



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI HIGH COURT

CASE NUMBER: HCJR/E145/2025

CITATION: DOUGLAS NYOKWOYO VS INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA AND CHIEF EXECUTIVE OFFICER & SECRETARY TO THE COUNCIL AND 1 OTHERS

RULING

1 The Application before this court is the one dated 9th June 2025 wherein the applicant seeks the following Orders: -

1) ...spent.

2) THAT this Honorable Court be pleased to vary and/or set aside the orders of the court issued on 4th June 2025.

3) THAT this Honorable Court proceeds and issue any other or further orders in the interest of justice for expeditious hearing and disposal of the Application herein.

4) THAT the costs of this application be provided for.

2 On 4th June 2025, this Court issued an Order granting leave for institution of Judicial Review proceedings and ordered issued that the leave so granted operates as a stay of further implementation of the interim Declaration of results dated 15th May 2025 including presentation of the election results during the 1st Respondent's Annual General Meeting.

3 This has not sat well with The applicant who allege that since the impugned order was issued without disclosure of fundamental and/or material facts by the Ex parte Applicant.

4 It is the applicants case that the issuance of the order was influenced by the allegations framed by the Ex parte Applicant as contained in Paragraphs 6-11 of the Statutory Statement and Paragraphs 15-18 of the Verifying Affidavit to the extent that the Respondents only granted voters merely 14 days for voter register scrutiny instead of 21 days as provided by the law.

5 According to the applicant, The Ex parte Applicant failed to disclose a Notice and/ or Communique by the 3rd Respondent issued on 7th April 2025 to all the members/voters titled 'Voter Register-Verification of Eligibility to Vote' which is the actual notice wherein members were expressly requested to inspect the Register.

6 It is the applicants case that had the said Notice/ Communique been availed to the Court, it would show clearly that by the time of closure of the voter's register on 6th May 2025, voters had been



granted a total of 29 days to conduct voter verification, which is way excess of the minimum period prescribed by the law.

7 The applicant further argues that the before moving the court, the applicant did not invoke Regulation M of the Accountants Regulation provides the procedure for making a compliant, period of making it and upon its lodging, the Council of the 1st Respondent is obligated to constitute an ad hoc appeals Committee to hear the complaint.

8 This is in breach Section 9(2) of the Fair Administrative Action Act, and no leave was sought to be exempted from the requirement to exhaust the said internal procedures.

9 Rule 3 of the 1st Schedule to the Accountants Act mandates the Institute to conduct an Annual General Meeting not later than six months after the end of each year, which means that the last date of holding an Annual General Meeting cannot go beyond June 2025 as by law required.

10 Rule 1 Of the 2nd Schedule also provides for election of the Council members at the Annual General Meeting of the Institute

11 According to Rule 5 of the 1st Schedule thereof, the Respondent is required by law to include the agenda of election of chairman and Council members as a key business to be transacted in the Annual General Meeting.

12 It is the applicants case that the order as framed, injuncts elections of all cadres including positions which are not subject of dispute before the court, being the position of Chairmanship.

13 It is its case that the term of the current Chairman of the Institute shall end at the Annual General Meeting upon the election of a new Chairman and the election of the Chairman must be confirmed during the Annual General Meeting of the Institute, which by law, must be held by June 2025.

14 The Respondents EX Parte applicant's case;

a. Regulation M of the 5th Schedule to the Accountants Regulations, 2022 provides as follows-

15 A person who is aggrieved by the results of an election may, within seven days after the Annual General Meeting in which the presentation of the results of the election is made, lodge a written complaint with the Secretary to the Council for determination.

16 It is irrefutable that Regulation M of the 5th Schedule to the Accountants Regulations, 2022, applies against a challenge to the validity or otherwise of election results and not to an application that challenge irrational, unreasonable and ultra vires acts of the Respondents as well as violation of constitutional rights under Article 23 of the Constitution of Kenya as in the case of the Ex-parte Applicant.

17 It is its case that the Respondents in their submissions attempts to mislead this Honourable court that Ex- parte Applicant's substantive Application is challenges the results of the election, however, its challenging the irrational, unreasonable and ultra vires acts by the Respondents in the preparations and conduct of the election entire electoral process.

18 It argues that the doctrine of ripeness does not apply in this matter because the cause of action in this matter arise from wrongful acts, irrational and ultra vires decision in the preparation of the elections, clearing of candidates and the general conduct of the elections by the Respondents and not the validity of the results of the purported elections.

19 It is its case that the violation of clear provisions of statutes and the Regulations coupled with procedural impropriety; the doctrine of ripeness does not apply and the Respondents by alleging this doctrine intends to defeat my application to be a mere academic considering the as per the notice of general meeting the issue of elector process is final and the only remaining issue.

20 Thus, the Ex-parte Applicant invoked the jurisdiction of the court for conservatory stay order to



prevent this matter being defeated technically and rendered mere academic exercise.

21 Further, the issue raised and the cause of action in this matter cannot be dealt with internally considering the issue is wrongful acts and irrational conducts of the respondents while conducting the election.

22 Regulation M(1) uses the word “may” suggesting that the Ex- parte Applicant had an option to appeal to the council or take such other legitimate action such as filing this suit. The Ex- parte Applicant is challenging the illegal, irrational, unreasonable and ultra vires acts decisions of the Respondents which can only be handled and resolved by this honourable court and not the council.

23 Article 50 (1) of the Constitution, provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. This provision as read together with the option granted to an aggrieved person under Regulation M(1). by the use of the word “may” is in tandem with this Article.

24 An aggrieved person cannot be estopped from exercising his/ her right to seek resolution of a dispute before a court where any other alternative mechanism is not appropriate. In support of this proposition, we rely on the case of Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] eKLR where Odunga Judge at paragraph 51 and 52 expressed himself as follows...In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in East African Railways Corp. vs. Anthony Sefu [1973] EA 327, where it was held that “It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”

25 The Respondents Application as prayed is an invitation to this honourable court to close its eyes to constitutional violations which would amount ousting, adjourning, restricting and or extinguishing the jurisdiction of this honourable court and dereliction of its duty.

26 Article 162 of the Constitution provides for superior courts. It is trite that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.

27 Reliance is placed on the case of Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] eKLR Odunga Judge at paragraph 49, 51 and 97 expressed himself as that ...Therefore any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act.

28 Reliance is also placed in the case of Apollo Mboya v Attorney General & 2 others [2018] eKLR had the following to say under paragraph 76, 81 and 87 –...Traditionally, the courts have interpreted provisions ousting the jurisdiction of Courts narrowly that is to mean that, the decision is still subject to judicial review. In other words, the decision under attack may be final on the facts but it is not to be regarded as final on the law. Denning L.J. put it better when he stated that: -“I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the



most clear and explicit words.

29 The Council does not have power to interrogate procedural and legality matters relating ultra to employment and labour related disputes which is the dominion this honourable court.

30 This was the position held in the case of Abdikadir Suleiman v County Government of Isiolo & another [2015] eKLR at page 4.... In the present case the claimant has alleged that the oral dismissal was illegal, unlawful and unconstitutional. It is the holding of the court that the jurisdiction to entertain that allegation and to make a primary conclusive finding thereon is vested in the court and the Commission does not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as is prayed for by the claimant in this case.

31 It is the exparte applicants position that this court should not vary or set aside its orders are prayed because the Ex- parte Applicant is not challenging the election results but the flawed entire electoral processes by arising from the Ultra vires, irrational and procedurally wrong actions by the Respondents.

32 The Respondents prepared and conducted the elections in blatant violations of express violations of the as illustrated in the subsequent paragraphs of these submissions. The statutory guidelines are to be strictly observed and failure to do so would lead to an illegality.

33 In the case of Githu Muigai & Another v Law Society of Kenya & Another (2015) eKLR it was held :- "In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority ..."

34 In MTN v Kie Limited & Another (2020) Eklr where at paragraph 71, the court stated that... "Courts have held that Courts will interfere with the internal disciplinary action only when the process is flawed. The interference will thus be to put back on truck the disciplinary process but not to do away with it all together".

35 In the same case the at paragraph 72 the court reiterated that. where grave injustice might result or where justice might not by other means be attained. The hearing of the claimants has not run its course, but the procedure adopted with sanction before according him a fair chance to be heard in the presence of his Union or a fellow employee of his choice not accorded to him. This far the court will interference with the proceedings as by not so doing grave injustice will be occasioned to the Claimant. This is one such exceptional case and thus the Court directs as follows;

36 Accordingly, in as much it is our contention that the current substantive application's subject matter is not subject to Regulation M(1), noting that two members of the council were contestants in the purported elections and that they still sit in the council that the Respondents want the Ex-parte Applicant to lodge his complaint, it is therefore apparent beyond any doubt that he will not get any justice from the council.

37 The purported elections were held in clear contravention of the law especially as per Paragraph 1 of the First Schedule to the Accountants Act which provides that the Chairperson shall be elected during the annual general meeting of the Institute.

38 It is its case that on the contrary, the elections were purportedly held between 12th and 15th May 2025 in total contravention of the said provision.



39 The Respondents acted irrationally, ultra vires and in total violation of the clear violation of the law by allowing Council members to contest for the position of chairperson and member without first resigning as per Paragraph 13 of Regulation E of the Accountants Regulations which provides that "A member serving on the Council and wishing to contest for the position of the chairman shall resign and communicate to the Council before the vacancies are declared and such resignation shall take effect at the next Annual General Meeting."

40 The Respondents, by clearing and allowing a council member to vie for the position of the chairperson without first resigning, acted irrationally, ultra vires and in total violation of the clear violation of the law. Hence the whole electoral process was tainted with procedural impropriety.

41 The Respondents arbitrarily set the elections to be held between 12th and 15th days of May, 2025 whereas the purported elected Chairman and members of the council are only planned to be presented and 'confirmed' during the 1st Respondent's Annual General Meeting in clear contravention of the law.

42 Contrary to the Respondents claims that the Ex-parte Applicant deliberately failed to disclose of suppressed material facts, the said Communique is material to the Ex-parte Applicant's Application as it clearly indicates the election dates in which are in contravention of express provisions of Paragraph 1 of the First Schedule to the Accountants Act which provides that the Chairperson shall be elected during the annual general meeting of the Institute.

43 It is irrefutable that the notice that the Ex-parte Applicant is wrongly accused of concealing actually aids his argument because going by the dates the Respondents set for the election, that is, 12th May, 2025, being the first election day, the latest day the voters' register should have been locked would have been 12/04/2025 being at least thirty (30) days before the actual election date. Thus, the members of the 1st Respondent should have been granted access to the voters' register at least on 20/03/2025 up until 12/04/2025 and not on 07/04/2025 as claimed by the Respondents.

44 According to them the Respondents admits that they actually locked the voters' register on 06/05/2025 whereas the elections were conducted only six (6) days later, between 12th and 15th May, 2025, and not at least thirty days before the election as required by the law fact affirmed by the Respondents Communique.

45 The voters' register having not been locked within the required timelines, whatever date the members of the 1st Respondent were granted access to the voters' register was definitely irregular and contrary to the express provisions of the law.

46 The Ex-parte Applicant is merely requesting the court to preserve the preserve the subject matter. On this they are guided by the case of Zena Achieng Mohamed v County Public Service Board of Kilifi & 6 others [2021] eKLR in which the court stated as follows at Paragraph 15....In my understanding, the Petitioner is asking the Court to preserve the status quo, pending the hearing and determination of her appeal before the Public Service Commission.

47 In the case of James Orre v Office of the Governor, County Government of Marsabit & another [2021] eKLR where the court held as follows at page 5-These are weighty issues touching on the validity of the actions of the Respondents in a manner advanced so as to oust the jurisdiction of the Public Service Commission as an arbiter of the issues in dispute in the circumstances. Here, as duly



submitted and amplified by the Petitioner/Respondent, the doctrine of exhaustion is surpassed by the circumstances and subject matter of this individual case.

48 Similarly, in the case of Republic V Royal Nairobi Golf Club at paragraphs 37,38,40,41,42 the court said that...it must be pointed out that illegal and unfair preliminary procedural decisions can also undermine the fairness of the entire decision making process and the lawfulness of the eventual substantive decision, and merit intervention of this Court at an early stage of the decision making.

49 They are further guided by the case of Anne Wambui Kamuiru vs Kenya Airways:- Cause No. 1684/2015), where Court held as follows:- There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal

50 The Respondents and its operations will not suffer any prejudice or be affected in any way whatsoever because previously when the Respondents were faced with a similar scenario, they adjourned the agenda for the elections for the Chairman and Council Members.

51 The allegation the 1st Respondents Annual General Meeting must be held on or before 30th June 2025, is a well calculated move to deceive this court to set aside its orders issued on 4th June 2025 whereas the outgoing chairperson was elected into office during Annual General meeting held on 29th September 2023 to serve for one term of two years ending 28th September 2025".

52 The Respondents own notice for the 45th Annual General Meeting, when there was a pending case being HCJR MiscE032/2023 Andrew Bulemi Vs ICPAK Council, deferred the consideration of the agenda for titled "To present the elected Chairman and Council Member as per First Schedule, paragraph 5(1)(b)(iii) of the Accountants Act, No. 15 of 2002". This clearly demonstrates that the agenda item stayed by virtue of the court order the Respondents' are seeking to set aside cannot prevent or in any way impede the Annual General Meeting from proceeding as scheduled.

53 Thus, the 1st Respondent's 47th Annual General Meeting to be held on 13/06/2025 as per the notice of the 47th Annual General Meeting dated 13/05/2025 will proceed as scheduled and all the business intended to be conducted therein will be transacted save for agenda number eight (8) therein having been stayed by the court order dated 04/06/2025.

54 Section 44 of the Accountants Act provides that the Council may exercise and perform its functions notwithstanding any vacancy among the members and the validity of any proceedings of the Council shall not be affected by any such vacancy or any defect in the appointment of a member. Additionally, there is no fixed quorum for the meetings of the Council and the arrangements relating to meetings of the Council as the Council is empowered to determine its own quorum pursuant to paragraph 6 of the Second Schedule to the Accountants Act.

55 There will be no vacancy because Paragraph 1(1) of the First Schedule to the Accountants Act provides that unless the chairperson of the council earlier vacates the office, a person elected to the office of Chairperson shall hold the office until another Chairperson is elected and in case of any vacancy Paragraph 2(1) of the First Schedule to the Accountants Act provides that in case a vacancy in the position of the chairperson the, the Cabinet Secretary for Finance can appoint a person to act as Chairperson on the advice of the Council.



56 In contrast if the stay orders are varied and/or set aside, the Respondents will get an opportunity to enjoy the proceeds of their irregular, illegal, unreasonable, and ultra vires actions whereas the Ex- parte Applicants rights will be violated.

57 Section 27 of the Civil Procedure Act states that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct. In this case, we humbly seek the cost of the suit be awarded to the Ex Parte applicant herein.

58 They submit that the Respondent/applicants case is predicated on the doctrine of ripeness and/or failure to disclose of material facts and prejudice suffered by the 1st Respondent.

59 Regulation M of the 5th Schedule to the Accountants Regulations,2022 provides as follows-

a. A person who is aggrieved by the results of an election may, within seven days after the Annual General Meeting in which the presentation of the results of the election is made, lodge a written complaint with the Secretary to the Council for determination.

60 It is submitted that Regulation M of the 5th Schedule to the Accountants Regulations,2022, applies against a challenge to the validity or otherwise of election results and not to an application that challenge irrational, unreasonable and ultra vires acts of the Respondents as well as violation of constitutional rights under Article 23 of the Constitution of Kenya as in the case of the Ex-parte Applicant.

61 The Ex- parte Applicant's substantive Application challenges the irrational, unreasonable and ultra vires acts by the Respondents in the preparations and conduct of the election entire electoral process and The doctrine of ripeness does not apply and the issue raised and the cause of action in this matter cannot be dealt with internally.

62 It is submitted that the Ex- parte Applicant had an option to appeal to the council or take such other legitimate action such as filing this suit since the Regulation uses the word "may".

63 Article 50 (1) of the Constitution, provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

64 In the case of Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] eKLR where Odunga Judge at paragraph 51 and 52 expressed himself as follows...In matters of jurisdiction of superior courts, it is however my view that one ought to take in consideration the well-known principle as enunciated in East African Railways Corp. vs. Anthony Sefu [1973] EA 327, where it was held that "It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect."

65 Reliance is placed in Article 162 of the Constitution provides for superior courts. It is trite that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect. We rely

66 Reliance is placed on the case of Republic v Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 4 others Ex-parte Alfred Kiptoo Keter & 3 others [2018] eKLR Odunga Judge at



paragraph 49,51 and 97 expressed himself as that ...Therefore any provision purporting to limit the jurisdiction of the High Court must itself derive its validity from the Constitution itself and must do so expressly and not by implication unless the implication is necessary for the carrying into effect the provisions of the Act.

67 In the case of Apollo Mboya v Attorney General & 2 others [2018] eKLR had the following to say under paragraph 76,81 and 87 –...Traditionally, the courts have interpreted provisions ousting the jurisdiction of Courts narrowly that is to mean that, the decision is still subject to judicial review. In other words, the decision under attack may be final on the facts but it is not to be regarded as final on the law. Denning L.J. put it better when he stated that: -"I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words.

68 In the case of Abdikadir Suleiman v County Government of Isiolo & another [2015] eKLR at page 4.... In the present case the claimant has alleged that the oral dismissal was illegal, unlawful and unconstitutional. It is the holding of the court that the jurisdiction to entertain that allegation and to make a primary conclusive finding thereon is vested in the court and the Commission does not enjoy constitutional or statutory jurisdiction to determine that issue and to make appropriate remedy as is prayed for by the claimant in this case.

69 In the case of Republic V Public Procurement Administrative Review Board & 2 Others Ex-Parte Selex Sistemi Integrati [2008] Eklr where it was held as follows- It is a well established principle that statutory provisions purporting to oust jurisdiction of the court should be construed strictly and narrowly.

70 The ex parte in urging the court not to set aside the order relies in the case of MTN v Kie Limited & Another (2020) Eklr where at paragraph 71, the court stated that... "Courts have held that Courts will interfere with the internal disciplinary action only when the process is flawed. The interference will thus be to put back on track the disciplinary process but not to do away with it all together".

71 In the same case at paragraph 72 the court reiterated that. where grave injustice might result or where justice might not by other means be attained. The hearing of the claimants has not run its course, but the procedure adopted with sanction before according him a fair chance to be heard in the presence of his Union or a fellow employee of his choice not accorded to him. This far the court will interfere with the proceedings as by not so doing grave injustice will be occasioned to the Claimant. This is one such exceptional case and thus the Court directs as follows;

72 It is submitted that two members of the council and they will not get any justice from the council.

73 It is submitted that the elections were held in clear contravention of the law especially as per Paragraph 1 of the First Schedule to the Accountants Act which provides that the Chairperson shall be elected during the annual general meeting of the Institute. On the contrary, the elections were purportedly held between 12th and 15th May 2025 in total contravention of the said provision.

74 They submit that The Respondents acted irrationally, ultra vires and in total violation of the clear violation of the law by allowing Council members to contest for the position of chairperson and member without first resigning as per Paragraph 13 of Regulation E of the Accountants Regulations which provides that "A member serving on the Council and wishing to contest for the position of the chairman shall resign and communicate to the Council before the vacancies are declared and such



resignation shall take effect at the next Annual General Meeting.”

75 The purported elections were tainted with procedural impropriety as well elaborated in verifying Affidavit and Statutory Statement which informed the court to issue the Order sought to be set aside which we invite this court to peruse and consider as part of our reply to the application by the Respondents dated 9th June 2025.

76 It is submitted that the notice that the Ex-parte Applicant is wrongly accused of concealing actually aids his argument.

77 Indeed the Respondents admits that they actually locked the voters’ register on 06/05/2025 whereas the elections were conducted only six (6) days later, between 12th and 15th May, 2025, and not at least thirty days before the election as required by the law fact affirmed by the Respondents Communique. The voters’ register having not been locked within the required timelines, whatever date the members of the 1st Respondent were granted access to the voters’ register was definitely irregular and contrary to the express provisions of the law.

78 They rely on the case of Zena Achieng Mohamed v County Public Service Board of Kilifi & 6 others [2021] eKLR in which the court stated as follows at Paragraph 15....In my understanding, the Petitioner is asking the Court to preserve the status quo, pending the hearing and determination of her appeal before the Public Service Commission.

79 They also guided by the case of James Orre v Office of the Governor, County Government of Marsabit & another [2021] eKLR where the court held as follows at page

80 5-These are weighty issues touching on the validity of the actions of the Respondents in a manner advanced so as to oust the jurisdiction of the Public Service Commission as an arbiter of the issues in dispute in the circumstances. Here, as duly submitted and amplified by the Petitioner/Respondent, the doctrine of exhaustion is surpassed by the circumstances and subject matter of this individual case.

81 Similarly, in the case of Republic V Royal Nairobi Golf Club at paragraphs 37,38,40,41,42 the court said that...t it must be pointed out that illegal and unfair preliminary procedural decisions can also undermine the fairness of the entire decision making process and the lawfulness of the eventual substantive decision, and merit intervention of this Court at an early stage of the decision making.

82 Reliance is further placed in the case of Anne Wambui Kamuiru vs Kenya Airways:- Cause No. 1684/2015), where Court held as follows:- There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal

83 The outgoing chairperson was elected into office during Annual General meeting held on 29th September 2023 to serve for one term of two years ending 28th September 2025”.

84 The Respondents own notice for the 45th Annual General Meeting, when there was a pending case being HCJR MiscE032/2023 Andrew Bulemi Vs ICPAK Council, deferred the consideration of the agenda for titled “To present the elected Chairman and Council Member as per First Schedule,



paragraph 5(1)(b)(iii) of the Accountants Act, No. 15 of 85 20028".

86 To them this clearly demonstrates that the agenda item stayed by virtue of the court order the Respondents' are seeking to set aside cannot prevent or in any way impede the Annual General Meeting from proceeding as scheduled.

87 Thus, the 1st Respondent's 47th Annual General Meeting to be held on 13/06/2025 as per the notice of the 47th Annual General Meeting dated 13/05/2025 will proceed as scheduled and all the business intended to be conducted therein will be transacted save for agenda number eight (8) therein having been stayed by the court order dated 04/06/2025.

88 Section 44 of the Accountants Act provides that the Council may exercise and perform its functions notwithstanding any vacancy among the members and the validity of any proceedings of the Council shall not be affected by any such vacancy or any defect in the appointment of a member. Additionally, there is no fixed quorum for the meetings of the Council and the arrangements relating to meetings of the Council as the Council is empowered to determine its own quorum pursuant to paragraph 6 of the Second Schedule to the Accountants Act.

89 On costs it is submitted that Section 27 of the Civil Procedure Act states that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

Analysis and determination;

90 Following are the issues for determination:

- 1) Whether the orders issued on 4th June 2025 can be varied and set aside.
- 2) Whether the court the doctrine of exhaustion applies.
- 3) Who shall bear the costs.

Whether the orders issued on 4th June 2025 can be varied and set aside.

91 Order 53 rule (1)4 which states:-

a. "the grant of leaveshall, if the judge so directs, operate as a stay of the proceedings in question until the judge orders otherwise."

92 The principles of setting aside and reviewing decrees or orders have been since been settled in the following authorities:

93 In Republic v Jubilee Party & another Ex parte John Kieru Wambui & another [2021] eKLR it was held that;

a. "5. The applicable law for setting aside or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

b. "Any person who considers himself aggrieved—

- i. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- ii. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."



c. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

i. "(1) Any person considering himself aggrieved—

1. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

ii. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

94 In *Paul Gathingu Gachie v Cabinet Secretary for Land & Physical Planning* [2021] eKLR;

a. "5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the submissions by learned counsel, the superior courts decisions cited therein, and come to the following conclusions;

i. That Order 51 Rule 15 of the Civil Procedure Rules provides for setting aside of ex parte orders in appropriate cases. The court in the case of *ZEBEDEE MMATA INJERA V BENSON ANUBI LUHONG; JOANNE C.K. LUHONGO (INTERESTED PARTY)* [2021] eKLR, expressed itself as follows on Order 51 Rule 15;

ii. "... while Order 51 Rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte, the court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. That the court's discretion to set aside an ex parte ruling/judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favor or discretion to adduce sufficient and plausible reasons that are demonstratable, and persuasive to the court..."

95 In the case of *Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare* [2018] eKLR;

"14. Jurisdiction to vary and or set aside the orders of this Honorable Court is one which is sparingly exercised and the reasons for invoking that jurisdiction must be specified and must be on solid basis. In *Judicial Review Handbook*, 3rd Edition by Michael Fordham at pages 360 and 361 it is stated that:

a. "At the request of a defendant or an interested party, the Court can set aside permission previously granted. However, this is a very restricted power. It was never popular with judges, who required there to be a very clear-cut case before discharging the permission...The jurisdiction to set aside is one which is sparingly exercised and the reason for invoking that jurisdiction in a particular case must be specified...."

96 Based on *Aga Khan Education Service Kenya v Republic Ex-parte Ali Seif & 3 Others* (2004) eKLR the position that this is a jurisdiction that should be very sparingly exercised; that the whole purpose of the [permission] stage would be vitiated if the grant of [permission] were to be regularly followed by an application to set it aside; that whereas it may very well be that [the claimants] will face great, perhaps insuperable, difficulties when the case is finally heard, this was never a case for an application to set aside [permission]" as such an application is not to be brought merely on the footing that a [defendant] has a very powerful, even overwhelming case.

97 The most recognized grounds for varying and or setting aside judicial review permission/order include instances of material non-disclosure, concealment of material particulars/documents, misrepresentation and where the application for leave/permission/order granted is an abuse of the



process of Court. In the Matter of an Application by Justus Nyangaya & Others, High Court of Kenya at Nairobi, Misc. Civil Case No. 1133 of 2002 where it was observed at page 9 thus:

a. "However, the Courts have set aside ex-parte orders obtained in judicial review proceedings following non-disclosure of material facts, concealment of material documents and on misrepresentation."

98 These are the principles under which the Courts do exercise their discretion in granting an order for stay. However, it is not in doubt that such an order, if granted ex parte, may be set aside at a later stage if the Court finds that the stay ought not to have been issued in the first place or that the change in circumstances no longer warrant the continued existence of the orders of stay. Parties and their counsel are, however, cautioned that the grant of an order of stay ought not to be followed by an application seeking to vacate the same. It is only in cases where the Court is convinced that the conduct of the applicant at the ex parte stage when the stay was granted does not justify the grant either by non-disclosure of material facts or misrepresentation of the same or due to subsequent events that the Court will set aside the stay granted. This is due to the fact that Courts do not grant orders of stay as a matter of course and where the Court is in doubt, the Court is now at liberty to direct that the prayer seeking the stay be heard inter partes even in cases where the leave has been granted.

Whether the court has powers to vary, set aside or discharge an order of stay.

Order 53 rule (1)4 which states as follows:-

a. "the grant of leaveshall, if the judge so directs, operate as a stay of the proceedings in question until the judge orders otherwise."

99 The wording of this sub-rule clearly indicates that the court has jurisdiction to review, vary, set aside or discharge stay and that the powers of court are discretionary. Referring to the review, varying or setting aside ex-parte orders by the court the matter was discussed in Civil Appeal No.77/2003 in Court of Appeal Judicial Commission of Inquiry to the Goldenberg Affair & Others vs. Job Kilach. The Court of Appeal referring to the case of Ex-parte Harbage and the words of MAY L. J. quoted a passage on page 14 thus:-

100 "The next point to make is that although appeal does lie to this court against an ex-parte order made by a judge of High Court.....nevertheless in his judgment in that case Sir Donalds on MR [1983] 3 All E.R. 589 at page 593 said:

i. "I have said ex-parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under duty to make full disclosure of all relevant information in his possession whether or not it assists his application this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given opportunity to review his provisional order in the light of evidence and argument adduced by the other side and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. This being the case it is difficult if not impossible to think of circumstances in which it would be proper to appeal to this court against an ex parte order without just giving the High Court judge an opportunity of reviewing it in light of argument from the defendant and reaching a decision."

101 The Ex parte Applicant's complaint per the Statutory Statement which influenced the grant of the stay orders are allegations framed by the Ex parte Applicant and contained in Paragraphs 6-11 of the Statutory Statement and Paragraphs 15-18 of the Verifying Affidavit to the extent that the Respondents only granted voters merely 14 days for voter register scrutiny instead of 21 days as provided by the law.

102 The Ex parte Applicant selectively annexed a Communique from the Respondent dated 22nd April 2025 and submitted that it was the date the Respondents opened the Register for verification, thus counting it to 6th May 2025.



103 The Ex parte Applicant failed to disclose a Notice and/ or Communique by the 3rd Respondent issued on 7th April 2025 to all the members/voters titled 'Voter Register-Verification of Eligibility to Vote' which is the actual notice wherein members were expressly requested to inspect the Register.
104 The exparte applicant now argues that had this letter works in favour of the applicant.No reason is advanced as to why the letter was not brought to this court's attention at the exparte stage.Had the said Notice/ Communique been availed to this Court at the leave stage, it would helped the court exercise its discretion judiciously.

105 From the foregoing this court arrives at a conclusion that there was a material and fundamental disclosure that misled court into granting the impugned orders which must be vacated.

106 The respondent/ex parte applicant does not say that they did not have access to the Notice and/or Communique by the 3rd Respondent issued on 7th April 2025.

107 The most recognized grounds for varying and or setting aside judicial review permission/order include instances of material non -disclosure, concealment of material particulars/documents , misrepresentation and where the application for leave/permission/order granted is an abuse of the process of Court.An applicant who moves the court exparte is under a duty to disclose all the material including content that doesn't go in their favour that is at their disposal to the court so as to enable the court to exercise it's discretion, legally and in a fair and just manner so as not prejudice, the party who has not been given a chance to be heard at the ex parte stage.

108 The exparte Applicant failed to act as such.This court has also looked at the application from another angle of Regulation M of the 5th Schedule to the Accountants Regulations,2022 provides as follows-

A person who is aggrieved by the results of an election may, within seven days after the Annual General Meeting in which the presentation of the results of the election is made, lodge a written complaint with the Secretary to the Council for determination.

109 The citadel of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based however on the rather universal concept or principle of justiciability. It also gathers much support from the engraved supplementary doctrines of ripeness, avoidance and mootness.

110 The doctrine of justiciability encompasses such principles as the refusal of the court to make declarations to, assume jurisdiction over matters which are allocated to such other branches of the government as the legislature or the executive, refusal to decide issues which are not ripe or those which are mute.

111 By justiciability it is meant a matter "proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision": Black's Law Dictionary 9th. It further goes on to define a 'justiciable controversy' as "a controversy in which a claim or right is asserted against one who has an interest in contesting it." The other definition given of a justiciable controversy is "a question as may properly come before a tribunal for decision".

112 In other words, courts should only decide matters that require to be decided. Thus in *Ashwander -v- Tennessee Valley Authority* [1936] 297 U.S 288, the US Supreme Court stated that courts should only decide cases which invite "a real earnest and vital controversy".

113 Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

114 Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time. The exception it must be noted exists where the court is



allowed by law to offer advisory opinions.

115 The justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in John Harun Mwau & 3 Others -v- AG & 2 others HCCP No. 65 of 2011 (unreported) stated as follows:

116 “We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.”

117 In Hon. Martin Nyaga Wambora -v- Speaker of County Assembly of Embu and 5 Others HCCP No. 3 of 2014, the court observed as follows:

118 “It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.’

119 In Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another HCCP 628 of 2014 [2015]eKLR, the court cited the case of Patrick Ouma Onyango & 12 Others -v- AG & 2 Others Misc. Appl No. 677 of 2005 wherein the court had endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed. as follows:

120 ‘In order for a claim to be justiciable as an article III matter, it must “present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted.” In part, the extent to which there is a ‘real and substantial controversy is determined under the doctrine of standing’ by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself-an aspect of ‘the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of ‘ripeness’ which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contingencies and of ‘mootness’ which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the ‘political question’ doctrine, barring decision of certain disputes best suited to resolution by other governmental actors’.

121 Congressionally authorized declaratory judgments may be obtained in federal courts, and state judgments reviewed there; if the requirements of the justiciability doctrine are otherwise met where there is a concrete case admitting of one immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised.

122 In Jesse Kamau & 25 Others V. Attorney General [2010] Eklr the court stated as follows:

“To us therefore the doctrines of justiciability, ripeness, mootness, collusive suits and the political question cannot be determined on their own. They are aids to, or matters to be considered in the interpretation and determination of a particular constitutional issue, if any, before the court. If any of the above grounds are present in an application, whether by way of reference from a subordinate or a lower court, or directly by Petition to the High Court, the court may uphold or strike out the application on those or other grounds.



123 Even without those doctrines, the constitutional position in Kenya is very clear. The High Court has a sextuple jurisdiction. Firstly it has original and unlimited jurisdiction in civil and criminal matters. Secondly it has supervisory jurisdiction over the subordinate courts under section 65(2) of the Constitution in all matters in which subordinate courts have jurisdiction. Thirdly it has jurisdiction to interpret any provision of the Constitution under section 67 (references, appeals and interpretation of the Constitution).

124 Fourthly section 84 (2) of the Constitution confers upon the High Court original jurisdiction to determine any question of alleged contravention of fundamental rights and freedoms of the individual and the discretion to grant relief to an aggrieved person by making such orders, issuing such writs and giving such directions as it may consider appropriate for the purpose of enforcement of any of the provisions of sections 70 to 83 (inclusive) that is, Chapter V (fundamental rights and freedoms of the individual) of the Constitution."

125 In *Trusted Society of Human Rights Alliance vs Attorney General & Others* Petition No.229/2012. The Court in that case differentiated a justifiable controversy (which is amenable to judicial review) and a policy decision by the political branches of government (which is a "political question" inappropriate for judicial review). The court stated thus;

126 "The justiciability doctrine expresses fundamental limits on judicial power in order to ensure that courts do not intrude into areas committed to the other branches of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand."

127 Going per the notice of general meeting the issue of the election process is final and the only remaining issue is presentation of the elected chairperson and council members at general meeting and they accordingly assume their office.

128 The Annual General Meeting is yet to take place and it is this courts finding that The Applicants moved the court prematurely.

129 They should wait for the Annual General Meeting then decide whether to lodge a written complaint with the Secretary to the Council for determination. That way they will seek redress at the appropriate time before the council which is a statutory outfit.

130 It is this courts finding that the Application herein has been presented in breach of the said Regulation and offends the doctrine of ripeness and more importantly it, offends the express provisions of Section 9(2) of the Fair Administrative Action Act, which provides as follows:

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

Disposition;

132 The application has merit.

Order;

1) The orders issued on 4th June 2025 are set aside.

2) Costs to the applicant.



SIGNED BY: HON. JUSTICE J. CHIGITI (SC)



THE JUDICIARY OF KENYA.

MILIMANI HIGH COURT

HIGH COURT JUDICIAL REVIEW

DATE: 2025-06-25 23:45:46

