes on elections and other conflicts are to be resolved, and that the Respondent could not convene the NEC due to challenges posed by the COVID19, and that the audit queries can only be answered by the Interested Parties. He argued that attempts to use internal mechanism were frustrated by the prevailing difficulties in the country among them restrictions in movement.

71. Mr. Dingi, counsel for the first and second Interested Parties argued that this suit is pre-mature. He relied on *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 Others**[19]*** for the holding that a court of law cannot arrogate jurisdiction to itself. He argued that despite the pendency of the complaint before the third Interested Party, the applicants rushed to this court disregarding Article **23** of the Church Constitution and section **18** of the Act. He cited *Speaker of The National Assembly v Karume*[20] in which the Court of Appeal stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

72. Additionally, Mr. Ndingi cited *Republic v Registrar of Societies & 7 others Ex-parte Njuri Ncheke Supreme Council of Ameru Elders***[21]**where the court declared a similar suit premature for failing to exhaust the dispute resolution mechanism provided under the Act. He also cited *East Africa Pentecostal Churches Registered Trustees & Others v Samwel Muguna Henry & 4 Others**[22]*** in which the High Court upheld the requirement to exhaust local dispute resolution mechanism before approaching the court. He submitted that the applicants have not demonstrated the existence of exceptional circumstances to justify by-passing the mechanism provide by the Act.

73. Mr. Mukuvi, counsel for the third Interested Party submitted that this suit offends section **18** of the Act which mandates the Registrar to make a determination in cases where a dispute occurs among officers of a society.He submitted that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed**.** (Citing *the Speaker of the National Assembly vs Karume***[23]** and *Kones v Republic & Another Ex Parte Kimani wa Nyoike & 4 Others***[24]***).* He argued that section**18** of the Act provides an opportunity for feuding officers or members of a society to resolve their dispute as envisaged under Article **159 (2) (c)** of the Constitution.

74. Before addressing the question of exhaustion, I propose first to comment on two authorities cited by Mr. Kimuli in support of his plea to justify the applicants' act of bypassing the dispute resolution mechanism established under the Act. It is succinct position of law that precedential verdicts are to be followed where the facts of the case are almost identical in nature or the question of law involved is identical. A case is only an authority for what it decides. This is correctly captured in the following passage: -[25]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)

75. The ratio of any decision must be understood in the background of the facts of the particular case.[26] A case is only an authority for what it actually decides, and not what logically follows from it.[27] A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[28]

76. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[29]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[30] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[31] My plea is to keep the path of justice clear of obstructions which could impede it.

77. Mr. Kimuli placed heavy reliance on *Republic v The Commissioner of Lands Ex parte Lake Flowers Limited* [32] which held that availability of other remedies is not a bar to the granting of a judicial review relief and *John Fitzgerald Kennedy Omanga v The Postmaster General Postal Corporation of Kenya & 2 Others* [33] which held the even though judicial review is a remedy of last result, an applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less

appropriate. Notably, these two cases are pre-2010 decisions. Their precedential value is in doubt because the promulgation of the 2010 Constitution fundamentally shifted the legal landscape in this Country. To operationalize Article **47** of the Constitution, Parliament enacted the FAA Act. I will shortly discuss the doctrine of exhaustion under the said Act. For now, it will suffice to mention that the said Act enjoys a constitutional underpinning.

78. Mr. Kimuli also relied on *Mohammed Ali Baadi & Others v Attorney General & 11 Others.*[34] I had the privilege of sitting in the bench which determined this case and the facts and the law addressed in the said decision are still fresh in my mind. The said case fell into a rare species of hybrid cases involving issues cutting across various branches of the law. It raised various constitutional issues among them the right to a healthy and clean environment, social economic rights, cultural rights, fishing rights, marine life, the right to public participation, compensation for disrupted fishing income, destruction of coral reefs which are breading grounds for fish, destruction of mangrove forests which offer natural protection to the shoreline from erosion by sea waves and also serve as breading grounds for fish, turtles among others, and failure to conduct environmental impact assessments and or failure to involve the public in the conception and development of the project. Also, under challenge was alleged failure by the developer to adhere to conditions imposed by the National Environment Authority and or failure to take precautionary measures. Also implicated were UN cultural and Heritage protected sites and alleged violation of fundamental rights. Other issues included failure to involve the County Government. The question here was whether an effective remedy could be obtained from the National Environment Tribunal whose jurisdiction is limited by statute. The answer was a resounding no, hence the excerpt relied upon by Mr. Kimuli. The other issue was whether the matter should have been filed in the Environment and Land Court. Again, after weighing the multiplicity of issues involved in the case, the court held that the case was hybrid in nature and applied the dominant test in concluding that the vast of the issues fell within the jurisdiction of the High Court and it was not possible to adopt a separationist approach. That was the background upon which the court appreciating the breadth and width of the issues confronting it pronounced the excerpt relied upon by Mr. Kimulu. The hybrid issues manifested in the said case cannot be compared with the narrow issues presented in this case nor can the dominant test apply. In fact, the dominant issue in this case is one, namely; a disputed election. Put simply, the cited case has no application or relevance to the issues presented in this case. I say no more.

79. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself.[35] The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine has been upheld by our superior courts in numerous decisions such that it is now of esteemed juridical lineage in Kenya.[36] The doctrine was felicitously stated by the Court of Appeal in *Speaker of National Assembly vs Karume,*[37] (supra) a pre-2010 decision in the following words: -

"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

80. Many Post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution. The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others*[38] as follows: -

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

81. The High Court in the *Matter of the Mui Coal Basin Local Community*[39] had this to say: -

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution –

including statutory regimes – in certain cases..."

82. At least two principles emerge from the above jurisprudence. *First,* while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[40] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.[41]

83. Section **18** of the Act provides as follows: -

1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.

2) If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.

3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.

84. It is common ground that on **17th** January 2019, the second Respondent notified the third Interested Party of the existence of the dispute. The third Interested Party states that they wrote to the society on **3rd** February 2020 requesting the first Respondent to respondent to the complaint, but the said letter elicited no response. The applicants' case is that they never received the said letter hence the reason they moved to court. From the two positions presented by the parties, it is clear that the dispute was pending resolution before the third Interested Party as at the time this case was filed.

85. Section **9(2)** of the FAA Act provides that the High Court or a subordinate court under sub-section **(1) shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted**. Sub-section **(3)** provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

86. Parliament used the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of the effect to be given to their directions.[42] There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[43] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

87. The duty of this court is to establish the real intention of the legislation by carefully attending to the whole scope of the statute. 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.

88. 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.[44] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[45] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

89. A faithful construction of section **9(2) & (3)** of the FAA Act shows that it is couched in mandatory terms. The only way out is

the exception provided by subsection **(4),** which provides that: - "Notwithstanding subsection **(3),** the High Court or a subordinate Court *may, in exceptional circumstances* and *on application by the applicant*, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. *First*, an applicant must demonstrate exceptional circumstances.

90. What constitutes exceptional circumstances depends on the facts of each case[46] and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. In addition, the FAA Act is heavily borrowed from the South African equivalent legislation, that is, the *Promotion of Administrative Justice Act*,[47] hence, jurisprudence from South African Courts interpreting similar circumstances and provisions may offer useful guidance. The following considerations from a South African court decision are relevant:-[48]

i.What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . ."

ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional." In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

91. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[49]

92. The FAA Act does not define 'exceptional circumstances.' However, exceptional circumstances mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. Where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[50]

93. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case. The contested argument that no communication was received from the third Respondent does not qualify to be an exceptional circumstance. Additionally, the argument that the Church constitution has no provisions for resolving election disputes is legally frail. This is because the Church is a Society under the Societies Act, hence, the exhaustion requirement is found in section 18 of the Act. In any event, even the two reasons were to qualify as exceptional circumstances (which they can't), there is a second requirement discussed shortly, that is, it is a requirement to a party to apply for exemption.

94. There is no convincing argument before me to show that the third Interested Part could not resolve the dispute registered at his offices as contemplated under section **18** of the Act. A reading of the said section and the core dispute registered at the third Interested Party's office suggests otherwise. The notification of a dispute related to the impugned election results, ie leadership of the society falls within the mandate of the third Interested Party under section **18** of the Act. All the other issues cited disclose a civil dispute, and as held earlier, they fall outside the purview of judicial review jurisdiction.

95. Mr. Kimuli argued that that the reliefs south herein, namely, injunctive orders, declarations and a prohibitory order are not available from the third Interested Party. He also argued that despite the dispute having been presented to the third Interested Party, no response was received, hence, the applicants moved to court. The foregoing argument is attractive as it is appealing especially viewed from the lens that a court should be slow to decline jurisdiction lest it lock out justiciable claims and make nonsense the constitutional right to access courts. However, the said reasoning collapse on the following fronts.

96. *First*, there is a requirement that on application by the applicant, the court may grant an exemption. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the FAA Act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[51] Section **9(4)** of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances.

97. Differently put, the law is that Section **9(4)** of the FAA Act postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond to his case and leave it to the court to determine. No application was presented before this court to determine the existence of exceptional circumstances or application for exemption. An internal remedy **must** be exhausted prior to Judicial Review, **unless** the applicant can show exceptional circumstances to exempt him from this requirement.[52]

98. From the foregoing, the conclusion becomes inevitable that the applicants ought to have exhausted the available mechanism under the Act before approaching this court. It follows that this case offends section **9 (2)** of the FAA Act. The applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the FAA Act nor did they apply for exemption. I find and hold that this case offends the doctrine of exhaustion of statutory available remedies. On this ground alone, the applicant's case collapses.

99. Mr. Kimuli sought refuge in Article **159 (2)** of the Constitution which enjoins courts to determine cases without undue regard to technicalities of procedure. This argument collapses not on one but on four fronts. *First*, it ignores the fact that the FAA Act flows from Article **47** of the Constitution, hence, it enjoys a constitutional underpinning. *Second*, the doctrine of exhaustion now enjoys a statutory underpinning, courtesy of section **9** of the FAA Act. It is a statutory requirement; hence it is not a procedural technicality. *Third*, the said argument flies on the face of numerous decisions by our superior courts (including Kenya's Apex court-see case below) upholding the doctrine of exhaustion. *Forth*, Article **159** is not a panacea for all problems. *Fifth*, it is not lost to this court that the provisions of section **9 (1) (2) (3) (4)** of the **FAA** Act are clear on the scope and province of jurisdiction to review, hence, there is no technicality in the application of such clear provisions of the law. In the circumstances, the applicants cannot seek refuge under Article **159 (2) (d)** of the constitution.

100. In support of my above reasoning, I find solace in *APA Insurance Company v Vincent Nthuka*[53] which stated: -

26. …It is my view Article 159(2) (d) of the Constitution cannot be a panacea for all ills. It cannot be relied upon to revive a claim which is expressly extinguished by statute since the provision does not give rise to a cause of action. In my view it is not meant to destroy the law but to fulfill it. It is meant to ensure that the path of justice is not clogged or littered with technicalities. Where, however, a certain cause of action is disallowed by the law, the issue of the path of justice being clogged does not arise since in that case justice demands that that claim should not be brought…"

101. The Supreme Court in *Raila Odinga v Independent Electoral and Boundaries Commission & Others***[54]** expressed itself as follows: -

"...Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a

procedural technicality; it is a constitutionally mandated technicality."

102. I stand guided by the above pronouncement by the Supreme Court and hold that the applicants attempt to seek refuge in Article **159 (2) (d)** of the Constitution collapses.

103. Despite my findings on the hither discussed issues, I will nevertheless address the issue whether the applicants have established any grounds to merit any of the orders sought.

104. Mr. Kimuli's submission, as I understand it is that the impugned decision is tainted with Illegality, unreasonableness, procedural impropriety. He founded this argument on the ground that the Respondents had notice of the applicant's and other congregants' concerns regarding the suitability of the first Interested Party to be installed as Bishop, right from the time of nominations, elections and prior to the installation. He argued that despite being aware that said issues, the installation proceeded. To buttress his argument, Mr. Kimuli cited *Republic v National Land Commission & another Ex Parte; Farmers Choice Limited*,[55]in which the court held[56] that in order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

105. He also relied on *Republic v Betting Control and Licensing Board & another Ex parte Outdoor Advertising Association of Kenya*[57]in support of his argument that the impugned decision is tainted with unreasonableness. He argued that the elections were marred by grave irregularities, that they took place amidst fear and tension and intimidation caused by police presence. To him this is "unprocedural" which is a ground for review.

106. Further, Mr. Kimuli submitted that the names of the candidates were pre-selected and imposed without a chance to the delegates to oppose or support the nominations. He submitted that no candidate could be said to have been validly elected out of such a process. He submitted that under Clause **1.2(vi)** of the Church Constitution, the Bishop and the Assistant Bishop elect ought to have been installed into office within six (6) months following their election, and that the installation done on **12th** July, 2020 was in blatant defiance of the clear provisions of the Constitution of the Church.

107. He submitted that the NEC failed to put in place a qualification criterion and procedure for nomination and selection of candidates (for Bishop and Assistant Bishop) that was free and fair, open, transparent, determinate, definite and ascertainable. He argued that under Regulation **1 A 2(d)** of the Constitution, it is the preserve of the NEC to nominate up to **4** candidates to contest for position of a Bishop. He argued that there is no room for participation by congregants in selection, nor is there room for willing congregants to offer themselves for nomination. He submitted that the failure to provide for an all-inclusive process of selection amounts to an ***unreasonable process and procedural unfairness*** as the congregants were constructively excluded from active participation.

108. Additionally, Mr. Kimuli argued that failure to afford a fair chance to members of the Church to seek the high office is unreasonable and irrational. He argued that without the filing Form H with the Registrar of Societies, the decision to install a new Bishop and Assistant Bishop, and the decision to handover the Church to officials who have not been registered with the Registrar of Societies is contrary to the law and amounts to an illegality. He argued that the decision to proceed with the consecration without first complying with all the necessary policies and procedures and without affording the congregants, including the applicants, the opportunity to participate in the monumental process was irrational, unconstitutional, illegal, improper, arrived at in bad faith and in gross breach of the principles of fair administrative action. He argued that the impugned decision is contrary to the law of the land, the Church Constitution and devoid of fair administrative processes.

109. Lastly, Mr. Kimuli cited Articles **22, 23 (3)** and **165** of the Constitution and reiterated this courts' jurisdiction to entertain this matter. To buttress his argument, he placed reliance on *Republic v Secretary of the Firearms Licensing Board & 2 Others, Ex-parte: Senator Johnson Muthama*[58] *Leonard Sitamze v The Minister for Home Affairs & 2 Others*[59]in support of the proposition that the courts' role when any contravention of constitutional and statutory provisions by a public body is alleged is to invoke its jurisdiction under Article **165(6)** of the Constitution to protect the rights of the affected party.

110. The Respondents' counsel Mr. Waweru, submitted that Regulation **1(a)(2)(d)(vi)** of the Church constitution provides that a bishop-elect shall be installed into office within 6 months of an election. He argued that the chairman and the secretary of *an ad hoc Transition Committee* of the NEC and the first Interested Party usurped and arrogated to themselves powers they did not have under the Act or the Church constitution and sidelined the other members of the Transition Committee and the existing officers of the church.

111. He argued that during the pendency of this suit the first Interested Party and a one Rev. Balozi Mrutu presented to the third Interested Party *Form H* (notification of change of officials). He argued that the said form must be signed by the officials of a society accompanied by a letter from the Secretary of the society, minutes of the meeting in which change of officials happened and the notice convening the meeting. He argued that Annexures JK-6 to the first and second Interested Party's affidavit are of no legal effect because they were authored and signed by unauthorized persons.

112. Mr. Waweru submitted that the first and second Interested Parties acted in excess or without jurisdiction or Powers in Contravention of the Church Constitution. He submitted that **Article 8 (8)** and **(17)** of the church constitution vests the Secretary General- (the second Respondent) with the duty, in conjunction with the other office bearers to author church correspondence and to represent the church in administrative and management matters. To him, the chairman and secretary of the said *ad hoc* sub-committee cannot subjugate the duly constituted officials of a church. He submitted that the *ad hoc* committee by inviting guests, taking over the correspondence of the church, irregularly filing Form H and overseeing the installation of the first Interested Party acted in excess of and without jurisdiction or power. He submitted that Article **11 (5)** and **(11)** of the church constitution, only confers the NEC with the powers to make decisions on 'matters concerning pastors while **Article 27 (2)** and **(3)** requires committees of the church to place their reports before the Executive Council for approval, hence, the transitionalTransition Committee had no powers to file documents with the Registrar of Societies.

113. Mr. Dingi, counsel for the first and second Interested Parties cited *Republic v National Land Commision & another Ex parte Lomolo Limited 1962***[60]** in support of the proposition that judicial review is not the proper forum within which to seek a prayer for injunction. As for prayer for a declaration, he placed reliance on *Commissioner of Lands & Hotel Kunste* **[61]** which held that for the court to make such declarations, it must hear evidence on the very serious factual issues which require to be resolved and which go beyond the court's jurisdiction in Judicial Review proceedings. Further, Mr. Dingi relied on *Republic v Registrar General & 2 others Ex-parte Thomas Asiago & 2 others* ***[62]*** which held that judicial Review orders can only issue where they are efficacious. He argued that issuing the orders sought would cause administrative chaos since the object for which the application is made has already been realized and the best way to challenge those acts is to seek intervention of a court exercising civil jurisdiction to interrogate the evidence and merits of the decisions that were arrived at by the respondents, and not by way of Judicial Review.

114. As for the plea for fresh elections, Mr. Dingi cited *Republic v Registrar General & another Ex-Parte James Papa****[63]*** which held that the decision to call for elections of a private society cannot be a public duty since the elections only affect members of the church and not the general public. To him, the court cannot compel conduct of fresh elections.

115. Mr. Dingi argued that prohibition cannot issue because the elections have already been held and the installation completed. (Citing *Republic v Kenya Revenue Authority & another exparte Tradewise Agencies****[64]***). Lastly, Mr. Dingi urged the court to condemn the applicant to pay the costs of these proceedings citing ***Judicial Hints on Civil Procedure.****[65]*

116. Mr. Mukuvi, cited *Director of Public Prosecutions v Martin Maina & 4 Others***[66]** for the proposition that Prohibition restrains abuse or excess of power. He placed reliance on *Kenya National Examination Council versus Republic ex part Geoffrey Gathenji Njoroge & 9 other***[67]** for the holding that an order of *prohibition* is directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land, and for a departure from the rules of natural justice but it does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. He submitted that the applicants have not demonstrated that the third Respondent acted in abuse or excess of its powers or in breach of the rules of natural justice. He placed reliance on *Jipe House Kindergarten Limited v City Council of Nairobi***[68]** for the holding that the court cannot issue orders of prohibition to prevent public bodies from performing their statutory duties and functions when the same are executed in accordance with the law. He submitted that the third Interested Party acted procedurally and within her mandate by receiving and addressing the complaint. He urged the court to dismiss the case with costs.

117. The question whether the applicants have established any grounds to warrant the orders sought is closely tied to the first issue, namely whether the applicants have presented a civil dispute as opposed to a judicial review application. Because I have already held that this suit fails on the earlier issues, it will suffice to repeat that literally all the issues presented in this case are invitations to this court to venture into a merit review which is outside the scope of judicial review jurisdiction. It will suffice to recall the holding in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[69] that judicial review applications do not deal with the merits of the case.

118. In *Minister for Immigration and Citizenship v SZJSS*[70] the South African High Court 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[71] 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 also cited, with approval, Basten JA’s warning[72] 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)

119. Back at home, the Court of Appeal in *Energy Regulatory Commission v S G S Kenya Limited & 2 others*[73] cautioned against *"delving into the merits of the decision as one would do when dealing with an appeal.* I may usefully quote *Republic v Business Rent Tribunal & 3 Others ex parte Christine Wangari Gachege*[74] for the holding that 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,[75] and, that, the court cannot substitute its judgment for that of an authority.

120. A glimpse of the grounds upon which Mr. Kimuli based his assault on the impugned decision on grounds Illegality, unreasonableness, procedural impropriety will certainly confirm that counsel was simply inviting this court to venture into the prohibited sphere of merit review. For example, he questioned the suitability of the first Interested Party to be elected and or installed as a Bishop citing credibility issues and instances of mal-administration and financial impropriety. It is basic to law that such allegation ran deep into a merit review which can only be resolved by way of oral evidence.

121. Mr. Kimuli submitted that the elections were marred by grave irregularities. He argued that they took place amidst fear, tension and intimidation caused by police presence and urged the court to find that the process was tainted with procedural impropriety. Sincerely, it is basic law that determining the validity or otherwise of an election process or proving the cited allegations is purely a civil dispute which requires evidence. I decline to venture into this forbidden sphere.

122. Additionally, Mr. Kimuli argued that the names of the candidates were also pre-selected and imposed without a chance to the delegates to oppose or support the nominations. Further, he argued that the NEC failed to put in place a qualification criterion and procedure for nomination and selection of candidates (for Bishop and Assistant Bishop) that was free and fair, open, transparent, determinate, definite and ascertainable. These are all issues of merit falling outside the scope of judicial review jurisdiction.

123. Lastly, Mr. Kimuli argued that failure to afford a fair chance to members of the Church to seek the high office is unreasonable and irrational. Determining whether or not the members were deprived the chance to seek high offices is a matter that can only be proved or disapproved by way of oral evidence.

124. On his part, Mr. Weweru argued that the chairman and the secretary of *an ad hoc Transition Committee* of the NEC and the first Interested Party usurped and arrogated to themselves powers they did not have under the Act or the Church constitution. He argued that they sidelined the other members of the Transition Committee and the existing officers of the church. He argued that during the pendency of this suit the first Interested Party and a one Rev. Balozi Mrutu presented to the third Interested Party *Form H* (notification of change of officials). He argued that the said form must be signed by the officials of a society accompanied by a letter from the Secretary of the society, minutes of the meeting in which change of officials happened and the notice convening the meeting. He argued that Annexures JK-6 to the first and second Interested Party’s affidavit are of no legal effect because they were authored and signed by unauthorized persons. All these are merit review issues as opposed to judicial review grounds. I say no more.

125. I may profitably refer to *Council of Civil Service Unions v. Minister for the Civil Service*[76] Lord Diplock’s enumeration a threefold classification of grounds for judicial review upon which the court can intervene, and any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock’s classification, namely; *proportionality.*[77] What Lord Diplock meant by *“Illegality”* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *“Irrationality”* by succinctly referring it as

"unreasonableness" in *Wednesbury* Case.[78] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

126. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature.

127. At the risk of repeating myself, the applicants' core grounds are : -

"..the elections though seemingly peaceful were not free and fair because- (a) candidates for the positions of the Bishop and the Assistant Bishop do not apply for the positions nor are they vetted but they are proposed in a sitting of the NEC. (b) that Members not proposed by the NEC have no opportunity under the constitution to apply to be considered. (c) that the Church constitution doesn't have provisions and mechanisms to vet and interview those selected to be candidates for the elections for the Bishop and the Assistant to the Bishop. (d) that the constitution of the church doesn't have provisions and mechanisms for members to object to the persons proposed as candidates to the elections of the Bishop and the Assistant to the Bishop. (e) that there were external forces and influences deployed to the elections to create fear, intimidation and coercion on the officials of the church, and, (f) that a candidate for the position of the Bishop is supposed to be a blameless person which is not the case in the elections that took place on 18th December, 2019."

128. The grounds cited do not and cannot fit anywhere near Lord Diplock's classification enumerated above. None of the above grounds qualifies for as grounds for judicial review either under section **7** of the FAA Act or under the common law.

129. Mr. Kimuli cited violation of the right to fair administrative action act guaranteed under Article **47** of the Constitution. This argument is attractive because arguments invoking the Constitution are bound to evoke emotions because the Constitution is the Supreme law of the land. However, attractive as it is, this argument collapses not on one but on three fronts. *First*, a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[79] Resolving the complaints highlighted above does not require interpreting provisions of the Constitution. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values.[80] As was stated in *Fredericks & Others vs MEC for Education and Training, Eastern Cape & Others*[81] citing *S v Boesak*[82] :-

"The Constitution provides no definition of "constitutional matter." What is a constitutional matter must be gleaned from a reading of the Constitution itself: If regard is had to the provisions of .....the Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State....., the interpretation, application and upholding of the Constitution are also constitutional matters. So too,..., is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly an extensive jurisdiction."[83]

130. Put simply, the following are examples of constituting constitutional issues; The constitutionality of provisions within an Act of Parliament; the interpretation of legislation, and the application of legislation.[84] At the heart of the cases within each type or classification is an analysis of the same thing – the constitutionally entrenched fundamental rights. Therefore, the classifications are not discreet and there are inevitably overlaps, but the classifications are nonetheless useful theoretical tools to organize an analysis of the nature of constitutional matters arising from the cases before the court. This court abhors the practice of parties converting every issue in to a constitutional question or a judicial review ground and filing suits disguised as constitutional Petitions or judicial review applications when in fact they do no not fall anywhere close to violation of constitutional provisions or fundamental rights or any of the known judicial review grounds. This is such a case. It does not disclose any known judicial review grounds. It is a pure private civil dispute.

Conclusion

131. In view of my analysis and determination of the issues addressed herein above and the findings arrived at, the conclusion becomes inevitable that this case is totally misconceived, unstainable and a shortcut aimed at obtaining judicial review reliefs in a purely civil dispute. The prayers relied upon do not qualify at all to be judicial review grounds. Some of the grounds cited challenge the manner in which nominations were conducted, a direct assault on the provisions of the church constitution which govern the nomination process and elections. The proper approach for the applicants to do would be to marshal the numbers at the Societies General Assembly and move an amendment to the constitution. The prayers sought are totally unmerited. This case attracts only one order, that is, dismissal. Accordingly, I dismiss the applicants' Notice of Motion dated **16th** July 2020 with costs to the first, second and third Interested Parties.

Orders accordingly

Signed, Dated and Delivered electronically at Nairobi this 15th day of October 2020.

John M. Mativo

Judge.

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[1] Cap 108, Laws of Kenya.

[2] {2018} e KLR citing Council for Civil Service Unions V Minister For Civil Service [1985] A.C. 374.

[3] {2002} e KLR.

[4] {2008} e KLR.

[5] {2016} e KLR.

[6] {2009} e KLR.

[7] JR MISC 33 of 2017.

[8] {1989} e KLR.

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

[10] {2015} e KLR.

[11] {2014} e KLR.

[12] {2014} e KLR.

[13] {2016} e KLR.

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

[15] {2018} e KLR.

[16] Act No. 4 of 2015.

[17] Nairobi HC Misc. Application No. 1235 of 1998.

[18] Nairobi HCMA No. 997 of 2003.

[19] Application No. 2 Of 2011.

[20] Civil Application No. Nai. 92 OF 1992.

[21] {2015} e KLR.

[22] Constitutional Petition No. 14 Of 2014.

[23] Civil Appeal No. 92 of 1992 Nairobi.

[24] Civil Appeal No. 94 of 2005.

[25] As observed in *State of Orissa v Sudhansu Sekhar Misra* MANU/SC/0047/1967.

[26] *Ambica Quarry Works v State of Gujarat and Ors*. MANU/SC/0049/1986.

[27] Ibid

[28] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* {2003} 2 SC 111 (vide para 59).

[29] High Court of Delhi at New Delhi February 26, 2007 W.P.(C). No. 6254/2006, *Prashant Vats v University of Delhi & Anr*. (Citing Lord Denning).

[30] Ibid

[31] Ibid

[32] Nairobi HC Misc. Application No. 1235 of 1998.

[33] Nairobi HCMA No. 997 of 2003.

[34] {2018} e KLR.

[35] See for example JR 363 of 2018 and JR 102 of 2018.

[36] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017]. eKLR

[37] {1992} KLR 21.

[38] {2015} eKLR.

[39] {2015} eKLR.

[40] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya

& 6 others [2017].

[41] Ibid.

[42]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[43] Ibid.

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

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

[46] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[47]Act 3 of 2000.

[48] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[49] See *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)*2010 (4) SA 327 (CC) para 39, Mokgoro J

[50] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[51] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[52] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC). para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[53] {2018} e KLR

[54] {2013} e KLR.

[55] {2020} e KLR.

[56] citing *Justice Kasule in the Uganda case of Pastoli v Kabale District Local Government Canal & Others {2008} 2 EA 300 at pages 300-304.*

[57] {2019} e KLR.

[58] {2018} e KLR.

[59] Nairobi HC Misc Civil Appl. No.430 of 2004.

[60] {2015} eKLR.

[61] CA 234/1995.

[62] {2016} e KLR

[63] {2014} e KLR.

[64] {2013} e KLR.

[65] Rtd. Justice Kuloba**,** *in his book* at p.94] cited in *Little Africa Kenya Limited v. Andrew Mwiti Jason* Civil Case No. 149 of 2011.

[66] {2017} e KLR.

[67] {1997} e KLR.

[68] {2012} e KLR.

[69] {2014} e KLR.

[70] {2010} HCA 48.

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

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

[73] {2018} eKLR.

[74] {2014} e KLR.

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

[76] {1985} AC 374.

[77] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[78] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[79]http://www.yourdictionary.com/constitutional-question

[80]Justice Langa in *Minister of Safety & Security v Luiters* {2007} 28 ILJ 133 (CC).

[81] {2002} 23 ILJ 81 (CC).

[82] {2001} (1) SA 912 (CC).

[83] 2001 (1) SA 912 (CC).

[84] Supra note 5 at paragraph 23.